(ORDER LIST: 606 U.S.)

MONDAY, JUNE 30, 2025

CERTIORARI -- SUMMARY DISPOSITIONS

23-402 OKLAHOMA, ET AL. V. UNITED STATES, ET AL.

The petition for rehearing is granted. The order entered June 24, 2024, denying the petition for a writ of certiorari is vacated. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *FCC* v. *Consumers' Research*, 606 U. S. ___ (2025).

23-1230 GROWTH ENERGY, ET AL. V. CALUMET SHREVEPORT RFG., ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *EPA* v. *Calumet Shreveport Refining, L.L.C.*, 605 U. S. ___ (2025).

23-1341) NRC, ET AL. V. FASKEN LAND AND MINERALS, ET AL.
)
23-1352) HOLTEC INTERNATIONAL V. NRC, ET AL.

The petitions for writs of certiorari are granted. The judgment is vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *NRC* v. *Texas*, 605 U. S. ___ (2025).

23-7678 MARTINEZ, JOSE A. V. BONDI, ATT'Y GEN.

The motions of petitioners for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Riley* v. *Bondi*, 606 U. S. ___ (2025).

23-7845 JACKSON, KENNETH V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Hewitt* v. *United States*, 606 U. S. ___ (2025).

24-11 SANCHEZ, MARCO A. M. V. BONDI, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Riley* v. *Bondi*, 606 U. S. ___ (2025).

24-90) CROUCH, SEC., WV DHHR, ET AL. V. ANDERSON, SHAUNTAE
)
24-99) FOLWELL, DALE, ET AL. V. KADEL, MAXWELL, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *United States* v. *Skrmetti*, 605 U. S. ___ (2025).

24-420 WALMSLEY, BILL H., ET AL. V. FTC, ET AL.

The motion of Cato Institute for leave to file a brief as *amicus curiae* is denied. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for

further consideration in light of *FCC* v. *Consumers' Research*, 606 U. S. ___ (2025).

24-429) FTC, ET AL. V. NAT. HORSEMEN'S ASSN., ET AL.
)
24-433) HISA, INC., ET AL. V. NHBPA, ET AL.
)
24-465) TEXAS, ET AL. V. BLACK, JERRY, ET AL.
)
24-472) NHBPA, ET AL. V. HISA, INC., ET AL.
)
24-489) GULF COAST RACING L.L.C., ET AL. V. HISA, INC., ET AL.

The petitions for writs of certiorari are granted. The judgment is vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *FCC* v. *Consumers' Research*, 606 U. S. ___ (2025).

24-437 OKLAHOMA V. DEPT. OF H&HS, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Medina* v. *Planned Parenthood South Atlantic*, 606 U. S. ___ (2025).

24-631 HAMSO, MAGNI V. M. H., ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *United States* v. *Skrmetti*, 605 U. S. ___ (2025).

24-801 STITT, GOV. OF OK, ET AL. V. FOWLER, ROWAN, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further

consideration in light of *United States* v. *Skrmetti*, 605 U. S. ___ (2025).

24-5016 MEDINA, MICHAEL V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Hewitt* v. *United States*, 606 U. S. ___ (2025).

24-5456 DURRELL, ROBERT P. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Esteras* v. *United States*, 606 U. S. ___ (2025).

24-6727 WOOD, DAVID V. PATTON, RACHEL

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Gutierrez* v. *Saenz*, 606 U. S. ___ (2025). Justice Thomas would deny the petition for a writ of certiorari.

ORDERS IN PENDING CASES

24M97 DeFRANCE, MICHAEL B. V. UNITED STATES

24M98 SAP SE, ET AL. V. TERADATA CORPORATION, ET AL.

The motions for leave to file petitions for writs of

certiorari with the supplemental appendices under seal are granted.

24-983 HAVANA DOCKS CORP. V. ROYAL CARIBBEAN CRUISES, ET AL.

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

24-1030 PARKER-HANNIFIN CORP., ET AL. V. JOHNSON, MICHAEL D., ET AL.

The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Alito took no part in the consideration of this petition.

24-1068 MONSANTO CO. V. DURNELL, JOHN L.

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

24-7098 PETERSON, DOROTA V. STAPLES SUPERSTORE, LLC

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until July 21, 2025, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

23-1209 M & K EMPLOYEE SOLUTIONS, ET AL. V. TRUSTEES OF THE IAM PENSION

The petition for a writ of certiorari is granted limited to the following question: Whether 29 U. S. C. §1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions to which its actuary subscribed at the end of the year, or allows the plan to use different actuarial assumptions that were adopted after the end of the year.

24-171 COX COMMUNICATIONS, INC., ET AL. V. SONY MUSIC ENTERTAINMENT, ET AL.

24-345 FS CREDIT CORP., ET AL. V. SABA CAPITAL MASTER FUND, ET AL.

24-777 URIAS-ORELLANA, DOUGLAS, ET AL. V. BONDI, ATT'Y GEN.

24-783 ENBRIDGE ENERGY, LP, ET AL. V. NESSEL, ATT'Y GEN. OF MI

24-1056 RICO, ISABEL V. UNITED STATES

The petitions for writs of certiorari are granted.

24-621 NRSC, ET AL. V. FEC, ET AL.

The motion of Democratic National Committee, et al. for leave to intervene is granted. The petition for a writ of certiorari is granted.

CERTIORARI DENIED

23-466) L. W., ET AL. V. SKRMETTI, JONATHAN, ET AL.
)
23-492) DOE, JANE, ET AL. V. KENTUCKY

23-1213 MULREADY, GLEN, ET AL. V. PHARMACEUTICAL CARE MANAGEMENT

23-1360 FIEHLER, VERNON V. MECKLENBURG, CATHERINE, ET AL.

24-86 CAREER COUNSELING, INC. V. AMERIFACTORS FIN. GROUP, LLC

24-181 SONY MUSIC ENTERTAINMENT, ET AL. V. COX COMMUNICATIONS, INC., ET AL.

24-277 BOROCHOV, SHARI M., ET AL. V. IRAN, ET AL.

24-350 PORT OF TACOMA, ET AL. V. PUGET SOUNDKEEPER ALLIANCE

24-732 CHILDREN'S HEALTH DEFENSE V. META PLATFORMS, INC., ET AL.

24-871 B. W. V. AUSTIN INDEP. SCH. DIST.

24-881 GA ASSN. CLUB EXECUTIVES V. GEORGIA, ET AL.

24-943 RABADI, FARES J. V. DEA, ET AL.

24-952 SOUTH POINT ENERGY CENTER V. AZ DEPT. OF REVENUE, ET AL.

24-957 STENGER, WILLIAM V. UNITED STATES

24-960 COINMARKETCAP OpCO, LLC, ET AL. V. COX, RYAN

24-961 EPA, ET AL. V. KENTUCKY, ET AL.

24-968 MOORE, DIONTAI V. UNITED STATES

24-972 BELL, FRANK, ET AL. V. UNITED STATES

24-982 EXXONMOBIL CORP., ET AL. V. ENVIRONMENT TX CITIZEN, ET AL.

24-996 HARVEY, TAMMY M., ET AL. V. BAYHEALTH MEDICAL CENTER, INC.

24-1025 CROWE, DANIEL Z., ET AL. V. STATE BAR OF OR, ET AL.

24-1034 SNEED, ULYSSES C. V. RAYBON, WARDEN

24-1074 ENTERGY AR, LLC V. WEBB, DOYLE, CHMN., ET AL.

24-1096 HALL, JAMES W. V. DAVIS, DORAIN, ET AL.

24-1105 KUSHNER, ALAN V. SUNDAY, ATT'Y GEN. OF PA, ET AL.

24-1108 McCARTHY, LISA, ET AL. V. INTERCONTINENTAL EXCH., ET AL.

24-1109 HANSEN, KARL V. TESLA, INC., ET AL.

24-1111 PETERSON, DAMON V. DIXON, SEC., FL DOC

24-1115 WALKER, REUBEN D., ET AL. V. CLERK, ANDREA L., ET AL.

24-1118 LI, DONGMEI V. PECK, RICHARD, ET AL.

24-1123 CALDWELL, RAHIM V. PROVIDENCE, RI, ET AL.

24-1136 PREY, DALE V. FRANCISCAN UNIV., ET AL.

24-1139 FLARITY, JOE P. V. WASHINGTON

24-1181 McLEAY, MATTHEW T. V. STEWART, COKE M.

24-1203 JAKITS, BERNHARD V. UNITED STATES

24-1218 ALIG, PHILLIP, ET AL. V. ROCKET MORTGAGE, LLC, ET AL.

24-1220 UHLENBROCK, MARK J. V. UNITED STATES

24-1225 SMALL, LaWANDA D. V. ALLIANZ LIFE INS. CO.

24-6057 APARICIO, LUIS A. V. TEXAS

24-6405 JOSEPH, SIDNEY V. UNITED STATES

24-6452 NORDVOLD, PHILIP L. V. UNITED STATES

24-6459 SHEPHARD, KYLE A. V. UNITED STATES

24-6476 DOSS, REGINALD C. V. UNITED STATES

24-6497 COLLETTE, JEROSWASKI W. V. UNITED STATES

24-6621 BROWN, CURTIS V. UNITED STATES

24-6666 ANDERSON, MARCUS J. V. UNITED STATES

24-6693 THOMPSON, SEAN W. V. UNITED STATES

24-6731 HEMPHILL, EMMANUEL A. V. UNITED STATES

24-6772 DOMINGUEZ, RAFAEL V. UNITED STATES

24-6847 EMERY, RICHARD D. V. MISSOURI

24-6875 BATES, KAYLE B. V. FLORIDA

24-6941 REYNOLDS, MICHAEL W. V. HAMM, COMM'R, AL DOC

24-7057 PENN, EARL B. V. UNITED STATES

24-7073 I. M. V. ILLINOIS

24-7074 ORTIZ, MIGUEL A. V. TEXAS

24-7080 STEWART, ROLONDO V. COOLEY, WARDEN

24-7081 GALLUZZO, MICHAEL V. EDWARDS, ROBIN K.

24-7085 ATKINS, HOWARD J. V. BOUSCH, WARDEN

24-7086 BROWN, BAKARI A. V. GUERRERO, DIR., TX DCJ

24-7088 FLETCHER, SAM A. V. GUERRERO, DIR., TX DCJ

24-7089 GARCIA, HARRY V. RANKINS, WARDEN

24-7096 CALHOUN, TIMOTHY W. V. LOUISIANA

24-7097 TAYLOR, JERMEL A. V. SACRAMENTO, CA, ET AL.

24-7102 ARMSTRONG, RYAN C. V. FED. GOVT., ET AL.

24-7125 WILSON, MELAINE R. V. DEPT. OF INTERIOR, ET AL.

24-7129 RICHARD, FRANK J. V. WINN, WARDEN, ET AL.

24-7145 RIEBER, JEFFERY D. V. HAMM, COMM'R, AL DOC

24-7182 RIDDICK, ANTJOUN V. UNITED STATES

24-7217 DEAN, LADARIUS V. UNITED STATES

24-7271 CHEVEZ-SOLANO, CRISTIAN J. V. UNITED STATES

24-7272 LEON, CARLOS B. V. UNITED STATES

24-7273 GOLSHAN, AMIR H. V. UNITED STATES

24-7275 MIRELES, JACOB T. V. UNITED STATES

24-7277 MIMS, DEREK M. V. UNITED STATES

24-7278 MOSS, MALIK J. V. UNITED STATES

24-7289 SALDANA RODRIGUEZ, FIDEL V. UNITED STATES

24-7290 CURRY, PAUL V. UNITED STATES

24-7295 BIRO, RILEY D. V. DOTSON, DIR., VA DOC

24-7296 HYLTON, KAREN V. UNITED STATES

24-7297 FLORES, HECTOR V. UNITED STATES

24-7300 NANEZ-LOPEZ, JORGE A. V. UNITED STATES

24-7303 LAVENDER, DONTERRIAN M. V. UNITED STATES

24-7304 WINDHAM, ERIC A. V. UNITED STATES

24-7305 JOSEPH, FRANCIS F. V. UNITED STATES

24-7307 ARDON-AMAYA, EBLIN O. V. UNITED STATES

24-7314 MO, EX REL. WEINHAUS, JEFFREY V. ADAMS, WARDEN

24-7315 WATSON, KENYON L. V. UNITED STATES

24-7316 YEPSON-CORTEZ, MIGUEL V. UNITED STATES

24-7318 SWICK, WESLEY E. V. UNITED STATES

24-7320 FONSECA, LUIS R. V. V. UNITED STATES

24-7323 OWENS, JODY D. V. UNITED STATES

24-7327 GILOWSKI, ARTUR V. UNITED STATES

24-7330 BRUCE, STETSON V. UNITED STATES

24-7332 JOHNSON, KAYLIN E. V. UNITED STATES

24-7334 HILL, BRANDON R. V. UNITED STATES

24-7335 HARRIS, CURTIS V. UNITED STATES

24-7340 BAZILE, JERRELL A. V. UNITED STATES

24-7367 LENERS, TIMOTHY D. V. SCHELHAAS, ATT'Y GEN. WY, ET AL.

The petitions for writs of certiorari are denied.

24-520 CONNELL, JAMES G. V. CIA

The petition for a writ of certiorari is denied. Justice

Gorsuch took no part in the consideration or decision of this petition.

24-728 IA PORK PRODUCERS ASSN. V. BONTA, ATT'Y GEN. OF CA, ET AL.

The petition for a writ of certiorari is denied. Justice Kavanaugh would grant the petition for a writ of certiorari.

24-922 HARPER, JAMES V. FAULKENDER, COMM'R, IRS, ET AL.

The motion of Professor Adam J. MacLeod for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

24-938 AM. AIRLINES GROUP INC. V. UNITED STATES, ET AL.

24-1026 OREGON V. COMM. TO RECALL HOLLADAY, ET AL.

The petitions for writs of certiorari are denied. Justice Kavanaugh would grant the petitions for writs of certiorari.

24-1200 KAETZ, WILLIAM F. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Thomas took no part in the consideration or decision of this petition.

24-6676 MERCADO, LOUIS A. V. DIXON, SEC., FL DOC, ET AL.

The petition for a writ of certiorari is denied. Justice Sotomayor would grant the petition for a writ of certiorari.

HABEAS CORPUS DENIED

24-7383 IN RE ROBERT T. BLAKE

The petition for a writ of habeas corpus is denied.

MANDAMUS DENIED

24-1216 IN RE MICRON TECHNOLOGY, INC., ET AL.

24-7099 IN RE JANE DOE

24-7215 IN RE JAMIE VARIEUR

The petitions for writs of mandamus are denied.

REHEARINGS DENIED

23-456 CONSUMERS' RESEARCH, ET AL. V. FCC, ET AL.

23-743 CONSUMERS' RESEARCH, ET AL. V. FCC, ET AL.

24-6557 ROSADO, STEVE V. UNITED STATES

24-6561 SCOTT, TONIA V. PENNSYLVANIA

24-6673 ROMERO, ISRAEL V. META PLATFORMS INC., ET AL.

The petitions for rehearing are denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

HOWARD GOLDEY, ASSOCIATE WARDEN, ET AL. *v.*
ANDREW FIELDS, III, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 24–809. Decided June 30, 2025

PER CURIAM.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), this Court recognized an implied cause of action for damages against federal officers for certain alleged violations of the Fourth Amendment. The Court subsequently recognized two additional contexts where implied *Bivens* causes of action were permitted, neither of which was an Eighth Amendment excessive-force claim. After 1980, we have declined more than 10 times to extend *Bivens* to cover other constitutional violations. Those many post-1980 *Bivens* "cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." *Egbert* v. *Boule*, 596 U. S. 482, 486 (2022). Despite those precedents, the U. S. Court of Appeals for the Fourth Circuit permitted the plaintiff here to maintain an Eighth Amendment excessive-force *Bivens* claim for damages against federal prison officials.

This case began when prison officials at the U. S. Penitentiary in Lee County, Virginia, ordered that plaintiff Andrew Fields be placed in solitary confinement. Prison officials monitored Fields while he was isolated. Fields alleges that during their periodic checks, officials would "physically abuse" him. *Fields* v. *Federal Bureau of Prisons*, 109 F. 4th 264, 268 (CA4 2024).

Fields sued the Bureau of Prisons (BOP), the prison warden, and several prison officials in federal court for damages, claiming that certain prison officials used excessive force against him in violation of the Eighth Amendment.

The U. S. District Court for the Western District of Virginia dismissed Fields's complaint. As relevant here, the court determined that Fields lacked a cause of action under *Bivens*. Because "the Supreme Court has never ruled that a damages remedy exists for claims of excessive force by BOP officers against an inmate," the District Court had "no difficulty in concluding that these claims arise in a new context" and that a *Bivens* remedy was unavailable. App. to Pet. for Cert. 49a; see *id*., at 45a–54a.

Fields appealed. In a divided decision, the Fourth Circuit reversed in relevant part, concluding that Fields could proceed with his Eighth Amendment excessive-force claim for damages. The Court of Appeals determined that no "special factors counseled against extending *Bivens*" here. 109 F. 4th, at 270.

Judge Richardson dissented and stated: "A faithful application of our precedent and the Supreme Court's leads squarely to the conclusion that we cannot create a new *Bivens* action here." *Id*., at 283.

After the Fourth Circuit denied rehearing en banc, prison officials sought review in this Court, with the support of the United States as *amicus curiae*. We now grant the petition for certiorari and reverse.

This Court has repeatedly emphasized that "recognizing a cause of action under *Bivens* is 'a disfavored judicial activity.'" *Egbert*, 596 U. S., at 491. To determine whether a *Bivens* claim may proceed, the Court has applied a two-step test. First, the Court asks whether the case presents "a new *Bivens* context"—that is, whether the case "is different in a meaningful way" from the cases in which this Court has recognized a *Bivens* remedy. *Ziglar* v. *Abbasi*, 582 U. S. 120, 139 (2017); see *Carlson* v. *Green*, 446 U. S. 14 (1980); *Davis* v. *Passman*, 442 U. S. 228 (1979); *Bivens*, 403 U. S. 388.

Second, if so, we then ask whether there are "special factors" indicating that "the Judiciary is at least arguably less

equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 596 U. S., at 492. That analysis is anchored in "separation-of-powers principles." *Ziglar*, 582 U. S., at 135.

This case arises in a new context, and "special factors" counsel against recognizing an implied *Bivens* cause of action for Eighth Amendment excessive-force violations. To begin with, Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages. See *Ziglar*, 582 U. S., at 148–149. In addition, extending *Bivens* to allow an Eighth Amendment claim for excessive force could have negative systemic consequences for prison officials and the "inordinately difficult undertaking" of running a prison. *Turner* v. *Safley*, 482 U. S. 78, 84–85 (1987). Moreover, "an alternative remedial structure" already exists for aggrieved federal prisoners. *Ziglar*, 582 U. S., at 137; see *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 74 (2001). The existence of such alternative remedial procedures counsels against allowing *Bivens* suits even if such "procedures are 'not as effective as an individual damages remedy.'" *Egbert*, 596 U. S., at 498.

For the past 45 years, this Court has consistently declined to extend *Bivens* to new contexts. See *Egbert*, 596 U. S., at 490–491. We do the same here. The petition for certiorari is granted, the judgment of the U. S. Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

KARI MACRAE *v.* MATTHEW MATTOS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 24–355. Decided June 30, 2025

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS, respecting the denial of certiorari.

Hanover Public Schools and two of its officials (collectively, respondents) fired petitioner Kari MacRae for her pre-employment political expression on the social-media platform TikTok. Through her personal account, MacRae had "liked, shared, posted, or reposted" six memes—images or other items that are "'spread widely online'"—expressing her views that immigration laws should be enforced, that an individual's sex is immutable, and that society should be racially color-blind. 106 F. 4th 122, 126–128, and n. 1 (CA1 2024). After her firing, MacRae sued respondents for "retaliating against her for exercising her First Amendment rights." *Id.*, at 130. But, the District Court granted summary judgment to respondents, and the First Circuit affirmed, finding that MacRae had not established a protected First Amendment interest under this Court's framework for public-employee speech. Because her petition for a writ of certiorari does not squarely challenge the First Circuit's application of that framework, I agree with our decision to deny it. I write separately, however, to raise serious concerns about the First Circuit's approach.

Our precedents establish that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U. S. 410, 417 (2006). Although "[g]overnment employers, like private employers, need a significant degree of control over their employees' words

and actions," they can regulate their employees' private speech about "matters of public concern" only to the extent "necessary . . . to operate efficiently and effectively." *Id.*, at 418–419. Under the so-called *Pickering-Garcetti* framework, whether such speech is protected turns on a balancing test, wherein the employee's speech interest is weighed against the government's interest as an employer in avoiding workplace disruption. See *Garcetti*, 547 U. S., at 419; *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968).

This case turns on the balancing component of the *Pickering-Garcetti* framework. All agree that MacRae's TikTok posts qualify as speech on matters of public concern, but the First Circuit concluded that the balance of interests favored respondents. That court first discounted the value of MacRae's speech interest because her posts, which are reproduced below, at times spoke in what the court described as a "mocking, derogatory, and disparaging manner." (See Figures 1 and 2.) 106 F. 4th, at 137; see Pet. for Cert. 7 (reproducing posts).

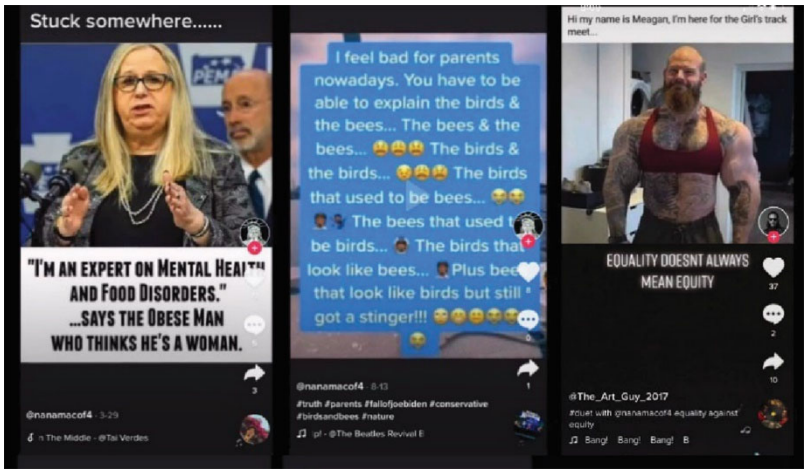

Figure 1. Kari MacRae TikTok posts

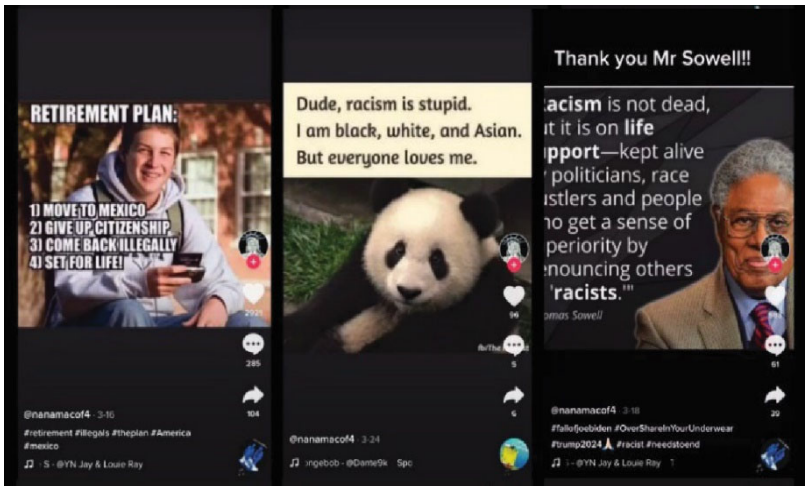

Figure 2. Kari MacRae TikTok posts

In contrast, the First Circuit explained that respondents—who fired MacRae out of "concer[n] about the potential negative impact [her] social media posts would have on staff and students"—had a "'strong'" interest in avoiding disruption, and that they made a "reasonable prediction of disruption." 106 F. 4th, at 130, 137–138. The court pointed to factors such as the public attention and news coverage MacRae had received in light of her position on a neighboring town's school board, as well as the fact that at least some Hanover students and staff were aware of her posts. *Id.*, at 139–141. It also cited the fact that "some of her TikTok posts (at least arguably) conflicted with the District's belief of '[e]nsur[ing] a safe learning environment based on respectful relationships' and Core Value of '[r]espect[ing] . . . human differences,'" "given the potential to perceive some of her posts as transphobic, homophobic, or racist." *Id.*, at 139–140. The First Circuit concluded that, on balance, the risk of disruption outweighed MacRae's interest.

The First Circuit's analysis strikes me as deeply flawed. To start, I do not see how the tone of MacRae's posts can

bear on the weight of her First Amendment interest. "Speech on matters of public concern is at the heart of the First Amendment's protection." *Snyder* v. *Phelps*, 562 U. S. 443, 451–452 (2011) (internal quotation marks and alterations omitted). And, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin* v. *McPherson*, 483 U. S. 378, 387 (1987). "[H]umor, satire, and even personal invective can make a point about a matter of public concern." *De Ritis* v. *McGarrigle*, 861 F. 3d 444, 455 (CA3 2017) (internal quotation marks omitted). Accordingly, we have declined to "affor[d] less than full First Amendment protection" even for speech that we have deemed "particularly hurtful," such as the picketing signs used by the Westboro Baptist Church. *Snyder*, 562 U. S., at 454–456; see *id.*, at 454 (listing, among other Westboro signs, placards reading, "'God Hates the USA/Thank God for 9/11,'" "'God Hates Fags,'" and "'Thank God for Dead Soldiers'").[1] Against this backdrop, I do not see how the First Circuit could discount the First Amendment value of MacRae's comparatively mild posts, all of which reflected positions that represent "by no means an isolated segment of public opinion." *Noble* v. *Cincinnati and Hamilton Cty. Public Library*, 112 F. 4th 373, 382 (CA6 2024).

The First Circuit's analysis of respondents' countervailing interest in avoiding disruption is similarly questionable. Although this Court has "consistently . . . given substantial weight to government employers' reasonable

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[1] Although *Snyder* was not a *Pickering-Garcetti* case, we grounded our analysis in caselaw from the public-employer context. See 562 U. S., at 451–455. And, our *Pickering-Garcetti* cases have not treated the tone or style of an employee's speech as bearing on its First Amendment value. Cf. *Rankin*, 483 U. S., at 379–380, 386–387 (recognizing, without qualification, that a "remar[k], after hearing of an attempt on the life of the President, 'If they go for him again, I hope they get him,'" "dealt with a matter of public concern").

predictions of disruption," the key word here is "reasonable." *United States* v. *Treasury Employees*, 513 U. S. 454, 492 (1995) (Rehnquist, C. J., dissenting). The First Circuit accordingly should have discarded factors whose disruptive potential was purely speculative, such as the fact that "'some students and staff . . . were aware of' [MacRae's] posts" or that "students [were overheard] discussing her social media activity." 106 F. 4th, at 139–140.

Even worse, the First Circuit compounded its reliance on speculative factors with consideration of illicit ones. We have made clear that the core First Amendment principle of viewpoint neutrality applies in the *Pickering-Garcetti* context as elsewhere. See *Rankin*, 483 U. S., at 384 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse . . . simply because superiors disagree with the content of employees' speech"). Yet, the First Circuit cited an arguable conflict between MacRae's posts and institutional expressions of viewpoint such as Hanover's "Core Value of '[r]espect[ing] . . . human differences'" as evidence of potential disruption. 106 F. 4th, at 139. It undermines core First Amendment values to allow a government employer to adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption. And, the problem is exacerbated in the case of an employee such as MacRae, who expressed her views only outside the workplace and before her employment.

Whatever the proper weight of respondents' interest in minimizing disruption, the First Circuit failed to conduct a proper balancing inquiry because it improperly discounted MacRae's First Amendment interest. To its credit, that court recognized that "[t]he government employer's interest must be proportional to the value of the employee's speech." *Id.*, at 136; see *Connick* v. *Myers*, 461 U. S. 138, 152 (1983) ("[A] stronger showing may be necessary if the employee's

speech more substantially involved matters of public concern"). But, because the court viewed MacRae's interest as "weigh[ing] less than it normally would," it did not hold respondents to their full burden. 106 F. 4th, at 137.

This case is the latest in a trend of lower court decisions that have misapplied our First Amendment precedents in cases involving controversial political speech. See, *e.g.*, *L. M.* v. *Middleborough*, 605 U. S. ___, ___–___ (2025) (ALITO, J., joined by THOMAS, J., dissenting from denial of certiorari) (slip op., at 6–13). And, a concerning number of these cases have arisen in the context of the *Pickering-Garcetti* framework. See, *e.g.*, *Kennedy* v. *Bremerton School Dist.*, 586 U. S. 1130, 1132–1133 (2019) (statement of ALITO, J., respecting denial of certiorari) (explaining how "the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling"); *Porter* v. *Board of Trustees of N. C. State Univ.*, 72 F. 4th 573, 586, 595 (CA4 2023) (Richardson, J., dissenting). If left unchecked, this number will likely increase: In many cases, government employers may find it convenient to attempt to "restric[t] . . . disfavored or unpopular speech in the name of preventing disruption." *Dodge* v. *Evergreen School Dist. #114*, 56 F. 4th 767, 786 (CA9 2022). But, the *Pickering-Garcetti* framework plainly forbids using "the guise of protecting administrative interests" to "disfavor any particular view." 56 F. 4th, at 785–787; cf. *Mahmoud* v. *Taylor*, 606 U. S. ___, ___ (2025) (THOMAS, J., concurring) (slip op., at 11) (recognizing, in the free-exercise context, that school claims of disruption must be scrutinized to avoid "giv[ing] schools a playbook for evading the First Amendment").

Lower courts are bound to apply the *Pickering-Garcetti* framework as we have articulated it.[2] I have serious con-

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[2] This obligation does not mean that the *Pickering-Garcetti* framework is necessarily correct as a matter of original meaning. Given that the

cerns about how the First Circuit applied it here. But, rather than raise these broader issues, MacRae's petition focuses on the discrete question whether the framework's balancing test applies at all in the context of a public employee's "unrelated, preemployment speech." Pet. for Cert. i. Because I agree with the Court that this question does not independently warrant review, I concur in the denial of certiorari. In an appropriate case, I would make clear that public employers cannot use *Pickering-Garcetti* balancing generally or unsupported claims of disruption in particular to target employees who express disfavored political views.

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historical rule was that "a public employee had no right to object to [employer-imposed] restrict[ions on] the exercise of constitutional rights," there is good reason to think it may not be. *Connick* v. *Myers*, 461 U. S. 138, 143 (1983). But, "unless and until this Court revisits it, [the *Pickering-Garcetti* framework] is binding precedent that lower courts must faithfully apply." *L. M.* v. *Middleborough*, 605 U. S. ___, ___ (2025) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 1).

SUPREME COURT OF THE UNITED STATES

GHP MANAGEMENT CORPORATION, ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24–435. Decided June 30, 2025

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting from the denial of certiorari.

During the COVID–19 pandemic, the City of Los Angeles enacted an eviction moratorium that "'effectively preclude[d] residential evictions.'" 2022 WL 17069822, *1 (CD Cal., Nov. 17, 2022). Among other restrictions, this policy barred landlords from evicting tenants "due to COVID-related nonpayment of rent." *Ibid.* Petitioners—13 owners of Los Angeles apartment buildings and their shared management company—sued the city, arguing that the moratorium effected a *per se* physical taking, in violation of the Takings Clause's prohibition on takings of "private property . . . for public use, without just compensation." U. S. Const., Amdt. 5. I would grant review of the question whether a policy barring landlords from evicting tenants for the nonpayment of rent effects a physical taking under the Takings Clause.

This question is the subject of an acknowledged Circuit split. The Eighth and Federal Circuits have held that a bar on evictions for the nonpayment of rent qualifies as a physical taking, while the Ninth Circuit has held that it does not. Compare *Darby Development Co.* v. *United States*, 112 F. 4th 1017, 1034–1035 (CA Fed. 2024), and *Heights Apartments, LLC* v. *Walz*, 30 F. 4th 720, 733 (CA8 2022), with 2024 WL 2795190, *1 (CA9, May 31, 2024). In issuing the decision below, the Ninth Circuit expressly acknowledged

this split. See *ibid.*, n. 2.

This Circuit split stems from confusion about how to reconcile two of our precedents. The Ninth Circuit treated as controlling this Court's decision in *Yee* v. *Escondido*, 503 U. S. 519 (1992), which held that a statute did not effect a physical taking when it allowed mobile home owners to evict tenants only after an onerous delay. *Id.*, at 527–528. The *Yee* Court explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land," whereas the landlord petitioners in *Yee* had voluntarily contracted with their tenants and were accordingly subject to laws "regulat[ing their] *use* of their land by regulating the relationship between landlord and tenant." *Ibid.* Thus, in the Ninth Circuit's view, the Los Angeles eviction moratorium did not "effect a taking" because petitioners had already "opened their property to occupation by tenants." 2024 WL 2795190, *1.

By contrast, the Eighth and Federal Circuits looked to our more recent decision in *Cedar Point Nursery* v. *Hassid*, 594 U. S. 139 (2021). There, we held that a law requiring agricultural employers to allow labor organizers onto their property constituted a physical taking because it "appropriate[d] for the enjoyment of third parties the owners' right to exclude." *Id.*, at 149. And, the Eighth and Federal Circuits reasoned, if "forcing property owners to occasionally let union organizers on their property infringes their right to exclude," it follows that "forcing them to house non-rent-paying tenants (by removing their ability to evict)" does too. *Darby*, 112 F. 4th, at 1035; accord, *Heights Apartments*, 30 F. 4th, at 733.

Because "[w]e created this confusion," we have an obligation to fix it. *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U. S. 1057, 1059 (2018) (THOMAS, J., dissenting from denial of certiorari). That obligation is particularly strong here, as there is good reason to think that the Ninth Circuit

erred. Under the logic of *Cedar Point*, and our Takings Clause doctrine more generally, an eviction moratorium would plainly seem to interfere with a landlord's right to exclude. See *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. 758, 765 (2021) (*per curiam*) ("[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude"). Nor does *Yee* dictate otherwise: Although the statute there constrained landlords' right to evict, it was not "an outright prohibition on evictions for nonpayment of rent." *Darby*, 112 F. 4th, at 1035; see 503 U. S., at 527–528.

Finally, this issue is important and recurring. Given the sheer number of landlords and tenants, any eviction-moratorium statute stands to affect countless parties. And, the end of the COVID–19 pandemic has not diminished the importance of this issue. Municipalities continue to enact eviction moratoria in the wake of other emergencies. See, *e.g.*, San Diego Cty., Cal., Ordinance No. 10936, §2 (N. S.) (2025) (codified at San Diego Cty., Cal., Code of Regulatory Ordinances tit. 3, div. 1, ch. 5, §31.503); Statement of Proceedings for the Public Hearing Meeting of the Board of Supervisors of the Cty. of Los Angeles 7–8 (Feb. 25, 2025), https://file.lacounty.gov/SDSInter/bos/sop/1178834_022525.pdf. Even if it were otherwise, we would do well to clarify our case law now, rather than in the heat of the next national emergency.

* * *

This case meets all of our usual criteria for granting certiorari, and it does not contain any impediments that would hamper our review. The Court nevertheless denies certiorari, leaving in place confusion on a significant issue, and leaving petitioners without a chance to obtain the relief to which they are likely entitled. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

ANTOINE WIGGINS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 24–6410. Decided June 30, 2025

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE BARRETT joins, respecting the denial of certiorari.

This case implicates a split among the Courts of Appeals over the proper definition of a "controlled substance offense" under §4B1.2(b) of the Federal Sentencing Guidelines. United States Sentencing Commission, Guidelines Manual §4B1.2(b) (Nov. 2024) (USSG). The Circuits have reached different conclusions on whether such offenses must involve a prohibited drug under state law, federal law, or either. See *Guerrant* v. *United States*, 595 U. S. ___, ___–___ (2022) (statement of SOTOMAYOR, J., respecting denial of certiorari) (slip op., at 1–2) (collecting cases).

Three years ago, I urged the Sentencing Commission to "resume its important function in our criminal justice system," including by resolving that conflict. *Id.,* at ___ (slip op., at 3). At the time, the Commission could not do so because it lacked a quorum of voting members. Just months later, however, the Commission regained a quorum, enabling it to amend the Guidelines. See Commission Regains a Quorum for The First Time in Three Years, Enabling it To Amend Federal Sentencing Guidelines, Issue Sentencing Policy (Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022. Yet while the Commission has since acknowledged the split, see, *e.g.*, 87 Fed. Reg. 60439 (2022), it has not resolved it. Nor, it seems, does it plan to do so in the 2025–2026 amendment cycle. See Federal Register Notice of Proposed 2025–2026 Priorities

(June 9, 2025), http://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2025-2026-priorities.

In the meantime, the disagreement among the Circuits over the proper definition of a "controlled substance offense" has not only persisted, but deepened. See, *e.g.*, *United States* v. *Dubois*, 94 F. 4th 1284, 1294–1296 (CA11 2024) (holding that a state-law drug offense counts); *United States* v. *Lewis*, 58 F. 4th 764 (CA3 2023) (same); *United States* v. *Minor*, 121 F. 4th 1084, 1089–1090 (CA5 2024) (holding that state-law offense counts only if it is a categorical match for a federal offense); *United States* v. *House*, 31 F. 4th 745, 752–753 (CA9 2022) (same). This issue is an important one: Whether the term "controlled substance offense" refers to a "controlled substance" under state or federal law (or both) can determine whether certain defendants will qualify as a "career offender" under the Guidelines, see USSG §4B1.1(a), and therefore "face dramatically higher sentencing ranges for their crime of conviction," *Guerrant*, 595 U. S., at ___ (slip op., at 1). So long as the split persists, two defendants whose criminal histories include identical drug offenses and who commit the same federal crime will be subject to significantly different sentencing ranges based solely on geography. Yet in our federal system, a defendant's location should not determine the severity of his punishment.

It remains "the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines." *Id.*, at ___ (slip op., at 2) (citing *Braxton* v. *United States*, 500 U. S. 344, 348 (1991)). If the Commission does not intend to resolve the split, it should provide an explanation so that this Court can decide whether to address the issue and restore uniformity.

SUPREME COURT OF THE UNITED STATES

LANDON HANK BLACK *v.* TENNESSEE

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE, EASTERN DIVISION

No. 24–6586. Decided June 30, 2025

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

This case presents important constitutional questions about the way Tennessee instructs juries in voluntary manslaughter cases. Because the court below did not grapple with those questions, I concur in the denial of certiorari. I write separately to highlight the constitutional flaws in Tennessee's approach to manslaughter instructions, and to encourage the Tennessee Supreme Court to resolve them in the first instance.

A night out with a group of friends ended in tragedy when petitioner Landon Black fatally shot Brandon Lee during an altercation in the parking lot of a sports bar. At Black's trial for murder, the prosecution and defense dissected the relationships between the people present at the bar that night. Each sought to answer a basic question: What motivated Black to shoot Lee, a total stranger? The prosecution, pursuing a first-degree murder conviction, argued that Black had originally planned to shoot someone else, a man who had "'humiliated and insulted'" him inside the bar. 2024 WL 2320284, *9 (Tenn. Crim. App., May 22, 2024). When Black saw Lee, the prosecution said, he decided "[w]ithin seconds" to shoot him instead. *Ibid.* The defense, meanwhile, argued that Lee, "who had just snorted cocaine, approached the car aggressively with his gun in his right hand," causing Black to shoot him "because he was in fear for his life." *Ibid.*

To allow the jury to decide between these rival theories of the case, the trial court instructed it on three different offenses: first-degree murder (requiring premeditation), second-degree murder (a voluntary killing without premeditation), and voluntary manslaughter (a killing driven by a state of passion caused by adequate provocation). Those instructions would have been unremarkable, except that two peculiar features of Tennessee law caused a significant problem. If the jury followed its instructions, it could never convict Black of voluntary manslaughter.

First, consider the elements of Tennessee second-degree murder and manslaughter. To obtain a conviction for second-degree murder, the State must establish an unlawful and voluntary (knowing) killing. See Tenn. Code Ann. §39–13–210(a) (2018); 2024 WL 2320284, *26. To obtain a manslaughter conviction, the prosecution must prove those same two elements, plus a third: that the defendant acted "in a state of passion induced by adequate provocation" (*i.e.*, "provocation sufficient to lead a reasonable person" to act irrationally). See §39–13–211(a) (Cum. Supp. 2024); 2024 WL 2320284, *26. Consequently, the prosecution must prove an additional element to obtain a manslaughter conviction, even though manslaughter is a less serious offense than second-degree murder.* Compare §39–13–211(b)

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*This transformation of the state-of-passion question from a traditional defense (raised by the defendant and disproved by the prosecution) into an element of the offense appears to have come about accidentally, by way of a line of dictum in *State* v. *Williams*, 38 S. W. 3d 532 (Tenn. 2001). There, the Tennessee Supreme Court remarked that "[c]omparing the revised second degree murder and voluntary manslaughter statutes, the essential element that now distinguishes these two offenses . . . is whether the killing was committed 'in a state of passion produced by adequate provocation.'" *Id.*, at 538. That comment in turn "has led any number of panels" of the Tennessee Court of Criminal Appeals "to conclude that 'a state of passion produced by adequate provocation' is an 'essential element' of the offense of voluntary manslaughter." *State* v. *Donaldson*, 2022 WL 1183466, *22 (Tenn. Crim. App., Apr. 21, 2022).

("Voluntary manslaughter is a Class B felony") with §39–13–210(c)(1) ("Second degree murder is a Class A felony).

Second, Tennessee courts instruct the jury to consider each offense in order of seriousness, beginning with the charged offense. Here is that instruction as it was given to Black's jury:

> "'In reaching your verdict, you shall, first, consider the offense charged in the Presentment. If you unanimously find a defendant guilty of that offense beyond a reasonable doubt, you shall return a verdict of guilty for that offense. If you unanimously find the defendant not guilty of that offense or have a reasonable doubt of the defendant's guilt of that offense, you shall then proceed to consider whether or not the defendant is guilty of the next lesser-included offense in order from greatest to least within that Count of the Presentment. *You shall not proceed to consider any lesser-included offense until you have first made a unanimous determination that the defendant is not guilty of the immediately-preceding greater offense* or you unanimously have a reasonable doubt of the defendant's guilt of that offense.'" Pet. for Cert. 7 (emphasis added).

These two instructions, taken together, mean that no jury instructed on both second-degree murder and manslaughter could ever reach a manslaughter verdict. If a jury finds a killing to be knowing and unlawful, it has found all the necessary elements for a second-degree murder conviction. At that point, the jury "shall not proceed to consider" the lesser included offense of manslaughter, *ibid.*, meaning it will never consider whether the killing was provoked.

That is just what happened in Black's case. The jury rejected the first-degree murder charge, reached the second-degree murder question on its verdict form, and found that Black's killing had been knowing and unlawful. The instructions then prohibited the jury from continuing to the

next lesser included offense. The jury thus convicted Black of second-degree murder.

That result raises serious federal constitutional questions. Half a century ago, this Court held "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the *absence* of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney* v. *Wilbur*, 421 U. S. 684, 704 (1975) (emphasis added). Drawing on *Mullaney*, Black argued below that it was error to treat "'state of passion' as an essential element of the offense that the State must prove beyond a reasonable doubt," because "'state of passion' is actually a defense to second degree murder that, if fairly raised by the proof, must be disproved by the State beyond a reasonable doubt." 2024 WL 2320284, *28 (describing Black's argument); see also App. to Brief in Opposition 120, 148–149 (Black's briefing before the Tennessee Court of Criminal Appeals). Notwithstanding *Mullaney*, the court held that the State was not required to establish the absence of a state of passion beyond a reasonable doubt, apparently because it felt bound by state law. 2024 WL 2320284, *28–*29. Whatever Tennessee law says about manslaughter, however, the court below was not free to disregard *Mullaney*.

So too, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U. S. 479, 485 (1984)). Here, Tennessee's jury instructions made it legally impossible for Black to succeed on a critical element of his defense: the argument that Lee's threatening approach with a gun in his hand constituted adequate provocation. It is hard to imagine that a set of jury instructions rendering it legally impossible for the jury to accept a legitimate defense could pass muster under the Due Process Clause. See *State* v. *Humphrey*, 2005 WL 2043778, *14–*15 (Tenn. Crim. App., Aug. 24,

2005) (Tipton, J., concurring) (warning that sequential jury instruction on manslaughter could violate the Due Process Clause); *Edge* v. *State*, 261 Ga. 865, 867, 414 S. E. 2d 463, 466 (1992) (invalidating conviction because a similar "'sequential' charge eliminate[d] the jury's full consideration of voluntary manslaughter" by preventing it from "go[ing] on to consider evidence of provocation or passion").

The Tennessee Court of Criminal Appeals has acknowledged that the State's present approach to manslaughter is a source of endless confusion. See *State* v. *Donaldson*, 2022 WL 1183466, *22, *24 (Tenn. Crim. App. Apr. 21, 2022) (decrying "[c]onfusion about the passion/provocation construct" and "ask[ing], as other panels have done since as early as 2004, that our supreme court address this issue"). Indeed, it has been clear for years that the instructions used in this case are wholly unworkable.

One problem, illustrated here, is that Tennessee treats voluntary manslaughter as a "lesser-included offense" of second-degree murder. *State* v. *Wilson*, 92 S. W. 3d 391, 396 (Tenn. 2002). Ordinarily, one offense can be a lesser included offense of another only if its elements are a subset of the more serious crime. *Schmuck* v. *United States*, 489 U. S. 705, 716 (1989) (adopting this "elements" approach). Yet here the opposite is true: The elements of second-degree murder (the more serious offense) are a subset of the elements of manslaughter (the lesser included offense). The Tennessee Supreme Court has thus far declined to explain how courts should square that doctrinal circle. It is hard to see how they could.

Tennessee's manslaughter instructions have led "to absurd results" disadvantaging the State, as well. *Donaldson,* 2022 WL 1183466, *23. Treating provocation as an element means that, even if the State has established a voluntary killing, "a reviewing court has no choice but to reverse" the conviction if the State has not also established provocation. *Ibid.* For example, in *State* v. *Lumpkin*, 2020 WL 7682239,

*2 (Tenn. Crim. App., Dec. 23, 2020), the defendant shot his victim in the head in the course of a robbery. "No evidence," however, suggested "that the perpetrator who shot the victim in the head acted in a state of 'passion,' produced by 'adequate provocation.'" *Id.*, at *6. Thus, even though the evidence "would have supported" a second-degree murder conviction, the court felt itself bound to invalidate the conviction for manslaughter. *Ibid.*; see also *State* v. *Benesch*, 2017 WL 3670196, *18–*19 (Tenn. Crim. App., Aug. 25, 2017) (modifying manslaughter conviction for similar reasons). Those cases, like this one, make plain that Tennessee's approach to manslaughter is untenable. Accord, *Donaldson*, 2022 WL 1183466, *22–*24.

The State defends the judgment below on the ground that Black forfeited his federal arguments. The record suggests the contrary. See App. to Brief in Opposition 120, 148–149. Nevertheless, by focusing on the ongoing state-law dispute over the elements of manslaughter, the court below appears to have overlooked Blacks' constitutional claims entirely. I thus concur in the Court's denial of certiorari. Given the serious constitutional problems with Tennessee's manslaughter instructions, however, I join the Tennessee Court of Criminal Appeals in encouraging the Tennessee Supreme Court to reconsider its approach. *Donaldson*, 2022 WL 1183466, *24. If that court does not, this Court should consider the constitutionality of Tennessee's manslaughter instructions in an appropriate case.