NOTE

Click at Your Own Risk: Free Speech for Public Employees in the Social Media Age

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ABSTRACT

An individual's right to exercise free speech is one of the most fundamental rights guaranteed by the Constitution. However, individuals who work for the government do not receive the same protections over their speech as private citizens. Their speech is protected to a lesser degree, and if a public employee challenges a silencing of their speech, this action is subject to the Pickering test, a multistep balancing test that is convoluted and inconsistent across federal circuits. As so much of speech is made online through social media, it is even more important that courts utilize a consistent test. This Note discusses the evolution of the Pickering test and looks to its application in modern social media cases. Additionally, this Note argues that a modified Pickering test requiring an "actual disruption" standard of evidence and abandoning the "private citizen" requirement is necessary to clarify the test's application and to create consistent outcomes.

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INTRODUCTION

Imagine that you are a government employee who innocently makes a Facebook post from your house, critiquing your boss and the office's work policies. Even more, imagine that you simply "like" a Facebook post that critiques your office. You never intended for anyone from the office to see the post and never intended to create a disruption in the office. You only wanted to use Facebook as a way to speak your opinion. Your boss sees the post online and fires you, leaving you unable to provide for your family.

Social media is a rapidly changing industry that affects everyone in some way each and every day. Facebook is estimated to have around 2.37 billion users.[1] Of the 2.37 billion, approximately 39 million of those users

[1] *See* Andrew Hutchinson, *Facebook Reaches 2.38 Billion Users, Beats Revenue Estimates in Latest Update*, SOC. MEDIA TODAY (Apr. 24, 2019), https://www.socialmediatoday.com/news/facebook-reaches-238-billion-users-beats-revenue-estimates-in-latest-upda/553403/ [https://perma.cc/3G72-UY55].

are active users who report using the social media platform every day.[2] Where litigation concerning speech on these platforms is involved, courts can hardly keep up with the rapid progress of technology.[3] With fast-paced advances to social media, and technology in general, comes a need for a uniform standard in implementing the applicable balancing tests for public employees' speech on these sites, which is treated differently than private citizens' speech.

The primary source for analyzing a public employee's speech is a pre-social media balancing test set forth in the case *Pickering v. Board of Education*.[4] The *Pickering* test has been modified multiple times since its inception, with courts adding new threshold requirements and emphasizing different standards.[5] Lower courts have varied greatly in interpreting relevant factors for the test, with little to no guidance from the Supreme Court in how to interpret its decisions.[6] Currently, the test to determine whether a public employee's speech is protected depends on whether (1) the speech at issue was a "matter of public concern," (2) the employee made the speech at issue "pursuant to [the employee's] official duties," and (3) the employee's interest in making the statement outweighs the government's interest in regulating the speech.[7]

The two most prevalent issues with the *Pickering* test lie in the official duties threshold—also referred to as the private citizen requirement—and in balancing the employee's and employer's interests in the speech. Under the private citizen requirement, a public employee must be speaking as private citizen for their speech to even reach the balancing portion of the test, but there is no uniform framework for how a court should balance the competing interests.[8] Federal circuit courts are split in their balancing analyses; some circuits use a "plausible disruption" or "potential disruption" standard to evaluate the impact of the speech at issue in the workplace, while other circuits use an "actual disruption" standard.[9] Although the lack of clarity and

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2 *See id.*

3 *See* Julia Griffith, *A Losing Game: The Law is Struggling to Keep Up with Technology*, J. HIGH TECH. L. (Apr. 12, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology/ [https://perma.cc/UGJ4-YYVB].

4 391 U.S. 563, 568 (1968).

5 *See infra* Part I.

6 *See infra* Sections I.C–D.

7 *See* Lane v. Franks, 573 U.S. 228, 236–37 (2014) (quoting Garcetti v. Ceballos, 547 U.S. 410, 418, 421 (2006)) (describing the elements of the *Pickering* balancing test).

8 *See Garcetti*, 547 U.S. at 421.

9 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, 434 (2019). *Compare* Jurgensen v. Fairfax Cnty., Va., 747 F.2d 868, 879 (4th Cir. 1984) (adopting a standard in

inconsistent implementation are concerns for analyzing any type of public employee's speech, it is even more problematic in social media cases where speech often has a larger audience. An unclear test can lead to a chilling effect on speech, causing public employees to refrain from posting job-related comments on social media sites in direct contrast to the interests of the First Amendment.

The *Pickering* test should be modified for clarity and consistency to provide better protection for all public employees' speech. Part I of this Note discusses the evolution of the *Pickering* test from its introduction in 1968 through its latest modification in 2006. Part II of this Note considers both the plausible disruption and actual disruption standards and how they are applied to cases involving public employees' speech on social media platforms. Part II also discusses the implications of the threshold requirement that the speech be made as a private citizen. Part III suggests that the Supreme Court clarify the *Pickering* test to definitively require an actual disruption standard and abandon the "official duties" threshold altogether. This Note concludes that in the interest of consistency and upholding fundamental free speech rights, these modifications are necessary to keep up with the ever-changing landscape of technology and social media.

I. BACKGROUND

Public employees of the federal and state government do not have the same protection over their speech as private individuals.[10] The *Pickering* test is a tool courts use to analyze when a public employee's speech is protected under the First Amendment, and it has evolved numerous times over the years. Today, the circuits are split over two crucial aspects of the test—when an employee is speaking as a private citizen and the level of disruption necessary in the workplace for the speech to be protected.

A. Introduction of the Pickering *Test*

Prior to 1968, the Supreme Court had unequivocally rejected the idea that public employment could be conditioned on relinquishing constitutional rights such as those under the First Amendment.[11] In 1968 the Court determined that public employees' First Amendment rights are not

which "it is sufficient that such damage to morale and efficiency is reasonably to be apprehended" by the workplace due to an employee's speech), *with* Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (adopting an "actual disruption" standard).

10 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

11 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) (explaining the Court's cases rejecting this notion and holding that teachers cannot be compelled to give up their First Amendment right of association for employment).

limitless.[12] However, the Court has long acknowledged that any restrictions on First Amendment rights should be narrowly construed.[13] Since 1968, the extent to which public employees' speech has qualified for protection under the First Amendment has varied greatly.

The Court established a limit on public employees' free speech rights in *Pickering v. Board of Education*,[14] setting forth a balancing test that is still used today to determine whether the speech at issue is protected.[15] In *Pickering*, an Illinois school board fired a teacher for sending a letter to the local newspaper criticizing the policies of the school where he was employed, which the newspaper published.[16] The Court recognized that public employees have an interest in being able to state their opinions on matters of public concern, while the government has an interest in regulating these statements in order to operate efficiently.[17] After weighing the two interests in question, the Court found that Pickering's right to criticize the school's policies outweighed the school's interest in firing him because his letter did not present a threat of harming his relationships with coworkers at the school, seeing as it was directed at the Board.[18] However, the Court did not establish specific criteria to use when balancing the two interests beyond looking to the impact on efficiency in the workplace.[19]

B. Establishing a Public Concern Threshold

Fifteen years after the *Pickering* test was established, the Court added a new threshold to the test. In the case of *Connick v. Myers*,[20] Connick was terminated after she opposed the transfer of her position as a District Attorney to a different section of the court.[21] In response to the proposed

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12 *See Pickering*, 391 U.S. at 568. A public employee is defined as "a person who is employed by a government agency and includes the employees of a municipal, county, state, or federal agency or state college or university." *Public Employee Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/p/public-employee/ [https://perma.cc/3Y8A-5L54].

13 *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (stating that the government may reasonably regulate speech if the restriction on speech is "narrowly tailored" so that it benefits a "legitimate, content-neutral" interest).

14 391 U.S. 563 (1968).

15 *See id*. at 568.

16 *See id.* at 564.

17 *See id.* at 568 (determining that the relevant interests are the interests of the employee, as a citizen, in bringing attention to matters of public concern and the interests of the employer, the government, in promoting efficiency in the workplace).

18 *See id.* at 569–70. The Court also took special note of the fact that there was no evidence of an actual detrimental effect to the school. *See id.* at 571.

19 *See id.* at 568–73.

20 461 U.S. 138 (1983).

21 *See id.* at 140.

transfer, she distributed questionnaires around the office to poll her fellow employees' satisfaction with the office's transfer policy and gauge their opinions on other aspects of the workplace, which later constituted the grounds for her termination.[22] *Connick* clarified the *Pickering* test by creating a threshold requirement that a public employee's speech must relate to a "matter of public concern" to be protected.[23] The Court indicated that government employers should "enjoy wide latitude in managing their offices" where an employee's speech does not relate to "any matter of political, social, or any other concern to the community."[24] The *Connick* Court clarified its public concern requirement, stating that a court should examine specific factors such as the manner, time, place, and context of the speech in question to determine if it qualifies as an issue that would concern the public.[25] Once it is determined that the speech at issue relates to a matter of public concern, then the court can analyze it using *Pickering*'s balancing test.[26]

Looking to the "content, form, and context of a given statement," the Court found that the Connick's questionnaires were not a matter of public concern because she was not informing others about wrongdoing or impropriety within the office.[27] Ultimately, the Court found that the questionnaire showed nothing more than one employee's frustration with office policy, which did not qualify as protected speech.[28]

Four years later, the Court construed the public concern threshold broadly.[29] In *Rankin v. McPherson*,[30] an employee in the local constable's office, McPherson, was terminated after making comments about her hope that the President would be assassinated.[31] The Court determined that McPherson's comments were plainly a matter of public concern because they were spoken in the context of the presidential administration's policies and "an attempt on the life of the President."[32] Although personally threatening the President is not protected speech, the Court held that whether

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22 *See id.* at 140–41.

23 *Id.* at 146.

24 *Id.*

25 *Id.* at 152–53.

26 *See id.* at 146.

27 *See id.* at 147–48.

28 *See id.* at 148.

29 *See* D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 255 (1990) ("The result [of *Rankin*] is that the *Pickering/Connick* test for deciding public employee free speech cases now applies to a broad spectrum of public employee speech").

30 483 U.S. 378 (1987).

31 *See id.* at 379–80.

32 *Id.* at 386.

or not a statement is controversial is wholly irrelevant to evaluating the public concern threshold.[33] By clarifying that controversial speech may still be entitled to First Amendment protection if it relates to a matter of public concern, *Rankin* broadened the definition of public concern itself.[34] This broad definition makes it easier to reach the next step in the *Pickering* test—the private citizen requirement.

C. Establishing a Private Citizen Requirement

The Supreme Court narrowed public employees' speech protection considerably by adding an additional requirement nineteen years after its broad reading of "public concern" in *Rankin*. The Court in *Garcetti v. Ceballos*[35] held that in order for the speech in question to be protected, the public employee must not have made the statement while acting "pursuant to their official duties."[36] Instead, they must have been speaking as a private citizen to receive First Amendment protection.[37] However, because the terminated employee in *Garcetti* conceded that the memorandum he prepared and was later fired for was an ordinary task of his official duties,[38] the Court did not provide a framework or analysis to determine when an employee is speaking "pursuant to their official duties."[39] The only guidance

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33 *See id.* at 387; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (considering the case based on the "principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

34 *See* 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, 238 (2018) (noting that the *Rankin* Court's protection of controversial speech about the assassination of a President significantly broadens the definition of public concern and creates an advantage for speech that is purely private). In addition to clarifying what constitutes public concern, *Rankin* also set forth several factors for weighing interests under the balancing portion of the *Pickering* test. *See Rankin*, 483 U.S. at 388. Pertinent factors to consider include whether the statement affects relationships between co-workers or superiors, whether it impacts relationships that require personal confidence, or whether it impairs the employee's job performance or the employer's operations. *See id.* The primary purpose of these factors is to establish whether or not the speech in question affects the overall ability of the office to function. *See id.*

35 547 U.S. 410 (2006).

36 *Id.* at 421 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

37 *See id.*

38 *See id.* at 424. The terminated employee, Ceballos, worked as a deputy district attorney in Los Angeles, where he was asked to review a case involving an inaccurate affidavit. *Id.* at 413–14. After reviewing the affidavit, Ceballos confirmed that it contained inaccuracies and wrote a memo to that effect. *Id.* at 414.

39 *Id.* at 421.

the Court offered was its assertion that formal job descriptions are neither a necessary nor sufficient indicator of determining an employee's duties.[40]

The Supreme Court later revisited the official duties threshold in *Lane v. Franks*.[41] Although the case gives slightly more insight into the Court's reasoning behind the official duties test and what the term means, the Court failed again to set forth a clear framework. Lane alleged that he was terminated in violation of the First Amendment due to his testimony against a different employee in court proceedings.[42] Reversing the Eleventh Circuit's determination that Lane was speaking pursuant to his official duties because he learned the information that he testified to through his employment, the Supreme Court limited the holding in *Garcetti*.[43] The key determinant of whether a public employee is speaking pursuant to their official duties is whether the speech in question is within the scope of an employee's ordinary duties.[44] This critical question emphasizes that just because speech relates to employment or concerns information learned during employment, it does not automatically qualify it as speech pursuant to one's official duties.[45] While some scholars acknowledge that the decision in *Lane* was a necessary move toward protecting speech for public employees,[46] the case was fact intensive and decided on very narrow grounds.[47]

Because the Supreme Court has not outlined a clear framework, it has left lower courts confused.[48] Several Circuits have tried creating frameworks clarifying when an employee is speaking pursuant to their official duties, but

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40 *See id.* at 424–25.

41 573 U.S. 228 (2014).

42 *See id.* at 234. Lane worked as a Director of a youth center in Alabama that was experiencing financial problems. *See id.* at 231–32. Before his termination, Lane testified on multiple occasions regarding another employee's termination. *See id.* at 232–33. The employee in question was an Alabama State Representative who was on payroll at the youth center. *See id.* at 232. After an audit disclosed that the Representative's actions handling the finances were illegal, Lane fired her and the Federal Bureau of Investigation initiated an investigation into her misconduct. *See id.* Lane's boss subsequently fired him, allegedly in retaliation for his testimony, and refused to rescind the termination. *See id.* at 233.

43 *See id.* at 239. The Court also noted that public employees are usually in the best position to learn information related to their position, and that it is necessary to be able to speak about this information without restraint from fear of termination. *See id.* at 240.

44 *Id.*

45 *Id.* at 239–40.

46 *See* Laura Dallago, Note, *Silence or Noise?: The Future of Public Employees Free Speech Rights and the United States Supreme Court's Jurisprudence on the Scope of the Right*, 22 WASH. & LEE J. C.R. & SOC. JUST. 239, 257 (2016).

47 *See Lane*, 573 U.S. at 247 (Thomas, J., concurring) (stating that the facts of *Lane* present a "discrete question" and noting that Lane testifying was not pursuant to his official duties because "his responsibilities did not include testifying in court proceedings").

48 *See* Sara J. Robertson, Note, Lane v. Franks*: The Supreme Court Frankly Fails to Go Far Enough*, 60 ST. LOUIS U. L.J. 293, 308 (2016).

they do not consistently prioritize the same factors.[49] For example, the Seventh, Tenth, and Eleventh Circuits look to the employee's role in the context of the circumstances surrounding the speech at issue.[50] For example, in a scenario where two employees emailed their boss complaining about their workload, the employees were speaking pursuant to their official duties because the circumstances of the email showed that their goal was to improve their work environment.[51]

Alternatively, the Fifth Circuit uses a "chain of command" analysis, which holds that if the employee communicates about their employment to a supervisor, it is considered speech pursuant to the employee's official duties.[52] Similarly, the Ninth and Tenth Circuits look to whether the speech at issue is "external," meaning whether the speech was made outside of the workplace.[53] Under this external speech analysis, if an employee speaks outside of the workplace and the speech is not required by the employee's job, the employee is speaking as a private citizen, not pursuant to their official duties.[54] However, no one test or set of factors is applied uniformly by the circuits in interpreting the scope of an employee's official duties.[55]

D. The Circuit Split Over the Evidentiary Standard Required Under the Balancing Test

Once a public employee's speech has met the requirements of the public concern threshold and private citizen requirement, the court reaches the balancing part of the *Pickering* test.[56] Just as the private citizen requirement is unclear, the balancing portion of the test is similarly vague. In interpreting

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49 *See* Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 847–49 (2011).

50 *See* Abcarian v. McDonald, 617 F.3d 931, 937 (7th Cir. 2010) (emphasizing a practical approach that considers the employee's job responsibilities, as well as the context of the speech); Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010) (stating that an "official duties" analysis should be applied on a "case-by-case" basis that looks to the content and audience of the employee's speech); Boyce v. Andrew, 510 F.3d 1333, 1343 (11th Cir. 2007) (per curiam) (determining that the "form and context" of the employees' speech evidenced an intent to only speak about matters related to their jobs).

51 *See Boyce*, 510 F.3d at 1346.

52 Davis v. McKinney, 518 F.3d 304, 313 (5th Cir. 2008).

53 *See* Keenan, *supra* note 49, at 851; *see also* Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006) (holding that an employee's complaint to a state senator and state inspector general about experiencing sexual misconduct in the prison she worked at was not made pursuant to her official duties); Thomas v. City of Blanchard, 548 F.3d 1317, 1325 (10th Cir. 2008) (holding that a city home inspector's threat to report to local law enforcement about fraudulent occupancy certificates issued by his superior was not within the scope of his official duties).

54 *See Thomas*, 548 F.3d at 1325; *Freitag*, 468 F.3d at 545.

55 *See* Keenan, *supra* note 49, at 852.

56 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

the balancing test—which weighs the employee's interest in free speech against the employer's interest in an efficient workplace—circuit courts look to a myriad of different factors.[57] While most circuits interpret the balancing test as imposing a "plausible" or "potential disruption" standard,[58] a minority of circuits believe that evidence of an "actual disruption" is required for the government employer to prevail.[59]

1. Majority Approach: The Plausible Disruption Standard

A majority of circuit courts have determined that in balancing a public employee's interest in free speech with an employer's interest in maintaining an efficient work environment, the key determination is whether or not the speech could plausibly cause a disruption in the workplace.[60] Even among the majority of circuit courts, however, there is still little consensus on what factors to apply, leading each circuit to use its own set of factors.

The Fourth Circuit utilizes the most extensive set of balancing test factors, numbering nine in total, to determine whether a potential disruption occurred in the workplace.[61] Most importantly, the court looks to the impact of the speech on relationships between the employees and their supervisors or colleagues, and whether it affects the efficiency of the workplace.[62] If the court finds evidence of a potential disruption, it is enough to tip the balance in favor of the government employer's interests instead of the employee's,

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57 *Compare* Gillis v. Miller, 845 F.3d 677, 687 (6th Cir. 2017) (looking to "whether the employer could reasonably predict that the employee speech would cause disruption"), *with* Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (looking to whether the speech had an actual effect on coworker harmony and loyalty, the employee's efficiency, and operations of the workplace); *see also* Olaya, *supra* note 9, at 438 (2019) (explaining balancing test in *Pickering*).

58 *See, e.g.*, *Gillis*, 845 F.3d at 687.

59 *Schalk*, 906 F.2d at 496.

60 *See Gillis*, 845 F.3d at 687.

61 *See* McVey v. Stacy, 157 F.3d 271, 278 (4th Cir. 1998) (utilizing nine different factors in applying the *Pickering* balancing test); *see also* Jurgensen v. Fairfax Cnty., Va., 745 F.2d 868, 879 (4th Cir. 1984) (holding that "it is sufficient that such damage to morale and efficiency is reasonably to be apprehended" to justify favoring the employer's interests over the employee's free speech interests). In *Jurgensen*, the court considered the plaintiff's distribution of an inspection report concerning his employer, the police department, enough to meet the plausible disruption standard. *See id.* at 884. However, the dissent argued that distributing the report could not have possibly disrupted the office. *See id.* at 894. (Butzner, J., dissenting).

62 *Id.* (evaluating whether the speech in question impacts supervisor relationships, impacts colleagues' relationships, impairs "close working relationships," impairs the performance of job responsibilities, impacts the agency's ability to function, undermines the agency, was spoken privately, conflicts with job duties, or is necessitated as a means of public accountability (quoting *Rankin v. McPherson*, 483 U.S. 378, 388–91 (1987))).

because the court believes that preventing potential office disruption outweighs an employee's interest in free speech.[63]

The rest of the circuit courts in the majority have adopted similar, but usually more condensed, sets of factors.[64] In particular, the Third Circuit identified just four factors to weigh the disruption of workplace efficiency.[65] The most recent addition to the majority is the Sixth Circuit, which expressly declined to adopt the minority position used by the Tenth Circuit, but did not explicitly adopt another circuit's factors for the balancing test.[66] In doing so, the Sixth Circuit based its concept of the potential disruption standard on the idea that ensuring workplace harmony meant that an employer does not need to wait for an actual disruption before acting to terminate the employee.[67] Despite the different approaches each circuit uses in the balancing test, the factors similarly focus on the extent that speech affects workplace efficiency, leading each to only require a potential disruption in the workplace rather than an actual one.

2. Minority Approach: The Actual Disruption Standard

The Tenth Circuit is alone in holding that the balancing test does in fact require proof of an actual disruption in the workplace, rather than just a possibility of disruption.[68] In *Schalk v. Gallemore*,[69] an employee of a municipally-owned hospital, Schalk, became concerned about the operations of the hospital.[70] After she submitted a letter of concern to the hospital board members, she was reprimanded for raising concerns that were beyond the

63 *See McVey*, 157 F.3d at 277.

64 Overall, the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits take the majority approach of the plausible disruption standard. *See id.*; *Gillis*, 845 F.3d at 685; Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 472 (3d Cir. 2015); Lewis v. Cowen, 165 F.3d 154, 163 (2d Cir. 1999); Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 979–81 (9th Cir. 1998); Shahar v. Bowers, 114 F.3d 1097, 1108 (11th Cir. 1997); Wallace v. Benware, 67 F.3d 655, 661 n.8 (7th Cir. 1995); Tindle v. Caudell, 56 F.3d 966, 971–73 (8th Cir. 1995).

65 *See* Dougherty v. Sch. Dist. of Phila., 772 F.3d 979, 991–93 (3d Cir. 2014) (analyzing speech under the factors of whether it impairs harmony, has a harmful effect on relationships within the office, impairs execution of the employee's job duties, or impacts the operation of the business).

66 *See Gillis*, 845 F.3d at 686 (rejecting the idea that an actual disruption standard was "obvious" under *Pickering* and *Rankin* because neither explicitly stated the evidence of disruption required).

67 *See id.* at 687.

68 *See* Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990).

69 906 F.2d 491 (10th Cir. 1990).

70 *See id.* at 492. Schalk specifically became concerned over what she considered to be inefficiency and unfairness under the leadership of the chief administrator. *See id.*

responsibilities of her job.[71] Subsequently, Schalk informally raised more concerns about waste and inefficiency to a board member, and the chief administrator terminated her employment due to the letter and informal discussion.[72]

Once the court determined that Schalk's complaint met the public concern threshold,[73] it moved on to the balancing portion of the *Pickering* test.[74] Relying on a previous Tenth Circuit case, the *Schalk* court held that the First Amendment protects a public employee's free speech rights unless an employer can demonstrate that a restriction on speech is necessary to prevent disruption in the workplace or to guarantee efficient performance.[75] This holding required the employer to produce evidence that an "actual disruption" occurred; otherwise, the balancing test favored the employee.[76] Because the chief administrator asserted that Schalk's comments created hostility but did not submit evidence of "disruptive confrontations," nor any evidence showing that Schalk's work suffered, the chief administrator failed to show that Schalk's speech caused an actual disruption.[77] Schalk's speech was thus protected under the First Amendment because without evidence that it caused an actual disruption, Schalk's interest in free speech was deemed to outweigh the employer's interest in regulating it.[78]

The decision in *Schalk* and the adoption of an actual disruption standard paved the way for a relatively clear application of the balancing test within the Tenth Circuit. When this standard was later applied in the First Amendment case of *Casey v. West Las Vegas Independent School District*,[79] the Tenth Circuit easily determined that because the public employee's concerned comments about her school district did not threaten her office's work, morale, or decision making, there was no actual disruption and the

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71 *See id.* at 493.

72 *See id.* at 493–94.

73 *See id.* at 495–96 (determining that Schalk's concerns about waste, efficiency, and favoritism were clearly made out of her concern as private citizen in order to raise awareness on public issues).

74 *See id.* at 496. The balancing part of the test is second here because in 1990 the private citizen requirement had not yet been established. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). The goal of the balancing test, as stated in *Pickering*, is to balance the "interests of the [employee], 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." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

75 Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (citing Melton v. City of Okla. City, 879 F.2d 706, 715–16 (10th Cir. 1989), *vacated and remanded on other grounds*, 928 F.2d 920, 922 (10th Cir. 1991) (en banc)).

76 *Id.*

77 *Id.* at 496–97.

78 *See id.* at 497.

79 473 F.3d 1323 (10th Cir. 2007).

speech in question was protected.[80] In *Weaver v. Chavez*,[81] a public employee's pattern of complaining about new employees and investigating their qualifications caused a disruption in the office because it hurt office morale and stunted hiring, justifying the employer's steps to discharge her to protect the efficient operations of the workplace.[82]

While acknowledging that some courts require only a possibility of disruption, the Tenth Circuit has consistently used the actual disruption standard, resting on its belief that actual disruption is an "obvious requirement" of *Pickering* and *Connick*.[83] Additionally, current Supreme Court Justice Sotomayor has indicated a preference for the actual disruption standard. Her dissenting opinion in *Pappas v. Giuliani*[84] supports the Tenth Circuit's rationale in adopting an actual disruption standard.[85] Using the Supreme Court's reasoning in *Rankin*, she stated that a potential disruption standard "does not give due respect to the First Amendment interests at stake" because it allows the government to take action over speech that only potentially might disrupt the office.[86] Conversely, an actual disruption standard respects the First Amendment interest in protecting speech by requiring a higher bar for disruption before the speech at issue can be restricted.

E. Use of the Balancing Test in Cases Involving Internet Speech

While courts have attempted to clarify the *Pickering* test over the years, they have gradually narrowed the scope of public employees' protected speech.[87] At the same time, the scope of what qualifies as speech has greatly

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80 *See id.* at 1333.

81 458 F.3d 1096, 1103 (10th Cir. 2006).

82 *See id.* at 1103.

83 *See* Melton v. Okla. City, 879 F.2d 706, 716 n.11 (10th Cir. 1989), *vacated and remanded on other grounds*, 928 F.2d 920, 922 (10th Cir. 1991) (en banc) ("[A]n obvious *Pickering* requirement [is] that the government show *some* ascertainable damages to its functioning.") (emphasis in original).

84 290 F.3d 143 (2d Cir. 2002).

85 *Id.* at 159 (Sotomayor, J., dissenting). In *Pappas*, a former New York police officer alleged that he was fired in violation of the First Amendment for sending anti-African American and anti-Semitic fliers in reply envelopes for charitable solicitations. *Id.* at 144–45 (majority opinion). The majority cited the Supreme Court's plurality opinion in *Waters v. Churchill*, 511 U.S. 661, 673–74 (1994), for support of a potential disruption standard, ultimately holding that an employer has a significant interest in terminating an employee if harm is reasonably believable based on the employee's speech, whether or not the potential harm occurs. *See Pappas*, 290 F.3d at 151.

86 *Pappas*, 290 F.3d at 159 (Sotomayor, J., dissenting).

87 *See supra* Sections I.A–D.

expanded.[88] As public employee's speech has been greatly scrutinized, the protection of internet-related speech in general has also been under scrutiny by courts attempting to apply the *Pickering* test to internet speech and social media cases in particular.[89]

The First Amendment has always protected oral or written uses of language, and for the first time in 1997, the Supreme Court held that its protections extended to speech made online.[90] At that time, however, social media platforms such as Facebook, Twitter, and Instagram had not yet been created.[91] Since the beginning of social media, its technology has rapidly advanced, particularly after Facebook's launch in 2004 and the addition of a "Like" button to the platform.[92] The like button is a way of allowing users to show support for another user's post, without actually commenting on the post.[93] With these advances in technology, it is not always clear what qualifies as "speech" in order to be protected.

Although it is well established today that the First Amendment extends to protect speech made online, it is unclear what exactly constitutes speech on social media platforms when it takes a nontraditional form, other than oral

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88 *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) (expanding speech to include internet speech); *see also* Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (expanding speech to include Facebook likes).

89 *See Bland*, 730 F.3d at 373–74 (attempting to determine how the *Pickering* test applies to social media and nontraditional speech).

90 *See Reno*, 521 U.S. at 885 (holding that protecting free speech, even online, outweighs "any theoretical but unproven benefit" derived from regulating it). Speech is traditionally considered to include all oral or written uses of language, which are referred to as "pure speech" and are the most rigorously protected forms of speech. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1058 (9th Cir. 2010). The idea that any type of oral or written use of a language does not qualify as "speech" has never been addressed by the Supreme Court because it is a basic assumption. *See* Ashutosh Bhagwat, *When Speech Is Not "Speech*,*"* 78 OHIO STATE L.J. 839, 851–52 (2017).

91 *See Reno*, 521 U.S. at 851 (analyzing the protection of speech made online through email, chat rooms, and the "World Wide Web"). Social media is defined as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." *Social Media*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20media [https://perma.cc/6E8M-WCDD].

92 *See* Thaddeus Hoffmeister, *"Liking" The Social Media Revolution*, 17 SMU SCI. & TECH. L. REV. 507, 508 (2014) (noting Facebook's introduction of the like button February 9, 2009); Nicholas Carlson, *At last—The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010, 4:10 AM), https://www.businessinsider.com/how-facebook-was-founded-2010-3 [https://perma.cc/AZH3-4UJX].

93 *What Does It Mean to "Like" Something on Facebook?*, FACEBOOK HELP CTR., https://www.facebook.com/help/110920455663362?helpref=uf_permalink [https://perma.cc/A8TC-44Y9].

or written language.[94] Because user experiences on Facebook and Twitter involve using features such as "liking" in addition to written aspects such as commenting, it is difficult to determine which actions are classified as speech.[95] Do Facebook likes fall under the category of speech? Do emoji reactions to posts that others have shared fall under this category too? These issues have not been addressed in most appellate courts. Even the Fourth Circuit, which has addressed First Amendment claims related to social media more than other circuit courts,[96] has only addressed the issue of liking posts on Facebook as speech once.[97]

1. The Balancing Test and Facebook Likes

One of the most controversial yet foremost decisions involving public employees' speech online concerns liking posts on Facebook. In the case of *Bland v. Roberts*,[98] Bland and the five other plaintiffs in the suit were all employees at their local sheriff's office, but they were not reappointed once the town sheriff, Roberts, won reelection.[99] The plaintiffs brought suit against the Sheriff, claiming that he did not reappoint the plaintiffs because they did not support his reelection campaign and spoke out in favor of the other senior officer's campaign by liking his campaign's Facebook page.[100] Before evaluating whether this type of speech by public employees is

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94 Other types of expressive conduct can still be protected as speech under the First Amendment if it was performed with the purpose of sharing a message. *See* Spence v. Washington, 418 U.S. 405, 409–11 (1974) (per curiam) (holding that expressive activity, such as flag burning, could be protected as a form of free speech if the activity was performed with the purpose of sharing a message).

95 *See generally* Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016) (applying the *Pickering* test to posts and comments made by police officers in violation of the department's social media policy); Holbrook v. Dumas, 658 Fed. App'x 280 (6th Cir. 2016) (evaluating whether a firefighter's Facebook post discussing the fire department's troubles obtaining insurance constitute a matter of public concern); Richerson v. Beckon, 337 Fed. App'x 637 (9th Cir. 2009) (holding that a public school employee's blog posts including "highly personal and vituperative comments about her employers" satisfied the *Pickering* test and justified her demotion).

96 *See* Langan, *supra* note 34, at 240 (asserting that few circuit courts have had the chance to implement decisions like *Garcetti* in social media cases).

97 *See* Bland v. Roberts, 730 F.3d 368, 384–88 (4th Cir. 2013).

98 730 F.3d 368 (4th Cir. 2013).

99 *See id.* at 372. Running against Roberts was another senior officer from the same office. *See id.* Sheriff Roberts won re-election after using his position in office and his subordinate employees to further his campaign efforts. *See id.* Following his reelection, he reappointed over 90% of his former employees but did not reappoint Bland or the five other plaintiffs. *See id.*

100 *See id.* at 372–73, 380. Specifically, one of the plaintiffs, Carter, liked the other senior officer's campaign page on Facebook, which was titled "Jim Adams for Hampton Sheriff." *Id.* at 385.

protected, the court first had to determine whether liking another candidate's Facebook page was considered speech.[101] In analyzing this issue, the district court found that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection" because Carter did not make an actual statement on the site.[102] The district court went on to explain that if it were to consider a Facebook like as speech, it would be attempting to infer Carter's reasoning behind his action—simply clicking a button on a page.[103]

On appeal, the Fourth Circuit explained the procedure of liking posts and pages on Facebook extensively.[104] At the time of the case, when a user liked a post on Facebook, details about the post were added to the user's profile and an announcement about the activity would appear to the user's friends on their own accounts.[105] The court stated that this conduct unquestionably demonstrates support for the page.[106] In this case, liking the "Jim Adams for Hampton Sheriff" page unquestionably demonstrated support for the page and the campaign.[107]

Additionally, the Fourth Circuit found that not only does the action of liking qualify as pure speech, but it also qualifies as a symbolic expression, which is another form of protected speech.[108] Therefore, even if liking had not been found to be pure speech, it would still be protected as a form of symbolic expression.[109] After determining that the Facebook activity was speech, the court evaluated it under the *Pickering* test, ultimately finding that the plaintiff's speech of liking a Facebook page was protected under the First Amendment.[110]

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101 *See id.* at 384.

102 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012). This contrasts with social media cases where "actual statements" were posted on Facebook, allowing them to qualify as protected speech as a traditional written form of speech. *Id.*; *see also* Liverman v. City of Petersburg, 844 F.3d 400, 409–10 (4th Cir. 2016) (explaining that publicly posting on social media is akin to writing a letter to a newspaper). It is well established that written posts on Facebook qualify as speech, and this topic is not examined in this Note.

103 *Bland*, 857 F. Supp. 2d at 604. This statement and the outcome of the case may be due to the court's lack of understanding about how Facebook and the like button function. *See* Hoffmeister, *supra* note 92, at 511.

104 *See Bland*, 730 F.3d at 385–86 (explaining that liking is how Facebook users communicate their support or enjoyment of another user's post).

105 *See id.* at 385.

106 *See id.* at 386.

107 *See id.*

108 *See id.*

109 *See Bland*, 730 F.3d at 386 (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)).

110 *See id.* at 387. In administering the balancing test, the Fourth Circuit noted that there was no evidence that liking the Facebook page caused any disruption in the office, even though the Fourth Circuit uses a potential disruption standard. *See id.* This further highlights the inconsistency of using a potential disruption standard.

2. *The Balancing Test and Facebook Posts*

Although public employee speech involving Facebook likes is a relatively new occurrence, courts have applied the *Pickering* test to Facebook posts on several occasions. In *Liverman v. City of Petersburg*,[111] two police officers alleged a First Amendment violation after they were denied a promotion because of posts they made on Facebook.[112] While applying the *Pickering* balancing test, the Fourth Circuit noted how social media posts have the ability to amplify an employee's speech, which also leads to the ability to create a larger disruption.[113] The police department argued that "divisive social media" can harm relationships in the office and that several officers wanted transfers because of the post.[114] Nevertheless, the court found this alleged disruption too speculative to outweigh the officers' interests in commenting on their workplace.[115]

Conversely, in another Fourth Circuit Facebook case with similar facts, the outcome favored the employer, highlighting the inconsistency in applying the *Pickering* test even within the same circuit.[116] In *Grutzmacher v. Howard County*,[117] the county fire department terminated a paramedic after he posted messages on Facebook that were inconsistent with the county's social media policy.[118] Again, the court focused on the balancing portion of the *Pickering* test, weighing the paramedic's interests against the fire department's.[119] The department presented evidence that multiple conversations about the posts were held in the office, that the posts affected the employee's job responsibilities as a manager because subordinates did not want to work with him, and that the posts had the potential to harm the department's reputation with the public.[120] The combination of the

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111 844 F.3d 400 (4th Cir. 2016).

112 *See id.* at 405–06. One officer posted negatively on Facebook while off duty about the promotion system within the office. *See id.* at 405. The other officer commented his support. *See id.* After a fellow officer notified the police chief about the exchange, the two were placed on probation, which ultimately affected their ability to be promoted. *See id.* at 405–06.

113 *See id.* at 407.

114 *Id.* at 408–09.

115 *See id.* (stating that a stronger showing of disruption is needed when there is a strong demonstration of public concern).

116 *See* Grutzmacher v. Howard Cnty., 851 F.3d 332, 348 (4th Cir. 2017).

117 851 F.3d 332 (4th Cir. 2017).

118 *See id.* at 336–40. The Department's policy prohibited social media posts that could "undermine the views or positions of the Department." *Id.* at 337. The Department terminated the paramedic, citing his Facebook posts as racist, derogatory, and mocking. *See id.* at 339–40.

119 *See id.* at 344–45.

120 *See id.* at 344–47.

department's allegations was enough for the balancing test to weigh against protecting the employee's speech because there was a reasonable apprehension of adverse effects.[121] The two different outcomes from similar cases show that the current *Pickering* test is poorly suited for social media cases.

II. APPLYING THE *PICKERING* TEST

Courts lack clarity in interpreting the standards of the *Pickering* test. Not only are there inconsistencies concerning the private citizen requirement, but also in the standard of disruption courts apply under the balancing portion of the test.[122] These differences create inconsistent results from circuit to circuit depending on which factors are prioritized, which can greatly affect a public employee's right to free speech.[123] This is even truer in a social media context because where advancements to social media continue to enhance opportunities for personal expression and amplify the impact of speech on the workplace, courts need to be able to evaluate public employees' free speech rights more consistently to provide adequate and fair protection.[124]

Imagine the scenario from the introduction, where a government employee makes a Facebook post from his house criticizing his employer, or maybe just likes a negative Facebook post about his employer. Even though no one in the office saw the post besides the employee's boss, the boss fires the employee. This scenario raises several issues: (1) was the employee speaking pursuant to his official duties and should this even matter, and (2) can the employee be terminated, even though there was no actual disruption in the office?

A. The Private Citizen Requirement

Abandoning the private citizen requirement that is applied before the *Pickering* balancing test is necessary because the requirement is unclear and

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121 *See id.* at 348.

122 *See* discussion *supra* Section I.C–D.

123 *See generally* Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 991 (1997) ("People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.").

124 S*ee* Liverman v. City of Petersburg, 844 F.3d 400, 405 (4th Cir. 2016) (noting that online posts can amplify the reach of an employee's speech, which in turn creates a larger potential disruption); *see also* 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) (asserting that because online speech can reach a larger audience, the potential to create a disruption is significantly increased).

overly broad, creating an unreasonable burden for a public employee's speech to qualify as protected.

1. The Private Citizen Requirement is Unclear and Unnecessary

When the Supreme Court first established the official duties threshold in *Garcetti*, the Court failed to explain what qualified as an official duty.[125] Eight years later, the Supreme Court had the opportunity to clarify the official duties threshold in *Lane v. Franks*, but it did not.[126] Instead, the Supreme Court created further confusion by referring to "official duties" and "ordinary job responsibilities" interchangeably throughout its opinion, which are not synonymous terms.[127]

"Ordinary job responsibilities" and "official duties" can have two vastly different meanings. On one hand, using the term "ordinary job responsibilities" can broaden the holding from *Garcetti* because "ordinary" seems to encompass more duties.[128] On the other hand, the change to ordinary job responsibilities could be a way to limit the *Garcetti* holding.[129] Without defining the term or articulating a framework under which to analyze the official duties requirement,[130] the Court left the implementation of this vague requirement to the lower courts. Because lower courts interpret it differently,[131] the outcome under this requirement differs depending on which circuit tries the case. This can create inconsistencies for similar cases even between employers that have offices across the country.

2. The Private Citizen Requirement is Overly Broad

In addition to being vague, the private citizen requirement is overly broad. Requiring that a public employee speak as a private citizen for their speech to be protected places an unreasonable burden on the employee, especially when their speech relates to information they learned through their

125 *See* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (noting that because the terminated employee, Ceballos, conceded that he was acting pursuant to his official duties, the Court had no reason to create a framework for defining "official duties").

126 *See supra* Section I.C.

127 *See* Lane v. Franks, 573 U.S. 228, 234–242 (2014).

128 *See* Dougherty v. Sch. Dist. of Phila., 772 F.3d 979, 990 (3d Cir. 2014) (noting that by seemingly adding "ordinary" as a modifier to the official duties requirement, *Lane* might broaden the holding in *Garcetti*).

129 *See Lane*, 573 U.S. at 239 (stating that the Eleventh Circuit interpreted *Garcetti* too broadly by holding that Lane was not speaking as a citizen when he testified concerning fraud by a former coworker).

130 *See Garcetti*, 547 U.S. at 424.

131 *See* supra Section I.C.

job.[132] Supreme Court precedent has clearly shown that the First Amendment is to be construed broadly, and it should only be limited by traditional exceptions.[133] In creating a distinction between speaking as a citizen and speaking as a public employee, the Court is essentially ensuring that an employee can only prevail under a narrow set of circumstances, such as commenting on serious acts of wrongdoing.[134] This contrasts with prior decisions that have determined that public employees do not give up their First Amendment rights simply because of their employment by the government.[135] Without a private citizen requirement, government restriction on an employee's speech is not automatically justified, which is more consistent with the idea that public employees do not give up their rights because of government employment. Using a balancing test ensures that the employee's rights are not invalidated simply because of government employment, but rather because their speech has an adverse effect on a legitimate government interest.

In the Court's attempt to balance the employee's interest in free speech with the employer's interest in an efficient workplace, the classification that all speech made pursuant to an employee's official duties can never be protected goes too far . This directly contradicts Supreme Court precedent that any attempt to regulate speech should be narrowly construed.[136] In the past, the Supreme Court has acknowledged that public employees are typically in the best position to learn about matters of public concern regarding an agency or other entity through their employment there.[137] Therefore, it is natural that a public employee's speech would relate to information they learned through their employment, especially if they are raising awareness about issues within the office.

Because the *Pickering* test has an additional threshold requirement that the speech in question be made about a matter of public concern, if public

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132 *See Garcetti*, 547 U.S. at 447 (Breyer, J., dissenting) (determining that "broad government authority" is unnecessary to control speech that is already subject to the balancing test).

133 *See* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (reaffirming that regulations on speech must be narrowly tailored); *see also* Morgan v. Swanson, 659 F.3d 359, 408 n.24 (5th Cir. 2011) ("Indeed, the Supreme Court in recent years has made it clear that the First Amendment has a broad reach, limited only by narrow, traditional carve-outs from its protection."). One traditional exception is allowing schools to restrict school-sponsored speech. *See Morgan*, 659 F.3d at 408–09 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

134 *See Garcetti*, 547 U.S. at 435 (Souter, J., dissenting) (asserting that under the official duties requirement, only when an employee comments on serious acts of wrongdoing or deliberate unconstitutional action will the *Pickering* test favor an employee).

135 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967).

136 *See* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).

137 *See* Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion).

employees make a statement involving a public concern that they learned through the course of their employment, they will almost always be found to be speaking pursuant to their official duties.[138] As this requirement overwhelmingly results in a finding that the speech was not protected, it is overly broad and is inconsistent with First Amendment aims of free speech.[139]

3. The Private Citizen Requirement is Inapplicable to Social Media

The unclear and overly broad nature of the private citizen requirement makes it inapplicable to social media cases because it is harder to determine the circumstances of internet speech. Although there is no clear framework for this part of the test, courts look to where the speech took place, whether the speech was required by the employee's job, and to the general circumstances prompting the speech.[140] However, when applied to social media speech, this creates an unnecessary hurdle in the *Pickering* test. For example, is the government employee who posts on Facebook about his job from his house, or likes a post on Facebook while at home, speaking as a private citizen or pursuant to his official duties? What if the employee does this while at work?

Under the private citizen requirement as is, there is no clear outcome. Comparing *Liverman* with *Grutzmacher*, one employee posted on Facebook from home and the other posted while on duty at work, but the court held that both employees were speaking as private citizens.[141] However, if the government employee is posting in an attempt to improve his job conditions, this could be seen as speaking pursuant to his official duties, similar to *Boyce v. Andrew*.[142] Where the speech took place is considered to be one of the main circumstances that courts look to for the official duties threshold, yet it

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138 *See Garcetti*, 547 U.S. at 428–29 (Souter, J., dissenting) ("[T]here is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him.").

139 *See* George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 142–43 (2008) (discussing how the plausible disruption standard weakens employee speech protections and is one of the difficulties causing the *Pickering* balancing test to "almost always str[ike] in favor of the employer").

140 *See supra* Section I.C.

141 *See* Liverman v. City of Petersburg, 844 F.3d 400, 404–05, 409–11 (4th Cir. 2016); Grutzmacher v. Howard Cnty., 851 F.3d 332, 347 (4th Cir. 2017). The *Liverman* and *Grutzmacher* courts did not explicitly discuss whether the plaintiffs were speaking as private citizens, but presumably assumed they were because the social media policies at issue restricted private use of personal accounts. *See Liverman*, 844 F.3d at 404–05; *Grutzmacher*, 851 F.3d 340–41.

142 510 F.3d 1333, 1346 (11th Cir. 2007) (holding that the employee who emailed his supervisor complaining about workload was speaking pursuant to official duties because it was an attempt to improve his work conditions).

should be, and often is, irrelevant because the effects of social media speech can be felt regardless of the employee's location.[143] Abandoning this unnecessary hurdle of speaking as a private citizen would ensure that any speech made by the public employee speaking on a matter of public concern can reach the balancing test, regardless of whether the employee is speaking pursuant to his official duties.

B. Adopting an Actual Disruption Standard

Using an actual disruption standard when applying the *Pickering* test is in line with First Amendment aims and will promote consistent outcomes because it creates a bright line rule. In an age where communication takes place online and in person, an actual disruption standard will protect more speech by placing a higher burden on the government employer seeking to restrict speech. The government will have to present evidence demonstrating that there was some adverse effect at the public office stemming from the speech.

1. The Plausible Disruption Standard is Inconsistent with the First Amendment and the Balancing Test as Established in Pickering

When the *Pickering* balancing test was first established, the Supreme Court recognized that unless an employer's interest in promoting efficiency outweighed the public employee's interest in free speech, the speech would be protected.[144] Because free speech is a fundamental right enshrined in the Constitution, any attempt to deny this right to a person must be justified.[145] A higher burden on the government is necessary when dealing with restricting fundamental rights.[146] Otherwise, using a standard where only a potential chance of disruption needs to be shown places a relatively light burden on the government or public employer.[147]

In the public employee context, denying freedom of speech should only be justified in situations where the employer can show evidence of an actual disruption because it places a higher burden on the government to justify its actions.[148] Typically, using a plausible disruption standard will lead to an

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143 *Compare Liverman*, 844 F.3d at 408–09, *with Grutzmacher*, 851 F.3d at 348.

144 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

145 *See* Garcetti v. Ceballos, 547 U.S. 410, 428–29 (2006) (Souter, J., dissenting).

146 *See Garcetti*, 547 U.S. at 428–29 (Souter, J., dissenting).

147 *See* Meghan M. Rose, Case Note, *Balancing the Efficiency Needs of the Government as Employer Against an Employee's First Amendment Rights:* Jeffries v. Harleston, 37 B.C. L. REV. 419, 429 (1996) (stating that in practice, the employer has a light burden in demonstrating that it thought disruption was likely).

148 *See* Melton v. City of Okla. City, 879 F.2d 706, 715–16 (10th Cir. 1989).

outcome favoring the employer.[149] But the right to free speech is so important that it should outweigh the employer's interest in taking action before a disruption occurs.[150]

Further, the plausible disruption standard is inconsistent with prior Supreme Court opinions on public employees' speech. The Court in *Pickering* specifically noted the lack of evidence of an actual effect resulting from the employee's speech in holding that the employee's speech was protected.[151] Additionally, the Court in *Rankin* stated that "whether the statement impairs discipline by superiors or harmony among co-workers" is a pertinent factor under the balancing test.[152] These opinions demonstrate the Court's preference for evidence of actual effects. In particular, balancing factors evaluating whether the speech impacts workplace relationships support the idea that actual disruption is required before the government may limit a public employee's speech.[153] The *Rankin* Court did not analyze whether the speech at issue had a possible impact on coworker or close working relationships, but whether there was an actual impact.[154] However, the majority of circuit courts have incorrectly stated that reading an actual disruption standard into this language is not an obvious application of *Pickering* and *Rankin*, merely because the Supreme Court did not explicitly call for a standard of actual disruption.[155] The Tenth Circuit's interpretation and the language of the opinion show that the Court favors actual disruption because of its deference towards evidence of actual disruption.[156]

2. An Actual Disruption Standard is Necessary to Prevent the Government from Chilling Public Employees' Speech

Adopting a standard of actual disruption is necessary among all circuits because it not only creates consistency in the outcomes of cases, but a clearer standard will prevent the effect of chilling public employees' speech. While

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149 *See* Rutherglen, *supra* note 139, at 136–37, 142–43.

150 *See* Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (arguing that an employee's free speech rights must be protected through an actual disruption standard); *contra* Gillis v. Miller, 845 F.3d 677, 687 (6th Cir. 2017) (arguing that an employer should not have to show actual disruption and should be able to intervene before the disruption occurs).

151 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 570–73 (1968).

152 Rankin v. McPherson, 483 U.S. 378, 388 (1987).

153 *See id.* at 569–70; *Rankin*, 483 U.S. at 388.

154 *See Rankin*, 483 U.S. at 388.

155 *See, e.g.*, Gillis v. Miller, 845 F.3d 677, 686 (6th Cir. 2017).

156 *See* Melton v. City of Okla. City, 879 F.2d 706, 715–16 (10th Cir. 1989), *vacated and remanded on other grounds*, 928 F.2d 920, 922 (10th Cir. 1991) (en banc) (interpreting *Pickering*'s opinion to require an actual disruption standard); Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990).

a majority of circuits have adopted a plausible or potential disruption standard, each circuit looks to different factors in determining what constitutes a possible disruption.[157] An actual disruption standard clarifies the discrepancies between circuit courts because it is a clear standard that only has one factor—whether there is evidence that the public employee's speech caused an actual disruption in the workplace. Tenth Circuit cases like *Casey* and *Weaver* demonstrate that a court can apply the *Pickering* balancing test with relative consistency where the actual disruption standard is used.[158] Further, because the standard used can have significant effects on whether speech is categorized as protected or not,[159] it is necessary for the Supreme Court to articulate a clear standard that the lower courts can uniformly implement.

A bright-line rule allows public employees to better predict whether their speech will be protected or not. A potential disruption standard can lead public employees to self-censor because they may fear the ramifications of their government employer taking action to restrict their speech, even before it has any real effect on the workplace.[160] This chilling effect is contrary to the aims of the First Amendment because it essentially restricts free speech.[161] If an employee can determine for themselves that their speech will be protected, they are more likely to speak freely and openly without fear of repercussions from their employer. This creates a benefit for the public, especially when the employee's speech concerns serious violations within their office.

3. The Actual Disruption Standard is More Applicable to Social Media

The need for a clear standard is even greater in social media cases due to the wide reach of speech communicated over social media. Because an employee can post, like, and comment on social media, they have a greater potential audience for any statement.[162] With a larger audience, it is easier to present evidence of a potential disruption because the speech reaches more people and simply has a higher likelihood of affecting workplace relationships and operations.[163]

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157 *See supra* Section I.D.

158 *See* Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1333 (10th Cir. 2007); Weaver v. Chavez, 458 F.3d 1096, 1103 (10th Cir. 2006).

159 *See supra* text accompanying notes 122–124.

160 *See* Rutherglen, *supra* note 139, at 130; *see also* Garcetti v. Ceballos, 547 U.S. 410, 428 (2006) (Souter, J., dissenting) ("Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment.").

161 *See* Rutherglen, *supra* note 139, at 130.

162 *See* Black & Shaver, *supra* note 124, at 3.

163 *See id.*

In the hypothetical scenario introduced above, a government employee who likes a critical Facebook post online could have two different outcomes depending on which standard of disruption the court uses. The government could argue that criticizing its actions can cause tension in the workplace, jeopardizing the office's operations. Under a plausible disruption standard as applied in *Grutzmacher*—where a paramedic's Facebook post caused other employees to refuse to work with him—the government's argument alone could be enough to tilt the balance in favor of the government, regardless of whether fellow employees complain.[164] This would likely lead a court to uphold a restriction on the employee's speech by the government employer, even though there was no actual harm to the office.[165]

In contrast, under an actual disruption standard, without evidence that liking the Facebook post actually created tensions in the workplace, the government's argument that it could possibly create tension would fail. Similar to *Schalk*, where the Tenth Circuit found the balancing test weighed in favor of the employee because there was no evidence of an actual workplace confrontation, the government's hypothetical argument about possible workplace tension alone would not outweigh the employee's interest.[166] Without actual disruption in this scenario, the balance would likely weigh in favor of the employee's interest, and the speech at issue would likely be protected.

III. SOLUTION

Because of the differences between traditional speech and internet speech—specifically the speed of communication and its ability to be transmitted virtually anywhere, as well as the unique forms that it can take, such as liking posts on Facebook—an updated version of the *Pickering* test must be introduced in order for the test to stay relevant.[167] The most effective way to modify the test and create a workable standard is for the Supreme Court to explicitly abandon the plausible disruption standard in favor of an actual disruption standard and to abandon the official duties threshold.

An actual disruption standard is favorable because it creates a clear evidentiary standard—whether there was an actual disruption.[168] If the

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164 *Cf.* Grutzmacher v. Howard Cnty., 851 F.3d 332, 345–48 (4th Cir. 2017) (finding that the workplace's interest in efficiency and preventing disruption outweighed the employee's interest in the speech at issue).

165 Rutherglen, *supra* note 139, at 136–37, 142–43 (explaining that when the potential disruption standard is used, it weakens employee speech protections, typically causing the balancing test to favor the employer).

166 *Cf.* Schalk v. Gallemore, 906 F.2d 491, 496–97 (10th Cir. 1990).

167 *See* Olaya, *supra* note 9, at 479–80.

168 Langan, *supra* note 34, at 246.

Supreme Court were to explicitly adopt the actual disruption standard, lower courts would apply the *Pickering* test more consistently, like the Tenth Circuit has.[169] This standard further prevents the chilling effect caused by a potential disruption standard, allowing public employees to speak more openly as the First Amendment intended. The clearer actual disruption standard is also easier to apply to social media cases, which often involve nontraditional forms of speech.

In addition to adopting an actual disruption standard, another key solution in creating a modern test that can be applied consistently to social media is to abandon the official duties threshold. The private citizen requirement is unclear and ill-suited for analyzing social media speech. By dropping the requirement entirely, the *Pickering* test would protect more speech because any speech made by a public employee on a matter of public concern would be evaluated under the balancing test, regardless of what capacity the employee was speaking in. Because public employees can use social media at home or in the office, it is harder to determine when they are speaking as private citizens. Abandoning this unnecessary requirement is more consistent with the aims of the First Amendment in protecting free speech rights because it allows more speech to reach the balancing portion of the test, which in turn can lead to more protected speech.

If these solutions are adopted by the Supreme Court, the *Pickering* test would then become a two-part, well-defined test. First, it must be determined whether the employee is speaking on an issue of public concern, as established in *Connick*.[170] If so, then the test immediately moves to the balancing portion, weighing the interests of the employee against the interests of the employer in the context of an actual disruption standard.[171]

A modified test is more easily applied to social media speech because it does not require analyzing whether someone who posts about their job from their house is speaking pursuant to their duties, or whether they are speaking as citizen within their own home. Further, social media speech and online speech in general have the potential to reach greater audiences, meaning that the possibilities for disruption are greater, which will almost always result in an outcome favoring the employer.[172] Modifying the *Pickering* test is necessary to ensure it is in line with the principles of the First Amendment and that it is consistently applied.

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169 *See* Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1333 (10th Cir. 2007); Weaver v. Chavez, 458 F.3d 1096, 1103 (10th Cir. 2006).

170 *See* Connick v. Myers, 461 U.S. 138, 146 (1983).

171 *See Pickering*, 391 U.S. at 568.

172 *See* Black & Shaver, *supra* note 124, at 3; *see* Rutherglen, *supra* note 139, at 142–45.

CONCLUSION

Protecting free speech interests for public employees is essential in ensuring that their constitutional rights are not infringed.[173] This is more important now than ever because of the rapidly expanding use of social media in people's everyday lives.[174] The *Pickering* test has changed significantly since its creation, with the Supreme Court adding new requirements and implementing vague standards. It is necessary to update this test in order to ensure it is applicable to speech made on social media, particularly nontraditional speech such as liking posts on Facebook. The Supreme Court should modify the *Pickering* test to abandon the official duties threshold and explicitly adopt an actual disruption standard. With technology advancing every day, it is important that courts use a consistent and applicable framework to ensure public employees' right to freedom of speech is protected.

173 *See* U.S. Const. amend. I.

174 *See* Hutchinson, *supra* note 1.