

No. 24-1279

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIAN HUSSEY,
Plaintiff-Appellant,

v.

CITY OF CAMBRIDGE; CHRISTINE ELOW, in her official capacity as
Commissioner of the Cambridge Police Department,
Defendants-Appellees.

BRANVILLE G. BARD, JR., in his individual capacity,
Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS IN CIVIL ACTION NO. 1:21-CV-
11868

**MOTION OF THE CENTER FOR INDIVIDUAL RIGHTS FOR
LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLANT BRIAN HUSSEY**

NOW COMES the Center for Individual Rights, pursuant to F.R.A.P.
29, by and through its counsel, and respectfully moves this Honorable Court
for leave to file the accompanying *amicus curiae* brief in support of

Plaintiff-Appellant Brian Hussey. All parties consent to this filing. No counsel for a party authored this motion or the proposed *amicus* brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to fund the motion or the brief.

I. Interest and Identity of the Amicus Curiae

The Center for Individual Rights (CIR) is a national public interest law firm dedicated to defending individual rights essential to a free and flourishing society. Founded in 1989, CIR has a record of landmark victories in this and many other courts, setting precedents that restore and protect fundamental individual rights threatened by government actions. CIR has a vital interest in preserving the guarantees of freedom of expression secured by the First Amendment. CIR has represented clients in a wide variety of First Amendment cases, *e.g.*, *Friedrichs v. California Teachers Ass’n*, 578 U.S. 1 (2016); *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), and has also participated as *amicus curiae* in cases implicating significant First Amendment issues, *e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007) (defending high school students’ free speech rights); *Elonis v. United States*, 575 U.S. 723 (2015) (urging narrow reading of mens rea requirement for federal “true threat” statute).

CIR also represents public employees whose First Amendment rights have been infringed. In *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), CIR vindicated the rights of a professor who was disciplined for protected speech made outside of class. CIR currently represents public employees in two other important First Amendment cases currently on appeal, *Davi v. Spitzberg, et al.*, Case No. 24-1778 (2d Cir.) and *Wang v. University of Pittsburgh, et al.*, Case No. No. 25-1816 (3d Cir.).

II. Reasons Why an *Amicus Curiae* Brief Is Desirable and Relevant.

CIR respectfully submits that the attached proposed brief is relevant and helpful to the Court because it highlights the importance of the substantial evidentiary burden on an employer seeking to support a prediction of future disruption or loss of public trust arising out of an employee's speech.

Because this motion is unopposed, and because the brief will assist the Court, CIR respectfully requests that the Court grant this motion and permit CIR to file the attached brief.

III. Conclusion

For the forgoing reasons, the Center for Individual Rights respectfully requests that this Honorable Court grant its motion for leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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Dated February 25, 2026

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**BRIEF OF *AMICUS CURIAE* THE CENTER FOR
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PLAINTIFF-APPELLANT BRIAN HUSSEY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Center for Individual Rights makes the following disclosures: (1) it is a non-profit corporation; (2) it has no parent corporations; and (3) no publicly held corporations own 10% or more of any of its stock, and in fact, it has no stock.

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Identity and Interest of the Amicus Curiae

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CIR respectfully submits that this brief is relevant and helpful to the Court because it highlights the importance of the substantial evidentiary burden on an employer seeking to support a prediction of future disruption or loss of public trust arising out of an employee's speech. All parties consent to this filing.

Rule 29(a)(4)(E) Statement

No part of this brief was authored, in whole or in part, by counsel for any party. No person other than *amicus*, its members, or its counsel made a monetary contribution to fund the motion or the brief.

Argument

In the plurality decision in *Waters v. Churchill*, 511 U.S. 661 (1994), after stating that courts generally gave predictions of disruption based upon speech more deference in the government employment context than when the government was acting as sovereign, the plurality added this:

This does not, of course, show that the First Amendment should play no role in government employment decisions. Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. *Pickering, supra*, 391 U.S. at 572. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished.

Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality op.). The following year, in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), Justice O'Connor repeated this "substantial showing" standard and stated that the rule at issue there (precluding government employees from accepting honoraria for outside speeches and articles) implicated that standard. *Id.* at 483 (O'Connor, J., concurring and dissenting).

Further, in making that substantial showing, the government must also make a reasonable investigation of the facts and circumstances. This includes not only the content of the speech, but "what the listener's reactions were." *Waters*, 511 U.S. at 668 (plurality op.); *id.* at 669 ("[I]t is important

to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures”). *See also Heil v. Santoro*, 147 F.3d 103, 109-110 (2d Cir. 1998) (“an employer that has received a report of such [potentially disruptive] speech must make a reasonable investigation before deciding to take action”).

This standard – requiring the government to conduct a reasonable investigation and make a substantial showing of likely disruption to its operations – has generally governed the law in the lower courts. In this regard, the law in this Circuit has been the exception rather than the rule. With this amicus brief, CIR will show that the courts of appeals have generally required much more evidence to support a prediction of disruption or loss of public trust than defendants produced in this case.

The panel majority concluded that the absence of evidence here supporting a prediction of disruption was irrelevant because the Cambridge Police Department was concerned with its relationship with the public, not disruption to internal operations. *Hussey v. City of Cambridge*, 149 F.4th 57, 71 (1st Cir. 2025) (agreeing “with Hussey that there is scant evidence in the record to support a prediction of disruption to the Cambridge Police Department’s internal operations, the absence of such evidence here is beside the point. . . [T]he Department maintains that Hussey’s suspension

was motivated by its concern that Hussey’s post would undermine the Department’s relationship of trust with the public.”), *vacated upon granting of petition for rehearing en banc*, 2026 U.S. App. LEXIS 2114 (1st Cir. Jan. 26, 2026). But if “concern with reputation” or “potential loss of public trust” becomes a get-out-of-evidentiary-requirements-for-free card, then the protection for speech of public employees will become so attenuated that the Court might as well return to the doctrine of *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892) that government employees have no right to government jobs. A prediction of a loss of public reputation, just like a prediction of disruption to operations, must be based upon evidence – where the speech is one of significant public concern, a *substantial* showing of *likely* loss of reputation. *Jungels v. Pierce*, 825 F.2d 1127, 1132 (7th Cir. 1987) (reversing dismissal of First Amendment claim by Civil Service Commissioner who had written a letter to the editor claiming that Hispanics were causing neighborhoods to deteriorate; “[n]o evidence was presented concerning public perceptions and their impact, if any, on [plaintiff’s] ability to perform his duties as a civil service commissioner”); *Goza v. Memphis Light, Gas, and Water Division*, 398 F. Supp. 3d 303, 321 (W.D. Tenn. 2019) (holding that employee speech should

not be restricted “based on a government official’s speculation as to the public’s eventual reaction”).

Several corollaries flow from this. First, this requires that the speech at issue was widely distributed and known to the public to be by an employee of the government agency. Second, it should require that the employer make the public *aware* of the adverse employment action taken against the employee. If the speech has damaged, or is likely to damage, the agency’s public reputation, taking action without letting the public know about it will not repair anything and should lead to the conclusion that the employer’s action is just pretext for disagreement with the speech.

I. OTHER COURTS OF APPEALS REQUIRE A SIGNIFICANT EVIDENTIARY RECORD TO SUPPORT A PREDICTION OF DISRUPTION AND/OR LOSS OF PUBLIC TRUST

A survey of cases in sister courts of appeals demonstrates that they do not simply accept an employer’s prediction of a likelihood of loss of public trust and/or interference with operations, much less that the predicted loss of public trust and/or disruption outweighs the employee’s First Amendment rights. To the contrary, they require a substantial showing, much greater than the showing made here with respect to Hussey’s speech.

Ninth Circuit

In *Moser v. Las Vegas Metropolitan Police Dept.*, 984 F.3d 900 (9th Cir. 2021), a SWAT police officer commented upon a friend’s Facebook post concerning the arrest of an individual who had shot a police officer. Moser stated that it was a shame that the arrestee did not have “a few holes” in him. An anonymous tipster forwarded the message to the department, and the department concluded that Moser’s comment violated its social media policy and demoted him to patrol. *Id.* at 903. The department defended the demotion on the ground that Moser’s comment “eroded public trust.” *Id.* at 904. The district court granted defendants summary judgment.

The Ninth Circuit reversed and held that there were issues of fact that precluded summary judgment. It noted that Courts give employers’ predictions of disruption more weight when the employer can provide evidence “that the community it serves discovered the speech or would inevitably discover it,” or where some disruption already had occurred. *Id.* at 909. On the other hand, “a court may discount the government employer’s fears of disruption if there is little evidence that the offending speech has been or will be discovered.” *Id.* at 910. *See also id.* (“Typically, courts credit the government’s claim where the challenged speech is widely known or reported by the press. Here, there was no media coverage of Moser’s

comment. In fact, the record shows no evidence that anyone other than the anonymous tipster even saw Moser’s Facebook comment. . . . [T]he chance that the public would have seen the Facebook comment remained low because Moser deleted that December 2015 comment by February 2016.”). The Ninth Circuit found that the record did not support defendants’ prediction of disruption caused by a loss of public trust. *Id.*

Last year, the Ninth Circuit considered school employees (one teacher and one assistant principal) who worked at a middle school and were concerned about their school district’s policy regarding gender identity, transitioning students, use of restrooms and locker rooms, and using names and pronouns for students. *Damiano v. Grants Pass School District No. 7*, 140 F.4th 1117, 1128-29 (9th Cir. 2025). The employees created an “I Resolve” campaign to create alternatives to the district’s policy, occasionally using their school email addresses to work on the project (which included a website and a video). *Id.* at 1129-30. A number of district employees lodged formal complaints against the two, some complaining that the “I Resolve” campaign violated the district policy against bias incidents. *Id.* at 1132. Another employee questioned the teacher’s ability to support a transitioning student. *Id.* A high school student and three former students also complained. *Id.* at 1133. A total of at least twenty complaints were received,

although the total was disputed. *Id.* at 1133 n.2, 1144. Within a few weeks, four news stories appeared on two different news channels, including one about an eighth-grade student who was protesting the employees' campaign. *Id.* at 1135.

Among other things, the employees' campaign had referred to a student who was exploring her gender identity and had made a request to identify as a male. Complainants claimed that this violated student confidentiality. *Id.* at 1132, 1141. The Ninth Circuit concluded that the district reasonably predicted that such apparent breach of confidentiality would erode the trust needed for effective teacher-student relationships. *Id.* at 1141. In addition, the Ninth Circuit considered complaints from the broader community to be relevant where it could affect the public's view of a government agency in a negative fashion and affect the district's mission. *Id.* at 1145.

The two employees were terminated by the district's board but then, several months later after an appeal, reinstated and transferred. *Id.* at 1135-36. Middle school students walked out in protest of the decision to reinstate, although the extent of the protest was disputed. *Id.* at 1143.

Taking all of this disruption, possible disruption, and loss of trust into account, including the possible loss of student and parent trust in the

employees, the Ninth Circuit nonetheless reversed the district court’s grant of summary judgment. *Id.* at 1147 (“a showing of *some* disruption is not necessarily enough”) (emphasis in original). Defendants’ burden on summary judgment, the Court held “is especially high – they must show that Plaintiffs’ expressive conduct caused actual or reasonably predicted disruption ‘so substantial’ that the District’s interests outweigh Plaintiffs’ free speech interests as a matter of law.” *Id.*

Sixth Circuit

In *Noble v. Cincinnati & Hamilton County Public Library*, 112 F.4th 373 (6th Cir. 2024), a security guard at a public library, a position which provided substantial contact with the public, shared an “insensitive meme on his personal Facebook page” (which he took down shortly after he put it up) shortly after Black Lives Matter protests began in 2020 following the deaths of George Floyd and others. *Id.* at 377. The meme read (in capital letters) “ALL LIVES SPLATTER . . . NOBODY CARES ABOUT YOUR PROTEST” and included “an offensive graphic of a vehicle running over protestors.” *Id.* at 378-79. Several of Noble’s Facebook friends worked at the Library and forwarded screenshots of the post to the library manager. Various employees of the library expressed concern about “how members of the public might perceive it,” but the library’s investigation “uncovered no

evidence that any patron of the Library had seen the post.” *Id.* at 379. The library fired Noble a few weeks after he had shared the meme, justifying it by asserting that (*inter alia*) the post caused his manager and co-workers to lose confidence that he could fairly wield his authority and could “do significant harm to the Library’s relationship with the diverse communities that the Library serves.” *Id.* at 380 (cleaned up).

In reversing summary judgment for the defendants, and instructing the district court to grant Noble summary judgment, the Sixth Circuit placed substantial weight on the fact that Noble had shared the meme at home on his private Facebook page (even though his page identified him as a public safety officer with the library). *Id.* at 378, 382. It also placed great emphasis on the fact “no member of the public ever complained” and it was unlikely that members of the public would have seen it. *Id.* at 383. Given that the employer’s “anticipation of disruption must be objectively reasonable,” and “the Library could not reasonably anticipate any public backlash against the meme that would disrupt its operations,” (*id.* at 384), the Sixth Circuit concluded that the Library had not met its burden to show that its interests outweighed Noble’s. The fact that Noble was a “public-facing employee does not alter this analysis.” *Id.* at 385 n.5.

Eighth Circuit

In *Melton v. Forrest City*, 147 F.4th 896 (8th Cir. 2025), a Forrest City fireman reposted an image of a baby in the womb with what looked like a noose around its neck with the caption “I CAN’T BREATHE.” *Id.* at 900. Although intended to be an antiabortion statement, it was perceived by some as a reference to George Floyd’s murder. A “huge firestorm” erupted over the “egregious nature” of the post, and the mayor of Forrest City decided to fire Melton. *Id.* at 901. After the district court granted summary judgment to the defendants, the Eighth Circuit reversed. Even though phone lines were jammed with calls from concerned citizens, “there was no showing that Melton’s post had an impact on the fire department itself.” *Id.* at 903. The court expressed concern that relying on outside complaints “could prevent government employees from speaking on any controversial subject, even on their own personal time.” *Id.* Under these circumstances, the Court concluded that the district court erred in giving the mayor’s belief deference. *Id.* at 904.

Third Circuit

In *Fenico v. City of Philadelphia*, 70 F.4th 151 (3d Cir. 2023), 12 police officers used Facebook “to openly denigrate various minority groups and glorify the use of violence.” *Id.* at 153. Among other things, individual

police officers stated that migrant workers should be gathered up and sent back where they came from (*id.* at 156); asked viewers to like and share if they support the Confederate flag (*id.* at 157); reposted a list of reasons why Muslims could not be good Americans and why people should be suspicious of them (*id.*); posted a skeleton draped in the American flag touting an automatic weapon with the caption “DEATH TO ISLAM” (*id.* at 159); commented that suspected murderers should be tortured and mutilated in a public square (*id.* at 160); and referred in a comment to “liberal scum” (*id.*). The Third Circuit nonetheless reversed a Rule 12(b)(6) dismissal. In the Court’s view, the record “lacks sufficient support for the likelihood of disruption the posts pose.” *Id.* at 166.

While a reasonable likelihood of disruption would be sufficient, “an employer must still establish likely disruption through record support, and courts have long required more than unadorned speculation as to the impact of speech.” *Id.* at 166 (internal quotation marks omitted). Thus, even though the City relied in part upon “maintaining and preserving the public’s trust” (*id.* at 167), the court rejected the City’s argument that further factual development was unnecessary. Relying upon an earlier decision in which public transit employees wore masks with political slogans (“Black Lives Matter” or “Trump 2020”), the Third Circuit noted that there must be more

than just a few complaints or comments about the speech before it loses First Amendment protection. *Id. See also FOP Pa. Lodge v. Twp. of Springfield*, 2025 U.S. App. LEXIS 1823, at *7 (3d Cir. Jan. 28, 2025) (affirming judgment enjoining law that prohibited wearing the Thin Blue Line American Flag as a show of support for the law enforcement; “a handful of gripes and grumbles does not resemble serious disruption caused by protests and riots impacting public services.”) (cleaned up).

II. THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO SUPPORT DEFENDANTS’ PREDICTION OF LOSS OF PUBLIC TRUST OR INTERFERENCE WITH OPERATIONS, OR THE CONTENTION THAT SUCH CONCERNS ACTUALLY MOTIVATED THEM AS A MATTER OF LAW

The evidence in this case – or, more accurately, the lack thereof – falls far short of the evidence deemed *insufficient* to support a judgment for the defendants in the cases cited above. Moreover, the defendants’ somewhat incoherent response to Hussey’s speech is strong evidence that such concerns were not their true motivation.

The only reaction of anyone in the record involves a few individuals from the NAACP who expressed concern over Hussey’s Facebook post. Other than that, the post met with “massive apathy.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968). To be sure, defendants speculated about how people *might* respond to Hussey’s post (assuming they were aware of it

at all). *See* Hussey Supp. Br. 27 n.18 (quoting various of defendants’ documents to the effect that the Facebook post could be “considered” or “interpreted” in various ways). But First Amendment rights should not be curtailed based on such speculation that falls woefully short of a “substantial showing that the speech is . . . likely to be disruptive.” *Waters*, 511 U.S. at 674 (plurality op.). Indeed, relying on such a thin reed will create a heckler’s veto; those who disagree with the opinion expressed can just claim how “concerned” they are about the one who made the speech at issue.

Worse, defendants’ conduct is simply inconsistent with a reliance on a loss of public trust. There is no evidence in the record that defendants made any announcement, or even communicated with the NAACP, regarding Hussey’s four-day suspension. If the public had truly lost trust in the police, or were likely to do so, because of the Facebook post, a hush-hush, unpublicized suspension of its author could not possibly restore that trust. And even if defendants *had* publicized the suspension, why would anyone who believed that they would not be treated fairly and without bias by Hussey in particular, or the Cambridge police in general, be reassured by Hussey’s four-day suspension? A trier of fact would be well-justified in believing that “loss of public trust” was just a pretext for defendants’ disagreement with the content of Hussey’s speech.

The facts here contrast markedly with cases like *Grutzmacher v. Howard Cnty.*, 851 F.3d 332 (4th Cir. 2017), cited by the Police Chiefs’ amicus brief, where the plaintiff’s Facebook posts were “made while he was on-duty and in his office, advocated violence to certain classes of people, and advocated using violence to effect a political agenda,” were reasonably interpreted as advocating “racism” or “bias,” and “expressly disrespected his superiors” within the Fire Department, which “smacked of insubordination.” *Id.* at 347 (cleaned up). *Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015), also heavily relied upon by the Police Chiefs, is even further afield. The speech there, a complaint about the failure of the police department to allow police officers to go to a funeral of an officer killed in the line of duty, “did not address a matter of public concern, but instead, involved a dispute over an intra-departmental decision.” *Id.* at 738. The Fifth Circuit characterized her speech as a “rant” against the Chief of Police. *Id.* Like the speech in *Grutzmacher*, it “smack[ed] of insubordination” (*id.* at 740) and threatened to undermine discipline within the police department.

In contrast, Hussey’s speech had nothing to do with the internal operations of the Cambridge Police Department and displayed no disrespect to any of its policies or his superiors. It simply expressed a view that federal laws should not be named after career criminals. It admittedly caused no

disruption and yielded scant evidence to predict disruption. It is speech that is at the heart of the First Amendment, and it should be weighed heavily in the balance.

III. CONCLUSION

For the forgoing reasons, CIR respectfully requests this Court to reverse the decision of the court below.

Respectfully submitted,

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