Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SIGMAHD, PETITIONER *v.* UNITED STATES MARSHALS SERVICE

CERTIORARI TO THE UNITED STATES FEDERAL GOVERNMENT

No. 3–4. Argued June 4, 2017—Decided June 6, 2017.

Respondent (United States Marshals Service) fired SigmaHD after conducting a background check and finding a uniform belonging to the infamous criminal organization PS–35. SigmaHD informed his employer he bought the uniform in December 2016 to troll and make a political statement regarding the abuses of the law enforcement community at Las Vegas. His explanations were ignored and service with the USMS ended. SigmaHD petitioned for a writ of certiorari to challenge his termination, claiming it was both discriminatory and violated his First Amendment rights.

Held: In order for the Government to terminate somebody for conduct, they must show it "adversely affect[ed] the performance of the employee or applicant or the performance of others," 5 U. S. C. § 2302(b)(10). P. 1. If the Government cannot do this, then it cannot terminate somebody for conduct done off-duty. Furthermore, the Government cannot discriminate against employees for speech expressed off duty without showing a substantial interest in curbing that expression. Pp. 3–9.

USMS termination, reversed.

ANTONINGSCALIA, J., delivered the opinion of the Court, in which MRYOSEMITE, SAMUELKING22, BOB561, QOLIO, and MRSUDDENRUSH12G, JJ., joined. KOTWARRIOR, C. J., filed a dissenting opinion, in which ANIMATEDDANNYO, J., joined. SUFFERPOOP, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 3–4

SIGMAHD, PETITIONER *v.* UNITED STATES MARSHALS SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES FEDERAL GOVERNMENT

[June 6, 2017]

JUSTICE ANTONINGSCALIA delivered the opinion of the Court.

Under Title V of the United States Code, various responsibilities and prohibitions outline the role of Government organization and its employees. The Government as an employer may not discriminate against an employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others," 5 U. S. C. §2302(b)(10). We must decide whether the ownership of uniforms used by illicit organizations by a government employee is merit for employment termination without violating this section or the petitioner's First Amendment rights.

I

Respondent, the United States Marshals Service (hereinafter USMS), is a law enforcement agency, see 28 U. S. C. §37 *et seq*., whose primary mission is to "provide for the security and to obey, execute, and enforce all orders of the . . . [c]ourts . . . , as provided by law," §566(a). The Director of the USMS, Tom_Dailey (hereinafter Tom), saw a marked uptick in rogue

marshals from the criminal organization PS–35 upon confirmation by the Senate to his position. See Brief in Opposition 1.[1] Consistent with their priority to weed out rogue agents, the USMS conducts reviews through refreshed background checks to ensure loyalty is to the agency and to the United States as a whole.

SigmaHD (hereinafter Sigma) is an American citizen who, for years, has served in various roles throughout the country—most of them involve service in either law enforcement or the military. In December 2016, Sigma purchased a PS–35 uniform off the ROBLOX catalog to "avoid being attacked by [PS–35] and troll [law enforcement] who arres[t] individuals based on clothing and appearance," App. to Pet. for Cert. B–10. Tom found it to be suspicious, *ibid.*, and ultimately fired him over it. Brief in Opposition 1. Sigma petitioned for a writ of certiorari to review the USMS's actions and seek reinstatement to his position as a marshal. He claimed his termination violates his First Amendment right to political expression and that his ownership of the uniform in no way affected his job performance, a crucial factor for employment termination to be valid under 5 U. S. C. § 2302(b)(10). We granted certiorari. 3 U. S. ___ (2017).

II

There is no debate as to whether the Government can "condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Meyers*, 461 U. S. 138, 142 (1983). They cannot. For many years the Court reinforced "the unchallenged dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. And while that principle has been upheld in certain respects, see *id.*, at 144–145, we've also impressed that employees do not

[1] According to the Director, the leaders of PS–35 claimed they had "many marshals . . . in the USMS." *Ibid.*

surrender all of their First Amendment rights by virtue of their employment with the Government; 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. ___, ___ (2006) (slip op., at 5); see also *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968); *Connick*, *supra*, at 147; *Rankin* v. *McPherson*, 483 U. S. 378, 384 (1987); *United States* v. *Treasury Employees*, 513 U. S. 454, 466 (1995). In the case before us today, the issue is whether the ownership and wearing of a criminal organization's uniform qualifies as expression under the First Amendment, and whether the Government had a substantial interest in curbing that expression. The Court has on numerous occasions affirmed that clothing worn to express a message is indeed speech. See, *e.g.*, *Tinker* v. *De Moines Indep. School Dist.*, 393 U. S. 503 (1969); *Cohen* v. *California*, 403 U. S. 15 (1971).

In *Tinker*, a group of students decided to wear black armbands during the holiday season at school to protest the United States' involvement in the Vietnam War. The school administration adopted a policy to suspend any student who refused to take off the armband until they complied with the school. 393 U. S., at 503. Because the students' speech in question was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance," the speech did not "intrud[e] upon the work of the schools or the rights of other students." *Id.*, at 508. In our system, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Ibid.* Accordingly, the Court ruled in favor of the students and upheld their protest through wearing of the armbands as protected speech under the First Amendment. *Id.*, at 514.

In similar style to *Tinker*, we dealt with in *Cohen* the question of whether an individual could be imprisoned for wearing a jacket styled plainly with the words "Fuck the Draft" to protest our country's draft policy during the Vietnam War. 403 U. S., at 16. The Court found the California court's decision to uphold

Cohen's imprisonment to be based on a rationale reflecting an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Id.*, at 23 (quoting *Tinker*, 393 U. S., at 508) (internal quotation marks omitted). The *Cohen* Court also expressed the crucial link between the prohibition on speech and the risk of suppression of ideas in the process—such risk is untenable under the First Amendment. *Cohen*, *supra*, at 26.

A crucial balance emerged through decades of cases to do with weighing the importance of government employee speech against the employer's interest in supressing it. "The problem in any case," the *Pickering* Court stated, "is to arrive *at a balance* between the interests of the . . . citizen, in commenting upon matters of public concern and the interest of the [Government], as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568 (emphasis added). Furthermore, the Court found because the employee's speech under review in *Pickering* "neither [was] shown nor can be presumed to have in any way either impeded the . . . proper performance of his daily duties . . . or to have interfered with . . . regular operation," *id.*, at 572–573 (footnote omitted), the interest of the employer in "limiting . . . opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the public." *Id.*, at 573.

Thus *Pickering* guides our Court with a two-pronged test to determine whether an employee's First Amendment rights have been infringed on by their employer. First, there must be a determination as to whether the employee's speech was spoken as a private citizen on a matter of public concern. See *Garcetti*, 547 U. S., at ___ (slip op., at 6) (citing *Pickering*, 391 U. S., at 568). If the answer to the first prong is no, then "the employee has no First Amendment cause of action based on his or her employee's reaction to the speech." *Garcetti*, *supra*, at ___ (slip op., at 6). See also *Connick*, 461 U. S., at 147. If the answer is yes, then there is ground for a First Amendment claim to be

valid. The question then becomes whether the Government employer had an adequate justification in treating the employee differently from a normal citizen. See *Pickering*, *supra*, at 568. This "consideration reflects the importance of the relationship between the speaker's expressions and employment." *Garcetti*, *supra*, at ___ (slip op., at 6). If the Government cannot show that its restriction is directed at speech that has potential to adversely affect the entity's operations, then that restriction cannot stand muster under 5 U. S. C. § 2302(b)(10). But not all speech is protected speech; this has been a constant throughout our jurisprudence covering a large variety of First Amendment cases. When citizens enter Government service, it is necessary for them to accept certain limitations on their freedom. See, *e.g.*, *Waters* v. *Churchill*, 511 U. S. 661, 671 (1994) (plurality opinion) ("[T]he Government as employer indeed has far broader powers than does the Government as sovereign."). Like private employers, government employers need a "significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U. S., at ___ (slip op., at 7).[2]

Despite this reality, citizens working for the Government are still citizens. The First Amendment protects an employee's status with the Government from being leveraged to "restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Ibid.*; see also *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). This protects employees from being punished for speech about matters of public concern given as private citizens; only restrictions necessary for the employers and their entities to operate effectively are constitutionally sound. See *Connick*, 461 U. S., at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government"). Before we

[2] Cf. *Connick*, 461 U. S., at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter.").

can apply the *Pickering* test, we first must decide whether Sigma's ownership and wearing of the uniform as a private citizen qualifies as expressive conduct.

III

To invoke the First Amendment in challenging one's termination, an employee must show that their conduct was expressive. See, *e.g.*, *Spence* v. *Washington*, 418 U. S. 405, 409–411 (1974); *Texas* v. *Johnson*, 491 U. S. 397, 403 (1989). If his or her conduct was indeed expressive, then we may apply the *Pickering* test.

The First Amendment, see Amdt. 1, "literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word." *Johnson*, 491 U. S., at 404. Though our jurisprudence has consistently rejected the idea that an "apparently limitless variety," *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), of conduct is "speech" under the First Amendment simply because the person engaging in the conduct intends to express any kind of idea. However, conduct may be "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment. *Spence*, *supra*, at 409. To decide if conduct possesses "communicative elements," *Johnson*, *supra*, at 404, required to qualify as speech protected by the First Amendment, we ask whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence*, *supra*, at 410–411. Under this jurisprudence, we have recognized that the wearing of black armbands in protest of the Vietnam war, *Tinker*, 393 U. S., at 505; a sit-in by African Americans in a "whites only" area to protest segregation, *Brown* v. *Louisiana*, 383 U. S. 131, 141–142 (1966); the wearing of military uniforms to criticize American involvement in Vietnam, *Schacht* v. *United States*, 398 U. S. 58 (1970); and of picketing about a wide variety of causes, see, *e.g.*, *Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308, 313–314 (1968); *United*

States v. *Grace*, 461 U. S. 171, 176 (1983) all qualify as expressive speech protected under the First Amendment.

The Government moreover has a "freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Johnson*, 491 U. S., at 406. See also *O'Brien*, *supra*, at 376–377; *Clarke* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Dallas* v. *Stanglin*, 490 U. S. 19, 25 (1989). However, it cannot ban certain conduct *because* of its expressive nature. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription." *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 55–56, 703 F. 2d 586, 622–623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd *sub nom. Clarke* v. *Community for Non-Violence*, *supra*. Simply put, it is the government interest at stake that determines whether the restriction or punishment on that expression is valid. *Johnson*, *supra*, at 406–407.

Sigma bought and wore the PS–35 uniform with an intent highlight abuses within the law enforcement community.[3] He believes the ownership of the clothing on its own constitutes a form of expression akin to wearing it. We agree insofar as to say the reality is owning items like a PS–35 uniform can stand alone to express a message. The question is whether a *reasonable* person would understand the message itself. We believe they would. The organization PS–35 made a mark for itself in our country; its name and history are well-known and ill-taken by the populace at large. Furthermore, it is an all-to-often reality that citizens experience abuses by law enforcement officers at Las Vegas. The expression of protesting this conduct—in whatever form it may take—is undoubtedly easy to understand by the general populace: by *reasonable* Americans. With

[3] Petitioner's counsel argued the uniform was bought to "expres[s] his political ideology that individuals should not be arrested based on what they wear." Tr. of Oral Arg. 3.

it decided that his conduct was expressive, "it does not necessarily follow" that it is "constitutionally protected activity." *O'Brien*, 391 U. S., at 376. We consider now whether the Government had a justified interest in terminating Sigma for this expression.

IV

The Court over the years has used "employed a variety of descriptive terms." *Ibid.* Terms like "compelling," *NAACP* v. *Button*, 371 U. S. 415, 438 (1693); see also *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963), "substantial," *NAACP*, 371 U. S., at 444; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 464 (1958), "subordinating," *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960), "paramount," *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); see also *Sherbert*, *supra*, at 406, "cogent," *Bates*, *supra*, at 524, and "strong," *Sherbert*, *supra*, at 408. Regardless the meaning of these terms, *O'Brien* provides a framework for us to decide if the Government had a justified interest in terminating Sigma. Under *O'Brien*:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 377.

The issue with the Government's position is that it failed to argue in any form whatsoever how regulating Sigma's expression furthered a state interest. We cannot insert reasoning for the USMS, and thus are bound by the argument they presented to the Court—they argued it was justified because to them ownership of the uniform constitutes membership of the gang. See Brief in Opposition 1; see also Tr. of Oral Arg. 6–7 ("it may be the only way to tell."). We reject this view completely.

There is no construction we can support that says ownership

of the uniform is sufficient evidence to believe one is a member of a criminal organization. Given the nature of ROBLOX's catalogue, anyone and everyone can buy clothing at their leisure in a relatively easy fashion. Without a doubt, one could sift through the inventories of many, many Americans ranging from citizen all the way to President of the United States and find articles of clothing which are facially eyebrow-raising. However, the appropriate response, especially for a law enforcement agency like the USMS, would be to investigate further: not to carry out a final action. We cannot find a substantial Government interest in terminating Sigma's employment within the USMS, and find the Government infringed on his First Amendment right to free expression.

V

One could argue the wearing of this uniform while on duty would be merit for termination. They would be correct; agencies are free to regulate *within reason* the clothes their employees wear *on duty*. But Sigma's conduct was not done while on duty. It was carried out as a private citizen, and without a showing that it "adversely affect[ed] the performance of the employee or applicant or the performance of others," 5 U. S. C. § 2302(b)(10), the Government has no cause to terminate his employment. Respondent failed to show effectively how it adversely affected his performance, and thus the termination under § 2302(b)(10 fails the constitutional sniff test.

* * *

We do not dispute the Government has interest in weeding out rogue agents in the law enforcement community. We simply require that interest be substantiated by a process that is rigid and thorough—in this case, it was neither. Accordingly, petitioner's termination is

Reversed.