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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANYELLE E. BENNETT,

Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE,

Defendant-Appellant.

No. 19-5818

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:17-cv-00630—Eli J. Richardson, District Judge.

Argued: May 6, 2020

Decided and Filed: October 6, 2020

Before: DAUGHTREY, GIBBONS, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Allison Bussell, THE DEPARTMENT OF LAW OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Nashville, Tennessee, for Appellant. Larry L. Crain, CRAIN LAW GROUP, PLLC, Brentwood, Tennessee, for Appellee. **ON BRIEF:** Allison Bussell, Paul Jefferson Campbell, II, THE DEPARTMENT OF LAW OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Nashville, Tennessee, for Appellant. Larry L. Crain, CRAIN LAW GROUP, PLLC, Brentwood, Tennessee, for Appellee. Stephanie L. Gumm, POYNER SPRUILL LLP, Raleigh, North Carolina, for Amicus Curiae.

DAUGHTREY, J., delivered the opinion of the court in which GIBBONS, J., joined, and MURPHY, J., joined in the judgment. GIBBONS, J. (pp. 21–22), delivered a separate concurring opinion. MURPHY, J. (pp. 23–34), delivered a separate opinion concurring in the judgment.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. At issue in this case is whether a public employee's use of a racial slur when discussing politics on Facebook is sufficiently protected by the First Amendment to outweigh a government agency's interest in having an efficient workplace and effectively serving the public. Plaintiff Danyelle Bennett was terminated from her position at the Emergency Communications Center (ECC) of the Metropolitan Government of Nashville (Metro) for a Facebook comment she made on November 9, 2016. On the night of the Presidential election, Bennett posted from her public-facing Facebook profile concerning Trump's victory. In response to someone else's comment, Bennett replied using some of the commenter's words: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" As a result of Bennett—a white woman—using what Metro deemed racially-charged language, several employees and a member of the public complained to ECC leadership and the Mayor's office. ECC officials determined that Bennett violated three Civil Service Rules and, after paid administrative leave and a due process hearing, they terminated her from her position. Bennett sued Metro for retaliation under the First Amendment and, following a jury trial that determined certain issues of fact, the district court found in favor of Bennett.

Metro appeals, arguing that the district court gave greater protection to Bennett's speech than the law warrants and improperly minimized the disruption Bennett's speech caused in the agency. A review of the record reveals the district court erred in its analysis, and we therefore reverse the district court's decision and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Bennett began working for Metro's ECC as an Emergency Telecommunicator in 2001 and was employed there for 16 years. Her role was to field emergency calls, and she was also certified in emergency medical dispatch and emergency fire dispatch. On the evening of November 8, 2016—Election Day—Bennett anxiously awaited the results of the Presidential

election, hoping for a win by the candidate she supported, Donald Trump. She stayed up watching the results until about 3:00 a.m. on November 9, when the electoral votes for Trump reached 270. At that time, she made a Facebook post from her public-facing profile of an image of the electoral map revealing Trump as the winner. Shortly thereafter, before Bennett went to bed, she received a notification that Mohamed Aboulmaouahib—a man she did not know—commented on her post, writing that "Redneck states vote[d] for Trump, niggaz and latinos states vot[ed] for hillary." She replied: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" The following morning, Bennett was off-duty when she received a notification that her friend and former colleague had commented on her post, asking "Was the niggaz statement a joke? I don't offend easily, I'm just really shocked to see that from you." Bennett replied, and several other comments demonstrating offense to Bennett's use of the racial slur followed. At approximately 3:45 p.m., after Bennett's friend and former colleague, Tamika Barker, responded to the comment, Bennett spoke on the phone with her and, as a result, deleted the entire Facebook post.

During this same day, the Facebook comment also became an issue at the ECC office. On the morning of November 9, Lynette Dawkins, the Metro Human Resources (HR) coordinator, began receiving complaints about Bennett's comment. Two ECC employees came to her office upset and complained about a derogatory comment on Facebook made by Bennett. She also received an anonymous text with a screenshot of Bennett's comment to her post, asking "when is this ever acceptable?" Dawkins informed her supervisor, Bruce Sanschargrin, of these complaints when he arrived in the office. He then opened Facebook, found Bennett's public post, and agreed that her comment on the post was "racially offensive" and "degrading" towards both African Americans and Caucasians. Sanschargrin then contacted ECC director Michele Donegan to make her aware of the complaints and how Metro employees were being impacted. Shortly thereafter, Assistant Director Angie Milliken came to his office. She also had received reports about complaints and conversations over the post; she noted that the office was unusually quiet that day.

When Donegan arrived to Sanschargrin's office, she learned that Bennett not only identified herself as a Metro employee in her Facebook profile, but also as an ECC employee and

a Metro Police Department employee. Donegan became concerned about the potential impact Bennett's use of racially charged language could have on the workforce and determined that the next step would be to have Sanschargrin reach out to Bennett to have her remove the post and to speak with her first thing in the morning.

Throughout that day, additional complaints were made. Alisa Franklin, Emergency Telecommunicator and chief steward of the Service Employees International Union (SEIU), received multiple complaints, both in person and over text messaging, complaining about Bennett's comment and use of the racial slur. Franklin conveyed to her supervisor that, in addition to the complaints she received, she, too, was shocked, hurt, and disgusted by Bennett's post. Donegan also received an email from the mayor's office that included a complaint from a constituent. The mayor's office specifically questioned whether Bennett identified herself as a Metro employee on her Facebook page. The complaint contained a screenshot of the constituent's Facebook post showing only Bennett's response and omitting Aboulmaouahib's, with a caption:

> If you've called 911 & officers don't get there as quickly as you need them it may not be the officer. And it may not have anything to do with calls around the city. In fact it may be the dispatcher that got your call. If your skin is too dark your call may have just been placed on the back burner. #WelcomeToNashville #MusicCity #Metro.

The screenshot was accompanied by a statement:

> These kind of derogatory statements are being made by our own government here in Davidson County. Despite everything else going on across the country I've always had a sense of hope for my city, Nashville. But after seeing things in this light I don't know anymore. I want to know that my life is valuable and that I will be protected just as well as any other citizen despite the color of my skin. Please fix this!

Sanschargrin also received a screenshot via text message of the same cropped Facebook post with the message "I just came across this post. I know it doesn't matter but this is an ex-employee throwing gasoline on the fire."

Later that afternoon Bennett returned Sanschargrin's call. Sanschargrin asked Bennett to remove the post because several other employees had spoken to him that day and were upset

about it. She explained that it had already been removed. He then asked Bennett to come to work early the next day, prior to roll call, to discuss the matter further with him and Donegan.

The following morning Bennett met with Sanschargrin and Donegan. Bennett explained that her comment on the post was a sarcastic response mocking the comment by Aboulmaouahib. Sanchargrin, and Donegan made clear that the language she used was inappropriate and that it was viewed as racially charged. Although Bennett acknowledged that other employees appeared to be outwardly offended, she believed they were just "playing the victim" and were not really offended. Bennett claimed that she was the real victim in the situation and resented being ganged up on. Donegan was concerned by Bennett's lack of remorse about her language and by her failure to acknowledge that it was an issue. It was only when Sanschargrin said it was possible the situation could result in some form of corrective or disciplinary action that Bennett changed her tune. Bennett asked how to fix the situation and offered to apologize to employees, but she declined Donegan's offer to issue an apology at roll call that morning. In the end, Donegan decided to place Bennett on paid administrative leave for a week or two to give management time to investigate the matter and allow the "uproar that had started to settle down."

Donegan was concerned about the impact of Bennett's language on the dynamics of the office. Communication between telecommunicators was essential to the work they did and, after the racially charged comment and the reactions of the employees, she was anxious about the team dynamics and the creation of a racial divide. She directed Sanschargrin to complete a summary of what had happened, investigate the facts, and identify any policies that Bennett may have violated.

Conversations about the issue continued after Bennett's leave began. The following week, Donegan received a call from the "second-in-command" for Metro Human Resources telling her that some ECC employees had come to his office with concerns. Franklin—in her role as chief union steward—reported that there was a level of general discomfort throughout the center and that "things were not harmonious like they normally were." The union stewards again raised the issue at the SEIU monthly meeting with Donegan. They described a great deal of tension in the call center, explaining that there was not the same level of communication going on as there was before the incident, reflecting a disconnect among the employees. As a result,

they recommended diversity training for employees and Donegan agreed, telling them that she also had been considering it. In addition, because "so many people were offended and hurt," Franklin advocated for having a counselor come in during roll call to speak with employees about diversity, the background of the racial slur Bennett had used, and why people might be bothered or concerned about its use. The counselor came in to address the ECC workforce and stayed to talk to employees one-on-one, an offer some employees took advantage of until they had to go back to work because there was insufficient coverage of incoming calls.

Sanschargrin determined that Bennett's conduct violated three policies of the Metropolitan Government Civil Service Commission: (1) her behavior "reflect[ed] discredit upon [her]self, the department, and/or the Metropolitan Government," (2) her conduct was "unbecoming of an employee of the Metropolitan Government," and (3) her Facebook profile disclosed that she was a Metro employee but failed to include a disclaimer that her "expressed views are [hers] alone and do not reflect the views of the Metropolitan Government." At Donegan's direction, Sanschargrin drafted a charge letter for Bennett that included a summary of the incident, described the three rules she was accused of violating, and outlined her due process rights. The letter explained that "[t]o advance the mission [of ECC], it is vitally important that all department employees conduct themselves in a manner free of bias, demonstrate unquestionable integrity, reliability and honesty," and that "[t]he success of [the] agency can be measured by the perception and confidence the public has in the employees representing the agency."

Donegan felt the charges were appropriate, first, because she felt that inclusion of a particularly offensive racial slur in a public social-media post was objectionable because it did not reflect Metro policy or the beliefs of people who worked there. Further, she thought such racially charged language would bring discredit to the office and testified that "the public that we serve is very diverse, and it's my expectation that when someone calls[,] regardless of who they are or where they're from, that they're going to receive the appropriate service." Donegan also concluded that Bennett's behavior warranted discipline because of the disruption it caused: employees were upset at work, counselors needed to be involved, and stress levels increased for the agency as a whole.

The charge letter was approved by Donegan and sent to Bennett on December 28, 2016, upon her return from Family Medical Leave. Bennett was again placed on administrative leave pending a hearing set in January. The purpose of the hearing was to allow Bennett to state her case, present evidence or witnesses, and "expand on [her] side of what happened" after having time to process the initial conversation and regroup. At the hearing, Bennett appeared with an attorney, was read the charge letter, and pleaded not guilty to all three charges. Bennett spoke on her own behalf, primarily discussing incidents other than the Facebook post, and defended her decision to use the language in question. In Donegan's view, Bennett failed to show any remorse or accountability. Although Bennett wrote an apology letter while on leave saying that she had been embarrassed and humbled by the experience, she did not mention any of those sentiments at the hearing. Because Bennett did not acknowledge that there was anything wrong with the post, Donegan feared that similar incidents would continue to happen and felt that the necessary healing among the ECC workers could not succeed with Bennett there. She decided to terminate Bennett's employment.

In March 2017, Bennett filed a lawsuit against Metro under 42 U.S.C. § 1983 alleging violations of her First and Fourteenth Amendment rights and a claim under the Tennessee Constitution. Both Bennett and Metro filed motions for summary judgment. The district court denied the plaintiff's motion for summary judgment and dismissed the state constitutional claim and the Fourteenth Amendment claims, leaving only the First Amendment claim for trial.

When the case went to the jury, the district court included in the instructions a set of interrogatories related to the balancing test outlined in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and the issue of causation. The jury concluded that Bennett's Facebook comment was not reasonably likely to impair discipline by superiors at ECC, to interfere with the orderly operation of ECC, or to impede performance of Bennett's duties at ECC. However, the jury did conclude that the Facebook post was reasonably likely to have a detrimental impact on close working relationships at ECC and undermine the agency's mission, that Metro terminated Plaintiff "[f]or using the term 'niggaz' when expressing her views regarding the outcome of a national election on Facebook," and that doing so violated the three charges outlined in Bennett's termination letter. Based on these findings, the district court ruled from the bench that the

Pickering balance weighed in Bennett's favor. Following a second phase of jury deliberations, Bennett was awarded $6,500 in back pay and $18,750 for humiliation and embarrassment. This appeal followed.

DISCUSSION

The application of the *Pickering* balancing test is a matter of law for the court to decide and, thus, we review it *de novo*. *Gillis v. Miller*, 845 F.3d 677, 684 (6th Cir. 2017).

To establish a claim for First Amendment retaliation, a public employee must show that:

> (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.

Gillis, 845 F.3d at 683 (alteration in original) (citations omitted). Here, only the first element of this framework is in question.

To determine whether the discharge of a public employee violates the First Amendment, we apply the two-step analysis laid out in *Connick v. Myers*. *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1186 (6th Cir. 1995) (citing *Connick v. Myers*, 461 U.S. 138, 140 (1983)). First, we must determine whether the statement in question constitutes speech on a matter of public concern.[1] *Id.* Then, if it does, we apply the *Pickering* balancing test to determine whether the Plaintiff's "interest in commenting upon matters of public concern . . . outweigh[s] the interest of [Metro], as an employer, in promoting the efficiency of the public services it performs through its employees." *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000) (quoting *Pickering*, 391 U.S. at 568). These two steps are sub-elements of the first element of the First Amendment retaliation framework.

Because neither party appears to argue that the speech is not of public concern, we direct our analysis to the second part of the *Connick* test—the *Pickering* analysis.

[1]The first part of the test also includes whether the employee spoke as a private citizen or public employee in the course of employment. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This prong is not at issue in this case, as neither party argues that Bennett's post was made in the course of employment.

Before applying the balancing test, it is appropriate to begin this analysis by determining the degree of protection the speech warrants, *i.e.*, the level of importance the speech has in the community. Because "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression," *Connick*, 461 U.S. at 150, we first consider the context of the speech for which Metro fired Bennett. On appeal, Metro does not challenge the district court's finding that the statement in question was political in nature. But Metro does argue that it "was not purely political" and, thus, was not entitled to the heightened level of protection the district court had granted to it. Bennett, on the other hand, argues that Metro's decision to terminate her "was based on the entirety of her post-election, political comment as a whole."[2]

Bennett bases her argument that she was fired for political speech on the jury's interrogatory response indicating that Metro terminated her "for using the term 'niggaz' when expressing her views regarding the outcome of a national election on Facebook." Though the district court similarly relied on the jury's response, its reliance is somewhat misleading. The interrogatory form was presented in a multiple-choice format, and the selected answer was the only answer choice that included the actual slur. The alternative responses included: "For expressing her views regarding the outcome of a national election on Facebook;" "For lack of accountability;" and "For the workplace disruption her Facebook comment caused."[3] Presented with its options, it seems logical to infer that the jury believed the speech at issue was the term "niggaz" and not statements expressing Bennett's views on the election, as selecting option one would have indicated. So, even though Bennett's speech was protected, it was not in the "highest rung" of protected speech as the district court erroneously found.

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[2]The crux of Bennett's argument that her speech was protected was that it was attached to a statement celebrating the outcome of the Presidential election, with a strong inference that her termination, at least in part, had to do with her support of Trump. The record does not support such a conclusion. Testimony and the facts of the case indicate that Bennett was fired specifically for her use of a racial slur, for her lack of regret for doing so, and for the disruption it caused—not for the political nature of her original post. For one, Bennett acknowledged that she had made previous political posts on Facebook that did not use racial slurs and that she had never been disciplined for any of those posts. Also, both Donegan and Sanschargrin testified that it was specifically the words Bennett used that led them to determine that she had violated civil service rules, and the situation in which she used them—political or not—was irrelevant.

[3]The form also included "other," which was placed not as an option, but rather as a space to add additional information.

This conclusion is bolstered by the First Amendment's focus on "not only . . . a speaker's interest in speaking, but also with the public's interest in receiving information." *Banks v. Wolfe Cty. Bd. of Educ.*, 330 F.3d 888, 896 (6th Cir. 2003) (quoting *Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 574 (6th Cir. 1997)) (finding that a teacher's airing of issues in a school district were of public interest because "[t]he community has an interest in knowing when the district does not follow state law or its own hiring practices" and such practices "could affect the community"). The Supreme Court described the "employee-speech jurisprudence" as "acknowledg[ing] the importance of promoting the public's interest in receiving the *well-informed* views of government employees engaging in civic discussion." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (emphasis added). Central to the concept of protecting the speech of government employees is the idea that public employees are the most likely to be informed of the operations of public employers and that the operation of such entities is "of substantial concern to the public." *See v. City of Elyria*, 502 F.3d 484, 492 (6th Cir. 2007) (quoting *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004); *see also Garcetti*, 547 U.S. at 419. "Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law."[4] *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (*per curiam*). Here, even if we consider Bennett's speech to include her comment on the election, we must consider the public's interest—or lack thereof—in receiving the information she shared. Compare Bennett's comment on the election—of which she had no special insight—to the litany of cases protecting speakers that are *exposing* inner workings of government organizations to the public. *See, e.g. Banks*, 330 F. 3d at 897 (finding that a board of education engaging in illegal hiring practices is a "concern to the community"); *City of Elyria*, 502 F.3d at 492 (holding that operations of public employers "are of substantial concern to the public," and thus, a public employee's right to comment on such matters are protected).

It is true that the speech in question was couched in terms of political debate, made in response to and repeating back the words of another person, and used a more casual version of an

[4]Examples of speech that would involve such matters of public concern include "statements 'inform[ing] the public that [a governmental entity] was not discharging its governmental responsibilities' or statements 'seek[ing] to bring to light actual or potential wrongdoing or breach of public trust on the part of' government employees," as well as speech protesting racial or sexual harassment or discrimination within a public organization. *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 182 (6th Cir. 2008) (citations omitted).

offensive slur.[5] Still, Bennett's speech does not garner the high level of protection that the district court assigned to it, and the balancing test requires less of a showing of disruption and other factors than the district court would require. *See Connick*, 461 U.S. at 152 (explaining that the greater extent to which the speech involves public concern, the stronger the showing of disruption necessary). In any event, the evidence of disruption caused by the language in Bennett's Facebook post was substantial.

We apply the *Pickering* test "'to determine [whether] the employee's free speech interests outweigh the efficiency interests of the government as employer.'" *Gillis*, 845 F.3d at 684 (quoting *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006)). The test considers "the manner, time, and place of the employee's expression." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The "pertinent considerations" for the balancing test are "whether the statement [(a)] impairs discipline by superiors or harmony among co-workers, [(b)] has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, [(c)] impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise," *id.*, or (d) undermines the mission of the employer. *Rodgers v. Banks*, 344 F.3d 587, 602 (6th Cir. 2003) (citing *Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir. 1994)). The consideration of the employee's performance, impaired discipline by superiors, harmony among co-workers, and undermining of the office's mission is "focuse[d] on the effective functioning of the public employer's enterprise." *Rankin*, 483 U.S. at 388 (avoiding interference with the functioning of the government office "can be a strong state interest").

Consideration of the first factor of the *Pickering* test, whether the speech impaired discipline by superiors or harmony among co-workers, weighs heavily in favor of Metro. The record makes clear that the harmony of the office was disrupted, and the district court erred in discounting the importance of harmonious relationships at ECC. Employees testified that Bennett's post prompted a "nonstop conversation" in the office that lasted for days, and for as

[5]Employees acknowledged that the form of the slur used by Bennett, ending as it did with "-az," is generally less offensive, but they also said that it depends on the context in which it was used. Employees also testified that African Americans have a "history of trauma with the word" and that their own use of it, in any form, is "trying to recapture that word to use it amongst [them]selves, to change the meaning, and use it as a term of camaraderie." They added that such use by people outside of the community would not have the same meaning.

much as three weeks to a month after Bennett's comment, there was a need for a counselor to address the office. Donegan testified:

> I was concerned, after learning about the need for [counselors] and for additional diversity training, to hear how we needed to heal as an agency. And it made me realize that for them to work side by side and to have to work as a team, I wasn't confident. I wasn't confident that that could continue with Bennett there. And to be honest, I wasn't confident that Ms. Bennett would not . . . say that again. . . . [S]he had broke my confidence at that time.

At Bennett's disciplinary hearing and during trial, she did not exhibit concern for her colleagues' feelings, called them hypocrites, and indicated that she would not apologize because someone else took something the wrong way—indeed, she believed her colleagues should instead apologize to her. Such facts indicate that if she had returned to work at ECC, her presence would have continued or exacerbated the disharmony.

In Bennett's favor, there is no indication that the speech itself impaired discipline by superiors. However, it is possible that any *inaction* on Donegan's part in the face of Bennett's derogatory speech could have been seen as an endorsement of the speech and impaired *future* discipline of similar derogatory statements.

The second factor, whether the speech had "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," also weighs heavily in favor of Metro. *Rankin*, 483 U.S. at 388. The district court acknowledged the importance of the close working relationships among the Emergency Telecommunicators at ECC, despite its failure to sufficiently credit the importance of those relationships. The jury also confirmed such a finding by indicating that Bennett's "Facebook comment was *reasonably likely to have a detrimental impact* on close working relationships" at ECC. (Emphasis added.) Donegan, Sanschargrin, and other supervisors and employees testified to the invaluable role that team dynamics play in the success of the agency. Sanschargrin highlighted the necessity of call takers and dispatchers being able to work together harmoniously, testifying that without that collaboration and communication, the public would be at risk.

Several ECC employees had concerns about being able to work effectively with Bennett after her use of the racial slur in her post. Because the job of an Emergency Telecommunicator

is so stressful, the employees operate somewhat as a team and need to depend on one another. They said that when Bennett used such a hurtful word, it made them question whether they could rely on her in their work and, as African Americans, whether Bennett would fairly assist their families when they called for help. Some also began to wonder whether Bennett had the requisite judgment to do her job effectively, one saying that "you need to be able to trust [that] the person beside you is making good decisions."

The district court minimized this substantiation by focusing on the lack of evidence "of any detrimental impact on any working relationships at the ECC other than Plaintiff's working relationships with whoever might be upset with her, or lose respect for or confidence in her, based upon her Facebook comment." The district court reasoned that the employees, "if anything, were brought closer together" by the emotions and ameliorative response from ECC leadership. But what the court failed to recognize is that the removal of Bennett from the agency was part of ECC's "ameliorative response." Indeed, the increased solidarity among the employees demonstrates how critical Bennett's termination was to fostering the close working relationships in the agency.

The third factor, whether Bennett's speech "impede[d] the performance of the speaker's duties or interfere[d] with the regular operation of the enterprise," is a close call. *Rankin*, 483 U.S. at 388. There is little indication, as supported by the jury's verdict, that Bennett's speech would impact the way Bennett did her job. But it is also possible that a damaged relationship with her colleagues could affect the quality and quantity of her work. Nevertheless, the jury found that her speech was not likely to interfere with the regular operation of ECC.

Finally, Bennett's comment detracted from the mission of ECC, weighing again in favor of Metro. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The agency's mission is to provide "the vital link between the citizens and first responders for all emergency and non-emergency calls, and to do so in an efficient, court[eous], and polite manner." As Metro stated in its letter to Bennett: "To advance that mission, it is

vitally important that all department employees conduct themselves in a manner free of bias, demonstrate unquestionable integrity, reliability, and honesty. The success of [the] agency can be measured by the perception and confidence the public has in the employees representing the agency."

Donegan, in making her decision to terminate Bennett, considered the importance of public perception to achieving ECC's mission.

> The fact that we had had people contact the mayor's office, that was concerning to me. Her Facebook post apparently, at that time, was open to the public. We can't run an agency that provides a service to the citizens and people think that our workplace is not free of bias. So that was concerning to me as well.

Had Bennett's profile been private, or had it not indicated that she worked for Metro, Metro's argument for terminating Bennett would not be as strong. But the relevant Civil Service Rules support the idea that public perception is central to ECC's mission. Bennett's public comments discredited ECC because they displayed racial bias without a disclaimer that the views were hers alone. This court and several others "have recognized the interest of a governmental entity in preserving the appearance of impartiality." *Thomas v. Whalen*, 51 F.3d 1285, 1292 (6th Cir. 1995) (listing courts that have held as such).

The district court acknowledged that the jury found Bennett's comment to undermine the mission of ECC but decided that the weight of such a determination was "relatively slight." We disagree and conclude that more weight should be given to this consideration.

First, the district court found the concerns were "attenuated," but the concerns about Bennett's interference in the mission of ECC were not as attenuated as the district court described. In weighing Metro's interest in fulfilling the mission of the office, we consider the role and responsibilities of the employee and, when the role is public-facing, whether the danger to successful functioning of the office may increase. *Rankin*, 483 U.S. at 390. In *Rankin*, the employee was not in a public contact role, and thus, concerns about public perception were too attenuated to limit the free speech rights of the employee. *Id.* at 391. Here, however, Bennett was in a public-facing role and used the slur in a public forum from a profile that implicated not only Metro Government but also the Metro Police Department. This situation is exactly the type

that *Rankin* warned could warrant a higher level of caution for public employees' choice of words. *Id.* at 390 (stating that if the employee is in a "confidential, policymaking, or public contact role," the danger to the agency's successful functioning may be greater).

Second, the district court determined that because the record contained evidence of only one member of the public expressing concern, the fear of the post "going viral" was not a sufficiently substantial justification. But, although we have not addressed the issue directly, other circuits have held that a reasonable prediction that the public perception will impact the government's operations is sufficient. *See Locurto v. Giuliani*, 447 F.3d 159, 179-181 (2d Cir. 2006) ("Where a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations. . . . [The Government] may legitimately respond to a reasonable prediction of disruption."); *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 346 (4th Cir. 2017) (finding that part of the job of public servants "is to safeguard the public's opinion of them" and that even the threat of deteriorated "community trust" grants greater discretion to the employer). *Grutzmacher* acknowledges that speech on social media "amplifies the distribution of the speaker's message." 851 F.3d at 345. Although this situation, in some respects, "favors the employee's free speech interests," it also "increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency." *Id.*

Third, the district court "view[ed] it as highly speculative that even if an African American were familiar with Plaintiff's Facebook comment and was offended by it, such African American would be deterred from calling in an emergency." The concern, however, was not that African Americans will no longer call for emergency service, but rather—as Metro explains—that "damaged public perception can lead to many ills" for an agency that serves the public directly. The Second Circuit has effectively captured the importance of public trust in such relationships:

> The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law *fairly, even-handedly, and without bias*. If the police department treats a segment of the population . . . with contempt, so that the particular

> minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged.

Locurto, 447 F.3d at 178 (emphasis added) (citing *Pappas v. Giuliani*, 290 F.3d 143, 146-47 (2d Cir. 2002)). The Ninth Circuit similarly reasoned that the government's interest in effectively maintaining their operations allows them to "rely on 'reasonable predictions of disruption'" if an employee's speech, "when known to the public," would harm the employer's mission.[6] *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008).

The district court's reference to Bennett's use of "niggaz" as "the mere use of a single word" demonstrates its failure to acknowledge the centuries of history that make the use of the term more than just "a single word." The use of the term "evok[es] a history of racial violence, brutality, and subordination." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004). It "may appear innocent or only mildly offensive to one who is not a member of the targeted group, but be intolerably abusive or threatening when understood from the perspective of a [person] who is a member of the targeted group." *Id.* "The use of this word, even in jest, could be evidence of racial apathy."[7] *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 514 (6th Cir. 1991) (citing *McKnight v. General Motors Corp.*, 908 F.2d

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[6]In writing as *amicus curiae*, the International Municipal Lawyers Association emphasized this point: "When the public distrusts officials and employees within a public safety organization, cooperation with the police plummets, community watch programs crumble, witnesses to crimes no longer come forward, and criminals enjoy the passive support of local residents." Brief for Int'l Munic. Lawyers Ass'n as *Amicus Curiae* Supporting Appellants at 12.

[7]Several other courts have acknowledged the weight of the word: "The word 'nigger' [is] 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry[.]'" *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (citing Merriam-Webster's Collegiate Dictionary 784 (10th ed.1993)) (finding that even though the word may have been used in a joking manner, because the African-American employee did not take it that way, the court understood it to be "undesirable and offensive"); *Morgan v. Commc'n Workers of Am., AFL-CIO, Dist. 1*, No. 3:08-cv-249-FLW, 2009 WL 749546, at *7 n.3 (D.N.J. Mar. 17, 2009) ("The word "nigger" persists as an ugly vestige of racial intolerance, bigotry, and brutality; its use in any setting is inappropriate and indefensible [ ] [a]gainst the backdrop of this country's mixed history of race relations.")

104, 114 (7th Cir.1990)). Surely the use of such an impactful and hurtful word can lead to the ills outlined in *Locurto*.

Further, the level of teamwork required for the effective functioning of an emergency-dispatch agency makes it more analogous to a police department than the district court determined. Although there are differences between emergency communications agencies and a police department, the distinction between the two may not be clear to the public, whose first point of contact in an emergency warranting police action is often with the employees fielding the emergency call. The diverse constituents of Metro Government need to believe that those meant to help them in their most dire moments are fair-minded, unbiased, and worthy of their trust.

Bennett raises the argument that ECC's anticipatory action—without further complaints from the public or employees—amounts to a "heckler's veto." A heckler's veto involves burdening or punishing speech "simply because it might offend a hostile mob." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). We have not addressed a heckler's veto in this context, but the Ninth Circuit has held that those concerns are not applicable to the "wholly separate area of employee activities that affect the public's view of a governmental agency in a negative fashion, and thereby, affect the agency's mission." *Dible*, 515 F.3d at 928-29. The Second Circuit has taken a similar view, finding that "members of the African-American . . . communities whose reaction . . . the defendants legitimately took into account . . . cannot properly be characterized as 'outsiders seeking to heckle [the plaintiffs] into silence.'" *Locurto*, 447 F.3d at 182-83 (citation omitted). Because effective emergency service "presupposes respect for the members of those communities," such agencies are permitted to account for the possible reaction of the public when disciplining their employees. *Id.* The public—as the consumers of ECC's services—and Bennett's colleagues with whom she must work collaboratively can hardly be said to be "a hostile mob."

Last, Sanschargrin's failure to investigate further is not fatal to Metro's argument. "Management can spend only so much of their time on any one employment decision." *Waters*, 511 U.S. at 680 (holding that basing a termination decision on "the word of two trusted employees, the endorsement of those employees' reliability," and "a face-to-face meeting with

the employee he fired" was reasonable and "no further time needed to be taken"). Additionally, employers may rely on conduct and evidence that "the judicial process ignores." *Id.* at 676 (finding that government managers are able to give standing to complaints that they know from experience to be credible, which may be "the most effective way for the employer to avoid future recurrences of improper and disruptive conduct.").

Sanschargrin saw the Facebook post before Bennett deleted it and considered the complaints made to his human resources staff, assistant director Milliken, a trainer of front-line employees, the chief union steward, and the mayor's office. He also discovered that Bennett violated three Civil Service Rules. Bennett, at her disciplinary meeting, had the opportunity—with counsel—to present additional information or evidence that countered what was in the charge letter, which would have been considered in Donegan's disciplinary decision. Bennett presented no evidence that any of the complaints were invalid or that she did not violate the Civil Service Rules. There is no precedent requiring further disruption to an office environment once the government confirms violations of policy and ascertained disruption. "[I]f the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." *Id.* at 680.

> It is true that these practices involve some risk of erroneously punishing protected speech. The government may certainly choose to adopt other practices, by law or by contract. But we do not believe that the First Amendment requires it to do so. Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

Id. at 676–77.

The question in this case is not whether members of the judiciary would have made the decision to terminate Bennett for using a racial slur in this instance.[8] The question is whether Bennett's language was sufficiently protected for the court to interfere in our proclivity for "affording government employers sufficient discretion to manage their operations." *Garcetti*, 547 U.S. at 422.

[8]Bennett argues at length, and the district court elaborates in a footnote, that the context of her speech is relevant because she might not have had grounds for discipline if she had use the word to quote Dr. Martin Luther King or Barack Obama, or used it to "denounce[] the bigoted use of the N-word."

> Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.

Waters, 511 U.S. at 678. Donegan's response cannot be considered unreasonable in light of the record, the jury responses, and Sixth Circuit precedent. The Civil Service Rules that Bennett violated cover all Metro employees, not just those at ECC, and are left largely undefined to give "department heads the latitude and the discretion to . . . apply them appropriately." In this case, the Civil Service Commission had the opportunity to determine whether Donegan applied them inappropriately and chose not to reverse her decision.

Because Bennett's speech does not occupy "the highest rung" of public concern, less of a showing of disruption is required. Several factors weigh heavily in favor of Metro. Although there are factors weighing in favor of Bennett, sufficient disruption was shown to tip the *Pickering* balance towards Metro. Based on the above analysis and in light of the discretion we must grant leadership at Metro, its interest in maintaining an effective workplace with employee harmony that serves the public efficiently outweighs Bennett's interest in incidentally using racially offensive language[9] in a Facebook comment.

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[9]As one author put it:

> The slur is a "speech act"—an act with meaning and consequences. In fact, when a white person uses the term "nigger," regardless of his conscious intentions, he is making a fundamental statement about his place in the world and, by extension, the place of African Americans. The history embedded in the term (its exclusive use in the nineteenth century as an assertion of power by whites over their black slaves) combined with the race of the white speaker and black listener is akin to the speaker saying explicitly: "I reject the concept of equality, I reject your humanity, I am more powerful than you, and because of that power, I can say anything I want, and you have no recourse." And the act has that consequence. It typically renders the targeted listeners speechless and often demoralized, and creates in them a feeling of helplessness that is met with anger, fear, or sadness.

Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 Berkeley J. Emp. & Lab. L. 299, 319–20 (2012).

CONCLUSION

The result we reach today should not be taken as reflecting a lack of deep appreciation for First Amendment values. As this court stressed in an earlier case involving a public employee's speech:

> We wish to emphasize that in seeking to strike the appropriate balance here today, we have carefully considered the parties' respective interests and have not taken our task lightly. Just as we "hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance—a value protected by every clause in the single sentence called the First Amendment." [W]e also hope that whenever we decide that intolerant speech should be restricted, it is understood that we do so with no less commitment to the value of tolerance and the First Amendment in which it is enshrined.

Bonnell v. Lorenzo, 241 F.3d 800, 826–27 (6th Cir. 2001) (quoting Edward J. Cleary, *Beyond the Burning Cross* 198 (1995), from a speech given by Justice Stevens at Yale Law School in October 1992).

The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

CONCURRENCE

GIBBONS, Circuit Judge, concurring. I join Judge Daughtrey's opinion and write separately only to highlight my specific disagreements with the district court's *Pickering* analysis.

The district court's principal error in its *Pickering* analysis was that it assigned insufficient weight to the disruption caused by Bennett's highly offensive and inflammatory language, given the evidence in the case and the jury's findings. The jury indicated that Bennett's comment was reasonably likely to have a detrimental impact on close working relationships at the ECC and to undermine the mission of the ECC. While the district court found these to not be "especially strong points" in Metro's favor, DE 147, Order, PageID 1716, it did so by understating the extent to which Bennett's comment jeopardized "the effective functioning of the [ECC]," *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

First, the district court unreasonably discounted the importance of harmonious working relations at the ECC by comparing the ECC to police and fire departments. *See* DE 147, Order, PageID 1718–19 (noting that "the ECC is not precisely akin to a police or fire department and does not have quite the same enormous need for . . . harmonious relations"). True, police and fire departments depend on harmonious relationships in navigating possible life-or-death situations. But the mere fact that another entity might have a greater need for harmonious relations does not mean that such relationships are not quite important to the ECC. Testimony at trial demonstrated the essential role of team dynamics and collaboration at the ECC, and this finding was confirmed by the jury. And the district court provided no authority or reasoned basis for diminishing the value of close working relations in one context simply because there might be a greater need for those relations in another context.

The district court further minimized Bennett's disruption to the ECC by noting, without support, that "disharmony counts far less in the defendant's favor when it takes the form . . . of seemingly everyone else with an opinion deeming the plaintiff's conduct beyond the pale and

treating her as something of a pariah." DE 147, Order, PageID 1717. The district court viewed Bennett's comment as creating solidarity among her co-workers—in opposition to Bennett—and therefore concluded that the risk of an office schism was low. *See id.* (observing that ECC employees were, "if anything, brought *closer together* by the emotions, and ameliorative response from ECC leadership, provoked by Plaintiff's Facebook comment"). If ECC employees' solidarity against Bennett shows anything, it demonstrates that the termination of Bennett was essential to preserving close working relations at the ECC.

Beyond causing disruption within the ECC, Bennett's use of an offensive racial slur on a public platform was highly likely to impair the public's perception of the ECC as an unbiased entity. A government entity has a significant interest in preserving the legitimacy and credibility of its law enforcement institutions, and, specifically here, the ECC has a stated mission of helping all citizens, regardless of race. If the ECC fails to discipline an employee who publicly uses racist language, without remorse, it would put the legitimacy and credibility of the ECC—a functional arm of Metro's police and fire services—at risk. And I do not believe this risk to be "attenuated" or "remote," as the district court concluded. DE 147, Order, PageID 1723. This direct risk is not only intuitively obvious, but it was also supported by evidence at trial where a member of the public expressed concern over the possibility that the ECC would not provide equal, race-neutral services.

Finally, Bennett's failure to apologize, show remorse, or otherwise recognize the harmful implications of her use of the n-word suggests that any disruptions to the ECC—both in its working relations and in its mission to the public—would have not only continued but would have been exacerbated by Bennett's presence at the ECC. Faced with evidence of actual disruption caused by Bennett's speech, along with the reasonable expectation that such disruption would continue to harm the ECC, Metro appropriately concluded that Bennett's continued employment would have impaired the "effective functioning of the [ECC]." *Rankin*, 483 U.S. at 388.

For these reasons, I believe the *Pickering* factors weigh more heavily in Metro's favor and accordingly agree that the district court's judgment should be reversed.

CONCURRING IN THE JUDGMENT

MURPHY, Circuit Judge, concurring in the judgment. Under the Supreme Court's current framework, I agree that the Metropolitan Government of Nashville did not violate the First Amendment when it fired Danyelle Bennett for using a highly offensive racial slur on her Facebook page while commenting on the 2016 presidential election. Yet I have found this case difficult because the Court's framework requires us to "balance" what strike me as two incomparable values—a public employee's interest in speaking about politics and a public employer's interest in its efficient operations. I write to explain my reasoning.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It was once thought that the government did not "abridge" the "freedom of speech" (i.e., "contract" the freedom or "deprive" a citizen of it) when the government made employment decisions based on its employees' expression. Noah Webster, *A Compendious Dictionary of the English Language* 2 (1806). In the words of Justice Holmes, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). And governments had long made hiring and firing decisions based on their employees' political activities when the Fourteenth Amendment was adopted and the First Amendment incorporated against the states. *See Elrod v. Burns*, 427 U.S. 347, 377–79 (1976) (Powell, J., dissenting). This right was instead traditionally thought to protect private citizens against efforts to stifle their speech with, say, criminal fines.

The Supreme Court eventually rejected the Holmesian view that the greater power (to deny a person a job) includes the lesser power (to condition the job on any and all speech restrictions) under its emerging "unconstitutional conditions" doctrine. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Still, the Court recognized (more as a pragmatic matter than a textual or historical one) that the "government as employer" must have "far broader powers" to regulate an employee's speech when making personnel decisions than "the government as sovereign" has the power to regulate a citizen's speech when meting out

punishments. *Waters v. Churchill*, 511 U.S. 661, 671–74 (1994) (plurality opinion). So once the Court departed from the traditional rule, it needed to develop an alternative framework for restricting the government's ability to fire employees for their speech. *See* Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 Wm. & Mary L. Rev. 1985, 2005–07 (2012).

The Court has gradually done so. Today, a public employer's decision to discharge an employee for speech violates the First Amendment if that speech satisfies three conditions. To begin, the employee must speak as a private citizen, not as part of the employee's official job duties. *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). Next, the speech must touch on "matters of public concern," not personal concern. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Last, the employee's interest in speaking must outweigh the government's interest in operating—a balancing test known as "*Pickering* balancing." *See Pickering*, 391 U.S. at 568.

Here, Bennett's speech was not part of her duties as a 911 operator, so this case turns on the other two conditions. I believe that Bennett spoke on a matter of public concern. And I see the "balancing" inquiry as a difficult one. On Bennett's side, she spoke on her personal time about a topic at the First Amendment's core (a presidential election). On Nashville's side, Bennett used a version of what is perhaps the most offensive word in the English language. The city could reasonably find that her speech risked the public trust in its Emergency Communications Center. Which interest is "greater"? I must express my uncertainty over how to engage in this putative "balancing." But in the end the deference that federal courts owe state governments under the Supreme Court's current approach leads me to conclude that we should reverse the district court's holding that Bennett's firing violated the First Amendment.

I

I agree with the district court that this case involves a matter of public concern because Bennett's comment addressed an election. To be sure, her use of a racial slur (even if only to respond to a stranger's comment) was "patently offensive, hateful, and insulting." *Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting). Yet the Supreme Court's cases teach that we cannot isolate the offensive word from the broader context. *See Rankin v.*

McPherson, 483 U.S. 378, 385 (1987); *see also Marquardt v. Carlton*, 971 F.3d 546, 550–51 (6th Cir. 2020).

To decide whether a statement addresses a matter of public concern, we must consider the "content, form, and context of [the] statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. This "public concern" element asks a question like the question central to a "common-law action for invasion of privacy": Does the employee's statement address "a subject of legitimate news interest"? *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam).

Under this rubric, it should be obvious that political elections are legitimately newsworthy. In fact, the Supreme Court's expansion of the First Amendment into public employment started with political speech. The expansion took root in the 1950s and 60s, when governments were barring employees from participating in "subversive" political groups. *See Connick*, 461 U.S. at 144 (citation omitted). In one of the more famous cases, the Court held that a state's ban on public employment for those belonging to the Communist Party violated the First Amendment. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605–06 (1967). It reasoned: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* (citation omitted). The First Amendment thus offers protections to public employees if their speech fairly relates "to any matter of political . . . concern[.]" *Connick*, 461 U.S. at 146.

The facts of *Rankin* next show that this public-concern test considers offensive remarks in their full context. In March 1981, Ardith McPherson, a clerical employee in a constable's office, heard that President Reagan had been shot. 483 U.S. at 381. After McPherson criticized the President's policies, she said, "shoot, if they go for him again, I hope they get him." *Id.* She made this statement to a coworker while on the job, and another employee overheard it. *Id.* at 381–82. That employee reported her to the constable, who fired McPherson "because she hoped that the President would be assassinated." *Id.* at 390 n.16. The Court held that her discharge violated the First Amendment. *Id.* at 392. McPherson's professed desire for a criminal assassination touched a matter of public concern because it was "made in the course of a conversation addressing the policies of the President's administration." *Id.* at 387. And "[t]he

inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387; *cf. Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

Neutral principles require us to apply the same rules here. There, as here, an employee made an offensive remark. In *Rankin*, the Court found that the statement touched a matter of public concern because McPherson made it in the context of discussing the President's policies. 483 U.S. at 387. In this case, the statement likewise touches a matter of public concern because Bennett made it in the context of discussing the President's election. In both cases, the "inappropriate" nature of the employee's statement is "irrelevant to the question whether it deals with a matter of public concern." *Id.*; *see also Connick*, 461 U.S. at 149.

To be sure, this is not to suggest that employees may use offensive language at their leisure while discussing matters of public concern. *See Waters*, 511 U.S. at 672 (plurality opinion). A statement's offensive nature may well make it unprotected under *Pickering* balancing. But a statement about a matter of public concern does not become a statement about a personal matter merely because the employee makes the statement in an offensive manner. As to this public-concern question, the offensive nature of the statement is "irrelevant." *Rankin*, 483 U.S. at 387.

II

A

We must instead resolve this case using *Pickering*'s "balancing test." *Roe*, 543 U.S. at 82. This test instructs courts to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. When assessing the employee's interest, the Court has told us to consider "the manner, time, and place of the employee's expression[.]" *Rankin*, 483 U.S. at 388. When assessing the government's interest, the Court has told us to consider whether the employee's "statement impairs discipline by superiors or harmony among co-workers," "has a detrimental impact on close working relationships for which personal loyalty and confidence are

necessary," "impedes the performance of the speaker's duties," "interferes with the regular operation of the enterprise," or "undermines the mission of the public employer[.]" *Id.* at 388, 390. When balancing these interests, the Court has said that the employer's operations-based rationales for firing an employee must increase as the employee's speech interest increases. *See Connick*, 461 U.S. at 150, 152; *cf. Lane v. Franks*, 573 U.S. 228, 242 (2014).

"Because of the enormous variety of fact situations," however, the Court has refrained from offering more specific guideposts about how to undertake this balancing. *Pickering*, 391 U.S. at 569. It has thus repeatedly acknowledged that the "balancing is difficult." *Connick*, 461 U.S. at 150; *Garcetti*, 547 U.S. at 418. As Justice O'Connor put it, balancing will never be easy "unless one side of the scale is relatively insubstantial." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 482 (1995) (O'Connor, J., concurring).

This case proves the point. The jury issued sharply divided findings about the effects of Bennett's speech on the Emergency Communications Center. Three of its answers favored Bennett: The jury found that her speech would not impair discipline by supervisors, impede her ability to perform her job, or interfere with the Center's operations. Two of its answers favored Nashville: The jury found that Bennett's speech would affect working relationships and undermine the Center's mission. When assessing these findings in a thoughtful opinion, the district court concluded that Bennett had significant interests in her political comments, but that the Center had only limited operational concerns in her use of the offensive racial slur. When assessing these findings in another thoughtful opinion, the majority concludes that Bennett has limited interests in her use of offensive language, but that the Center has significant interests in ensuring harmonious operations. In my view, both parties have significant interests on their side.

Bennett's Speech Interests. For two reasons, Bennett's speech should receive significant First Amendment weight. Reason One: The general content of the speech. The Court's cases distinguish speech about an employee's job from speech about broader policy. The more the speech looks like a mere "grievance" about working conditions, the more the government can use that speech as the grounds for a discharge. *Connick*, 461 U.S. at 154. The more the speech discusses "issues of public importance," the less the government can do so. *Pickering*, 391 U.S. at 574. This factor supports Bennett. Her social-media comment was not about her job as a 911

operator; it was about a presidential election. Despite her comment's offensive nature, therefore, her speech falls near the First Amendment's core. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Even outrageous "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 452 (quoting *Connick*, 461 U.S. at 145).

Reason Two: The "time" and "place" of Bennett's speech. *Rankin*, 483 U.S. at 388. The Court's cases distinguish "on-the-job" speech from speech during the employee's own time. If the employee speaks pursuant to official job duties, the speech receives no constitutional protection. *Garcetti*, 547 U.S. at 426. And even if the speech is not part of an employee's duties, an employer has greater leeway to regulate speech that occurs on the employer's premises than speech away from the office during the employee's own time. *See Connick*, 461 U.S. at 153. If, by contrast, the employer seeks to "leverage" the employee's job by restricting the employee's off-the-job speech as a private citizen, this restriction raises more First Amendment red flags. *Garcetti*, 547 U.S. at 419; *see Connick*, 461 U.S. at 153 n.13. This factor also supports Bennett. She posted a comment on her Facebook page while at home. She was acting like a private citizen, not a 911 operator. *Cf. Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017).

Indeed, in other "unconstitutional conditions" contexts, that Bennett's speech occurred "on her own time and dime" might well lead the Supreme Court to protect it without more. *Compare Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) (*AOSI*), *with Rust v. Sullivan*, 500 U.S. 173, 196–98 (1991). Consider speech restrictions on entities that receive government funds to implement government programs. There, the Court distinguishes speech restrictions imposed inside the context of the program (that is, "those that specify the activities [the government] wants to subsidize") from speech restrictions "that seek to leverage funding to regulate speech outside the contours of the program itself." *AOSI*, 570 U.S. at 214–15. When invalidating a law that sought to regulate outside-the-program speech, the Court did not consider whether that outside speech would disrupt the program's effectiveness. *See id.* at 214–21; *cf. B.L. ex rel. Levy v. Mahanoy*, 964 F.3d 170, 178–91 (3d Cir. 2020).

All told, Bennett's speech interests are significant in this case because she spoke on her own time as a private citizen and because her expression concerned a presidential election.

Nashville's Operational Interests. Yet Nashville identifies two significant reasons for terminating Bennett. Reason One: The jury found that Bennett's comment was likely to "undermine" the Emergency Communications Center's mission. *Rankin*, 483 U.S. at 388. Many decisions recognize that public entities performing law-enforcement functions have an interest in maintaining "the respect and trust of the community"—an interest that has often allowed these entities to fire employees who circulate "racist messages" even on their own time. *Pappas*, 290 F.3d at 246–47; *see Grutzmacher v. Howard County*, 851 F.3d 332, 347 (4th Cir. 2017); *Sczygelski v. U.S. Customs & Border Prot. Agency*, 419 F. App'x 680, 681 (8th Cir. 2011) (per curiam); *Locurto v. Giuliani*, 447 F.3d 159, 178–83 (2d Cir. 2006); *Pereira v. Comm'r of Soc. Servs.*, 733 N.E.2d 112, 121–22 (Mass. 2000). To give the extreme example, the government may fire law-enforcement officers who promote the views of the Ku Klux Klan to ensure the community's trust in the government's nondiscriminatory enforcement of the laws. *See Weicherding v. Riegel*, 160 F.3d 1139, 1143–44 (7th Cir. 1998); *cf. Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 700 (1996) (Scalia, J., dissenting). Nashville could reasonably conclude that Bennett's use of the n-word implicated this interest in maintaining the community's trust in the Emergency Communications Center. She made the comment publicly on a Facebook page that mentioned her affiliation with the Center. That fact distinguishes Bennett from the employee in *Rankin*, who made her remark "in a private conversation" with a trusted coworker. 483 U.S. at 389. And while Bennett was not a police officer, her job as a 911 operator still entailed the type of "public contact role" that the clerical employee's job in *Rankin* did not. *See id.* at 390–91.

Reason Two: The jury likewise found that Bennett's public use of the n-word would undermine relationships at the Emergency Communications Center. *Id.* at 388. That is not surprising. Many cases recognize this slur's offensive nature and its potential effect on employment relations. "No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013)

(Kavanaugh, J., concurring); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993). When used in the workplace, courts often have found that the word offers evidence of a racially hostile environment in violation of Title VII. *See, e.g.*, *Gates v. Bd. of Educ. of the City of Chi.*, 916 F.3d 631, 638–40 (7th Cir. 2019); *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1251–53 (11th Cir. 2014). Here, while Bennett's speech occurred outside the workplace, Nashville could reasonably conclude that it hindered employee relationships. According to the district court, some six employees of the 120 or 125 employees at the Emergency Communications Center complained about her racial slur to supervisors.

Unlike in other contexts, moreover, the Supreme Court has not drawn a clear divide between on-the-job speech and off-the-job speech in this employment setting. It has, for example, long upheld laws that restrict employees from engaging in core political speech even outside the job on their own time. *See Broadrick v. Oklahoma*, 413 U.S. 601, 616–17 (1973); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 556 (1973). If the government can terminate employees for core political speech outside the workplace, it would be odd if they could not consider an employee's use of an offensive racial slur outside the workplace too.

B

With significant interests on both sides, what are courts to do? As in other contexts where "we must juggle incommensurable factors," I'm not sure I see a "right" or "wrong" answer to this balancing question. *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting). In my respectful view after struggling with the task, *Pickering*'s instructions to engage in open-ended balancing do not provide helpful guidance to resolve concrete cases.

First, I find the Solomonic weighing of interests difficult because it is "out of step with our interpretive tradition." *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in the judgment). As I understand it, the balancing entails a "utilitarian calculus" about what outcome best promotes the public good: protecting the employee's speech or the government's operations. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020)

(Roberts, C.J., concurring) (citation omitted). Such a policy question requires us to act more like "legislators" than "judges." *Id.* The Supreme Court's usual method of constitutional interpretation, by contrast, relies on the text, structure, and history of a provision (e.g., the Confrontation Clause) to develop a workable legal test that we can neutrally apply in individual cases (e.g., its divide between testimonial and non-testimonial hearsay). *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004).

This balancing especially stands out from the Supreme Court's free-speech jurisprudence. The Court has rejected as "startling and dangerous" the notion that we may engage in "an ad hoc balancing of relative social costs and benefits" of speech. *United States v. Stevens*, 559 U.S. 460, 470 (2010); *June Med. Servs.*, 140 S. Ct. at 2179 (Gorsuch, J., dissenting). If the government targets speech based on content, the Court instead asks whether the speech falls within a category that the government has historically regulated. *See Stevens*, 559 U.S. at 468–69. If not, the Court applies rigorous scrutiny rather than legislative balancing. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *cf. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124–28 (1991) (Kennedy, J., concurring). If so, the Court strives to adopt an administrable legal rule to define and delimit the category. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 393–94 (1992). Take libel law. There, the Court adopted the "actual malice" test. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). It did not require lower courts to weigh in every case an individual's reputational interests against the speaker's expressive interests.

Second, this balancing requires us to compare incomparable interests. *Cf. Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Start with the employee's speech "interest." If we are to "measure" that interest using standard First Amendment gauges, the interest should increase as the speech becomes more controversial. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he proudest boast of our free speech jurisprudence," then, is that we protect the speech "we hate." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (Alito, J., opinion) (citation omitted). The "Nazi Party may march through a city with a large Jewish

population." *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985). The Westboro Baptist Church may shout "Thank God for Dead Soldiers" outside the funeral of a soldier killed in the line of duty. *Snyder*, 562 U.S. at 448, 460–61. And Gregory Lee Johnson may protest this country by burning the American flag, no matter "how repellent his statements must be to the Republic itself." *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring). As these cases symbolize, the First Amendment has its most urgent application for speech on public issues that many in our society might find dangerously wrong. *See Snyder*, 562 U.S. at 460–61. Conversely, the First Amendment would serve no purpose if it safeguarded only "majority views." *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc). Democracy does that well enough on its own.

Turn to the government's operational "interest." If we are to "measure" that interest under a consider-everything test, it will surely increase as the speech becomes more controversial (and thus more entitled to protection). *Rankin*, 483 U.S. at 388. We must consider such things as whether the speech will impair "harmony among co-workers" or negatively affect "working relationships." *Id.* If an employee's off-the-job political advocacy sufficiently annoys coworkers who hold opposite views, does that suffice to terminate the employee? What if non-religious coworkers are offended by a religious coach's decision to pray in a stadium on his personal time? *Cf. Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (Alito, J., respecting the denial of certiorari). How about if an employee's decision to kneel during the national anthem (again on the employee's own time) garnered significant complaints? *Pickering* has been the law for decades, yet it remains unclear how much its balancing "constitionaliz[es] a 'heckler's veto' for controversial expressions"—even expressions that occur on the employee's personal time. Kozel, *supra*, 53 Wm. & Mary L. Rev. at 2019. In short, an employee's speech interest will often move in lockstep with an employer's operational interest. How, then, can we realistically assess which is "greater"?

Third, because this task requires us to compare incommensurate interests, the proper outcome is bound to be in the eye of the beholder. As one of my colleagues said in another context, a subjective weighing of interests "affords far too much discretion to judges in resolving the dispute before them." *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J.,

concurring in the judgment). And as Chief Justice Roberts reminded, "under such tests, 'equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'" *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

These concerns have great force in this free-speech context. For employees, *Pickering*'s opaque test has an "obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997). It "force[s] potential speakers to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011) (Alito, J., concurring in the judgment) (citation omitted). Indeed, if a legislature enacted *Pickering*'s balancing approach, I doubt it would survive a void-for-vagueness challenge. For employers, *Pickering*'s opaque test creates "unavoidable risks and costs" too. *Wales v. Bd. of Educ. of Cmty. Unit Sch. Dist. 300*, 120 F.3d 82, 85 (7th Cir. 1997). Just as an unclear test may deter worthwhile expression, so too it may deter a worthwhile termination. By making the answer turn on an assessment of each side's generic interests, employers can have little confidence that a federal court will agree that their operational interests outweigh their employees' speech interests. This uncertainty and the litigation risk it creates could entrench employees in positions for which they are ill-suited and thereby disserve the populace the employer serves. *Id.*; *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

C

If the abstract balancing does not help resolve this case, where else should courts look? As best I can glean from precedent, the public employer must win where, as here, both sides have substantial interests on their side. The Court has told us to give "substantial deference" to an employer's decision under *Pickering*. *Umbehr*, 518 U.S. at 678. The plurality in *Waters*, for example, noted that we should give "greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." 511 U.S. at 673 (plurality opinion). *Connick* likewise said that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide

degree of deference to the employer's judgment is appropriate." 461 U.S. at 151–52. Our court, too, has "long recognized 'the importance of deference' to law enforcement officials when speech threatens to undermine the functions of organizations charged with maintaining public safety." *Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017) (quoting *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989)). In cases like this one, therefore, precedent tells me to defer to a government's decision that its operational interests outweigh the employee's speech interests.

History might further justify this default rule of deference. Recall that, until the 1950s, the government was not thought to have abridged the freedom of speech by "curb[ing] the tongues of its own employees[.]" *Brown*, 867 F.2d at 321; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96–97 (1990) (Scalia, J., dissenting). If accurate, *cf. Janus v. Am. Fed'n of State, Cnty. and Mun. Emps.*, 138 S. Ct. 2448, 2470–71 (2018), this historical account might confirm that public-employee speech represents a "category" of expression over which the government has far greater room to make content-based decisions. *See Stevens*, 559 U.S. at 472; *see also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009).

Or perhaps the Court should consider another default rule. One scholar suggests that it should move away from a "balancing" test to a default "of parity: employees and other citizens are presumed to be similarly situated for purposes of the First Amendment." Kozel, *supra*, 53 Wm. & Mary L. Rev. at 2011. Under this view, courts should not engage in a broad balancing of interests; they should narrowly ask whether an employee's speech (like an employee's job performance) sheds light on whether the employee can adequately do the job. *See id.* at 2022–35. (Here, the jury found that Bennett's speech did not impair her ability to do her job.) The Court has also refused to engage in "halfway originalism." *Janus*, 138 S. Ct. at 2470. So once it rejected Justice Holmes's view by holding that a firing (like a fine) can amount to an "abridgment" of the "freedom of speech," why should pragmatic concerns about government operations outweigh longstanding free-speech values (such as the prohibition on the heckler's veto)? An abridgment is an abridgment. But these proposals must be directed to a different tribunal. As an intermediate appellate judge, I must apply current doctrine where it stands. And I see a current default rule of deference. For that reason, I concur in the judgment.