IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATE ADAMS, **Plaintiff-Appellant,** **v.** **COUNTY OF SACRAMENTO; SCOTT JONES, Sheriff,** **Defendants-Appellees.**	**No. 23-15970**

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF REHEARING EN BANC

Pursuant to Circuit Rule 29-2, proposed *amicus curiae* First Amendment Lawyers Association respectfully moves for leave to file a brief amicus curiae in support of Appellant's petition for rehearing en banc. The panel decision was issued on September 9, 2024. The Petition for Rehearing was filed on November 15, 2024. The reasons for seeking permission are set forth in the attached declaration of Ryan E. Long.

Appellees have deferred to the Court's discretion as to whether the relief requested herein should be granted.

Respectfully submitted,

November 22, 2024 /s/ Edward Rudofsky

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KATE ADAMS, **Plaintiff-Appellant,** **v.** **COUNTY OF SACRAMENTO; SCOTT JONES, Sheriff,** **Defendants-Appellees.**	)	**No. 23-15970**

DECLARATION OF RYAN E. LONG IN SUPPORT OF FIRST AMENDMENT LAWYERS ASSOCIATION'S MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARNG *EN BANC*

1. I am a member of the First Amendment Lawyers Association ("FALA"), a non-profit, volunteer-based organization of attorneys dedicated to protecting and preserving the right to freedom of expression guaranteed by the First Amendment. FALA is comprised of more than 150 attorneys across the United States who represent businesses and individuals engaged in constitutionally protected expression and association.

2. This motion is filed pursuant to Circuit Rule 29-2.

3. On September 9, 2024, this Court issued a decision, reported at 116 F.4th 1004, affirming the Order of Hon. William B. Shubb, S.D.J. granting defendant's motion to dismiss this action arising out of the alleged retaliatory forced resignation of the Plaintiff as Chief of Police for the City of Rancho Cordova in violation of the First Amendment. The District Court's Order is reported at 2023 WL 2655856. Its Order granting a motion to certify the issue presented for appeal is reported at 2023 WL 3413672.

4. On November 15, 2024, plaintiff petitioned this Court for reargument en banc. Plaintiff's petition is pending at this time. No opposition has been ordered by the Court as of the date of this filing.

5. The Petition for Rehearing raises significant First Amendment issues, specifically: whether private politically related speech among public employees while off duty is protected under the First Amendment.

6. As is more fully set forth in the accompanying amicus brief, FALA has a long and distinguished history of submitting briefs as *amicus curiae* to the United States Supreme Court, the Circuit Courts of Appeals, the Courts of Last Resort of the Several States, and various other courts and tribunals, in regard to First Amendment issues, and respectfully requests leave to do so in this case.

7. In accordance with Circuit Rule 29-2 a copy of the proposed Amicus Brief is submitted herewith.

8. On November 1, 2024, on behalf of FALA, I requested consent to the filing of FALA's proposed amicus brief. On or about November 15, 2024, Karin Sweigart, Esq., counsel for Appellant-Plaintiff, consented. On November 19, 2024, Dylan De Wit, Esq., counsel for Appellees-Defendants, advised me that he deferred to the discretion of the Court, necessitating this motion.

9. There has been no prior request for the relief sought herein.

10. I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

Dated: Santa Monica, CA
November 22, 2024

/s/ Ryan E. Long

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23-15970

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FOR THE NINTH CIRCUIT

KATE ADAMS,

Plaintiff-Appellant,

v.

COUNTY OF SACRAMENTO and SCOTT JONES, SHERIFF,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 2:22-cv-01499
Hon. William B. Shubb

BRIEF FOR *AMICUS CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

I. Interest of Amici Curiae

The First Amendment Lawyers Association ("FALA") is a not-for-profit, nationwide association of hundreds of attorneys devoted to the protection of free expression under the First Amendment who represent businesses and individuals engaged in constitutionally protected expressive activity. For more than a half-century, FALA's members have advocated against governmental censorship.

FALA often appears as *amicus curiae* in the U.S. Supreme Court and other appellate courts in cases in which First Amendment rights are at stake. Its members have been involved in many of the landmark cases that helped define and strengthen protections for freedom of expression. *See, e.g., Ashcroft v. Free Speech Coalition, Inc.,* 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act, argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member and former president Robert Corn-Revere)). In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues pertaining to the First Amendment. *See, e.g., City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004) (*amicus* brief submitted by FALA); *United States v. 12,200-ft Reels of Super 8mm Film,* 413 U.S. 123 (1972) (order granting FALA's motion to submit *amicus* brief)).

FALA has a direct interest in the conduct of this proceeding. More than a dozen of its members are residents of California and many others are either licensed to practice in the State or appear on a *pro hac vice* basis in California courts. These attorneys represent businesses and individuals, including those employed by state and federal governments, in First Amendment litigation. Formed in the mid-1960s, FALA's members practice throughout the U.S. in defense of the free speech and, in so doing, advocate against all forms of government censorship. FALA is also concerned that the discipline of a publicly employed client because of arguably political speech would have a chilling effect on the speech of other professionals as well as that of the general public. FALA seeks to ensure that speech which falls within the penumbra of the First Amendment is allowed to thrive free of the specter of censorship – even if it is private.

II. Authorship and Consent

In accordance with FRAP 29(a)(4), no party's counsel authored any part of this brief, in whole or in part; no party, or their counsel, contributed money that was intended to, or actually did, prepare this brief; and no person, other than FALA and its undersigned counsel, contributed time or money that funded the preparation of this brief. All parties have not consented to this filing. The brief is supported by the accompanying motion for leave to file in accordance with Circuit Rule 29-2 and FRAP 29(a)(3).

III. Introduction

The County of Sacramento punished Ms. Kate Adams for her private messages. The messages were tinged with racial overtones of which she disapproved. They were received and forwarded to two co-workers. All were, upon information and belief, off-duty on New Year's Eve. This Court found that the speech did not relate to a matter of "public concern." Fundamentally, the Court discounted the protectability of the speech in light of its private nature. However, dubious consequences to free expression can follow if private off-duty communications of public employees under these circumstances do not receive First Amendment protection. Under this rubric, a later leaked attorney-client talk, husband-wife conversation, priest confession, or psychology visit that includes the same content and also never intended for public consumption, can result in an adverse employment decision. However, this would destroy something very important: the peaceful airing of unpopular ideas that otherwise might become destructive. As a result, FALA respectfully supports Ms. Adams's petition for en banc rehearing.

First, the content of the speech "tangentially touched on" an issue of public concern: namely racial discrimination. It is undisputed that the content included horribly racist images Ms. Adams had received – but which she had denounced on the spot. The images included one where a white man was spraying a young black

child with a hose and the text "[g]o be a n***** somewhere else." Ms. Adams: "[s]ome rude racist just sent this!!" She also explained: "Oh, and just in case u [sic.] think I encourage this . . ." There is also no dispute that the messages were private and not intended for public consumption. However, the fact that these messages, once they were later leaked in or about March 2022, received coverage by the Sacramento Bee is evidence that they were related to an issue of public concern.

Second, the private nature of the messages -- and that they were unrelated to her job -- should not make then ipso facto not a matter of public concern. Previous jurisprudence of this Court addressed racist comments made publicly and found them to be of public concern – even when they were unrelated to the speaker's employment. What is more, First Amendment jurisprudence from the U.S. Supreme Court shows that merely because it is private speech doesn't preclude protection. In any event, case law from the Second Circuit shows that when employee speech is off duty and unrelated to the employment, it need not be related to an issue of public concern to be protected.

Third, a robust marketplace of ideas is important. The U.S. Supreme Court has noted that this marketplace acts as a peaceful pressure valve for the airing of grievances or viewpoints which may not otherwise be expressed in a calm way. This is especially true for private speech. Countless negative consequences can follow if such speech – because it merely doesn't directly address an issue of public concern

or the workplace – is not entitled to the umbrella of First Amendment protection. As here, other examples of leaked private digital media can later see the light of day and chill this marketplace. As a result, a shroud of fear and anxiety would permeate public employees who privately seek counsel, venting, or a venue for concerns about the ugliest of views – from, here, purported friends.

Given the foregoing, FALA respectfully submits this brief in support of the Plaintiff's en banc rehearing challenging the Court's narrow finding that there was no "public concern" here or, in the alternative, that no finding is necessary given the circumstances.

IV. Argument

A. The racist imagery at least "tangentially touched on" a matter of public concern.

Content is "foremost" in the First Amendment analysis. *See, e.g., Weeks v. Bayer*, 246 F.3d 1231, 1234 (9th Cir. 2001). As this Court noted in *Hernandez v. City of Phoenix*:

> Subjects that receive media coverage 'almost by definition involve[] matters 'of public concern' . . . so it follows that speech criticizing the media's coverage of a particular subject qualifies as a matter of public concern as well. The post with the meme about the British cab driver at least tangentially touched on matters of cultural assimilation . . . which again are topics of social or political concern to some segments of the general public.

43 F.4th 966, 978 (9th Cir. 2022).

The same is true here about the content. As in *Hernandez*, Ms. Adams's speech indirectly touched upon – without explicitly commenting on -- "cultural assimilation." The distasteful photo is a case in point. 2-ER-152-153. It is unclear how this photo, along with her disapproval of the same via her message, could not be taken to be content that touches upon a "[s]ubject[] that receive[s] media coverage." *Hernandez*, 43 F.4th at 978. The same is true about the other tawdry humor using an image of the comedian – Will Ferrell. 2-ER-152-153. These depictions are no different than those racist images – adopted with approval by the speaker – in *Hernandez*. *Compare* 2-ER-152-153 *with Hernandez*, 43 F.4th at 978 ("Military Pensions Cut, Muslim Mortgages Paid By US!" and British meme involving the cabdriver). In this case, Ms. Adams' conveyed images were later leaked. 2-ER-158-159, ¶¶115 – 123. They received extensive media coverage by the Sacramento Bee. 2-ER-159, ¶122. This strongly suggests that the content is of "concern to some segments of the general public." *Hernandez*, 43 F.4th at 978. This is contrasted with content that is only about a "personal employment dispute." *Id.* at 977.

In the alternative, FALA respectfully submits that a different test be applied. Here, the speech in question was to co-workers -- but it was ostensibly during Ms. Adams' time off-duty on the night of New Year's Eve, 2013, and unrelated to the workplace. 2-ER-152-153. The U.S. Supreme Court has recognized that "the public

concern test does not apply neatly as a threshold test for expression unrelated to Government employment." *See Locurto v. Giuliani*, 447 F.3d 159, 174 (2d Cir. 2006) (*citing United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 480 (1995) (O'Connor, J., concurring in the judgement in part and dissenting in part)). As a result, the Second Circuit has suggested that: "[i]t is more sensible, instead, to treat off-duty, non-work related speech as presumptively entitled to First Amendment protection *regardless of whether, as a threshold matter, it may be characterized as speech on a matter of public concern*." *Locurto*, *supra*, at 175; *see also Fenico v. City of Philadelphia*, 70 F.4th 151, 162 (3d. Cir. 2023) ("a negative answer to the public concern question [is] not meant to license wholesale Government disregard of employee speech rights, especially outside of the workplace") (*citing Locurto* at 174)).

Given these reasons, the content suggests strongly that it is of an issue of public concern or, even if it is not, that a different test should be applied given that it was not-work related.

B. Although the messages were private, the case law shows this does not forfeit protection.

Relevant to the District Court's analysis was the fact that the messages were private. *Adams v. Cnty. of Sacramento*, No. 23-15970, at *7 ("In its initial dismissal, the court recognized that Adams's speech was not on a matter of public concern 'because the speech was intended to be private and [did] not relate to the personnel

or functioning of the Department.'") What is more, the lower court – and this Court -- also discounts the ability of these messages to be an issue of public concern because they were unrelated to Ms. Adams's employment. *Id.*; *see also id.* at *12.

However, 9th Circuit precedent makes clear that the private versus public distinction should not be legally relevant to whether the speech in question is of a public concern. *See Skaarup v. City of North Las Vegas*, 320 F.3d 1040, 1044 (9th Cir. 2003) (holding that a portion of a public employee's private speech to two co-workers "touched on a matter of public concern."); *see also id.* at 1044 ("But the law imposes no requirement that an employee's speech on matters of public concern be aired to superiors *or publicly expressed*. The First Amendment protects speech on matters of public concern *uttered in private conversations between employees*.") (Berzon, dissenting) (emphasis added) *and Ulrich v. City and County of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002) ("Although there is no evidence that Dr. Ulrich expressed his views to the press or representatives of the public at large, *this does not defeat his claim*.") (emphasis added) The fact that the content was unrelated to Ms. Adams's employment is not directly relevant to the issue so long as the content "tangentially touch[es] on matters of cultural assimilation" or "political concern to some members of the general public." *Hernandez v. City of Phoenix*, 43 F.4th 966, 978 (9th Cir. 2022). This is especially true of racially-tinged speech that is made off-duty and is otherwise unrelated to the employee's duties.

For these reasons, FALA respectfully submits that the private nature of the speech should not bar First Amendment protection.

C. Regulating public employee private speech would chill the marketplace of ideas.

To facilitate a robust marketplace, FALA also respectfully submits that rehearing be granted. The result for which FALA advocates in this case is necessary to maintaining a marketplace of ideas among public employees – it will offer them a safe release valve for speech not intended for the public. In 1919, the marketplace of ideas concept was set forth by Justice Holmes:

> But when men have realized that time has upset many faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also, e.g., Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978) ("For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."), *and Hustler Magazine v. Falwell,* 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").) "[A]ny restriction based on the content of the speech must satisfy strict scrutiny . . . and restrictions based on viewpoint are prohibited,

see Carey v. Brown, 447 U.S. 455, 463… (1980)." *Pleasant Grove City v. Summum,* 555 U.S. 460, 469 (2009).

The peaceful airing of conflicting opinions or views is a key basis on which the U.S. Supreme Court has justified robust protection of the free flow of ideas. This is particularly true of political expression. *See Meyer v. Grant,* 486 U.S. 414, 422 (1988) ("The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"). Earlier, Justice Douglas explained the rationale behind this reasoning:

> Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps society from becoming stagnant and unprepared for the stresses and strains that work to tear civilizations apart.

Dennis v. United States, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting); *see also Kleindienst v. Mandel,* 408 U.S. 753, 780 (1972) (Marshall and Brennan, dissenting) ("The First Amendment represents the view of the Framers that 'the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones' — 'more speech.'").

This is particularly true in this age of the internet. Cell phone use has increased precipitously through the years – with 97% of Americans now owning one. *See* https://www.pewresearch.org/internet/fact-sheet/mobile/. Nine in ten own a smartphone. *Id.* Given the almost ubiquitous existence of computers and these phones, recording has become much easier. Consequently, recent cases in the digital age – unfathomable prior to it – allege that phones can record – even when the user has turned this function off. *See, e.g., Lopez v. Apple, Inc.*, 519 F. Supp. 3d 672, 679 (N.D. Cal. 2021) (alleging that Siri on the iPhone inadvertently recorded user conversations without consent). These cases show that leaks of otherwise intended confidential personal communications are easier now in the digital age. In other contexts, this has led to negative ramifications on the sanctity of what was supposed to be privileged speech. *See* https://www.latimes.com/local/lanow/la-me-ln-courthouse-recordings-20180721-story.html (attorney-client communications recorded); https://ew.com/billy-ray-cyrus-blasts-estranged-wife-firerose-saying-hes-at-wits-end-8683588 (husband-wife recorded conversation leaked). Given the lessened barriers to entry of technologies that can record, the distinction between public-private speech in the digital age has lessened – with some saying this has led to the death of privacy. *See, e.g.,* https://www.forbes.com/sites/neilsahota/2020/10/14/privacy-is-dead-and-most-

people-really-dont-care/. Others disagree with this sentiment. *See, e.g.*, https://www.eff.org/deeplinks/2024/02/privacy-isnt-dead-far-it.

Regardless, Ms. Adams's communications with co-workers were intended to be private. 2-ER-152-153, ¶¶88 – 89. All of her communications were concerning an issue of public concern: racism. *See id.* None included any commentary on, or criticism of, the workplace. *See id.* As in all matters pertaining to speech, context matters. *See Pacifica Foundation*, *supra*, 438 U.S. at 742 (stating that "indecency is largely a function of context—it cannot adequately be judged in the abstract."). In context, Ms. Adams's communications were expressions—however unpopular among some segments of the populace—of what she thought about the images in question.

Employees of various public institutions have private opinions on issues of public concern – not disclosed to the public -- in other contexts as well. They can include the following: expressions of dissatisfaction with a union (*Skaarup v. City of North Las Vegas*, 320 F.3d 1040, 1042 (9th Cir. 2003)) or employment decisions (*Ulrich v. City and County of San Francisco*, 308 F.3d 968, 971 (9th Cir. 2002) (protesting layoffs as an injustice to patients)). Once the speech is of public concern, the First Amendment demands that the County of Sacramento show a countervailing interest as to why the speech at issue is deserving of regulation. *See, e.g., Locurto v. Giuliani*, 447 F.3d 159, 176 (2d Cir. 2006). On this point FALA does not opine.

However, to hold that the speech in question here – regardless of how distasteful and that it has no relation to the workplace – is not on an issue of public concern merely because it is private would be to gut the First Amendment of its primary purpose: protection of political speech.

V. Conclusion

In conclusion, the panel ruling against Ms. Adams denies First Amendment protection to speech on an issue of public concern and unconstitutionally restricts the marketplace of ideas. The ruling also deprives her (and anyone else in her circumstances) of the "peaceful pressure value" afforded by this marketplace and otherwise can have potentially ruinous consequences in this digital age. As such, FALA respectfully submits that this Court grant the motion for re-hearing en banc and, upon such rehearing, reverse the Order appealed from.

Dated: November 21, 2024

Respectfully submitted,

/s/ Ryan E. Long

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CERTIFICATE OF COMPLIANCE

This brief in support of Appellant's petition complies with the volume limitations of Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Fed. R. App. 32(f), this document contains less than 15 pages. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it appears in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Dated: November 21, 2024

Respectfully submitted,

__/s/ Ryan E. Long_____
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