Note

In Defense of *Pickering*: When a Public Employee's Social Media Speech, Particularly Political Speech, Conflicts with Their Employer's Public Service

*Abby Ward**

With the rise of social media and the United States' increasing political polarization, public employees take to social media to post about political issues such as race and policing. But when public employees make posts on political issues in an inflammatory or controversial way, public employers often discipline or fire the employee, fearing disruption and community backlash. The result is First Amendment litigation involving social media speech, an uncharted territory for courts.

When a public employee is disciplined for engaging in political speech on social media, courts usually analyze the employee's First Amendment claim under the Pickering *balancing test. This test weighs the government's interest in operating an efficient workplace against the employee's free speech rights as a private citizen. Scholars often critique this analysis, arguing that, when it comes to Internet speech, the test unfairly favors employers and is too uncertain. This Note responds to those arguments and defends the use of the* Pickering *balancing test as applied to public employee social media speech.*

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To that end, this Note offers three arguments in support of Pickering*'s balancing test. First, the government has a unique interest in sustaining public trust and thus needs some discretion, especially in light of the inherent risks associated with speech on social media. The* Pickering *analysis properly allows for these considerations while still holding the government accountable. Second, a case-by-case analysis is both unavoidable and necessary for this area of law, where free speech conflicts with the government's interest in efficiently providing its public services. Furthermore,* Pickering *may be more predictable than some scholars argue. Third, while* Pickering *may have some drawbacks, those drawbacks do not warrant changing the legal analysis, particularly at the federal level. While it is always important to review legal analyses as the world evolves, further inquiry reveals* Pickering*'s test is still an adequate legal standard that should not be altered or replaced even considering the advent of social media.*

INTRODUCTION

America's current polarized political landscape and culture war climate, combined with the public's increasing use of social media, makes public employee First Amendment issues ripe for litigation.[1] Imagine you are a Jewish individual seeking medical care, so you turn to a local public hospital. However, a few weeks prior, you came across a hospital employee's social media post which said it was too bad a funnel cloud that recently hit the area did not wipe out all the residents of your neighborhood, a predominantly Hasidic community.[2] You may question the type of care and services you will receive from said hospital. Imagine you are a transgender high school student who recently came across your math teacher's Facebook page, which included disparaging memes making fun of the transgender community.[3] Specifically, the teacher wrote it was "insanity" for transgender people to use public restrooms that aligned with their gender.[4] You may question the type of education you will receive from this teacher or the school. Finally, imagine you are a Black American and you come across a city Emergency Medical Services employee's Facebook page expressing support and glee about Tamir Rice's death.[5] You may question what kind of emergency service you will receive if you encounter sudden and serious illness or injury in your city.

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1. *Infra* notes 17–25 and accompanying text; *infra* Part II.B.

2. Patrick Dorrian, *Anti-Semitic Facebook Post May Count as Protected Free Speech*, BLOOMBERG L. (Apr. 1, 2019), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X3OO678000000 [https://perma.cc/7QJ9-DWYA].

3. Emily Bloch, *Sandalwood Teacher Suspended for Slew of Transphobic, Anti-LGBTQ Facebook Posts*, FLA. TIMES-UNION (Dec. 2, 2020), https://www.jacksonville.com/story/news/education/2020/12/02/sandalwood-teacher-suspended-slew-transphobic-anti-lgbtq-facebook-posts-duval-county/3788872001 [https://perma.cc/9AYH-TNDV].

4. *Id.*

5. *See* Marquardt v. Carlton, 971 F.3d 546, 548 (6th Cir. 2020) (reversing summary judgment against an EMS worker whose Facebook page included a post celebrating Tamir Rice's death on Facebook). Cleveland police officers fatally shot Tamir Rice when responding to an alert that a male was allegedly pointing a gun at people, and his death made national news. *Id.* Tamir Rice was a twelve-year-old Black child, and the alleged "gun" was just a toy. *Id.* The court determined the speech "addressed a matter of public concern" so the court remanded the case instructing the district court to determine if the employee's free speech interests outweighed the interest of the public employer in efficiently administering its duties. *Id.* at 549, 553.

The government, and broader society, have a strong interest in maintaining public trust in government institutions.[6] However, public employees' social media speech, particularly controversial political speech,[7] could undermine trust in the government and its services.[8]

The First Amendment's Free Speech Clause[9] protects public employees when they speak as a private citizen[10] on a matter of public concern,[11] but the protection is not unlimited. When an employee speaks as a private citizen on a matter of public concern, courts apply the *Pickering* balancing test, which weighs the employee's free speech rights as a citizen against the government's interest in being able to operate efficiently as an employer.[12] When analyzing whether the speech interferes with the

6. *Infra* Part III.A.1.

7. In this Note, political speech is defined as speech seeking to achieve political and social change or to advocate for a cause. *See generally* Meyer v. Grant, 486 U.S. 414, 421–22 (1988) (determining that the circulation of a petition is "core political speech" as it "involves both the expression of a desire for political change and a discussion of the merits of the proposed change"). Examples of political speech include speech critiquing government and public officials, discussing or advocating for political candidates, advocating for causes, or discussing social and political issues, such as voicing an opinion on President Trump's travel ban. *See* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (discussing speech that concerns public affairs, including critiquing the government); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (recognizing broad First Amendment protection of political speech, including "[d]iscussion of public issues and debate on the qualifications of candidates"); Gardetto v. Mason, 100 F.3d 803, 812 (10th Cir. 1996) ("[T]he advocacy of a particular candidate for public office is [a] type of core political speech . . . ."); Joseph M. Creed, *Political Speech in the Public Workplace*, 50 MD. BAR J. 22, 25 (2017) ("Pure political expression—such as voicing an opinion on President Trump's travel ban or immigration policies—is almost certainly speech on a matter of public concern.").

8. *See supra* notes 2–5 and accompanying text.

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

10. Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

11. Connick v. Myers, 461 U.S. 138, 147 (1983).

12. Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968). *Pickering* involved a public school district that terminated a teacher after he sent a letter to a local newspaper criticizing the school's handling of finances. *Id.* at 564. The Supreme Court held that the school violated the teacher's free speech rights. *Id.* at 565. Given the specific facts of this case, the teacher's right to speak as a citizen on matters of public importance did not "furnish the basis for his dismissal from public employment." *Id.* at 574.

government's efficiency interests,[13] courts primarily look at whether the speech creates, or could reasonably create, disruption,[14] and whether the speech negatively impacts the employee's ability to perform their job duties.[15]

While the *Pickering* doctrine has remained the law of the land for over fifty years, the world in which *Pickering* applies has dramatically changed. Social media radically changed how, and how often, public employees speak and express themselves.[16] In 2021, "around seven-in-ten Americans use[d] social media."[17] Additionally, current studies show half of United States adults get news on social media, at least some of the time, which further demonstrates social media's extensive prevalence in Americans' lives.[18]

In combination with social media's expanding role in society, some argue the United States is experiencing a strong culture

13. *Id.* at 572–73. The government has an interest in efficient operations and administration, and by extension efficient delivery of its services. *Id.* at 564, 568. For example, the Eleventh Circuit found the government was warranted in acting against a beach law enforcement officer for offensive social media speech. Snipes v. Volusia County, 704 F. App'x 848, 853 (11th Cir. 2017) (per curiam). The speech in *Snipes* undermined the Beach Safety and Ocean Rescue Department's efficiency interests because it could have negatively affected the employer's ability to fully staff a police force that is representative of the community, could have led to a decrease in public confidence in the local fire and rescue services department, and could have led to substantial protests and rallies. *Id.* These potential consequences threatened the employer's ability to efficiently operate and provide its public service (law enforcement) to the community. *Id.*

14. *Pickering*, 391 U.S. at 573 (considering whether the speech "interfered with the regular operation" of the government employer).

15. *Id.* at 572–73, 573 n.5 (considering whether the speech hampers the employee's "proper performance of [their] daily duties").

16. *See infra* Part II.A; Denise S. Smith & Carolyn R. Bates, *The Evolution of Public Employee Speech Protection in an Age of Social Media*, 22 ATL. L.J. 1, 2–3 (2020) ("The wide-spread adoption of . . . social media platforms has allowed for an exponential increase in the ability of public employees to make their opinions . . . widely known.").

17. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media [https://perma.cc/R88V-Z2RG].

18. *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Sept. 20, 2022), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet [https://perma.cc/5PUH-FBTB] (demonstrating how people sometimes look to social media to stay informed on current events).

war that is here to stay.[19] While "culture war" can take on various definitions, one way to think about the term is as "a political battle over certain kinds of cultural issues, like abortion, sexuality, family values, church-state issues, and so on."[20] Additionally, ideology increasingly divides Republicans and Democrats, and partisan hostility is deeper and more extensive than any time in the last twenty years.[21] In fact, a recent study found "[n]o established democracy in recent history has been as deeply polarized as the U.S."[22]

America's culture war and partisan hostility, combined with Americans' use of social media, results in Americans using social media to comment on social, cultural, and political issues. For example, Americans use social media to comment on racism and

19. *See* Hannah Natanson & Moriah Balingit, *Caught in the Culture Wars, Teachers Are Being Forced from Their Jobs*, WASH. POST (June 16, 2022), https://www.washingtonpost.com/education/2022/06/16/teacher-resignations-firings-culture-wars [https://perma.cc/DY9Z-2SA2] (reporting on the increasing number of teachers losing their jobs for expressing opinions on current issues); Shadi Hamid, *The Forever Culture War*, ATLANTIC (Jan. 8, 2022), https://www.theatlantic.com/ideas/archive/2022/01/republicans-democrats-forever-culture-war/621184 [https://perma.cc/8UR5-U9H8] (noting the heightened intensity of American political debate).

20. Zack Stanton, *How the 'Culture War' Could Break Democracy*, POLITICO (May 20, 2021), https://www.politico.com/news/magazine/2021/05/20/culture-war-politics-2021-democracy-analysis-489900 [https://perma.cc/5RJT-ETPW].

21. *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public [https://perma.cc/U6NE-WWTD]. While the Pew study is from 2014, the results continue to hold true today. Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TRS. (Mar. 29, 2021), https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide [https://perma.cc/7X93-5FDK] ("Americans have rarely been as polarized as they are today. The studies we've conducted at the Pew Research Center over the past few years illustrate the increasingly stark disagreement between Democrats and Republicans on the economy, racial justice, climate change, law enforcement, international engagement, and a long list of other issues.").

22. Yascha Mounk, *The Doom Spiral of Pernicious Polarization*, ATLANTIC (May 21, 2022), https://www.theatlantic.com/ideas/archive/2022/05/us-democrat-republican-partisan-polarization/629925 [https://perma.cc/4LC5-4LEM] (remarking on conclusions of a study by the Carnegie Endowment for International Peace).

police killings,[23] and LGBTQ+ inclusivity in schools.[24] However, that commentary can sometimes be "inflammatory, derogatory, offensive, or racist," which can be problematic for government employers if it results in the public questioning the employer's reputation or quality of services.[25]

Social media only adds fuel to the fire. Social media is instantaneous,[26] reaches wider audiences,[27] spreads quickly,[28] and

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23. *See* Jimmy F. Robinson, Jr. & Christine Bestor Townsend, *Social Media Posts During Turbulent Times: FAQs on Employee Rights and Employer Responsibilities*, OLGETREE DEAKINS (June 22, 2020), https://ogletree.com/insights/social-media-posts-during-turbulent-times-faqs-on-employee-rights-and-employer-responsibilities [https://perma.cc/B7QB-LUHU] (examining whether employers can discharge employees who make inflammatory social media posts regarding the anti-racist movement).

24. *E.g.*, Natanson & Balingit, *supra* note 19 (reporting on a high school teacher who was terminated because of a TikTok video where she said she ran for school board "[s]o [students are] not being taught that they can choose whether or not they want to be a girl or a boy").

25. Robinson & Bestor Townsend, *supra* note 23; *see also* Pamela Wood, *Former Maryland Employee Fired over Social Media Posts Files Lawsuit*, BALT. SUN (Aug. 11, 2021), https://www.baltimoresun.com/politics/bs-md-pol-mac-love-lawsuit-20210811-t4wiydg64revjowvyyihls2m2u-story.html [https://perma.cc/WSF8-3D5P] (discussing a Maryland state employee who lost his job after making Facebook posts sympathizing with Kyle Rittenhouse, who killed two people during the 2020 racial justice protests in Kenosha, Wisconsin).

26. Lilli B. Wofsy, Note, *Will I Get Fired for Posting This?: Encouraging the Use of Social Media Policies to Clarify the Scope of the* Pickering *Balancing Test*, 51 SETON HALL L. REV. 259, 273 (2020) ("Cases dealing with social media content require a modified standard because a statement expressed through such mediums can be spread within moments, with exposure to the public being almost instantaneous.").

27. Watt Lesley Black, Jr. & Elizabeth A. Shaver, *The First Amendment, Social Media, and the Public Schools: Emergent Themes and Unanswered Questions*, 20 NEV. L.J. 1, 3 (2019) ("Electronic speech has the potential to 'go viral,' reaching an audience far larger than the speaker may have ever intended."); Christina Jaremus, Note, *#FiredforFacebook: The Case for Greater Management Discretion in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 5–6 (2014) ("Since social media has the capacity to amplify employee voice and exposure, courts and labor boards should take into account the greater potential for employee activity or speech on social media to be widely disseminated and negatively impact management's business.").

28. Black & Shaver, *supra* note 27, at 3 ("Unlike in 1969, virtually everyone now has the means to quickly and easily distribute expressive content throughout their communities and far beyond."); Jessica O. Laurin, Note, *"To Hell in a Handbasket": Teachers, Free Speech, and Matters of Public Concern in the Social Media World*, 92 IND. L.J. 1615, 1628–29 (2017) ("And disseminating information on social media is easy; it only requires a click of a button. As a result,

can be permanent.[29] Accordingly, rash or ill-thought-out speech by public employees on social media increases the risk of harm to the government's interests in operating an efficient workplace.[30]

Thus, as social media use increases, it creates more opportunities for a government employee to undermine the government's integrity and ability to provide public services.[31] Increasingly, public employers discipline or fire their employees for controversial social media posts.[32] As a result, employee lawsuits challenging these actions under the First Amendment are on the rise, with no sign the lawsuits will slow down any time soon.[33]

Thankfully, courts are already equipped to properly handle these scenarios by using the balancing test developed by the Supreme Court in *Pickering v. Board of Education*.[34] This Note

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social media allows immediate 'viralization and amplification' of information." (footnote omitted)).

29. Sabrina Niewialkouski, Note, *Is Social Media the New Era's "Water Cooler?" #NotIfYouAreAGovernmentEmployee*, 70 U. MIA. L. REV. 963, 970 (2016) ("[E]verything that is posted is saved in cyberspace."); Jaremus, *supra* note 27, at 5 ("[E]rasing one's electronic footprint is virtually impossible once a posting has gone viral and spread rapidly via the Internet.").

30. *See infra* Part III.A.2.

31. Laura Prather, *A Balancing of 'Incomparable Interests:' The Pickering Test and First Amendment Rights of Government Employees*, HAYNES BOONE (May 3, 2021), https://www.haynesboone.com/news/publications/the-pickering-test-and-first-amendment-rights-of-government-employees [https://perma.cc/ZCV8-BXC9] ("The perceived invincibility and quick, broad publicity that social-media outlets bring make ill-advised employee posts that reflect poorly on government employers' integrity or impartiality all too common.").

32. David Hudson, *Controversial Social Media Posts by Public School Employees Raise Interesting Free-Speech Questions*, FREEDOM F., https://www.freedomforum.org/controversial-social-media-posts-by-public-school-employees-raise-interesting-free-speech-questions [https://perma.cc/4BU8-SM4A] (overviewing incidents where public employees faced discipline for controversial social media speech and noting that these events are not new as "[m]any public employees have faced discipline over controversial social media posts").

33. *See infra* Part II.B; *see also* Jonathan Abel, *Cop-"Like" ("👍"): The First Amendment, Criminal Procedure, and the Regulation of Police Social Media Speech*, 74 STAN. L. REV. 1199, 1201 (2022) ("Legal challenges [from police officers disciplined for biased or violent comments on social media] are just beginning to percolate through the courts, and there is no reason to expect any reversal in this trend as social media becomes the default form of self-expression for more and more people." (footnote omitted)).

34. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568, 573–74 (1968); *see also infra* Part III.

argues that even though the *Pickering* standard for analyzing these claims arose well before social media's time, it still works well for addressing public employee social media speech because it correctly balances the competing interests inherent in these legal disputes.[35] The legal analysis for these situations gives the government room to act when employee speech reasonably threatens the government's ability to operate effectively. On the flip side, public employee speech that does not significantly interfere with government operations is protected under this analysis.[36] For that reason, the *Pickering* balancing test adequately and appropriately addresses social media speech concerns.[37]

Nonetheless, some disagree and argue *Pickering*'s test does not adequately balance these competing interests when it comes to social media speech.[38] Scholars critique *Pickering*, as applied to social media, arguing the standard gives employers too much power and results in too much uncertainty.[39] Yet these critiques overlook and undervalue the unique characteristics and challenges associated with social media and the government's unique interest in public trust.[40]

This Note provides a thorough response to those critiques. This Note argues that despite being a pre-social media standard, *Pickering* works well in dealing with public employee free speech rights on social media. Social media speech, particularly controversial political speech, threatens government interests. *Pickering* gives the government discretion while still holding it accountable. Additionally, using *Pickering*, courts can engage in the type of fact-specific inquiries necessary for a proper First Amendment analysis. Finally, *Pickering* allows courts room to consider how different speech might have different repercussions in the public employment context warranting different constitutional treatments. Thus, courts should not abandon or

35. *Infra* Part III.

36. *See, e.g.*, *Pickering*, 391 U.S. at 573–75; Goza v. Memphis Light, Gas & Water Div., 398 F. Supp. 3d 303, 324–25 (W.D. Tenn. 2019) (holding the government violated its employee's right to free speech by terminating him for his social media conduct, in part because the government did not produce evidence the speech disrupted the workplace).

37. *Infra* Part III.A.

38. *See, e.g.*, Smith & Bates, *supra* note 16, at 39.

39. *Infra* Part II.C.

40. *Infra* Part III.

adjust the *Pickering* standard for social media speech since the standard works appropriately as is.

Part I of this Note provides background on the First Amendment. Part I argues the First Amendment has never protected all speech, and the government has always had more latitude in regulating speech when operating as an employer. Next, Part I overviews the landmark cases, including *Pickering*, that led to the current First Amendment jurisprudence for public employees. Part II outlines social media's role in society and overviews cases involving political speech by public employees on social media. Part III defends *Pickering* and explains why the standard is the proper legal tool for analyzing public employees' social media speech. Part III also responds to specific criticisms of *Pickering*. Finally, Part III acknowledges some concerns with *Pickering*, but explains why such concerns do not justify changing or abandoning the standard.

I. AN OVERVIEW OF THE FIRST AMENDMENT AND PUBLIC EMPLOYEES

This Part highlights how First Amendment protections, while robust, are not unlimited.[41] Additionally, while political speech is an especially protected category, the government's role as an employer creates a unique situation where speech is sometimes less protected.[42] Next, this Part overviews the landmark cases creating the test for analyzing public employee free speech claims.

41. *See generally* Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 SAINT JOHN'S L. REV. 119, 145 (1991) ("[N]o one seriously argues that the first amendment [sic] means that anyone anywhere can say absolutely anything.").

42. *Infra* Part II.B.1 (discussing cases where courts found no First Amendment violation when an employer acted against an employee because of the employee's political speech on social media); *see also* Citizens United v. FEC, 558 U.S. 310, 329 (2010) (stating political speech is essential to the First Amendment).

A. THE FIRST AMENDMENT IS NOT UNLIMITED AND DOES NOT PROTECT ALL SPEECH

A common misunderstanding is that the Free Speech Clause protects all speech.[43] In actuality, the First Amendment only prevents the government, not private entities, from infringing on speech.[44] Thus, in the employment context, the First Amendment only protects public, not private, employees.

Outside the government employment context, the First Amendment still does not protect all speech. While the First Amendment provides robust protection of speech,[45] the protection is not absolute. One of the hallmarks of the First Amendment is that the government cannot regulate speech purely because it disapproves of the ideas or sentiments.[46] Nevertheless,

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43. AJ Willingham, *The First Amendment Doesn't Guarantee You the Rights You Think It Does*, CNN (Sept. 6, 2018), https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html [https://perma.cc/6PZS-X7UJ]; Karen Hansen, *4 First Amendment 'Where America Stands' Findings that Surprised Experts (and 3 that Didn't)*, FREEDOM F., https://www.freedomforum.org/4-first-amendment-where-america-stands-findings-that-surprised-experts-and-3-that-didnt [https://perma.cc/XFS4-5VRR] (discussing recent survey results and stating, "[w]hile most people know [the First Amendment] applies at all levels of government, most also expect it to protect freedoms in more aspects of society than it does").

44. Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 689 (1997) ("[I]n the private sector, employers enjoy nearly untrammeled power to censor and punish the speech of their employees, subject only to a variety of limited statutory and common law restrictions; without state action, the First Amendment plays no role."); *What Speech Is Protected by the First Amendment?*, FREEDOM F., https://www.freedomforum.org/is-your-speech-protected-by-the-first-amendment [https://perma.cc/NQ8R-5LL4] (discussing how the First Amendment only applies to federal, state, and local government actors).

45. Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2095–96 (2018) ("[The First Amendment] is why people can burn flags, why schoolchildren can decline to say the Pledge of Allegiance . . . why there is so much money in politics, why the outsides of abortion clinics look the way they do, why white supremacists can utilize a public park, and why Nazis can march through a town of Holocaust survivors." (footnotes omitted)); At Liberty Podcast, *Ask an Expert: What Is Free Speech?*, ACLU, at 4:48 (Apr. 26, 2022), https://www.aclu.org/podcast/ask-an-expert-what-is-free-speech [https://perma.cc/UB2T-VCNW] ("Most things we say, even things that offend, even things that hurt and wound, even things that deceive, that are false are going to be protected speech under the First Amendment.").

46. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 380–82, 396 (1992) (striking down a city ordinance which criminalized speech, such as burning a cross or

the Supreme Court has said that even with a broad reading, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[47] Therefore, despite the First Amendment's broad protections, the government can regulate speech in certain contexts.

Specifically, obscenity and speech that incites imminent lawless action are not automatically protected under the First Amendment.[48] The Supreme Court held the First Amendment does not protect obscene material.[49] Additionally, the First Amendment does not protect child pornography.[50] Speech advocating violence or violations of the law receives First Amendment protection unless the speech does, or is likely to, incite or produce imminent lawless action.[51] This Note does not attempt to discuss the intricacies of the law on obscenity or inciting violence and how to determine if speech falls within those categories. Rather, this Note uses these as examples to demonstrate the First Amendment is not absolute. Beyond permissible content restrictions, certain relationships such as school/student[52] and, as relevant here, public employer/employee also limit First Amendment protections.[53]

In short, the First Amendment is not a complete guardrail protecting all types of speech. Furthermore, when the government is an employer, the First Amendment becomes even more limited as the government has a special interest in ensuring its

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Nazi swastika, when "one knows or has reasonable grounds to know [the speech] arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"); Texas v. Johnson, 491 U.S. 397, 414, 420 (1989) (holding that burning an American flag is protected under the First Amendment in part because a fundamental First Amendment principle is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

47. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

48. *Id.* at 572.

49. Miller v. California, 413 U.S. 15, 23 (1973).

50. New York v. Ferber, 458 U.S. 747, 764 (1982).

51. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

52. *See, e.g.*, Emily McNee, Note, *Disrupting the* Pickering *Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818, 1828 (2013) (noting "[s]chools are also permitted to restrict student speech" and discussing the student speech doctrine).

53. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 143–44 (1983) (discussing how prior to the *Pickering* case public employees had no First Amendment protection).

operations run smoothly.[54] This is an important distinction, as this Note focuses on when the government tries to regulate employee speech, not when the government tries to regulate ordinary citizen speech. These are two different scenarios, and it is a "well-settled rule that the government, when acting as an employer, may regulate employee speech to a greater extent than it can that of private citizens."[55] The fact that the government has more latitude in regulating its employees' speech than its citizens' speech is clearly engrained in Supreme Court precedent, as discussed next.[56]

B. THE FIRST AMENDMENT ANALYSIS FOR PUBLIC EMPLOYEE SPEECH IS NUANCED

This Section outlines how courts analyze public employee free speech claims. It then overviews a case involving a public employee's in-person political speech.

1. First Amendment Public Employee Jurisprudence Developed from Three Key Cases

Even though the First Amendment prohibits the government from infringing on free speech, public employees received no free speech protection from the law prior to 1968. Justice Holmes captured this era's philosophy best when he said, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[57] Then came *Pickering v. Board of Education*, the first landmark case recognizing the First Amendment protects public employees.[58]

Pickering produced a balancing test for lower courts to use when analyzing cases involving public employees' First Amendment rights.[59] *Pickering* involved a public school that fired a teacher after he sent a letter to the local newspaper criticizing how the school district handled financial resources and a recent

54. *Infra* Part I.B.1 (describing *Pickering* in more detail).

55. Marquardt v. Carlton, 971 F.3d 546, 553 (6th Cir. 2020).

56. *Infra* Part I.B.1.

57. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *Connick*, 461 U.S. at 143–44 (discussing how this quote embodied the Court's law for many years and citing the relevant case law).

58. Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).

59. *Id.* at 568, 572–73.

tax proposal to raise revenue.[60] The Court balanced the teacher's interest as a citizen against the state's interest as an employer working to efficiently educate the community.[61] In other words, the Court recognized the school has an interest in ensuring its operations run smoothly so it can provide its public service—education—with ease.[62] Nonetheless, the Court concluded the employer violated the First Amendment because the school's interest did not outweigh the teacher's interest in speaking on a matter of public concern.[63] While the letter criticized the public school and its administration, the Court found it did not impede the employee's ability to perform his job duties nor did it impact the school's operations.[64] However, even when recognizing a First Amendment protection for public employees, the Court acknowledged these scenarios are fact specific.[65] As such, the Court clearly rejected a bright-line rule for these situations as both inappropriate and impractical.[66]

Circuit courts articulate the *Pickering* balancing factors differently, but reasonable disruption and lack of fitness are the main considerations. The Eighth and Fourth Circuits flesh out *Pickering* with six and nine different factors, respectively.[67]

60. *Id.* at 564–66.

61. *Id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

62. *Id.* at 571–73.

63. *Id.* at 573 ("In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.").

64. *Id.* at 572–73 ("What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." (footnote omitted)).

65. *Id.* at 569.

66. *Id.* ("Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.").

67. Frank E. Langan, Note, *Likes and Retweets Can't Save Your Job: Public Employee Privacy, Free Speech, and Social Media*, 15 U. ST. THOMAS L.J. 228, 245–46 (2018).

Some of these factors are harmony among coworkers; the time, manner, and place of the speech; the degree of public interest in the speech; the risk of impairing the maintenance of discipline by supervisors; whether the speech undermined the mission of the institution; and whether speech was made to the public or co-workers in private.[68] On the other hand, the Second, Sixth, and Tenth Circuits focus only on the need for harmony in the office or workplace, whether the government responsibilities require a close working relationship between the employee and their co-workers, and whether the speech impedes the employee's ability to perform their job duties.[69] Thus, the main considerations by the circuits, and the factors of focus for this Note, are whether the speech affects the employer's operations and efficiency (level of disruption)[70] and whether the speech negatively impacts the employee's ability to perform their job duties (lack of fitness).[71]

A second major public employee First Amendment case, *Connick v. Myers*, clarified the term "public concern," which the Court used in *Pickering* when it announced the balancing analysis.[72] In *Connick*, an assistant district attorney refused to accept an internal transfer, and subsequently sent a questionnaire to fellow staff members concerning the office's transfer policy and office culture.[73] Afterwards, her employer fired her for failing to accept the transfer and argued the questionnaire was an act of insubordination.[74] The Supreme Court held that *Pickering* applies only if the employee's speech is a matter of public

68. *See id.* (listing the *Pickering* factors as articulated by the Eighth and Fourth Circuits).

69. *Id.* at 246.

70. *Pickering*, 391 U.S. at 573 (considering whether the speech "interfered with the regular operation" of the government employer).

71. *Id.* at 572–73, 573 n.5 (considering whether the speech hampers the employee's "proper performance of [their] daily duties").

72. Connick v. Myers, 461 U.S. 138, 146 (1983); *Pickering*, 391 U.S. at 568 (stating constitutional inquiry weighs "the interests of the teacher, as a citizen, in commenting upon matters of *public concern*" against the efficiency interests of the government employer (emphasis added)).

73. *Connick*, 461 U.S. at 141 (explaining how the questionnaire solicited fellow staff members' views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether the employees felt pressured to work in political campaigns"). The employee sent the questionnaire to fifteen Assistant District Attorneys. *Id.*

74. *Id.*

concern.[75] Most of the questionnaire included matters of personal interest and thus was not protected by the First Amendment.[76] Only one question in the questionnaire was a matter of public concern, according to the Court, and that was whether coworkers felt pressure to work on political campaigns supported by the office, but the employee ultimately lost under *Pickering* on that question anyway.[77] The key takeaway here is that *Connick* limited public employees' First Amendment rights by applying *Pickering* only to speech that touches on a matter of public concern.[78]

How *Connick* should apply to social media is often discussed by legal academics.[79] However, the nuances of the public concern test as applied to social media is not a focus of this Note. Since *Connick* acknowledges that speech relating to political, social, or other community matters is speech of a public concern, political

75. *Id.* at 147 ("We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

76. *Id.* at 148.

77. *Id.* at 149–54. The employee lost under *Pickering* because the Court determined the employer reasonably feared the question about working on political campaigns would disrupt work relationships and office functions which were important to the office's ability to fulfill its public duties. *Id.* at 153–54.

78. *Id.* at 146–47.

79. *See* Laurin, *supra* note 28, at 1631 (noting social media requires an updated public concern analysis because the content is potentially infinite and often contains public and private elements, so courts should instead focus only on specific posts rather than a social media page's entirety and should not give much weight to how much media attention the speech receives when deciding if speech is of public concern); McNee, *supra* note 52, at 1823 (discussing how the Internet makes it difficult to distinguish between public and private speech); Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1634 (2012) (arguing *Connick* is too restrictive on public employees' free speech rights on social media); Patricia M. Nidiffer, *Tinkering with Restrictions on Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?*, 36 U. DAYTON L. REV. 115, 134 (2010) (arguing that focusing solely on the forum of speech does not give public employers, particularly school boards, enough authority to monitor employee Internet speech).

speech on social media meets the *Connick* standard, and *Pickering* applies.[80]

The third major public employee First Amendment case is *Garcetti v. Ceballos*, where the Supreme Court held that speech made pursuant to an employee's job duties is not protected under the First Amendment.[81] Ceballos was a deputy district attorney for the Los Angeles County District Attorney's Office.[82] He argued his employer retaliated against him after he wrote a memo claiming the office used an affidavit with false and misleading information to obtain a search warrant.[83] The Court said Ceballos's speech was not protected under the First Amendment because he spoke pursuant to his job duties as a calendar deputy (advising his supervisor on how to proceed with a case).[84] In contrast, speech not made pursuant to job duties may be protected under the First Amendment because that is the same type of speech non-government employee citizens can engage in.[85]

What constitutes speech within the scope of an employee's job duties could be the subject of a whole, separate note.[86]

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80. Connick v. Myers, 461 U.S. 138, 146 (1983); *see also* Watt Lesley Black, Jr., *When Teachers Go Viral: Balancing Institutional Efficacy Against the First Amendment Rights of Public Educators in the Age of Facebook*, 82 MO. L. REV. 51, 67 (2017) (discussing how *Connick* was not decisive in four federal circuit cases dealing with public employees and Internet speech).

81. 547 U.S. 410, 421 (2006).

82. *Id.* at 413.

83. *Id.* at 420 ("Ceballos believed the affidavit used [by his office] to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor.").

84. *Id.* at 421 ("The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. . . . [T]he fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case [] distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline.").

85. *Id.* at 423.

86. In *Garcetti*, no one disputed Ceballos created the memo because of his job duties. *Id.* at 424. The only guidance the Court provided for determining what speech is pursuant to job duties is that formal job descriptions are not dispositive. *Id.* at 424–25. Thus, *Garcetti*'s failure to lay out a test for "pursuant to official duties" could be the sole subject of a note. *See* Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How* Garcetti v. Ceballos *Threatens the Flow of Newsworthy Information*, 16 COMMC'N L. & POL'Y 129, 143 (2011) (examining cases where employees claimed retaliation for revealing "mismanagement or possible malfeasance" by their employer and

However, *Garcetti* and its aftermath are not as relevant to this Note because social media speech is rarely made pursuant to an individual's job duties. Certainly situations exist where a court could find a public employee spoke on social media pursuant to their job duties.[87] However, most people speak on social media for their own purposes, not as a requirement of their job, so often courts have found an employee's social media use was not pursuant to job duties and applied *Pickering*.[88] Therefore, this Note assumes social media speech by public employees passes *Garcetti*, so *Pickering* applies.

2. Political Speech Is Central to the First Amendment, and Courts Protect In-Person Political Speech Made by Public Employees

The Supreme Court recognizes political speech is integral to the First Amendment.[89] Outside the employment context, when

arguing those cases show lower courts struggle to determine job duty speech, "sometimes defining it more broadly than a written job description, sometimes defining it rigidly to match a written job description, and sometimes trying to parse an entire course of communication into job-duty and non-job-duty components more by intuition than by any tangible standards"); *see also* Madyson Hopkins, Note, *Click at Your Own Risk: Free Speech for Public Employees in the Social Media Age*, 89 GEO. WASH. L. REV. ARGUENDO 1, 21 (2021) (arguing against a private citizen requirement for social media cases).

87. Papandrea, *supra* note 79, at 1618 ("Answering the *Garcetti* question might depend upon *how* a teacher is using social media. It is not much of a stretch to view discussions of homework assignments on social media as part of a teacher's job duties; it is less clear whether more casual conversations with students on social media are considered part of a teacher's job.").

88. *See, e.g.*, Duke v. Hamil, 997 F. Supp. 2d 1291, 1300 (N.D. Ga. 2014) (noting employee's Facebook posts were not pursuant to job duties because the posts were on a personal Facebook page, the page did not identify the employee's employment with the police department, and none of the statements referred to polices, practices, or employees of the department); Czaplinski v. Bd. of Educ., No. 15–2045 (JEI/JS), 2015 WL 1399021, at *4 (D.N.J. Mar. 26, 2015) (accepting for purposes of a preliminary injunction that the employee's social media speech was not pursuant to job duties because it was "on her own time" and "outside of her job duties"); Grutzmacher v. Howard County, 851 F.3d 332, 345–48 (4th Cir. 2017) (applying the balancing test to a public employee's social media speech); Liverman v. City of Petersburg, 844 F.3d 400, 411 (4th Cir. 2016) (applying *Pickering* to analyze police officers' First Amendment claims for retaliation based on their social media activity).

89. Citizens United v. FEC, 558 U.S. 310, 329 (2010) ("[P]olitical speech . . . is central to the meaning and purpose of the First Amendment."); *see* 2 RODNEY A. SMOLLA, *Smolla & Nimmer on Freedom of Speech* § 16:1 (2023) (listing

the government tries to regulate political speech, the regulation is subject to strict scrutiny, which requires the government action be narrowly tailored to achieve a compelling state interest.[90] While political speech is "inherently controversial," the Ninth Circuit noted it is a "quintessential example of protected speech."[91]

Given the importance of political speech, courts generally protect public employees' in-person political speech. The seminal case on this issue is *Rankin v. McPherson*, where the Court protected a county employee's political remark made to a coworker at the office.[92] The employee commented on an attempted assassination of the President.[93] The speech was a matter of public concern because it related to the life or death of the United States' President, so the Court applied *Pickering* and found in favor of the employee.[94] Importantly, the employee made the statement in private.[95] Therefore, the speech did not threaten the office's legitimacy.[96] Furthermore, the government offered no evidence that other employees heard the remark.[97] These considerations suggested low risk that the speech would disrupt operations.[98] Additionally, the Court also found the employee

Supreme Court cases articulating the important relationship between political speech and the First Amendment); *see also* Connick v. Myers, 461 U.S. 138, 146 (1983) (holding speech relating to a political matter meets the "public concern" requirement and, therefore, the government cannot automatically act on the speech as it must pass the *Pickering* test).

90. Boos v. Barry, 485 U.S. 312, 321 (1988) ("Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983))).

91. Dodge v. Evergreen Sch. Dist. #114, 56 F.4th 767, 783 (9th Cir. 2022).

92. 483 U.S. 378, 392 (1987).

93. *Id.* at 381 (recounting the employee's comment: "I said, shoot, if they go for him again, I hope they get him.").

94. *Id.* at 386, 388.

95. *Id.* at 389 ("Nor was there any danger that McPherson had discredited the office by making her statement in public.").

96. *Id.* ("There is no suggestion that any member of the general public was present or heard McPherson's statement.").

97. *Id.* ("Nor is there any evidence that employees other than Jackson who worked in the room even heard the remark.").

98. *Id.* at 388–89.

performed only clerical duties.[99] The employee did not make policy or interact with the public, so the speech minimally threatened office operations, and the speech did not suggest the employee lacked fitness for the job.[100] Thus, *Pickering*'s disruption and lack of fitness factors weighed in favor of the employee, so the First Amendment protected her speech.[101]

In conclusion, the First Amendment does not protect all speech. The Supreme Court gives the government, as an employer, more leeway to regulate employee speech as opposed to when the government tries to regulate ordinary citizen speech.[102] If a public employee speaks on a matter of public concern, not pursuant to their job duties, courts apply the *Pickering* balancing test and weigh the employer's efficiency interests against the employee's free speech rights.[103]

While courts protect in-person political speech made by public employees, they may not be as willing to protect the same speech on social media. *Rankin* is an example of an employee engaged in political speech winning under *Pickering*, but the case predates social media.[104] Social media complicates the

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99. *Id.* at 392 ("Her duties were purely clerical and were limited solely to the civil process function of [her employer's] office. There is no indication that she would ever be in a position to further—or indeed to have any involvement with—the minimal law enforcement activity engaged in by the [employer's] office.").

100. *Id.* at 390–91 ("Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. . . . At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.").

101. *Id.* at 392.

102. *Supra* Part I.B.1; Marquardt v. Carlton, 971 F.3d 546, 553 (6th Cir. 2020).

103. *Supra* Part I.B.1.

104. The Supreme Court decided *Rankin* in 1987. *Rankin*, 483 U.S. at 378. Social media as we understand it today started in the early 2000s, but technically the first recognizable social media site was created in 1997. *See* Esteban Ortiz-Ospina, *The Rise of Social* Media, OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media [https://perma.cc/X838-S884] ("MySpace was the first social media site to reach a million monthly active users [] it achieved this milestone around 2004. This is arguably the beginning of social media as we know it."); Chenda Ngak, *Then and Now: A History of Social Networking Sites*, CBS NEWS (July 6, 2011), https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites [https://perma.cc/62SK-JPUT] (stating Six Degrees, which launched in 1997, "is widely considered to

analysis because social media speech poses a greater risk of threatening an employer's interests.[105] Part II describes how social media has changed this legal landscape and how courts apply *Pickering* when public employees make political speech on social media. In these cases, courts often uphold the government action.[106]

II. SOCIAL MEDIA'S PREVELANCE LEADS TO LAWSUITS BY PUBLIC EMPLOYEES AND CRITIQUES OF THE PRESENT LEGAL ANALYSIS

Part II provides background on what social media is and how it exists in the lives of everyday Americans. While social media connects people, it also has downsides that can pose legitimate concerns for public employers. Part II then overviews court cases dealing with public employees' political speech on social media. Part II concludes by highlighting the two main criticisms of using *Pickering* to analyze public employee social media speech.

A. SOCIAL MEDIA IS INCREASINGLY RELEVANT IN TODAY'S SOCIETY

Social media allows people to connect and communicate. On social media sites, users create online profiles to connect with others who have common interests, whether that is family, friends, or strangers.[107] Social media encompasses a variety of platforms. MySpace is an early example of social media.[108] Facebook, Instagram, X (formerly known as Twitter), YouTube, and LinkedIn are the well-known social media sites today.[109] TikTok

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be the very first social networking site"). Regardless, both benchmarks predate *Rankin*.

105. *Infra* Part III.A.2.

106. *See infra* Part II.B.

107. Thalia Olaya, Note, *Public Employees' First Amendment Speech Rights in the Social Media World: #Fire or #Fire-d?*, 36 HOFSTRA LAB. & EMP. L.J. 431, 445 (2019).

108. *See* Spanierman v. Hughes, 576 F. Supp. 2d 292, 297 (D. Conn. 2008) ("This case involves the Plaintiff's use of MySpace.com . . . a website that allows its users to create an online community where they can meet people.").

109. Nick Leighton, *Top Five Social Media Platforms for Business Leaders*, FORBES (Mar. 9, 2021), https://www.forbes.com/sites/forbescoachescouncil/2021/03/09/top-five-social-media-platforms-for-business-leaders [https://perma.cc/DKN6-LCFZ].

is the most recent social media giant dominating teenagers' social media use.[110] The theme uniting these entities is that the online platforms provide people an opportunity to engage and communicate with one another.[111]

Social media is increasingly integral and fundamental in the lives of most Americans. As of 2021, ninety-three percent of American adults use the Internet.[112] Social media is one of the most popular Internet activities and, as of 2021, seventy-two percent of American adults used at least some type of social networking site.[113] Not only do Americans use social media in their free time, but many use it at work for a variety of reasons.[114] These are just some of the statistics highlighting how prevalent social media is in most Americans' day-to-day lives.

The Supreme Court itself recognized social media's increasing presence in American culture. In 2017, the Supreme Court struck down a North Carolina law preventing registered sex offenders from accessing Internet websites including social media

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110. Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022 [https://perma.cc/LM2F-Q3Y9].

111. *See* Olaya, *supra* note 107, at 445–46 (describing social aspects of online platforms).

112. *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband [https://perma.cc/WW8Y-5686]. In this study, an adult is an individual eighteen years of age or older. *Id.*

113. *Social Media Fact Sheet*, *supra* note 17.

114. Kenneth Olmstead et al., *Social Media and the Workplace*, PEW RSCH. CTR. (June 22, 2016), https://www.pewresearch.org/internet/2016/06/22/social-media-and-the-workplace [https://perma.cc/6S32-X9ES]. The survey asking full or part-time Americans about social media at work found that:

> 34% ever use social media while at work to take a mental break from their job[;] 27% to connect with friends and family while at work[;] 24% to make or support professional connections[;] 20% to get information that helps solve problems at work[;] 17% to build or strengthen personal relationships with coworkers[;] 17% to learn about someone they work with[;] 12% to ask work-related questions of people *outside* their organization[;] 12% to ask such questions of people *inside* their organization.

Id. While this study was conducted in 2014, it is still a useful metric as studies referenced earlier would suggest, if anything, the percentages have only increased. *See, e.g.*, *Social Media Fact Sheet*, *supra* note 17; *Social Media and News Fact Sheet*, *supra* note 18; *Internet/Broadband Fact Sheet*, *supra* note 112.

websites.[115] The Court determined the statute violated the First Amendment, basing some of its reasoning on Americans' widespread social media use.[116] Supporting its holding, the Court explained how social media is a venue to speak, listen, and reflect, which are qualities essential to the First Amendment.[117] Thus, as social media use continues to grow, courts must increasingly take the Internet, and the unique characteristics of social media, into consideration when deciding First Amendment cases.

While social media brings people together, the tool is not without risks and tradeoffs. Just as social media connects people, it can also tear people apart and fuel divisiveness.[118] Social media not only exacerbates existing political polarization,[119] but it can also cause tension in workplace relationships. Twenty-nine percent of American workers aged eighteen to twenty-nine discovered information on social media that lowered their opinion of a colleague, while only twenty-three percent in the same age category found information on social media improved their opinion of a colleague.[120] Since social media threatens some

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115. Packingham v. North Carolina, 137 S. Ct. 1730, 1737–38 (2017).

116. *Id.* at 1735 ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular"). The Court further remarks,

> [b]y prohibiting sex offenders from using [social media] websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.

Id. at 1737.

117. *Id.*

118. Paul Barrett et al., *How Tech Platforms Fuel U.S. Political Polarization and What Government Can Do About It*, BROOKINGS INST. (Sept. 27, 2021), https://www.brookings.edu/blog/techtank/2021/09/27/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it [https://perma.cc/N2B7-HAKJ] ("Our central conclusion, based on a review of more than 50 social science studies and interviews with more than 40 academics, policy experts, activists, and current and former industry people, is that [social media] platforms . . . likely are not the root causes of political polarization, but they do exacerbate it.").

119. *Id.*

120. Olmstead et al., *supra* note 114. Twenty-nine percent of workers ages eighteen to twenty-nine said they discovered information on social media that lowered their opinion of a colleague, sixteen percent of adults thirty to forty-nine-years-old said the same along with six percent of fifty to sixty-four-year-olds. *Id.*

workplace relationships, social media also threatens employers' ability to operate smoothly and risks causing internal disruption.

Social media's broad use, combined with its potential divisiveness, puts public employers in a precarious situation when employees make controversial social media speech. One law review student note described social media as this era's "water cooler," except the platforms allow widespread dissemination in contrast to contained conversations at a water cooler.[121] Therefore, problematic speech that once could be contained within a small group can now spread widely.[122] With this fear, public employers often discipline or terminate employees for controversial political speech on social media. In response, employees have challenged these actions under the First Amendment.

B. CASES INVOLVING POLITICAL SPEECH BY PUBLIC EMPLOYEES ON SOCIAL MEDIA

Courts usually apply *Pickering*'s balancing test when addressing public employees' political speech on social media.[123] As stated above, two primary factors courts consider when applying *Pickering* are potential disruption to the employer and whether the speech negatively impacts the employee's fitness for the job.[124] Both of these factors affect the employer's efficiency in performing its public service functions.[125] The following cases provide examples of how courts apply *Pickering* to public employees' social media speech.

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121. Niewialkouski, *supra* note 29, at 969–70 (noting social media sites "are water coolers with microphones that can amplify a whisper into a shout that's rebroadcast in untold directions").

122. Laurin, *supra* note 28, at 1628–29 ("[S]ocial media allows immediate 'viralization and amplification' of information."); Jaremus, *supra* note 27, at 5 (arguing the law should treat employee activity on social media differently in part because prior to social media, controversial speech was limited to small, closed groups of people who witnessed the speech firsthand).

123. *See supra* Part I.B.1 (discussing how *Connick* and *Garcetti* are not dispositive in social media cases); *see also* Black & Shaver, *supra* note 27, at 25 ("Because *Connick* and *Garcetti* both seem to be of limited utility in cases involving public employees and social media or other [I]nternet-based speech, *Pickering* has emerged as the most relevant tool for analyzing online employee speech.").

124. Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).

125. Connick v. Myers, 461 U.S. 138, 150–51 (1983).

1. The Current Case Law Exemplifies *Pickering*'s Ability to Correctly Balance Competing Interests by Protecting the Employee Unless the Speech Undermines the Government's Interests

In *Duke v. Hamil*, a district court in Georgia upheld a police officer's demotion because he posted a Confederate flag with the message, "It's time for the second revolution," on social media.[126] The court found the speech was offensive enough that the employer could reasonably conclude the speech would impact the employer's ability to function effectively.[127] Thus, the government did not violate the First Amendment by demoting the employee.[128] The court reasoned many of the posts were "controversial, divisive, and prejudicial to say the least," so the public might reasonably worry about the employee's prejudice, and by extension, assume the department carries those same harmful prejudices.[129] Given the likelihood people would find this speech offensive, and that the employee had supervisory responsibilities, the employer did not have to wait for an internal disruption before addressing the issue.[130] As the department's second-in-command, the offensive speech threatened to disrupt operations because it posed a strong threat of undermining the discipline, respect, and trust of employees below the officer.[131] Finally, the court stated the First Amendment would also not protect the employee because, by posting on social media, he took the risk that the speech could be shared broadly.[132]

Another case, *Czaplinski v. Board of Education*, involved a school that terminated its security guard after she made

126. 997 F. Supp. 2d 1291, 1293 (N.D. Ga. 2014).

127. *Id.* at 1303 ("[T]he Court finds that the CSU Police Department's interests outweigh Plaintiff's interest in speaking. It is obvious that speech invoking revolution and the Confederate flag could convey a host of opinions that many would find offensive, especially when associated with a senior law enforcement official.").

128. *Id.* ("Defendant Hamil did not violate the First Amendment when he demoted Plaintiff to maintain both the CSU Police Department's good working relationships and its reputation.").

129. *Id.* at 1301.

130. *Id.* at 1301–02 (explaining that since the employee was second-in-command, the employer could address the speech immediately instead of waiting to see if it affected the discipline, mutual respect, and trust among the employee's coworkers).

131. *Id.*

132. *Id.* at 1303.

multiple, controversial posts about race and policing.[133] The employee's speech did not survive *Pickering* because security guards need to resolve disputes and maintain peace, and at least one person found the employee's activity on social media racist, suggesting others may have reacted similarly.[134] The perceived racial bias in these statements risked undermining the employee's and other security guards' authority in the eyes of students and staff.[135] Unlike *Pickering*, where the teacher's speech criticizing the school's financial decisions did not impact his teaching duties, in *Czaplinski*, the guard's speech impacted her ability to be unbiased and respectful of diversity, necessary requirements of her job duties.[136] Czaplinski's role as a public school security guard warranted treating her differently than a regular member of the public, so she lost under *Pickering*.[137]

In *Snipes v. Volusia County*, the Eleventh Circuit upheld a police department's termination of its officer who posted vulgar and racist content on his Facebook page and in text messages with other employees.[138] The employer reasonably worried the speech would result in substantial protests and rallies, hinder the department's ability to recruit African Americans, and erode

133. No. 15–2045 (JEI/JS), 2015 WL 1399021, at *1 (D.N.J. Mar. 26, 2015). The security guard made these posts after learning Black assailants shot and killed a Black police officer. *Id.* Her first post stated, "Praying hard for the Philly cop shot today by another black thug . . . may[be] all white people should start riots and protests and scare the hell out of them." *Id.* (footnote omitted).

134. *Id.* at *5 (reasoning that because some in the community already came forward saying they found the speech racist and troubling, others may do the same, which weighed in favor of the government, as it has an interest "in avoiding a perception of racial bias").

135. *Id.* ("[T]o the extent the comments contributed to a perceived racial bias, they arguably undermined both Plaintiff's individual authority in the eyes of the students and staff, as well as the authority of security guards more generally . . . .").

136. *Id.* at *4 ("Unlike in *Pickering*, Plaintiff's statements can reasonably be presumed to impede her proper performance of her daily duties as a security guard.").

137. *Id.* at *5 (denying the employee recourse under the First Amendment, meaning her interests as an individual citizen did not outweigh her responsibilities as a public employee).

138. 704 F. App'x 848, 850 (11th Cir. 2017) (per curiam) (explaining that the day after a jury acquitted George Zimmerman for the shooting death of Trayvon Martin, a Black teenager, the employee wrote on his Facebook: "Another thug gone! Pull up your pants and act respectful. Bye bye thug rip!").

public confidence in the department.[139] Staffing a police force representative of the community it serves is important for the department, and this speech threatened that goal.[140] Additionally, ensuring public confidence in fire and rescue services is a compelling and legitimate government interest.[141] This speech risked creating disruption by undermining public confidence in the government's services, so the court held in favor of the government.[142] The First Amendment did not protect the employee's speech.[143]

These cases are not limited to the police and security guard context. In *Durstein v. Alexander*, a Virginia district court applied *Pickering* to a case involving a school that terminated a teacher after previous social media posts containing prejudice against Muslims resurfaced.[144] The court found in favor of the employer on the grounds that these posts caused significant internal and external disruption (press reports, phone calls, email complaints, and upset students and coworkers).[145] In addition, the posts suggested the employee lacked fitness for the position, which could negatively affect the school's credibility.[146] Applying

139. *Id.* at 853 ("[I]f the County had not terminated Snipes it was reasonably possible that there would have been substantial protests and rallies in the community, that the Beach Patrol's ability to recruit new members from the African-American community would have been hindered, and that the public's confidence in the Beach Patrol—and perhaps all County law enforcement—would have been adversely affected.").

140. *Id.* (quoting a reverend leader who stated African American community members would hesitate in applying for these positions as a result of this speech). The court reasoned that this could negatively impact the Beach Patrol's ability to staff a police force that represented the community. *Id.*

141. *See id.* (describing a community member who said the social media posts "make[] you wonder if a black person is out in the ocean drowning, if [Beach Patrol officers] would turn their head or if they would take their time to help rescue them," which the court said was an example of the type of public confidence traditionally viewed as a compelling government interest).

142. *Id.* at 853, 855

143. *Id.* at 855.

144. For a complete list of the many problematic social media posts, see Durstein v. Alexander, 629 F. Supp. 3d 408, 416–17 (S.D. W. Va. 2022).

145. *Id.* at 424–25.

146. *Id.* at 427 ("[W]hile not a police or fire service member, as an educator, particularly an educator in a class that involves discussion of religion, Plaintiff's tweets, which could certainly be seen as discriminatory, diminished the Board's standing with the public, particularly given that they are antithetical to the Board's mission to provide a safe and nondiscriminatory school environment, as laid out in its polices.").

Pickering, the court considered the nature of the employee's job responsibilities and whether the speech directly conflicted with those duties.[147] After considering these factors, the court concluded the government did not violate the First Amendment.[148]

While law enforcement and teachers are highly public government roles, these same issues arise in less public-facing positions. In *Goza v. Memphis Light, Gas & Water Division*, an employee who worked for the City of Memphis's utility provider was terminated after he attended a rally, voiced his disproval of the efforts to remove a Jefferson Davis statue, and made racist posts on Facebook.[149] The court applied *Pickering* and found for the employee because the employer's adverse actions were not actually motivated by liability, safety, or operational concerns.[150] The court came to this conclusion because the employer did not provide evidence that the employee's continued employment would disrupt the utility's services, and the employer acted more leniently when a different employee made similar inflammatory speech on social media.[151] In fact, Goza worked for four days without any disruption after the protest.[152]

These cases demonstrate that the facts matter when determining if the government's interest as an employer outweigh the employee's free speech rights. *Pickering*, as a fact-specific balancing test, is advantageous for both sides. If an employee makes controversial political speech on social media, a court can protect the speech if, like in *Goza*, the speech does not reasonably

147. *Id.*

148. *Id.* at 423–26.

149. 398 F. Supp. 3d 303, 311 (W.D. Tenn. 2019). The employee's Facebook post made extremely bigoted comments about segregation and violent crime and even stated Black people are "[his] enemy." *Id.*

150. *Id.* at 319–20.

151. *Id.* at 320 ("MLGW [the employer] also reacted more leniently to similarly inflammatory speech by a different employee, which further demonstrates that MLGW did not genuinely believe that Goza's statements represented a threat of violence."). Additionally, the government did not "produce evidence to show that Goza's continued employment would disrupt MLGW in providing services to African-Americans or to Memphis generally." *Id.* at 321.

152. *Id.* at 321. The government employer also never conducted interviews from coworkers or supervisors about the likelihood Goza would discriminate against Black customers and "did not interview any customers who submitted complaints to determine whether they would boycott MLGW or would bar Goza from working in their homes." *Id.* at 319. Therefore, the government did not carry its burden of demonstrating Goza's speech and employment truly threatened the government's interests. *Id.* at 325.

threaten or undermine the government's operations.[153] After all, protecting offensive speech or unpopular speech is a central tenet of the First Amendment.[154] However, protecting unpopular speech must give way when the speech reasonably threatens the government's ability to operate efficiently and serve the public, as cases like *Duke*, *Czaplinski*, *Snipes*, and *Durstein* demonstrate.[155] In those cases, the speech more readily undermined the government's ability to operate as an institution serving the public, so courts gave the government more latitude in controlling speech.[156] As these cases demonstrate, *Pickering* correctly threads the needle of protecting employee free speech rights while limiting those rights when the speech could harm the public by undermining the government's ability to serve community members.

Two cases from the Fourth Circuit further demonstrate the need for a fact-specific analysis because certain types of speech may be more harmful to the government's interest than others. Consequently, outcomes may differ under *Pickering* depending on the type of speech and how the individual's job and expertise relates to the speech at issue.

2. Two Commonly Discussed Fourth Circuit Cases Reach Different Conclusions Under *Pickering*

Legal analysis in this area often includes a discussion of the following two cases, particularly in connection with *Pickering*'s disruption factor.[157] The Fourth Circuit decided both cases

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153. *Id.* at 319–20.

154. *See* Linda R. Monk, *The First and Second Amendments*, PBS, https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/first-and-second-amendments [https://perma.cc/U9R2-8WHS] ("Unpopular ideas are especially protected by the First Amendment because popular ideas already have support among the people."); Alexis Martinez, Comment, *The Right to Be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media*, 27 AM. U. J. GENDER SOC. POL'Y & L. 285, 306–07 (2019) ("Offensive speech is at the heart of the First Amendment, and the government as an employer cannot compel a general code of civility online or in person.").

155. *Supra* notes 126–48 and accompanying text.

156. *Supra* notes 126–48 and accompanying text.

157. *See, e.g.*, Black, *supra* note 80, at 77–78 (discussing *Liverman* when overviewing lower court decisions involving Internet-based speech and public employees); Smith & Bates, *supra* note 16, at 17–23 (comparing *Grutzmacher* with *Liverman* and arguing "[t]he issue of disruption is central to distinguishing *Liverman* from *Grutzmacher*").

applying the *Pickering* analysis, and both involve public employees' social media speech. However, the results come out differently.

In *Grutzmacher v. Howard County*, the Fourth Circuit upheld a firefighter's termination following his posts about gun control legislation and his frustration with the department's social media policy.[158] The court held the government's concern about disruption and disharmony was reasonable because the online activity led to multiple conversations with concerned lower-level employees.[159] Additionally, members of the African American community expressed concern about working for the employee based on his social media activity.[160]

Also important to *Grutzmacher*'s outcome was how the speech affected the employee's ability to do his job.[161] The court observed the speech could be interpreted as supporting racism, which would negatively impact the public's trust in firefighters' ability to make fair and unbiased decisions.[162]

In contrast, in *Liverman v. City of Petersburg*, the Fourth Circuit struck down a police department's social media policy because it prohibited all speech critical of the department.[163]

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158. 851 F.3d 332, 338, 349 (4th Cir. 2017). One of the posts the employee made while watching news coverage on a gun control debate was, "My aide had an outstanding idea . . . lets [sic] all kill someone with a liberal . . . then maybe we can get them outlawed too!" *Id.* at 338. Another post about the department's social media policy was, "To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted." *Id.* The plaintiff also liked a comment in response to his post which said "But. . . . was it an 'assult [sic] liberal'? Gotta pick a fat one, those are the 'high capacity' ones. Oh . . . pick a black one, those are more 'scary.'" *Id.*

159. *Id.* at 345–46.

160. *Id.* at 346 ("Three African-American employees within the Department approached the president of the Phoenix Sentinels—the Howard County affiliate of the International Association of Black Professional Firefighters, a constituent group representing African-American and other minority firefighters—about the posts . . . .").

161. *Id.* at 347 (arguing that fire departments act as paramilitary organizations which require discipline at the expense of freedom, so courts afford fire departments more latitude in dealing with employee dissension).

162. *Id.* (explaining that the department reasonably believed the employee's speech could be interpreted as supporting racism or bias, and as a result, would interfere with the public's confidence in the employee to make fair and impartial decisions for all).

163. 844 F.3d 400, 407 (4th Cir. 2016) ("We hold that the Department's social networking policy is unconstitutionally overbroad . . . .").

Therefore, the department acted impermissibly when it disciplined officers for violating the policy when they made Facebook posts about concern over the department's training and promotion practices.[164] One of the employees criticized the department for promoting young officers so early.[165] This employee expressed concern that police veterans would be responsible for potential negative consequences of this practice, even if they warned administration about the downsides of promoting cops who are too inexperienced.[166] The court noted the employees did not merely air personal grievances, but rather their speech added to an ongoing debate about the appropriateness (or not) of elevating young and inexperienced police officers to supervisory roles.[167] Additionally, the government did not provide evidence of disruption, and the employees grounded their comments in specialized knowledge.[168] Therefore, the court concluded the employer acted unconstitutionally when it disciplined them for their speech.[169]

These cases include important factual differences. *Grutzmacher* involves speech of a political nature, unrelated to the employee's expertise as a firefighter.[170] In contrast, *Liverman* involves speech that is more whistleblower-like because it involves

164. *Id.* at 414. One of the comments was: "[O]n average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in todays [sic] world of instant gratification and political correctness we have rookies in specialty units, working as field training officer's [sic] and even as instructors." *Id.* at 405.

165. *Id.* at 405. Responding to the original comment, another employee said, "It's a Law Suit [sic] waiting to happen." *Id.*

166. *Id.* ("And you know who will be responsible for that Law Suit [sic]? A Police Vet, who knew [and] tried telling and warn [sic] the admin for promoting the young Rookie who was too inexperienced for that roll [sic] to begin with.").

167. *Id.* at 410 ("Liverman and Richards were not simply airing personal grievances but rather were joining an ongoing public debate about the propriety of elevating inexperienced police officers to supervisory roles.").

168. *Id.* at 410–11 (stating each officer "grounded his statements in specialized knowledge" and that "[s]erious concerns regarding officer training and supervision are weighty matters that must be offset by an equally substantial workplace disruption," which the government failed to establish).

169. *Id.* at 411. However, the employees ultimately failed on their retaliation claim because the government had legitimate reasons to investigate them (sexually explicit emails, sexual misconduct while on duty which Liverman admitted to during an investigation, a complaint about a comment made to the media about another officer's spouse, and a complaint about involvement with a department program). *Id.* at 412–13.

170. *See* Grutzmacher v. Howard County, 851 F.3d 332, 338 (4th Cir. 2017).

critiquing the government's operations, and the critique is informed by the employees' expertise given their jobs.[171] Part III argues treating political speech on social media differently than speech that is more whistleblower-like may be warranted.[172] Additionally, understanding that courts sometimes draw this distinction helps make outcomes like *Grutzmacher* and *Liverman* more reconcilable.[173]

These cases are a representative sample of the cases to date involving public employees challenging employer action against them because of their social media speech. These cases are not exhaustive, as the case law continuously grows.[174] While Part III of this Note uses these cases to explain why *Pickering* is the right legal standard for these scenarios, not everyone agrees.

C. CRITICS ARGUE *PICKERING* GIVES THE GOVERNMENT TOO MUCH POWER AND IS UNPREDICTABLE

Many do not agree that *Pickering* works well for analyzing public employee social media speech, and the critiques boil down to two main assertions. The first criticism of *Pickering*, as it applies to social media speech, is that it leads to results that overly restrict public employees' free speech rights.[175] Most circuits interpret *Pickering* as laying out a "reasonable disruption" standard.[176] Therefore, an employer can show the speech negatively impacts its efficiency interest just by showing the employer

171. *See Liverman*, 844 F.3d at 410.

172. *Infra* Part III.B.2.

173. *Infra* Part III.B.2.

174. *See also, e.g.*, Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 902–03 (9th Cir. 2021) (involving a Las Vegas SWAT sniper challenging transfer and pay decrease resulting from a Facebook comment "that it was a 'shame' that a suspect who had shot a police officer did not have any 'holes' in him"); Hernandez v. City of Phoenix, 43 F.4th 966, 973 (9th Cir. 2022) (involving a police officer who filed a lawsuit seeking a preliminary injunction to prevent the public employer from disciplining him for Facebook posts denigrating Muslims).

175. Smith & Bates, *supra* note 16, at 39 ("Courts will be challenged to develop new balancing tests to weigh employees' rights of expression against employers' interests, as the current *Pickering* balance test appears to give employers license to 'put the thumb on the scale' in the interest of avoiding workplace disruption.").

176. Hopkins, *supra* note 86, at 10 ("[M]ost circuits interpret the [*Pickering*] balancing test as imposing a 'plausible' or 'potential disruption' standard [as opposed to an actual disruption standard].").

reasonably believed the speech would cause disruption.[177] Social media can more easily lead to disruption,[178] so some argue *Pickering* unfairly advantages the government, as it can easily meet this standard when its employees speak on social media.[179]

To solve this "problem," scholars offer various alternatives. One student note advocates adopting a reasonable disruption standard while simultaneously requiring employers have social media policies in place.[180] Another suggests adopting a rebuttable presumption test for new forms of online speech while requiring actual disruption.[181] An additional article suggests when speech involves "non-work-related expression," courts should get rid of *Pickering* entirely and apply a nexus test where courts presume speech protection unless the employer shows a substantial nexus between the speech and the employee's fitness to perform their job.[182] The most commonly proposed solution is altering the

177. Wofsy, *supra* note 26, at 268 ("The majority of circuits recently rejected the actual disruption standard, requiring instead that the employer show that it had a reasonable belief that disruption could result from the contested speech.").

178. Any employee's post could go viral, which could harm the employer. *See Can a Government Worker Get Fired over a Facebook Post?*, AM. BAR ASS'N (Feb. 20, 2021), https://americanbar.org/news/abanews/aba-news-archives/2021/02/can-a-government-worker-get-fired-over-a-facebook-post-- [https://perma.cc/4WL5-3ZCL] (warning public employees should be careful with social media because "posts go viral" and could "become digitally manipulated in some way").

179. *E.g.*, Wofsy, *supra* note 26, at 274 ("Because of social media's ability to quickly disseminate information to the public, public employees' free speech rights diminish under the *Pickering* test's progeny, with employers able to satisfy a low threshold of a reasonable belief of disruption."); Smith & Bates, *supra* note 16, at 39 ("The application of the *Pickering* analysis for public employee social media communications has evolved in such a way that virtually any negative comment may be interpreted as 'potentially disruptive,' effectively barring such posts.").

180. Wofsy, *supra* note 26, at 286–87; *see also* Nidiffer, *supra* note 79, at 138 ("[S]chool boards [need] to also develop comprehensive acceptable use policies [regarding the use of Internet social networking sites] for all staff, including administrators, employees, substitute teachers, and student teachers.").

181. Olaya, *supra* note 107, at 479 (arguing courts should adopt a rebuttable presumption test requiring actual disruption in cases with online speech). This means courts would presume the speech did not create an actual disruption, and the employee would be automatically entitled to judgment on the merits "unless proven otherwise by the employer, beyond a preponderance of the evidence." *Id.*

182. Papandrea, *supra* note 79, at 1631. While this article announces this new rule in the context of public educators, the author notes, "The courts do not

standard by requiring the government show some type of actual disruption.[183]

The second main critique is that *Pickering* is too subjective and unpredictable.[184] *Pickering*'s analysis can be difficult to apply.[185] Sometimes courts rule in favor of the employee while other times they side with the employer, leading to an unclear area of law.[186] The law, as the argument goes, becomes even more ambiguous when courts apply *Pickering* to social media speech.[187] The concern is that public employees will, out of fear, refrain from engaging in speech because of these inconsistencies.[188] Part III responds to both these arguments.

III. THE DEFENSE OF *PICKERING* FOR SOCIAL MEDIA SPEECH

Part III includes three Sections arguing in support of *Pickering*. First, *Pickering* works well because it allows employer

need a special test for teachers distinct from the test that applies to public employees generally." *Id.* This suggests the author thinks this test could be used for all public employees. *Id.*

183. *E.g.*, Hopkins, *supra* note 86, at 24–26 (arguing that actual disruption is the most workable standard); McNee, *supra* note 52, at 1847–52 (arguing for an actual disruption standard for teacher speech if the speech is a matter of public concern); *see also* Lindsay A. Hitz, Note, *Protecting Blogging: The Need for an Actual Disruption Standard in* Pickering, 67 WASH. & LEE. L. REV. 1151, 1183 (2010) (arguing the Supreme Court should adopt an actual disruption standard to protect public employee's blogging speech).

184. Wofsy, *supra* note 26, at 278 ("Another flaw . . . is a lack of clarity over what it means for an employer to have a reasonable belief to justify adverse employment action. . . . The standard's subjectivity may leave public employees in vulnerable situations because employers' decisions are based on speculative beliefs.").

185. Abel, *supra* note 33, at 1216 ("There is a great deal of concern about the difficulty in applying *Pickering*'s balancing test.").

186. Olaya, *supra* note 107, at 452–53 ("Just as some courts, in deciding cases pertaining to public employees' First Amendment rights, have decided in favor of the employee, others have refrained from protecting the employee. . . . [Thus] in light of the [I]nternet and social media revolution, the applicability of speech right protections to public employees remains unclear and unsettled." (footnotes omitted)).

187. McNee, *supra* note 52, at 1853 ("The standard for determining whether speech will be protected under the First Amendment is unclear, and even more ambiguous when applied to Facebook speech.").

188. *See id.* ("Teachers need consistency and certainty if they are to freely engage in speech that addresses matters of public concern.").

discretion and enables courts to consider nuances.[189] Second, *Pickering* provides an opportunity for courts to account for how social media political speech and whistleblower speech may have different ramifications.[190] Third, while *Pickering* is imperfect, none of the concerns about *Pickering* warrant an adjusted or different standard.[191]

A. *PICKERING* WORKS WELL BECAUSE IT PERMITS GOVERNMENT ACTION WHEN NECESSARY AND ALLOWS FOR A NUANCED ANALYSIS

While good reasons exist to protect public employees' free speech rights, valid concerns also exist for limiting their speech, at least some of the time.[192] While some scholars argue that courts need a new standard for social media because *Pickering* unfairly favors the employer, an employer's relative ease in meeting the *Pickering* test is the exact reason *Pickering* is a good standard. The government is in a unique situation of being an employer with a vested interest in its reputation with the public. Employees' speech threatens that interest, especially controversial political speech on social media. And, while employers can satisfy *Pickering* relatively easily when social media speech is involved, *Pickering* does still hold the government to some burden.

1. Government Employers Need Some Discretion in Regulating Employee Speech Because the Government Has a Unique Interest in Sustaining Public Trust

Many reasons exist to avoid a more strenuous standard for public employers when it comes to dealing with employee social media speech. The government is not like private employers

189. *Infra* Part III.A.

190. *Infra* Part III.B.

191. *Infra* Part III.C.

192. *See* Black, *supra* note 80, at 66–67 (discussing scholarly criticisms of *Connick* as it relates to teachers' online speech but noting that "the majority of these proposals likely tip the scales too far in the direction of the employee, not giving adequate consideration to the level of disruption the employer might suffer" and arguing that "a public educator who engages in expression that reasonably calls into question his judgment, decision-making ability, or general commitment to treating students with fairness can have a tremendous negative impact on the school community").

operating to make a profit.[193] The government, as an employer, exists as a democratic institution operating for the public's benefit.[194] Therefore, the government has a special interest in building and sustaining the public's trust.[195]

In addition, the government has a special responsibility in ensuring its operations run efficiently, since the government's purpose is providing services to the public.[196] The government operates as an employer so it can provide services essential to the functioning of society, like education and emergency response.[197] The last three years demonstrate just how important government services are, as government employees directed the United States' response to a global health pandemic.[198] As a

193. Jim Woodruff, *The Differences Between Government Employment and Private Sectors*, CHRON (July 30, 2020), https://smallbusiness.chron.com/differences-between-government-employment-private-sectors-10104.html [https://perma.cc/BKX3-4FCK] (explaining that the primary difference between public sector jobs and private sector employment is that "public sector positions focus on providing services to their community," whereas private sector positions "are intended to produce a profit by selling products and services" to community members).

194. *See* Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863) (proclaiming the United States government to be a "government of the people, by the people, for the people").

195. *See Army Secretary Says Senior Officers Should Avoid Culture Wars on Social Media* (C-SPAN television broadcast Oct. 10, 2022), at 00:25–00:36, https://www.c-span.org/video/?c5034996/army-secretary-senior-officers-avoid-culture-wars-social-media [https://perma.cc/X5GW-M8E5] (noting it is important to "keep[] the Army apolitical and keep[] it out of the culture wars. Because frankly we have got to be able to have a broad appeal, you know, when only nine percent of kids are interested in serving").

196. Woodruff, *supra* note 193.

197. *See* Tonie Rose Guevarra, *Top 8 Reasons to Work for the Government*, CAREERS IN GOV'T, https://www.careersingovernment.com/tools/gov-talk/about-gov/education/top-8-reasons-to-work-for-the-government [https://perma.cc/A8YP-VLPJ].

198. *See* John Travis, *Meet Anthony Fauci, the Epidemic Expert Trying to Shape the White House's Coronavirus Response*, SCIENCE (Mar. 14, 2020), https://www.science.org/content/article/meet-anthony-fauci-epidemic-expert-trying-shape-white-house-s-coronavirus-response [https://perma.cc/777K-PXNM]. State government employees also played a crucial role in addressing the crisis facing Americans. *See Coronavirus Disease 2019 (COVID-19)*, MINN. DEP'T OF HEALTH (Dec. 16, 2022), https://www.health.state.mn.us/diseases/coronavirus/index.html [https://perma.cc/FSE7-4SGZ] (demonstrating how state public officials provided information on the ongoing Coronavirus Disease 2019 (COVID-19) pandemic like situation updates, where to get tested, what to do if you test positive, and where to get the COVID-19 vaccine, as some examples).

democratic institution tasked with operating entities that provide essential services necessary for a well-functioning society, courts should allow the government space to ensure employee speech does not unduly undermine its mission.

Not only does the government have an interest in maintaining public trust, but, as a democratic institution, it has a duty to ensure everyone feels they have fair and equal access to government services. Divisive political speech on social media could lead members of the public to question whether their government represents and works for them. Take *Durstein* as an example. A public-school teacher's social media speech that includes prejudice against Muslims may result in Muslim community members questioning not only the quality of education students receive, but also whether the whole school district operates on similar prejudices.[199] As *Durstein* shows, speech that could raise public doubts about whether the government treats community members fairly will likely succeed under *Pickering* because the employer can show reasonable fear of disruption. Therefore, *Pickering* properly takes into consideration that the American government has a special interest in ensuring its people believe the government represents and works for them, and a duty to ensure that belief is reality.

Congress recognized the government has a special interest in maintaining public trust in its integrity and reputation when it passed the Hatch Act.[200] The Act limits political activities of federal employees and some state and local government employees.[201] By doing that, the Act ensures federal programs remain nonpartisan, prevents political coercion, and safeguards against employee advancements based on politics rather than merit.[202] The Hatch Act also regulates employees' off-duty speech, demonstrating concern for how speech, even off-the-clock speech, could impact government integrity and reputation.[203]

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199. *See* Durstein v. Alexander, 629 F. Supp. 3d 408, 424 (S.D. W. Va. 2022) ("It is important that a teacher responsible for instructing students about other religions not be seen disparaging those religions publicly.").

200. 5 U.S.C. §§ 7321–7326.

201. *Hatch Act Overview*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/HatchAct.aspx [https://perma.cc/DA8D-FW8K].

202. *Id.*

203. United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 95 (1947) ("The influence of political activity by government employees, if evil in its effects

Congress is not alone in recognizing the potential downsides of public employee political speech. The Supreme Court upheld the Hatch Act's constitutionality twice.[204] Even though the Court stated this is a decision for Congress, it still recognized there are "obviously important interests" served by limiting partisan political activities by government employees.[205] The Court also said, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."[206] For these same reasons, the government needs room to act if an employee makes political speech on social media that risks eroding public confidence in the government.

2. Social Media Speech Poses a Greater Threat to Government Interests than In-Person Speech

Government employers need a standard that will allow them flexibility in addressing employee speech on social media because social media speech can more easily erode public trust. For example, offensive Facebook posts by police officers could erode the public's trust in that profession and its services because the public may question the department's ability to enforce laws justly.[207] Just one inappropriate or harmful post on social

on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours. Of course, the question of the need for this regulation is for other branches of government rather than the courts.").

204. *Id.* at 99 ("Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 556 (1973) (reaffirming *Mitchell* and noting "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees").

205. *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564. For example, employees in the Executive Branch or working for its agencies "are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Id.* at 565.

206. *Id.*

207. Smith & Bates, *supra* note 16, at 32 (noting one such social media post by an officer promoting a police dog attack inspired an attorney to start the Plain View Project, an online and searchable database of officer social media posts, because these posts "could erode civilian trust and confidence in police").

media can spread quickly, leading to reputational damage within the community,[208] so government employers need room to adapt and manage those concerns. Therefore, the fact that *Pickering* is not too strenuous is advantageous. *Pickering* helps promote public trust in institutions by giving public employers the ability to address threats to their integrity before substantial harm occurs.

The relatively low standard of *Pickering* is particularly appropriate for social media speech because employee social media speech risks reaching a far greater audience than in-person speech and can do so in a matter of minutes.[209] If a public employee makes controversial speech on social media, the speech has the potential to go viral, whereas in-person speech is usually limited to the people who heard the speech.[210] People can capture social media speech permanently, which is another reason it risks spreading to a wider audience than in-person speech, even if the post is ultimately deleted.[211] If a public employer can demonstrate the speech is reasonably likely to cause disruption given it could spread far and wide on social media, then the government should be able to take action to prevent such disruption.

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208. Leslie Ramos Salazar, *Be Careful What You Post: Social Media and Reputation*, PROFSPEAK (Jan. 28, 2021), https://profspeak.com/be-careful-what-you-post-social-media-and-reputation [https://perma.cc/N3MU-WTK6] ("One inappropriate tweet from a CEO, employee, or client can go viral, and ruin the reputation of the company. A negative reputation from inappropriate social media use can have a negative effect on the company's revenue, brand value, trust, goodwill, and ethical reputation.").

209. *See supra* Part II.A; Wofsy, *supra* note 26, at 274 ("[S]peech conducted through social media differs greatly from the contested speech once considered by the Supreme Court. The difference stems not only from the rapid dissemination of speech on social media but also the disintegration of the separation of public and private life . . . ." (footnote omitted)); *see also* Nidiffer, *supra* note 79, at 134 ("[T]he concern with social networking sites is that even when created by educators from the privacy of their home, students, parents, and the community at large will have access to educators' personal [social media accounts].").

210. *See* Jaremus, *supra* note 27, at 5–6 (discussing a woman who dressed up as a Boston Marathon bombing victim for Halloween and noting that prior to social media, "her costume choice would likely be totally divorced from her employer. But in the age of the Internet, her posting went viral, and, as a result, her employer, who has an interest in avoiding this kind of sick humor, has been drawn in and associated with her poor taste.").

211. Smith & Bates, *supra* note 16, at 35 ("The problem, and benefit, of the [I]nternet is that information put online is difficult to remove. Comments and posts can be retrieved and saved . . . .").

Rankin, a case protecting a public employee's political speech, supports the conclusion that the law should account for the fact that social media speech poses a greater threat to government interests than in-person speech. While the employee's speech in *Rankin* posed little risk in causing disruption, a crucial aspect of the Court's reasoning was that the employee made the speech in private, and the speech did not reach the public nor other employees.[212] In contrast, social media is extremely public with the potential to reach both community members and other employees.[213] Social media creates the potential for a post to disseminate quickly, so an employee who posts political speech on social media creates a situation distinguishable from *Rankin*.[214] All employees, public or private, have agency when they choose to post political speech (which may be more controversial[215]) on a platform where the speech could explode. If public employees make political speech outside of social media, they may be protected by *Rankin*, but *Rankin*'s reasoning becomes distinguishable when applied in the social media context. Therefore, *Rankin* itself provides support for a test like *Pickering*, which is easier for employers to satisfy when public employees make controversial political speech on social media.

Social media also changes the nature of the speech made by public employees. Prior to social media, when public employees brought these cases, the employees spoke in letters, newspapers, depositions, at public events, or made speech in private conversations.[216] Those types of speech arguably require more thoughtfulness and planning, so not as many employees engage in said speech.[217] Specifically, writing a letter or making a public speech

212. Rankin v. McPherson, 483 U.S. 378, 389 (1987) ("McPherson's speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's statement. Nor is there any evidence that employees other than Jackson who worked in the room even heard the remark.").

213. *See supra* Part II.A.

214. *See* Duke v. Hamil, 997 F. Supp. 2d 1291, 1303 (N.D. Ga. 2014) (describing how the employee's choice to make his speech on social media created a risk that the speech would reach a wider audience).

215. Political speech is more likely to be controversial given America's political polarization; thus, political speech can easily be speech that adds fuel to the culture war fire. *See supra* notes 19–25 and accompanying text.

216. Smith & Bates, *supra* note 16, at 2.

217. *Id.*

require forethought, and the employee has time to think about their speech and its consequences. On the other hand, on social media, individuals can post quickly without pre-planning, thus making it more likely an individual will make impulsive and inflammatory comments they later regret.[218] On that account, *Pickering*'s relatively low burden for the government seems more reasonable.

Because speech on social media can be captured permanently[219] and can spread easily,[220] employers have legitimate reasons to be concerned and cautious. Thus, public employers should have some discretion to rein in their employees' social media speech to protect their reputation and ensure their workforce continues functioning smoothly. *Pickering* allows them to do so while still requiring the government carry its burden of showing it is acting reasonably.

3. *Pickering* Gives the Government Power to Ensure Its Integrity Remains Intact, but Still Requires the Government to Carry Its Burden

Even while *Pickering* allows the government employer some discretion to navigate the potential landmines of social media speech, the test does not abandon the employee's individual free speech rights. *Pickering* still requires the government to carry the burden of demonstrating that the speech reasonably threatens its efficiency interests.[221] If the employer cannot carry its burden, then the employee's free speech rights will win. Therefore, *Pickering* still recognizes the need to protect the employee some of the time, and courts do protect employees' speech when the government does not carry its burden.

Employers do not always win under *Pickering*. *Pickering* itself is a case where the government did not demonstrate its efficiency interests outweighed the employee's free speech rights, so the employee's termination violated the First Amendment.[222] As another example, in *Goza* the court found *Pickering* weighed in

218. Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 902 (9th Cir. 2021) ("But social media can also tempt people to impulsively make inflammatory comments that they later regret.").

219. Smith & Bates, *supra* note 16, at 35.

220. Wofsy, *supra* note 26, at 274 (acknowledging "social media's ability to quickly disseminate information to the public").

221. Pickering v. Bd. of Educ., 205, 391 U.S. 563, 568 (1968).

222. *Id.* at 574–75.

favor of the employee in part because the employer reacted more leniently to similar inflammatory speech by another employee, and the employer did not produce evidence that continued employment would disrupt its ability to provide its services to the community.[223] *Goza* demonstrates that employers must still establish how their state interest in efficiency outweighs the employee's free speech rights as a citizen, and half-hearted or inconsistent reasons by the employer will not fare well under *Pickering*.[224] Therefore, *Pickering* does provide some protection for employees.

Also, while employers can win on *Pickering* by demonstrating reasonable disruption, courts still consider actual disruption when applying *Pickering*. In *Durstein*, the fact that at least one student approached the principal about the speech, the speech upset at least one coworker, and the school board received press requests, emails, and a number of calls regarding the speech bolstered the employer's argument under *Pickering*.[225] In contrast, in *Goza* the employer did not produce any testimony from upset supervisors or coworkers, and the employee worked for four days afterwards without incident, which bolstered the employee's argument under *Pickering*.[226] Thus, in practice, whether the speech actually caused disruption can matter when courts apply *Pickering* and can be a consideration that helps protect an employee's speech.[227]

Since courts already consider actual disruption when analyzing if an employer meets its burden under *Pickering*, adopting

223. Goza v. Memphis Light, Gas & Water Div., 398 F. Supp. 3d 303, 320–21 (W.D. Tenn. 2019).

224. *Id.* at 325.

225. Durstein v. Alexander, 629 F. Supp. 3d 408, 424–25 (S.D. W. Va. 2022). Additionally, the Muslim Association of Huntington wrote to the school board expressing their shock and concern. *Id.* at 425. The tweets spread locally and nationally, so under these circumstances the court found the employer's concerns went beyond "'lip service' and 'vague references' [of] disruption." *Id.* This weighed in favor of the employer. *Id.; see also* Czaplinski v. Bd. of Educ., No. 15–2045 (JEI/JS), 2015 WL 1399021, at *5 (D.N.J. Mar. 26, 2015) (taking into consideration that at least one person anonymously complained about the speech, which bolstered the government's argument that the speech could undermine the authority of security guards and thus impair the government's ability to operate efficiently and effectively).

226. *Goza*, 398 F. Supp. 3d at 321, 324.

227. *Id.* at 324–25 (taking into consideration the fact that the government did not show any actual disruption, which helped the employee win under *Pickering*).

a formal "actual disruption" standard would be more harmful than helpful. The biggest problem with an actual disruption standard is it puts the government into crisis management instead of prevention mode, as the harm to the governments' reputation would already be realized.[228] This solution is inadequate because, as already stated, the government, more than any employer, has an incredibly strong interest in ensuring the public believes in its office's competency and its ability to fairly administer public services.[229]

Altogether, *Pickering* strikes the right balance. On the one hand, *Pickering* accounts for the fact that the government is not restricting a regular, individual citizen's speech, but rather a citizen who is in the unique position of being the government's employee. The government is a democratic institution accountable to the public and tasked with providing public services, and employees' controversial political speech on social media can severely undermine those objectives. On the other hand, *Pickering* recognizes the government must demonstrate a good reason to regulate its employees' speech because these employees are still citizens who deserve First Amendment protections.[230] The fact that the *Pickering* balancing test is relatively easy for employers to satisfy does not mean the government always wins.[231] However, in situations where the government can show it needs to rein in its employees' speech for the greater good of ensuring trust in democracy and democratic institutions, the government should win.

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228. Duke v. Hamil, 997 F. Supp. 2d 1291, 1302 (N.D. Ga. 2014) ("But a genuine potential for speech to harm a police department's reputation also justifies an employer taking action before that harm is realized."); *see also* Langan, *supra* note 67, at 247 (discussing how student complaints make the actual disruption standard an easy measurement for teachers, but "[t]he 'actual disruption' standard becomes much more difficult . . . in the context of public employees like firefighters, 911 operators, or IRS agents, who serve important public functions but have far fewer interactions with the general public, and thus fewer opportunities for public complaints").

229. *Supra* Part III.A.1.

230. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (rejecting the idea that government employees "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest").

231. *See, e.g.*, *Goza*, 398 F. Supp. 3d at 320–21.

B. WITHIN THIS AREA OF LAW NUANCE IS NECESSARY AND UNAVOIDABLE, BUT VIEWING POLITICAL SPEECH DIFFERENTLY THAN WHISTLEBLOWER-LIKE SPEECH CAN PROVIDE CLARITY

Some argue *Pickering* leads to unpredictable results, but *Pickering* allows for nuance when weighing the important interests of free speech versus the government's ability to operate effectively. For the legal standard to be comprehensive, it must take into account factors that will vary case-by-case.[232] Specifically, *Pickering* allows courts to consider how publicly connected an employee is with their employer and how the speech relates (or does not relate) to an employee's job duties.[233] These considerations should not be forgone for purposes of predictability or clarity.[234] Moreover, *Pickering*'s social media speech jurisprudence becomes clearer and more predictable when viewed as courts sometimes distinguishing between political speech unrelated to an employee's job and speech discussing the employer's operations, which is more "whistleblower-like" speech.[235]

1. A Case-by-Case Analysis Allows Courts to Engage Properly with Each Case's Unique Facts

Under *Pickering*, a court can consider how connected and visible an employee is to their government employer when the court determines whether the First Amendment protects the employee's speech. The public more readily associates certain public employees with their employers than others.[236] As a result,

232. The Supreme Court clearly explained that an "enormous variety of fact situations" can arise regarding public employees' speech, so creating a general standard used to judge all situations would not be appropriate or feasible. *Pickering*, 391 U.S. at 569.

233. *Infra* Part III.B.1.

234. *Infra* Part III.B.1.

235. *Infra* Part III.B.2.

236. *See* McNee, *supra* note 52, at 1820 ("The unique position that teachers have within the educational system makes them more visible to the general public."). *Compare What Elementary, Middle, and High School Principals Do*, U.S. BUREAU LAB. STAT. (Sept. 6, 2023), https://www.bls.gov/ooh/management/elementary-middle-and-high-school-principals.htm#tab-2 [https://perma.cc/SVT5-QUZ2] ("Principals serve as the public representative of their school."), *with* Cindy Long, *School Custodians Are Essential Frontline Workers for Our Students*, NEATODAY (May 28, 2020), https://www.nea.org/advocating-for-change/new-from-nea/school-custodians-are-essential-frontline-workers-our

controversial political speech made by a principal poses a higher risk of disrupting operations and public trust in the school district compared with controversial political speech made by a custodian or cafeteria server, for example.[237] Both jobs play an essential role in ensuring a well-functioning school system, but principals are more visible public employees. Thus, members of the community may be more likely to associate the principal's speech with the school district as opposed to other, less high-profile, education employees. Balancing tests may lead to some uncertainty; however, the tradeoff is a test that more accurately captures the complexity of these situations by considering the public visibility of the employee and the employee's connection to the employer within the public.

Taking into consideration how the visibility of an employee might affect (or not affect) the government's interest and need for regulating the speech is one way *Pickering* provides a thorough analysis for these types of cases. *Duke* is a perfect example of a court engaging in this reasoning and analysis.[238] In *Duke*, part of the reason the police department won under *Pickering* was because the employee who made the controversial social media speech was the Deputy Chief of Police.[239] As Deputy Chief of Police, the employee's speech risked being seen by the public as an extension of speech by the police department.[240] Therefore, the employer's interests in protecting itself was higher than the Deputy Chief's free speech interests.[241] In contrast, speech by a less high-level or publicly visible police officer may be less harmful to government operations. It should matter how the public views the employee's connection with the employer when determining if the employer violated the First Amendment. This is precisely the reason the Supreme Court avoided adopting a bright-line rule when first announcing that the First

-students [https://perma.cc/Y4P8-VK9N] ("[Custodians] need to make sure . . . schools are thoroughly cleaned and disinfected throughout the day, after the students leave, and before they come each morning . . . .").

237. *See* comparison *supra* note 236.

238. Duke v. Hamil, 997 F. Supp. 2d 1291, 1300–03 (N.D. Ga. 2014).

239. *Id.* at 1302 ("Because Plaintiff was the Deputy Chief of Police, his conduct reflected on the Department's reputation more significantly than the conduct of other officers.").

240. *Id.*

241. *Id.*

Amendment protects public employees, because these situations are inherently fact-specific.[242]

While *Pickering* can sometimes produce different results, the balancing test seeks to protect employee speech by only allowing the government to act when its interests outweigh the employee's.[243] Who the employee is and how they are connected to the employer are important factors in this analysis.[244] *Pickering*'s ability to account for this is preferable to a rule that would, inevitably, be over or underinclusive.[245]

Pickering also allows for consideration of what the employer, and public, expects from the employee, which is equally important when balancing an employee's free speech rights against the government's efficiency interest. For example, in *Durstein*, the fact that the teacher's social media speech was Islamophobic made it especially harmful to the government's efficiency interests because the teacher taught world history and her classroom included many African American and Muslim students.[246] Some may, appropriately, view this speech as harmful regardless of the fact that the speaker was a public school teacher of world history. Yet, the legal analysis for determining if the First Amendment protects the speech should account for what job the speaker holds. The legal analysis should be different if a different public employee made the same speech—for example, a

242. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

243. *Id.* at 568.

244. *See supra* notes 236–43 and accompanying text.

245. As demonstrated with the principal and school custodian or cafeteria worker and *Duke* examples, how the public views the employee's relationship to the employer directly relates to how strong, or weak, the government's efficiency argument will be. *See supra* notes 236–42 and accompanying text. Therefore, a rule that takes this nuance out of the analysis to provide more predictability risks being too harsh on employers or too harsh on employees depending on the specific facts of the case.

246. Durstein v. Alexander, 629 F. Supp. 3d 408, 424 (S.D. W. Va. 2022) ("Plaintiff had been responsible for teaching a diverse group of children and knew the school population included African American and Muslim students."); *see also* Rachel A. Miller, Note, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU EDUC. & L.J. 637, 637 (2011) ("The public often holds teachers to a higher moral and ethical standard than the general populace because they are mentors, coaches, and examples for the nation's youth."). Whether the public is correct to hold teachers to a higher moral and ethical standard is beside the point. The point is *Pickering* allows for courts to consider public expectations for public employees when analyzing the government's interest in regulating speech, and that is a good thing.

highway maintenance worker. A highway maintenance worker's job responsibilities greatly differ from that of a world history teacher's, so the speech may not conflict as directly with the employer's mission and service.[247] As a result, the government would need to provide more evidence of disruption or lack of fitness to win under *Pickering*.[248]

Similarly, *Pickering* allows courts to consider if the employee has supervisory responsibilities, which could increase the likelihood that inflammatory political speech disrupts internal cohesiveness and relationships within the workplace.[249] Courts must account for these differences because how the speech relates to job duties directly affects how much the speech could harm the government, and thus whether the government is justified in acting on the speech.

Government law enforcement and safety jobs provide additional examples of why considering job duties matters when engaging in a free speech analysis. *Pickering* allows courts to consider the notion that perhaps police officers, firefighters, and security guards should be held to a higher standard regarding their social media speech because their job expressly requires

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247. *Compare Highway Maintenance Workers and Technicians*, MINN. DEP'T OF TRANSP., http://www.dot.state.mn.us/careers/tss.html [https://perma.cc/EZE6-DXAG] (overviewing job responsibilities, which include maintaining and repairing roadways, plowing snow, filling potholes, paving roads, and inspecting bridges), *with Durstein*, 629 F. Supp. 3d at 423 (stating the employee was responsible for teaching a diverse school population about "the Muslim religion and modern Middle Eastern history, society, and culture").

248. *See* Goza v. Memphis Light, Gas & Water Div., 398 F. Supp. 3d 303, 323–25 (W.D. Tenn. 2019) (contrasting the utility employee's speech with other cases where employees had more managerial duties, responsibility for maintaining public safety, or obligations to set anti-discrimination polices); Rankin v. McPherson, 483 U.S. 378, 392 (1987) ("Given the function of the agency, McPherson's position in the office, and the nature of her statement, we are not persuaded that Rankin's interest in discharging her outweighed her rights under the First Amendment.").

249. *Compare* Duke v. Hamil, 997 F. Supp. 2d 1291, 1301–02 (N.D. Ga. 2014) (applying the *Pickering* analysis allowed the court to acknowledge that the employee's speech was particularly harmful because he had supervisor responsibilities, and the speech threatened not only external disruption but also the loyalty, discipline, and relationships within the department if not addressed), *and* Grutzmacher v. Howard County, 851 F.3d 332, 346 (4th Cir. 2017) ("Plaintiff's managerial position [as battalion chief] also weighs in the Department's favor."), *with Goza*, 398 F. Supp. 3d at 324–25 (ruling in favor of the employee and noting the employee "was not in a managerial role, let alone one as the head of an agency charged with maintaining public safety").

they act in a just and fair manner.[250] In these cases, the government interest in efficiency and avoiding disruption is quite strong.[251] And it should be, because the public service those institutions provide (such as safety and security) are important for a peaceful state and only work when the public believes the institutions are fair and just.[252]

In contrast, employees outside these law enforcement and security positions have different job responsibilities, so the government should generally have less discretion in regulating social media speech, assuming the speech does not directly conflict with their job duties. Unlike a police officer, the employee in *Goza* worked as a technician for the city's utility provider and won under *Pickering*.[253] While the speech in *Goza* was still controversial and prejudicial, his job did not involve impartial decision-making or setting anti-discrimination policy, so his continued employment did not undermine the utility's operations.[254] Situations like that in *Goza* are quite different from situations with safety officers. In the former, the employee's free speech rights should be weighed more heavily since the employer's efficiency interests are less threatened. In the latter situation with law enforcement officers, the government interests are stronger given the nature of the profession. *Pickering* succeeds by allowing courts to engage in that exact analysis.[255]

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250. *See Grutzmacher*, 851 F.3d at 347; *Duke*, 997 F. Supp. 2d at 1302; Czaplinski v. Bd. of Educ., No. 15–2045 (JEI/JS), 2015 WL 1399021, at *4–5 (D.N.J. Mar. 26, 2015) (finding defendants reasonably presumed the school security guard's speech impeded her ability to do her job, which required unbiased and impartial judgment in resolving disputes and maintaining peace).

251. Snipes v. Volusia County, 704 F. App'x 848, 853 (11th Cir. 2017) (per curiam) ("[M]aintaining the public's confidence in local fire and rescue services is a compelling and legitimate government interest.").

252. *See Duke*, 997 F. Supp. 2d at 1302 (applying *Pickering* allowed the court to consider that the speech advocating for a revolution was particularly detrimental given the police department was the employer and officers are charged with upholding law and order); *Czaplinski*, 2015 WL 1399021, at *5 (holding the school security guard's speech interest did not outweigh the government's interest in avoiding a perception of racial bias and inability to provide security impartially).

253. *Goza*, 398 F. Supp. 3d at 325.

254. *Id.*

255. *Compare Duke*, 997 F. Supp. 2d at 1302–03 (holding that the police department did not violate the First Amendment in part because "many in the community would take offense to [the employee's] form of speech not just

The unpredictability that potentially comes with using a balancing test like *Pickering* is an unavoidable consequence of dealing with legal situations that turn on the specific facts of a case. How visible is the employee to the public? Could the public perceive the employee's speech as the employer's speech? What did the employee say, and how does that relate to the employee's job responsibilities? How do the job duties and speech relate to the government's interest in efficient operations? Courts should not forgo these important questions simply for the sake of clarity and predictability. Besides, *Pickering* becomes more predictable when one views courts as applying it differently depending on the type of speech involved.

2. *Pickering* Is More Predictable If One Recognizes Courts Sometimes Treat Public Employee Political Social Media Speech Differently than Whistleblower-Like Social Media Speech

Pickering may not be as unpredictable as scholars argue if one views some of the alleged inconsistencies as courts distinguishing between different types of speech. *Pickering* allows courts to consider the different implications of political speech on social media versus speech about government operations on social media. *Grutzmacher* and *Liverman*, both from the Fourth Circuit, provide a useful comparison to highlight this point. Additionally, the Sixth Circuit seemed to draw a similar line in one of its cases.[256] With this understanding, *Pickering* is more predictable, and also equipped to handle the reality that the public

because they disapprove of it, but because it raises concerns of Plaintiff's prejudice—and the Department's. Appearing to advocate revolution, coming from a police officer charged with upholding law and order, could also undermine confidence in the Department"), *with Goza*, 398 F. Supp. 3d at 323–25 (holding that the employer violated the employee's free speech rights by demoting and terminating him and distinguishing cases that "involve[] an individual responsible with duties more serious than Goza's, including responsibility over life-and-death decisions, supervision of entire City departments, and the setting of City policy. The Court's Opinion should not be understood as disagreeing with these cases or as holding that offensive speech by public employees is always protected; the Memphis Police Department, for example, would likely be acting constitutionally if it disciplined an officer who used a racial slur on the job").

256. Bennett v. Metro. Gov't of Nashville & Davidson Cnty., 977 F.3d 530 (6th Cir. 2020).

interest in certain speech, at the expense of the government's efficiency interests, differs depending on the type of speech.[257]

One student note used the different outcomes in *Grutzmacher* and *Liverman* to argue *Pickering* is "poorly suited for social media cases,"[258] but a closer analysis reveals *Grutzmacher* and *Liverman* are consistent. These two cases are not factually similar. In fact, their factual differences explain why, when it comes to social media, *Pickering* works. *Grutzmacher* involved political and inflammatory speech while *Liverman* involved speech critiquing employer practices.[259] This difference matters.

Liverman involved speech commenting on the public employer's operations of police training and promotion procedures.[260] The court in *Liverman* highlighted that the officers' speech was not just "personal grievance," but was speech contributing to a live public debate about the correctness of promoting inexperienced officers to supervisory roles.[261] The court said whether the department enforces the law effectively and diligently could be relevant to the public.[262] As experienced police officers, their employment gave them a unique perspective on whether the department was enforcing the law effectively.[263] The implication of the officers' speech is that they thought the department's promotion practices impeded the department's ability to enforce the law effectively and diligently.[264] In a democracy, government transparency about its actions and operations is important.[265] In scenarios where social media speech

257. *Infra* note 279.

258. *See* Hopkins*, supra* note 86, at 17–18.

259. Liverman v. City of Petersburg, 844 F.3d 400, 405 (4th Cir. 2016); Grutzmacher v. Howard County, 851 F.3d 332, 338 (4th Cir. 2017).

260. *Liverman*, 844 F.3d at 405.

261. *Id.* at 410.

262. *Id.* at 408.

263. *See id.* at 410 (explaining how the officers grounded the statement in specialized knowledge).

264. *Id.* (describing how the speech expressed concern about the department's ability to effectively carry out its important mission).

265. Press Release, ACLU, ACLU Decries Government Crackdown on Whistleblowers, Calls Transparency Vital to American Democracy (July 28, 2006), https://www.aclu.org/press-releases/aclu-decries-government-crackdown-whistleblowers-calls-transparency-vital-american [https://perma.cc/6FP6-XNS8] ("Transparency should be applauded, not punished. . . . [People] who bring hidden truths to light, letting lawmakers and the American people know when official misconduct has occurred, perform a valuable public service."); *U.S.*

relates to government operations, courts like that in *Liverman* may require the government show more to demonstrate its interests outweigh the employee's, and general public's, interest in the speech.

In contrast, *Grutzmacher* involved an employee posting about gun control and liking a post that could be viewed as supporting racism, both of which were unrelated to his duties as a battalion chief with the county fire department.[266] This difference can and should matter. In this case, the court found in favor of the government under *Pickering* because the speech impaired the department's operations and relationships within the department, conflicted with the employee's job responsibilities, frustrated the employer's mission of public safety, and risked diminishing community trust in the department.[267] Those factors all directly influence the fire department's ability to function properly. The speech also disrespected superiors and upset the chain of command.[268] The court reasoned, therefore, the government had a strong efficiency interest in regulating the speech because discipline, respect, and hierarchy are important for ensuring fire departments perform effectively.[269] However, regardless of the level of disruption, the employee's speech in *Grutzmacher* was not informed by his employment like the speech in *Liverman* was.[270] The Ninth Circuit recognized this reading of

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Transparency and Accountability, COAL. FOR INTEGRITY, https://www.coalitionforintegrity.org/what-we-do/transparency-and-accountability [https://perma.cc/NY97-TAZR] (promoting transparency and accountability in federal, state, and local governments); Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) ("*Government should be transparent*. Transparency promotes accountability and provides information for citizens about what their Government is doing.").

266. Grutzmacher v. Howard County, 851 F.3d 332, 343 (4th Cir. 2017).

267. *Id.* at 345–46.

268. *Id.* at 347.

269. *Id.* (noting the plaintiff disregarded and upset the chain of command in an organization where "discipline is demanded").

270. *Compare id.* at 348 ("Plaintiff's Facebook activity is not of the same ilk as the speech at issue in *Liverman* . . . ."), *with* Liverman v. City of Petersburg, 844 F.3d 400, 410–11 (4th Cir. 2016) (stating "[t]aken together, plaintiffs' statements stand in stark contrast to the sort of [speech] this court has characterized as personal grievances. Each veteran officer ground his statements in specialized knowledge" and expressed serious concerns about officer training and supervision which relate to the Department's ability to effectively carry out its public mission).

Grutzmacher as well.[271] In *Grutzmacher*, the online speech was purely personal, not better informed because of his job, so that weighed against the employee under the *Pickering* analysis.

A case from the Sixth Circuit further supports sometimes treating these two types of speech differently. In *Bennett v. Metropolitan Government*, the Sixth Circuit recognized the different degree of speech protection between these two categories when it applied *Pickering* to a public employee who worked as a telecommunicator for emergency calls.[272] The employee used a racial slur when discussing the 2016 election on Facebook.[273] The court noted that the public employee's comment on the upcoming election was a matter the employee had no special interest in, and the court contrasted that situation to the cases that protect speech "*exposing* inner workings of government organizations to the public" like speech revealing illegal hiring practices or commenting on the operations of a public employer.[274] The court acknowledged the speech in *Bennett* occurred in the context of a political debate, but found *Pickering* required a lesser showing of disruption because the employee's job did not inform her speech.[275] Thus, the speech did not deserve heightened protection under the balancing test.

One way of reading *Bennett* is that, when the government is in the unique position of an employer (i.e., not attempting to regulate all citizens' speech), employees' speech criticizing their employer or discussing the operations of the employer is especially important to the public, as compared to inflammatory political speech, which could be made offline.[276] This conclusion is

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271. *See* Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 907 (9th Cir. 2021) ("[A]t least one court [*Grutzmacher*] has suggested that racially charged comments that have no connection to the government employee's workplace arguably receive less First Amendment protection under the *Pickering* balancing test for government employees." (citing *Grutzmacher*, 851 F.3d at 348)).

272. *See* Bennett v. Metro. Gov't of Nashville & Davidson Cnty., 977 F.3d 530, 539 (6th Cir. 2020) (distinguishing Bennett's speech, which required no special insight, with employee speech that exposed "inner workings" of the government employer).

273. *Id.* at 533.

274. *Id.* at 539.

275. See *id.* (considering the public's interest in the speech and noting Bennett had no special insight informing her comment on the election).

276. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[T]o suggest that teachers may constitutionally be compelled to relinquish the First

supported by the different results of *Grutzmacher* and *Liverman*.[277] The fact that *Pickering* allows for this type of distinction, when factually appropriate, is a further reason it successfully analyzes social media speech.

The public benefit of the speech is an especially salient factor to consider in situations of social media speech since that speech poses a stronger threat to government efficiency interests.[278] Speech like that in *Liverman* should be treated differently than speech like that in *Grutzmacher* and *Bennett* because the public value of the speech, weighed against the risk for disruption or the risk of the public perceiving the employee as unfit for the job, is different.[279] Controversial political speech online may especially threaten the integrity and welcoming environment of government entities.[280] The fact that *Pickering* allows

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Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest *in connection with the operation of the public schools in which they work* . . . proceeds on a premise that has been unequivocally rejected. . . ." (emphasis added)), *with Bennett*, 977 F.3d at 539 (stating "[c]entral to the concept of protecting the speech of government employees is the idea that public employees are the most likely to be informed of the operations of public employers" and noting "Bennett's speech does not garner the high level of protection that the district court assigned to it" because the speech was not related to the operations of the employer).

277. *Compare* Grutzmacher v. Howard County, 851 F.3d 332, 348 (4th Cir. 2017) (concluding the government's employment interests outweighed the employee's free speech rights), *with* Liverman v. City of Petersburg, 844 F.3d 400, 411 (4th Cir. 2016) (concluding the First Amendment protected the officers' posts).

278. *Supra* Part III.A.2.

279. Like *Bennett*, the political speech in *Grutzmacher* was not informed by the Plaintiff's employment, thus making his speech no more or less valuable than any other citizen's speech, whereas the officers' speech in *Liverman* may be especially useful to the public because the officers, given their employment, could provide a perspective on the issue (of police promotions) that no ordinary citizen could. *Compare Bennett*, 977 F.3d at 539 (stating the public lacked interest in the employee's speech because she had no special insight), *and Grutzmacher*, 851 F.3d at 347–48 (finding the public's interest in the Plaintiff speaking about gun control did not outweigh the government's efficiency interests and distinguishing the Plaintiff's speech from speech specifically informed by employment), *with Liverman*, 844 F.3d at 410 (explaining that the public employees' jobs gave them specialized knowledge when speaking on the subject).

280. *See* Durstein v. Alexander, 629 F. Supp. 3d 408, 426 (S.D. W. Va. 2022) (holding the school could terminate an employee for her social media posts which contained prejudice against Muslims). The court in *Durstein* said: "Plaintiff's tweets, which could certainly be seen as discriminatory, diminished the Board's standing with the public, particularly given that they are antithetical

courts to balance and weigh the type of speech differently demonstrates why the standard works when applied to social media speech.[281]

Grutzmacher, *Liverman*, and *Bennett* demonstrate that the type of speech matters when balancing an employee's rights against the government's interests, and *Pickering* appropriately accounts for this.[282] And, it should matter whether the employee's speech is especially important to the public in ensuring government accountability and transparency (speech about government operations) or whether the employee's speech is purely political and especially controversial.[283] While this reasoning is not always used when courts conduct a *Pickering* balancing

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to the Board's mission to provide a safe and nondiscriminatory school environment, as laid out in its policies." *Id.* at 427; *see also Grutzmacher*, 851 F.3d at 347 (upholding an employee's termination in part because the employee's social media comment advocating violence against a class of people, and his like of a comment which could be interpreted as support for racism, reasonably risked diminishing the public's trust in the employee's ability to make fair decisions).

281. The Supreme Court has not said that courts should distinguish between types of speech when analyzing public employees' First Amendment rights, but *Pickering* could support this interpretation, or at least demonstrate such an analysis is plausible. Importantly, *Pickering* did not arise from a public employee expressing views on an upcoming election or political issues, such as climate change, civil rights, et cetera. *Pickering* involved a teacher critiquing his school's handling of finances. *Pickering*, 391 U.S. at 566. The Court wrote that the question of whether the school required additional funding was open to debate by the electorate and teachers, as a class, were most likely (compared to other community members) to have informed opinions on the topic of how school funds should be spent. *Id.* at 571–72. Given this specific expertise, the Court said they should be able to freely speak on these questions without fear of retaliation. *Id.* at 572. It is significant that the first time the Supreme Court recognized some form of First Amendment rights for public employees it did so in the context of a teacher who, because he was a teacher, had a unique view as a citizen on a matter of public concern (school spending). The Court specifically found teachers do not relinquish their free speech rights to "comment on matters of public interest *in connection with the operation of the public schools in which they work*." *Id.* at 568 (emphasis added). Thus, *Pickering* could be read in that context meaning the Court is protecting speech made by a public employee who, because of their employment, is a uniquely situated community member whose speech may be particularly valuable for other community members to hear. Upon this reading, the Fourth Circuit may not be wrong to distinguish between social media speech of a political nature unrelated to one's employment versus social media speech that is more whistleblower-like as the public's interest in the speech, and the threat to the government, may be different between these two types of speech. *See supra* notes 260–72.

282. *See supra* notes 272–82 and accompanying text.

283. *See supra* note 279 and accompanying text.

test,[284] viewing some of the public employee social media speech jurisprudence with this framework provides logic and more predictability to allegedly inconsistent *Pickering* results.

Social media's use and prevalence in society is growing and changing, so courts need a test that can similarly bend to accommodate the unique situations created by each type of speech on social media.[285] Courts cannot make a complete and thorough decision on whether a public employer violated an employee's free speech rights without considering the level of the employee's public connection with the employer, job responsibilities of the employee, and whether the speech relates to government operations or mere politics unrelated and uninformed by one's job.[286] Luckily, these considerations are embedded in the *Pickering* analysis.[287] Consequently, *Pickering* should not be altered or dismissed, even if it means people cannot always predict the outcomes of these cases with 100 percent accuracy.

C. NONE OF THE CONCERNS ABOUT *PICKERING* WARRANT OVERHAULING OR REFORMING IT

Pickering may not please everyone, but the concerns about the standard do not rise to the level of requiring reform or adopting a completely new standard. One concern about *Pickering* is that it gives the government too much power, which could stifle important speech.[288] Protecting speech is important, but not at the cost of allowing speech that legitimately threatens the government's ability to provide services to the public. Additionally, *Pickering* still has safeguards for preventing complete government authoritarianism and only applies when the government is uniquely situated as an employer. Furthermore, a bright-line

284. *See* Goza v. Memphis Light, Gas & Water Div., 398 F. Supp. 3d 303, 319–20 (W.D. Tenn. 2019) (ruling in favor of a public employee who made political speech unrelated to his employment).

285. *See supra* Part II.A (overviewing the impact and magnitude of social media's presence in Americans' day-to-day lives).

286. *Supra* Part III.B.

287. *See supra* Part III.B.1 (describing how *Pickering* allows courts to take into consideration the level of the employee's public connection with the employer, job responsibilities of the employee, and the public's interest in the speech).

288. *See infra* Part III.C.1 (discussing how some people may worry that too much government discretion will lead to an abuse of power and will limit necessary public employee speech).

rule for this area of law is not only infeasible but would also be inadequate in addressing the competing interests involved in cases like these. Finally, a bright-line rule at the federal level risks being too harsh. For that reason, those concerned with *Pickering* should turn towards state constitutional law to tease out the nuances of public employee free speech claims.

1. While *Pickering* Could Restrain Some Useful Speech, It Simultaneously Limits the Harms of Problematic Speech and Has Safeguards to Prevent Government Abuse of the Standard

The fact that *Pickering* is a relatively easy standard for employers to satisfy when dealing with employees' social media speech may worry some. After all, a hallmark of the First Amendment is protecting speech—especially political speech and speech others disagree with—in order to discover truth, add to the marketplace of ideas, and effectuate a democratic self-government.[289] Some worry that government regulation of free speech can lead to inconsistency, and the government may silence important but unpopular views that could hold the government accountable or ignite useful change.[290]

Take, for example, current controversies in Florida. A school district fired a substitute teacher who posted a video of empty bookshelves in a middle school library in response to recent Florida legislation that requires schoolbooks be "age appropriate" for students.[291] The school district cited misrepresentation and disruption as the reasons for the teacher's termination.[292] The fact that social media makes reasonable disruption under *Pickering* easier for employers to establish could be worrisome. This worry is especially justified in situations like this where the

289. Monk, *supra* note 154.

290. Lee Rowland, *Free Speech Can Be Messy, but We Need It*, ACLU (Mar. 9, 2018), https://www.aclu.org/news/free-speech/free-speech-can-be-messy-we-need-it [https://perma.cc/B24S-LBHS] ("[T]he First Amendment . . . is our most powerful tool to keep the government from regulating the conversations that spark change in the world.").

291. Lauren Sforza, *Florida Substitute Teacher Fired over Video DeSantis Called 'Fake Narrative*,*'* THE HILL (Feb. 19, 2023), https://thehill.com/homenews/state-watch/3865612-florida-substitute-teacher-fired-over-video-desantis-called-fake-narrative [https://perma.cc/U28S-XKBT].

292. *Id.*

government acts as the catalyst and then argues its employees' speech, in response to said government action, is disruptive.

Yet, the thorn of free speech is that people cannot have their cake and eat it too. For example, some may want to limit racist, offensive, and inflammatory speech about Black Lives Matter (BLM) made by public employees on social media.[293] But those same people may be upset if the government takes adverse action against its employees' social media speech praising BLM because it equally causes disruption.[294] These two types of speech are different. One is prejudicial while the other is calling for equal rights. But it is not up to courts, or the government, to say which speech is better. In fact, doing so means engaging in unconstitutional viewpoint discrimination.[295] The risk of a standard like *Pickering*, which is an easier standard for public employers to meet when regulating social media speech, is that it could discourage important speech such as support for racial justice initiatives or speech showing ramifications of controversial government action, like the Florida teacher's speech.[296] However, the tradeoff is that hateful and problematic speech can also be regulated. That tradeoff is worth it when it comes to public employment and the need for members in a democracy to feel as though their institutions work fairly and justly for them.[297]

Additionally, while some useful speech may lose under *Pickering*, *Pickering* still requires the government show a reasonable

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293. *See* Hudson, *supra* note 32 (highlighting scenarios where public employers disciplined employees for derogatory social media comments about protestors and BLM).

294. *See* Ginia Bellafante, *They Criticized the N.Y.P.D. It Cost Them Their Jobs*, N.Y. TIMES (Feb. 11, 2022), https://www.nytimes.com/2022/02/11/nyregion/nypd-social-media-teachers-fired.html [https://perma.cc/PH54-T9XG] (discussing a private school teacher who was fired after she posted support of Black Lives Matter and criticized the school's "dress down" day which sought to raise money for the families of two police officers who died).

295. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Viewpoint discrimination is "[c]ontent-based discrimination in which the government targets not a particular subject, but instead certain views that speakers might express on the subject; discrimination based on the content of a communication." *Viewpoint Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019).

296. *See supra* note 291 and accompanying text.

297. *See supra* Part III.A.1.

threat to its efficiency interests, as already discussed.[298] Therefore, the teacher's speech in Florida, if challenged under the First Amendment, could pass *Pickering* depending on what the government offers (or does not offer) about why the speech threatens its interests.[299] While the government may be able to satisfy *Pickering* fairly easily for social media speech, that does not mean the government always will.[300]

Finally, to address concerns that *Pickering*, as applied to social media speech, could hinder the free marketplace of ideas and democracy by unduly limiting public employee speech, *Pickering* is limited to the unique circumstance of public employment. First, public employees could engage in the same speech in a different manner, just not online where the risk to employers' efficiency interests is especially salient.[301] Second, *Pickering* only applies when the government is in a unique role of an employer, and that relationship matters. As *Pickering* recognizes, the employer-employee relationship forces a balancing test that is not needed when the government is in a purely citizen-sovereign relationship with an individual. Third, the concern for speech stifling should be eased by the reality that *Pickering* rarely applies to begin with. As of May 2020, private sector jobs constituted eighty-five percent of employment in the United States.[302] As a result, most of the time the government is not in the unique situation of being an employer. For these reasons, concerns about *Pickering* restraining useful speech are not strong enough to warrant overhauling the standard.

298. *Supra* Part III.A.3.

299. *See, e.g.*, Agnew v. St. Louis County, 504 F. Supp. 3d 989, 999–1000 (E.D. Mo. 2020) ("But Defendants make no argument that prohibiting Plaintiffs' speech would have promoted governmental efficiency, so the Court has nothing against which to balance Plaintiffs' interests. Under the circumstances, the Court finds that Plaintiffs have pleaded sufficient interest in speaking out to satisfy *Pickering*.").

300. *Supra* Part III.A.3.

301. *See supra* Part III.A.2 (arguing the government's interest is greater in cases of social media speech than in-person speech).

302. Audrey Watson, *Occupational Employment and Wages in State and Local Government*, U.S. BUREAU OF LAB. STATS. (Dec. 2021), https://www.bls.gov/spotlight/2021/occupational-employment-and-wages-in-state-and-local-government [https://perma.cc/Z6QK-XL7J].

2. Those Who Prefer a More Bright-Line Rule Should Turn to State Constitutional Law Rather than Federal Constitutional Law

While some may find discomfort in *Pickering*'s flexibility and balancing, the reality is a more bright-line rule,[303] like an actual disruption standard,[304] is inappropriate in these cases. Certainly bright-line rules can be advantageous at times.[305] Bright-line rules are more straightforward and easier for judges to apply because an objective rule resolves the legal question.[306] As a result, bright-line rules lead to more predictable outcomes,[307] and thus employers and employees could, in theory, adjust their behavior accordingly to avoid lawsuits. Surely those are positive consequences of adopting such a rule, but the reality is that doing so in these cases is impractical.[308]

Pickering's balancing test is preferable to a bright-line rule because the nuances of public employee social media speech and First Amendment protections are not well suited to bright-line rules. The free speech rights of public employees, at their core, are not straightforward, so a bright-line rule does not work.[309] These cases will always involve two important, but competing, interests, which are the public employee's free speech rights and the government's interest in operating efficiently so it can

303. "A bright-line rule is an objective rule that resolves legal questions in a straightforward, predictable manner." *Bright-Line Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/bright-line_rule [https://perma.cc/JMV8-PKDP] (last updated June 2022).

304. Hopkins, *supra* note 86, at 22 (arguing for an actual disruption standard because "it creates a bright line rule. . . . [and] will protect more speech by placing a higher burden on the government employer").

305. *See* Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 143 (1993) (arguing for the return of the "bright line" rule of *Miranda* because "it is the bright line nature of the rule which makes it work reasonably well," particularly in providing law enforcement more clarity in how they should conduct themselves to avoid violating the right against self-incrimination).

306. *Bright-Line Rule*, *supra* note 303.

307. *See id.*

308. *Infra* notes 309–14 and accompanying text.

309. Abel, *supra* note 33, at 1221 ("[T]ough calls and difficult line drawing are hallmarks of First Amendment law. These challenges are not indications that *Pickering* is broken or misguided. Nor is there a better alternative to balancing.").

properly serve the public.[310] While *Pickering* may not always be predictable and may allow for some subjectivity, that is a feature of the situation it seeks to grapple with, rather than an indication the test is ill-suited to address the problem.[311] The ambiguity and room to address the specific facts of a case are why *Pickering* is an appropriate test for analyzing public employee free speech rights on social media.[312] The situations before the courts are not simple, so the legal test cannot be either.[313] The test must be fact-specific and allow for a nuanced analysis of equally important, but competing, considerations.

Those who do not find this reasoning adequate nonetheless should take up their issues with state constitutional law. All states have some version of free speech protection in their constitutions.[314] This means plaintiffs, in all fifty states, already have an additional constitutional avenue for challenging speech infringements. States must abide by federal constitutional law, but are free to interpret their state constitutions independently, so state constitutions could provide more free speech protection than the Federal Constitution.[315] Therefore, the solution to the concerns highlighted in this Note are best addressed by leaving *Pickering* intact for federal claims and using state constitutions to hash out areas where *Pickering* falls short.[316]

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310. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (noting the importance of balancing public and private interests).

311. *Id.* at 569 ("Because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.").

312. *See supra* Part III.B.

313. *See supra* Part III.B.1 (explaining that who the employee is, what their job duties are, and how much the speech conflicts with those job duties affects how an employee's speech impacts the public employer's interest in regulating that speech).

314. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 134 (2018) ("[A]ll States have free speech and free exercise guarantees of one sort or another . . . .").

315. *See id.* at 16 ("State courts have authority to construe their own constitutional provisions however they wish. . . . As long as a state court's interpretation of its own constitution does not violate a federal requirement, it will stand . . . ."); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

316. *See infra* notes 317–21 and accompanying text.

State constitutional law is better equipped to handle some of the concerns addressed in this Note as opposed to federal constitutional law. State constitutions may be the better vehicle for addressing the nuances of public employee speech on social media because states do not have the same constraints or concerns about adopting bright-line rules since those rules affect substantially fewer people.[317] Additionally, states can better manage enforcement of new individual rights.[318] With *Pickering* as the federal standard instead of a harsh rule, states can experiment with their own solutions for this area of law, an area filled with inherent tension.[319] Finally, states can consider local conditions and traditions when analyzing how to interpret free speech for public employees, which may be especially useful in this context where community perceptions of the employee and speech matter when determining the constitutional outcome.[320] For all of these reasons, those concerned that *Pickering* does not do enough to protect public employee free speech should take their concerns to the state. Federally, *Pickering* remains a successful and proper legal standard for analyzing public employee social media speech.[321]

CONCLUSION

Pickering should not be changed to deal with social media speech because it already strikes the right balance between two conflicting and equally important interests. Using *Pickering*,

317. *See* SUTTON, *supra* note 314, at 16 ("Because the Supreme Court must announce rights and remedies for fifty States, one national government, and over 320 million people, it is more constrained than a state supreme court faced with an issue affecting one State, and, say, twelve million people.").

318. *See id.* at 17 (arguing that state supreme courts do not face the same enforcement issues of new rights as the United States Supreme Court).

319. *See id.* at 17–18 (discussing how innovation by one state poses no risk to other states and arguing easier constitutional amendment procedures and judicial elections allow remedies for mistaken or ill-conceived state constitutional decisions).

320. *See id.* at 17 (noting "[s]tate courts also have a freer hand in . . . allowing local conditions and traditions" to guide interpretation); *supra* Part III.B.1 (understanding how the public views an employee, the employer, and the speech at issue is integral when balancing the free speech rights of the employee against the public employer's interest in efficiency).

321. *Supra* Parts III.A–B (describing the strengths of a nuanced approach under the reasonable burden scheme of *Pickering* that allows the balancing of varied interests).

courts properly hold the government can regulate employee speech when the speech reasonably threatens the government's interest in operating efficiently. Simultaneously, *Pickering* protects employees by requiring the government provide evidence it acted reasonably. Accordingly, despite the criticisms, *Pickering* leads to legally correct outcomes when analyzing public employee social media speech, particularly controversial political speech.

Pickering is the proper legal standard for analyzing public employee social media speech precisely because, when appropriate, it gives the government more power to address harmful social media speech. The government is not just an employer operating for profit, but instead is a democratic institution.[322] Therefore, the government has a special interest in cultivating and sustaining public confidence in both its employees and the public employer more broadly.

Public employees' inflammatory social media speech threatens these interests more than in-person speech because social media speech can go viral and can be captured permanently. Moreover, public employees can make social media posts in a matter of seconds, thus increasing the likelihood the speech is rash and ill-thought out.[323] Because of those unique features of social media speech, and because America's current political climate is highly polarized, employers can fairly easily demonstrate controversial political speech on social media threatens its efficiency interests. This is not a bad thing, but instead demonstrates *Pickering* properly accounts for the unique circumstances of social media in the government employment context. *Pickering* acknowledges the importance of ensuring the public views its democratic government—and the services it provides—as just, fair, and competent. Without such a standard, public employee social media speech could harm public employers, and the general public, if the government can no longer function efficiently and people do not believe it operates fairly.

Concerns about *Pickering* being too unpredictable or uncertain are overblown. A bright-line rule for these claims would be inappropriate. This area of law, by its nature, involves balancing the competing interests of an individual's free speech rights and the government's—and public's—interest in a well-functioning

322. *See* Lincoln, *supra* note 194.

323. *See supra* text accompanying note 218.

government. *Pickering* properly allows for important considerations like how publicly connected a government employee is with the employer and how much the speech conflicts with an employee's job duties. Further, public employee social media speech jurisprudence is more consistent when viewed as courts sometimes weighing political speech unrelated to an employee's job differently than speech highlighting important concerns about the employer. Thus, *Pickering* leads to more well-reasoned conclusions, and that is more important than a consistent rule that leads to less comprehensive results.

The rise of social media and its unique characteristics justify a renewed discussion of how courts should analyze public employees' free speech rights for social media speech. Social media has changed the world. And while scholars, courts, and the legal community should always revisit legal doctrines as the world changes, it is also important to remember the old adage, "If it ain't broke, don't fix it."[324]

324. This proverbial saying is "used to say that one should not try to change something that is working well." *If it ain't broke, don't fix it*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/if%20it%20ain%27t%20broke%2C%20don%27t%20fix%20it [https://perma.cc/2VLB-Q7EN].