

## WILL I GET FIRED FOR POSTING THIS?: ENCOURAGING THE USE OF SOCIAL MEDIA POLICIES TO CLARIFY THE SCOPE OF THE *PICKERING* BALANCING TEST

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### I. INTRODUCTION

In the Nineteenth Century, it was thought that while “[a person] may have a constitutional right to talk politics, . . . he ha[d] no constitutional right to be a policeman.”<sup>1</sup> The Supreme Court repudiated this proposition in its influential *Pickering v. Board of Education* decision by declaring that public employees do not relinquish all of their free speech rights when working for the government.<sup>2</sup> In *Pickering*, the Court established a balancing test to determine whether the First Amendment protects a public employee’s speech: a balance must be achieved to protect a public employee commenting on matters of public concern and a public employer’s concern in promoting workplace efficiency.<sup>3</sup> Since the *Pickering* decision in 1968, the Court has further elaborated on the applicable requirements, holding that government employees enjoy First Amendment protections only when speaking as private citizens<sup>4</sup> and on matters of public concern.<sup>5</sup>

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<sup>1</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

<sup>2</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>3</sup> *Id.*

<sup>4</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

<sup>5</sup> *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

But while the *Pickering* framework dates back over fifty years, it predates the era of social media.<sup>6</sup> Since the law predates social media, the current framework should be supplemented with an instruction to government employers that they should develop concise social media policies to protect their employees' rights.

Over the turn of the century, the internet has become a "digital marketplace of ideas."<sup>7</sup> Stemming from the popularity of the internet, social networking services such as Facebook, Instagram, and Twitter have emerged.<sup>8</sup> These interactive sites allow users to create online profiles and connect with other users online.<sup>9</sup> Users can post content online while also having the ability to alter or delete their postings immediately.<sup>10</sup> As of 2019, the average American spent two hours and three minutes per day on social media.<sup>11</sup>

Employers have a substantial interest in what their employees post on social media. In terms of hiring, seventy percent of employers check social media accounts when reviewing job candidates.<sup>12</sup> Employers are understandably concerned with their employees' social media accounts, potentially subjecting employers to liability or increasing the probability of reputational damage.<sup>13</sup> On the other hand, employees often believe that their social media accounts are private, despite their co-workers', employers', and the general public's potential ability to access these accounts.<sup>14</sup> One of the consequences of these conflicting

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<sup>6</sup> See Mark Schroeder, *Keeping the Free in Teacher Speech Rights: Protecting Teachers and Their Use of Social Media to Communicate with Students Beyond the Schoolhouse Gates*, 19 RICH J.L. & TECH. 1, 26 (2012).

<sup>7</sup> Benjamin Good, *Google and Twitter Speak up in Support of the First Amendment Rights of Their Users*, ACLU (Jan. 20, 2016, 2:45 PM), <https://www.aclu.org/blog/free-speech/internet-speech/google-and-twitter-speak-support-first-amendment-rights-their-users>.

<sup>8</sup> See, e.g., *About*, FACEBOOK, <https://about.fb.com/> (last visited July 30, 2020); *About Us*, INSTAGRAM, [about.instagram.com/about-us](https://about.instagram.com/about-us) (last visited July 30, 2020); *Our company*, TWITTER, <https://about.twitter.com/company> (last visited July 30, 2020).

<sup>9</sup> JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW* 18–19 (2010).

<sup>10</sup> ADAM COHEN, *SOCIAL MEDIA: LEGAL RISK AND CORPORATE POLICY* 57 (2013).

<sup>11</sup> J. Clement, *Daily Social Media Usage Worldwide 2012-2019*, STATISTA (Feb. 26, 2020), <https://www.statista.com/statistics/433871/daily-social-media-worldwide/>.

<sup>12</sup> Saige Driver, *Keep It Clean: Social Media Screenings Gain in Popularity*, BUSINESS NEWS DAILY (Mar. 23, 2020), <https://www.businessnewsdaily.com/2377-social-media-hiring.html>.

<sup>13</sup> Nina Krüger et al., *A Framework for Enterprise Social Media Guidelines* 1 (2013), <https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1578&context=amcis2013&httpsredir=1&referer=>; 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, 230 (2018).

<sup>14</sup> See Langan, *supra* note 13, at 230.

interests is an absence of a clear consensus over what social media content deserves constitutional protection as “speech.”<sup>15</sup>

The Supreme Court has yet to decide a case involving the free speech claims of a public employee disciplined for posting content on a social media site. In a 2017 decision, however, the Court nonetheless hinted at an inclination to afford special treatment to social media use.<sup>16</sup> Specifically, in *Packingham v. North Carolina*, Justice Kennedy described social media as “the modern public square”;<sup>17</sup> that is, “perhaps the most powerful mechanism[] available to a private citizen to make his or her voice heard[,]” by providing the ability to spread one’s voice to a greater amount of people.<sup>18</sup> He further noted that while the great revolution sparked by the Cyber Age could not have been foreseen at its developing stage, it nonetheless bore emphasizing that to deny an individual’s access to social media would prevent the user from “engaging in the legitimate exercise of First Amendment rights.”<sup>19</sup>

The *Packingham* Court did not address the First Amendment standards for evaluating government employees’ free speech claims. As such, cases continue to arise in which public employers discipline their employees for speech made on social media accounts. Thus, this Comment advances a series of proposals for the future application of the *Pickering* test to public employees’ free speech claims. Section II discusses the influential *Pickering v. Board of Education* decision and its development over time. Section III focuses on an ongoing circuit split regarding one particular aspect of the *Pickering* analysis—namely, the question of whether the employer must demonstrate that the employee’s speech caused actual disruption or instead merely demonstrate a reasonable belief that the speech could have caused disruption. Section IV proposes a resolution to this circuit split, arguing that the reasonable belief of disruption test, while flawed, is the correct test to apply. Section V proposes that the Court incentivize employers to adopt social media policies as a resolution for issues stemming from the reasonable belief of disruption test, while simultaneously protecting the interests of both employers and employees.

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<sup>15</sup> See e.g., *Bland v. Roberts*, 730 F.3d 368, 385–86 (4th Cir. 2013).

<sup>16</sup> See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

<sup>17</sup> *Id.* at 1737.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1736–37.

## II. FIRST AMENDMENT PROTECTIONS OF EMPLOYEE'S SPEECH

The Supreme Court has offered some guidance for courts when dealing with cases brought by employees alleging violations of their First Amendment rights when they were terminated because of some form of speech.<sup>20</sup> There is no definitive answer for the correct level of disruption an employer must demonstrate to support its decision to fire an employee.<sup>21</sup> This section first discusses background law concerning the First Amendment and protections offered to public employees. Next, this section sets forth the applicable legal framework when public employees bring suit because their employers have allegedly violated their First Amendment rights. Finally, this section addresses the Supreme Court's lack of uniformity in determining the correct level of disruption an employer is required to demonstrate when protecting their termination decision.

A. *The First Amendment and the Freedom of Speech*

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."<sup>22</sup> Courts have interpreted the Amendment's guarantee of "the freedom of speech" to mean that employers cannot unreasonably restrict an individual's ability to speak, write, or freely spread ideas.<sup>23</sup> These protections extend to the domain of government employment. A public employee is described as a person "employed in a department responsible for conducting the affairs of a national or local

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<sup>20</sup> Compare *Melton v. City of Okla. City*, 879 F.2d 706, 715-16 (10th Cir. 1989) ("[T]he government must introduce evidence of an actual disruption of its services resulting from the speech at issue."), and *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999) (stating the employer must demonstrate proof of "real, not imagined" disruption), and *Schalk v. Gallemore*, 906 F.2d 491, 496 (10th Cir. 1990) ("The government must produce evidence of an actual disruption of services which results from the employee's speech."), with *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 345 (4th Cir. 2017) (stating employers do not need to offer proof of actual disruption, but rather that an adverse effect would be reasonably apprehended), and *Gillis v. Miller*, 845 F.3d 677, 686 (6th Cir. 2017) (affording deference to employer's prediction of disruption), and *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) ("The government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech.").

<sup>21</sup> *Id.* The Supreme Court has constantly alternated between whether to require proof that the employee's speech actually disrupted the workforce, or that the employee had a reasonable belief that disruption could occur before terminating the employee. *Id.*

<sup>22</sup> U.S. CONST. amend. I.

<sup>23</sup> *Freedom of Speech*, BOUVIER L. DICTIONARY (2012).

government.”<sup>24</sup> The Court has held that when a citizen becomes a government employee, the person takes on a “dual status” as an employee and citizen, but often the employee’s free speech rights will be significantly less robust than those extended to citizens.<sup>25</sup>

*B. First Amendment Supreme Court Decisions in the Employment Context*

The Supreme Court has developed a legal framework governing public employee speech claims over time.<sup>26</sup> The Supreme Court has dictated that to be constitutionally protected, an employee’s speech must address a matter of public concern, and the public employee’s First Amendment interest must not be outweighed by the employer’s interest in promoting workplace efficiency.<sup>27</sup> While these two requirements may seem simple on their face, they have caused considerable confusion within the lower courts.<sup>28</sup>

Before the 1960s, the widespread belief was that the First Amendment’s protection did not in any way extend to public employees’ speech.<sup>29</sup> In 1968, the Supreme Court uprooted this view in *Pickering v. Board of Education*.<sup>30</sup> In *Pickering*, the plaintiff, a school teacher, was dismissed by the board of education after he sent a letter to a local newspaper criticizing the way the board and the district superintendent addressed previous proposals to raise school revenues.<sup>31</sup> Rather than reject the free speech claim outright, the Court proceeded to apply a balancing test.<sup>32</sup> The test was intended to weigh the competing objectives of safeguarding a public employee’s interest in commenting

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<sup>24</sup> *Civil Servant*, BLACK’S L. DICTIONARY (11th ed. 2019). It is important to note that this Comment focuses on the disadvantages and barricades public employees must overcome when posting on social media. Private employers can restrict employees’ speech without violating the First Amendment. See John Q. Mulligan, Note, Huppert, Reilly, and the Increasing Futility of Relying on the First Amendment to Protect Employee Speech, 19 WM. & MARY BILL RTS. J. 449, 460 (2010) (finding that a major flaw with the First Amendment protection offered by the Supreme Court is that the “First Amendment protections do not apply to private employees.”).

<sup>25</sup> Langan, *supra* note 13, at 228.

<sup>26</sup> *Liverman v. City of Petersburg*, 844 F.3d 400, 405 (4th Cir. 2016).

<sup>27</sup> *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion).

<sup>28</sup> See *infra* Section 0.

<sup>29</sup> *Connick v. Myers*, 461 U.S. 138, 143–44 (1983); *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892) (holding that the policeman had a constitutional right to discuss politics, but lacked a constitutional right to be a police officer).

<sup>30</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>31</sup> *Id.* at 564.

<sup>32</sup> *Id.* at 568.

on matters of public concern against the public employer's interest in promoting workplace efficiency.<sup>33</sup>

Fifteen years after *Pickering*, the Supreme Court added a further wrinkle to the analysis.<sup>34</sup> In *Connick v. Myers*, the Court made clear that the *Pickering* test applies only when the employee's speech touches on a "matter of public concern."<sup>35</sup> The Court cautioned that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."<sup>36</sup> The Court further clarified that when looking at a statement to determine whether it addresses a matter of public concern, such a statement will not be "considered in a vacuum"; rather, the statement will be evaluated in context by considering the manner, time, and place of the employee's speech.<sup>37</sup>

When balancing the interests of the employer against the interests of the employee, the Court has identified several factors worth considering.<sup>38</sup> For example, in *Rankin v. McPherson*, the Court suggested that it might matter whether the employee's speech (1) "impairs discipline by supervisors"; (2) "impairs ... harmony among co-workers"; (3) "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary"; (4) "impedes the performance of the speaker's duties"; (5) "interferes with the regular operation of the enterprise"; (6) "undermines the mission of the public employer"; (7) is information communicated in private; (8) conflicts with "the responsibilities of the employee within the agency"; and (9) abuses the "authority and public accountability the employee's role entails."<sup>39</sup> But in identifying these factors in *Rankin*, the Court did not make clear whether the employer needed to show the *presence* of

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<sup>33</sup> *Id.*

<sup>34</sup> *See Connick*, 461 U.S. at 147–48.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 146.

<sup>37</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Connick*, 461 U.S. at 152–53).

<sup>38</sup> *Id.* at 388–91.

<sup>39</sup> *Id.* The *Pickering* Court had "previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570–73 (1968)).

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actual disruption or a mere reasonable fear that such disruption might come to pass.<sup>40</sup>

C. *Supreme Court's Lack of Clarity over Disruption Test*

The disruption test's ambiguity has caused lower courts to be conflicted over whether the employer must demonstrate that the employee's speech actually disrupted the workplace or that the employee had a reasonable fear of disruption to justify preemptively terminating a public employee based on his or her speech.<sup>41</sup> Initially, in *Pickering*, the Court's language appeared to require proof of actual disruption, finding that while the teacher made inaccurate public statements condemning his employer, the statements were "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."<sup>42</sup> Since *Pickering*, however, the Supreme Court has offered conflicting opinions regarding this decision.

For example, the *Connick* decision complicated *Pickering's* initial stance by holding that the state's burden of proof "varies depending upon the nature of the employee's expression."<sup>43</sup> The Court explained that matters substantially involving public concern require a closer showing of actual disruption, whereas speech expressing a less significant public concern requires a lesser showing of disruption.<sup>44</sup> Four years later, the *Rankin* decision revisited *Pickering* but failed to determine the necessary level of disruption.<sup>45</sup> The Court followed *Pickering's* method by looking for evidence that the employee's speech had actually interfered with the office's functionality.<sup>46</sup>

By 1994, the Court further exacerbated the confusion with its plurality opinion in *Waters v. Churchill*.<sup>47</sup> In *Waters*, the plurality gave "substantial weight to government employers' reasonable predictions

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<sup>40</sup> See Richard Renner, *Retaliation—Public Employees and First Amendment Rights*, WORKPLACE FAIRNESS, <https://workplacefairness.org/retaliation-public-employees#1> (last visited Sept. 12, 2019), where the factors are described as "vague and subjective," which can be a hint toward understanding why confusion exists over what type of disruption an employer must demonstrate that the employee caused to tip the scales.

<sup>41</sup> See *infra* Section 0.

<sup>42</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968).

<sup>43</sup> *Connick v. Myers*, 461 U.S. 138, 150 (1983).

<sup>44</sup> *Id.* at 152.

<sup>45</sup> See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

<sup>46</sup> *Id.*

<sup>47</sup> *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion).

of disruption.”<sup>48</sup> By 2006, in *Garcetti v. Ceballos*, the Court further alluded to, but did not explicitly state, the idea that the employer may restrict employees if the speech has the potential to affect its operations.<sup>49</sup> That most recent language on the subject perhaps indicates that the Court would likely apply the reasonable belief of disruption standard, but the issue is far from settled.

These conflicts are only intensified in the realm of social media usage. For example, if a doctor working for a state-owned hospital makes a comment on her Facebook account that demonstrates that she is against abortions, should the hospital be required to demonstrate that her post actually disrupted the workforce, or would it be enough to show a reasonable belief that disruption could have occurred shortly after she released her post? The usage of a social media outlet versus a newspaper or alternate channel of communication allows the doctor’s language to be shared and questioned by people beyond the doctor’s jurisdiction or realm.<sup>50</sup> The potential effects of this realistic hypothetical emphasize the need for the Supreme Court to provide further guidance.

### III. PICKERING’S UNCLARIFIED BALANCING TEST REQUIRES PREDICTABILITY AMONG COURTS

There is a lack of clarity within the lower courts as to whether *Pickering* and subsequent Supreme Court decisions require public employers to offer proof of actual disruption or merely a reasonable belief that the speech would have caused disruption. As a result, employees may face very different fates depending on the jurisdiction they are in.<sup>51</sup> This section explores the circuit split and illustrates that the reasonable belief of disruption standard has been utilized by more states, specifically in cases dealing with speech stemming from social media usage.

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<sup>48</sup> *Id.*

<sup>49</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.”).

<sup>50</sup> See Ute Krudewagen & Lisa Stem, *Global Employee Terminations in The Age of Social Media*, LAW360 (Aug. 26, 2011, 3:22 PM), <https://www.law360.com/articles/267702?scroll=1>.

<sup>51</sup> It has been argued that courts that require proof of actual disruption tend to rule in the public employee’s favor, while courts that do not require such proof often rule in favor of the public employer. See Lindsay A. Hitz, Note, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 WASH & LEE L. REV. 1151, 1175 (2010).

A. *Distinguishing Between Actual Disruption and Reasonable Belief of Disruption*

The *Pickering* balancing test requires courts to perform a fact-sensitive inquiry that considers the time, place, and manner of the speech.<sup>52</sup> After *Pickering*'s holding and its progeny, circuit courts are split over whether a public employer must make a showing of actual disruption<sup>53</sup> or reasonable belief of future disruption caused by its employee's speech to justify terminating an employee.<sup>54</sup>

The Tenth Circuit has been an advocate for requiring employers to provide proof of actual disruption.<sup>55</sup> As envisioned by that court, the actual disruption test would require the government to demonstrate, before terminating an employee, how that employee's speech actually disrupted the workforce.<sup>56</sup> This test would provide more certainty for both employees and employers, by allowing employees to predict whether their speech will be protected and by providing employers a definitive line of what constitutes as terminable behavior.<sup>57</sup> In *Melton v. City of Oklahoma City*, the Tenth Circuit found that even though the employee's speech could impact workplace efficiency, the government "must introduce evidence of an actual disruption of its services resulting from the speech at issue."<sup>58</sup> The Tenth Circuit reaffirmed this point in its subsequent decision in *Schalk v. Gallemore* by requiring the employer

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<sup>52</sup> *Connick v. Myers*, 461 U.S. 138, 152 (1983).

<sup>53</sup> *See Melton v. City of Okla. City*, 879 F.2d 706, 715–16 (10th Cir. 1989) ("[T]he government must introduce evidence of an actual disruption of its services resulting from the speech at issue."); *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999) (stating the employer must demonstrate proof of "real, not imagined" disruption); *Schalk v. Gallemore*, 906 F.2d 491, 496 (10th Cir. 1990) ("The government must produce evidence of an actual disruption of services which results from the employee's speech.").

<sup>54</sup> *See Grutzmacher v. Howard Cty.*, 851 F.3d 332, 345 (4th Cir. 2017) (stating employers do not need to offer proof of actual disruption, but rather that an adverse effect would be reasonably apprehended); *Gillis v. Miller*, 845 F.3d 677, 686 (6th Cir. 2017) (affording deference to employer's prediction of disruption); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) ("The government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech.").

<sup>55</sup> *See Melton*, 879 F.2d at 715–16; *Schalk*, 906 F.2d at 496.

<sup>56</sup> *Langan*, *supra* note 13, at 246–47.

<sup>57</sup> Emily McNee, *Disrupting the Pickering Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818, 1847 (2013) (discussing the *Pickering* balancing test as applied to school districts and their employees).

<sup>58</sup> *Melton*, 879 F.2d at 715–16.

to offer proof that the contested speech actually disrupted its workplace.<sup>59</sup>

The Eighth Circuit has also evaluated employer testimony and evidence to find proof demonstrating an employee's speech actually disrupted the workplace.<sup>60</sup> In *Morgan v. Robinson*, the court found there was evidence that a former employee's campaign statements made while running for sheriff actually disrupted the office.<sup>61</sup> The court looked to the employer's testimony that emphasized that the employee's statements were "detrimental to the office, harmful to morale, and adversely impacted the public's trust of the office."<sup>62</sup> The court also found that the employee violated the administration's and other employees' trust and created office disharmony, which further proved that actual disruption occurred.<sup>63</sup> The court found this evidence sufficient to justify the employer's decision to terminate the employee.<sup>64</sup> The Eighth Circuit, however, has not definitively determined that employers must proffer evidence of actual disruption but has also found that an employer's reasonable belief that a disruption could occur justifies terminating an employee.<sup>65</sup>

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.<sup>66</sup> For example, in *Munroe v. Central Bucks School District*, the Third Circuit analyzed whether a teacher's personal blog, which contained several posts that negatively portrayed her students, should be protected under the First Amendment.<sup>67</sup> Upon the teacher's dissemination of defamatory information to the public through her blog, the school district received over 200 requests from parents to opt their children out of having the teacher; this forced the board to hire another

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<sup>59</sup> *Schalk v. Gallemore*, 906 F.2d 401, 496 (10th Cir. 1990); *see also Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999) (requiring proof of "real, not imaged disruption" by the public employer to support its termination decision).

<sup>60</sup> *See Morgan v. Robinson*, 920 F.3d 521, 525 (8th Cir. 2019).

<sup>61</sup> *Id.* at 522, 526.

<sup>62</sup> *Id.* at 525.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 526.

<sup>65</sup> *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 833–34 (8th Cir. 2015) (finding that employers do not need to offer evidence of actual disruption in all cases, but rather courts can look to the government entity's "prediction[] of harm") (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion)).

<sup>66</sup> *Gillis v. Miller*, 845 F.3d 677, 685 (6th Cir. 2017) ("The Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have each held that evidence of actual disruption is not required.").

<sup>67</sup> *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 457–58 (3d Cir. 2015).

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teacher to teach the same schedule as the teacher at issue.<sup>68</sup> Even though there was ample evidence that the teacher's speech disrupted the workplace, the court declared that the employer did not need to demonstrate actual disruption to justify terminating the teacher.<sup>69</sup> Rather, the court ruled that the employer only needed to demonstrate "that disruption [wa]s likely to occur because of the speech,"<sup>70</sup> and held that the blog impeded the teacher's ability to perform her job and interfered with the school district's ability to operate regularly, thus satisfying the reasonable belief of disruption standard.<sup>71</sup>

Similarly, the Sixth Circuit has affirmatively established that there exists no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."<sup>72</sup> In *Gillis v. Miller*, the plaintiffs, former correctional facility officers, drafted a memorandum informing the jail staff of their rights during a management investigation.<sup>73</sup> The memorandum had explicitly advised correctional officers to have a union representative present before speaking to management and provided the officers with instructions on what to say during their questioning.<sup>74</sup> The court held that the department could have reasonably predicted the memorandum would disrupt the "legitimate law enforcement interests" by hindering its ability to complete a thorough management investigation.<sup>75</sup>

#### B. *The Disruption Standard Evaluated in Cases Stemming from Social Media*

Lower courts have also tried to apply the Supreme Court framework to cases dealing with social media speech. Many circuit courts have applied the reasonable belief of disruption test.<sup>76</sup> In *Liverman v. City of Petersburg*, the Fourth Circuit found that social media

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<sup>68</sup> *Id.* at 462.

<sup>69</sup> *Id.* at 472.

<sup>70</sup> *Id.* See also *Lewis v. Cohen*, 165 F.3d 154, 163 (2d Cir. 1999).

<sup>71</sup> *Munroe*, 805 F.3d at 478. While the Third Circuit did not require proof of actual disruption, there was substantial proof that the teacher's blog actually disrupted the school district, i.e., the need to hire a new teacher and the receipt of over 200 "opt-out" requests from parents. *Id.*

<sup>72</sup> *Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017) (quoting *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 833-34 (8th Cir. 2015)).

<sup>73</sup> *Id.* at 681.

<sup>74</sup> *Id.* at 687.

<sup>75</sup> *Id.*

<sup>76</sup> *But see Morgan v. Robinson*, 920 F.3d 521, 525 (8th Cir. 2019) (finding proof of actual disruption caused by the deputy's statements because they were "detrimental to the office, harmful to morale, and adversely impacted the public's trust of the office").

use “fits comfortably” within the *Pickering* balancing test because “[a] social media platform amplifies the distribution of the speaker’s message—which favors the employee’s free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer’s interest in efficiency.”<sup>77</sup> The court’s explanation of the *Pickering* balancing test, as applied to social media cases, exposes the heightened risks that social media speech poses to both employers and employees.<sup>78</sup> By applying the reasonable belief test to social media speech based on social media platforms’ potential amplifying effect—which may not always exist—courts, more than ever, are left searching for what would qualify as protected speech.

Before getting into the mechanics of the reasonable belief of disruption test, one preliminary point bears emphasis: social media enables “speech” and communication through various sometimes-subtle means. In particular, social media allows users to post, comment, and select “like” or “dislike” options to other users’ posts, thus engaging in behavior that courts have deemed sufficiently speech-like to implicate free speech protections.<sup>79</sup> For example, the Fourth Circuit has characterized the clicking of a “like” button, also commonly known as “liking,” as a form of speech, similar to a making a post on Facebook.<sup>80</sup> “Liking” a social media post or comment has been perceived as connecting the user with content he or she agrees with or cares about.<sup>81</sup> In *Grutzmacher v. Howard County*, a fire department’s battalion chief’s Facebook activity led to the court upholding his termination by the department.<sup>82</sup> The chief had initially posted on his personal Facebook page about killing liberals.<sup>83</sup> Subsequently, he “liked” a racially charged comment, which was written by another user, on his original post.<sup>84</sup> After receiving emails to remove posts inconsistent with the

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<sup>77</sup> See *Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016).

<sup>78</sup> *Id.*

<sup>79</sup> See *Bland v. Roberts*, 730 F.3d 368, 385–86 (4th Cir. 2013).

<sup>80</sup> *Id.* at 386.

<sup>81</sup> See Brief for Facebook, Inc. as Amicus Curiae Supporting Appellant, *Bland v. Roberts*, 857 F. Supp. 2d 599, at 2–3 (E.D. Va. 2012) (No. 12-1671).

<sup>82</sup> *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 345–46 (4th Cir. 2017).

<sup>83</sup> *Id.* at 338. The battalion chief’s Facebook post read, “My aide had an outstanding idea . . . lets [sic] all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its [sic] almost poetic . . .” *Id.*

<sup>84</sup> *Id.* The comment by a voluntary paramedic read, “But . . . was it an ‘assault liberal’! Gotta pick a fat one, those are the ‘high capacity’ ones. Oh . . . pick a black one, those are more ‘scary’. Sorry had to perfect on a cool idea!” *Id.* The former battalion chief also liked a post that included a photo of an elderly woman raising her middle finger and stating that she could post whatever she pleased on her Facebook page. *Id.* at 339.

department's social media policy, the battalion chief wrote on his Facebook page that he took down the original post to "prevent future butthurt and comply with a directive from my supervisor."<sup>85</sup> Meanwhile, the "liking" of the racist Facebook comment caused African-American employees to reach out to a constituent group that represented minority firefighters.<sup>86</sup> As a result, one employee was no longer willing to work under the chief.<sup>87</sup> These and other examples illustrate the pervasiveness of "speech"-like options that social media sites enable. And in light of that fact, the need to develop a workable and sensible "disruption" test for employee speech on social media becomes even more apparent.

The *Grutzmacher* decision illuminates the impact social media usage can have on public employees. While the battalion chief's termination was based on a compilation of his actions, the court held that his "liking" of another's racially charged comment constituted a form of speech that infringed on the department's overall ability to make fair decisions.<sup>88</sup> Regardless of the battalion chief's morality, the court's interpretation of his "like" as speech demonstrates the expansion of the concept of speech from what was originally applied when the *Pickering* framework was developed.<sup>89</sup> The Supreme Court denied cert of this case in *Buker v. Howard County*, thereby leaving untouched this guiding principle that "liking" an online post can constitute a form of speech for employment termination purposes.<sup>90</sup>

The public is often able to view an individual's Facebook posts and likes. In this past year, a district court even considered whether private Facebook messages are relevant to prove the disruption element.<sup>91</sup> In *Moreau v. St. Landry Parish Fire Department*, the plaintiff was a fire captain who had posted on his Facebook page about a school teacher being arrested after questioning the school board about a raise for the superintendent.<sup>92</sup> In the post, the fire captain compared the board's actions to those of his fire department.<sup>93</sup> The fire captain went on to have a "private Facebook message exchange," where he continued to

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<sup>85</sup> *Id.* at 338.

<sup>86</sup> *Id.* at 346.

<sup>87</sup> *Id.*

<sup>88</sup> *Grutzmacher*, 851 F.3d at 347.

<sup>89</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968) (speech considered by the Court was a letter written by a former school teacher).

<sup>90</sup> See *Buker v. Howard Cty.*, No. 16-1539, 2017 U.S. LEXIS 5570 (2017).

<sup>91</sup> See *Moreau v. St. Landry Par. Fire Dist. No. 3*, 413 F. Supp. 3d 550 (W.D. La. 2019), *aff'd*, 808 F. App'x 225 (5th Cir. 2020).

<sup>92</sup> *Id.* at 556.

<sup>93</sup> *Id.* at 556-57.

discuss the fire department with another user.<sup>94</sup> In denying his motion to strike the private Facebook message exchange, the court found this evidence to be significant in determining whether he was terminated in violation of his First Amendment rights.<sup>95</sup>

Rather than strictly looking at what was publicly available through an individual's Facebook page, the court also considered an individual's private messages.<sup>96</sup> The same type of conversation could have occurred in the comments on the original Facebook post, but instead the parties used a private forum. While this decision leaves employees more vulnerable to termination for conversations they privately have through electronic messages, employees could argue in litigation that they did not intend to disrupt their workforce by having private, rather than public, discussions on an online forum.

As seen in *Grutzmacher* and *Moreau*, courts have considered comments that public employees do not explicitly express to the public, such as clicking a "like" button on another user's content or having a private message conversation, when evaluating whether a public employer maintained a reasonable belief of disruption to the workforce.<sup>97</sup> Since the majority of jurisdictions have adopted the reasonable belief of disruption test, courts should be wary about the growing amount of online actions that may be considered when evaluating whether an employer had a reasonable belief of disruption to justify adversely treating an employee.

#### IV. COURTS SHOULD ADOPT A MODIFIED REASONABLE BELIEF OF DISRUPTION STANDARD

The Constitution's framers could not have imagined that electronic devices would exist, much less social media platforms.<sup>98</sup> Just as courts have been willing to adjust the constitutional framework over time, courts should also be willing to adjust the *Pickering* balancing test to simultaneously benefit the rights of employees and employers. This

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<sup>94</sup> *Id.* at 559, 562.

<sup>95</sup> *Id.* at 562–63.

<sup>96</sup> It is important to note that these private Facebook messages were offered to the Board of Commissioners by the other party engaging in the private messages with the fire captain. *Id.* at 558.

<sup>97</sup> See *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 346 (4th Cir. 2017); *Moreau v. St. Landry Par. Fire Dist. No. 3*, 413 F. Supp. 3d 556, 562 (W.D. La. 2019), *aff'd*, 808 F. App'x 225 (5th Cir. 2020).

<sup>98</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434 (2d Cir. 2001) ("When the Framers of the First Amendment prohibited Congress from making any law 'abridging the freedom of speech,' they were not thinking about computers, computer programs, or the Internet.").

section first addresses why it is necessary to revisit the disruption standard dilemma. It then explains why the reasonable belief of disruption standard is the correct standard for application. This section concludes by addressing potential flaws stemming from the reasonable belief of disruption standard that must be dealt with to adequately protect both employers' and employees' interests.

A. *Why This Issue Should Be Revisited*

First Amendment retaliatory claims stemming from social media posts are on the rise today.<sup>99</sup> Daniel Horwitz, a Tennessee constitutional lawyer, believes the reason behind the rise in these types of cases is social media's visibility and widespread usage for communication.<sup>100</sup> Social media's "increasingly prevalent use . . . has created an ongoing tension between an employee's right to free speech and the employer's right to manage employees and operate the business."<sup>101</sup> Whereas the contested speech addressed in past Supreme Court cases dealt with verbal conversations or written letters, courts are now facing claims questioning whether social media speech should be interpreted in the same light.<sup>102</sup> 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.<sup>103</sup> Because of this, courts should modify the current *Pickering* framework to protect the interests of both employers and employees.

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<sup>99</sup> David L. Hudson Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, 103 ABA JOURNAL 49 (May 1, 2017, 4:10 AM), [http://www.abajournal.com/magazine/article/public\\_employees\\_private\\_speech](http://www.abajournal.com/magazine/article/public_employees_private_speech) ("The number of such social media cases involving public employees disciplined for posts has been on the rise . . .").

<sup>100</sup> *Id.*

<sup>101</sup> Krudewagen & Stem, *supra* note 50.

<sup>102</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968) (evaluating a former teacher's letter); *Connick v. Myers*, 461 U.S. 138, 140 (1983) (examining a former Assistant District Attorney's questionnaire); *Rankin v. McPherson*, 483 U.S. 378, 380-81, 384 (1987) (considering a former deputy county constable's private conversation); *Waters v. Churchill*, 511 U.S. 661, 664, 668 (1994) (looking at a former nurse's conversation with a co-worker); *Garcetti v. Ceballos*, 547 U.S. 410, 414-15 (2006) (assessing a police officer's witness testimony).

<sup>103</sup> See *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016) (noting that social media "amplifies the distribution of the speaker's message").

B. *Courts Should Apply a Modified Reasonable Belief of Disruption Standard for Social Media Cases*

Social media is on the rise and will likely only continue to become more popular in the future.<sup>104</sup> 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. This necessitates modifying the *Pickering* test's current application to ensure that both the rights of public employers and employees are adequately protected.

The actual disruption test would adequately protect employees' rights by mandating employers to demonstrate proof that the employee's speech actually disrupted the workplace.<sup>105</sup> But since many courts have abandoned requiring proof of actual disruption, the government only needs to show that there is a reasonable possibility that the speech could adversely harm the workforce.<sup>106</sup> While this standard has flaws, the reasonable belief of disruption standard has received substantial support from circuit courts.<sup>107</sup> Nonetheless, speech conducted through social media differs greatly from the contested speech once considered by the Supreme Court.<sup>108</sup> 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 due to oversharing on the internet.<sup>109</sup> Public employers also react more quickly to employees' social media posts because "the increased

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<sup>104</sup> See Esteban Ortiz-Ospina, *The rise of social media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media>.

<sup>105</sup> See Hitz, *supra* note 51, at 1191 ("In light of the ambiguity associated with the meaning of disruption in the context of *Pickering*, the Supreme Court must adopt a clear standard that lower courts can apply uniformly."); see also Sabrina Niewialkouski, Note, *Is Social Media the New Era's "Water Cooler"?* # *NotIfYouAreAGovernmentEmployee*, 70 U. MIAMI L. REV. 963, 992 (2016) ("Courts should revert to the old test, created in *Pickering*, in which there must be an actual showing of disruption or inefficiency by the employee before the employer can take an adverse employment action.").

<sup>106</sup> See *Snipes v. Volusia Cty.*, 704 F. App'x 848, 852 (11th Cir. 2017).

<sup>107</sup> See *supra* Section 0.

<sup>108</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 414–15 (2006) (assessing a police officer's witness testimony); *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (looking at a former nurse's conversation with a co-worker); *Rankin v. McPherson*, 483 U.S. 378, 384–85 (1987) (considering a former deputy county constable's private conversation); *Connick v. Myers*, 461 U.S. 138, 141 (1983) (examining a former Assistant District Attorney's questionnaire); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968) (evaluating a former teacher's letter).

<sup>109</sup> Paul Hiebert, *The Real Reason Why So Many People Overshare on Facebook*, SLATE (Aug. 19, 2013, 10:47 AM), <https://slate.com/technology/2013/08/oversharing-on-facebook-researchers-weigh-in.html>.

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visibility of social media posts renders employers hypersensitive to controversy and public overreaction.”<sup>110</sup> Subsequently, there is a need to modify the reasonable belief of disruption standard.

When dealing with First Amendment cases based on social media activity, courts should follow the majority of circuits when applying the *Pickering* balancing test and require employers to demonstrate they had a reasonable belief that disruption could have occurred had they not acted.<sup>111</sup> While numerous courts have expressed their desire to require a reasonable belief of disruption, courts have been unclear what exactly constitutes a reasonable belief. Before posing a solution to the imperfect reasonable belief of disruption standard, there is a need to understand the standard’s flaws.

### C. *The Issues Stemming from the Reasonable Belief of Disruption Standard*

While most courts have decided that the reasonable belief of disruption standard is the appropriate standard to apply when deciding free speech claims stemming from social media activity, the standard, as it presently stands, has flaws that unfairly disadvantage employees. First, courts consistently offer employers in fields that require “close working relationships” an extreme amount of deference for their beliefs. Additionally, courts have not come to a consensus of what a reasonable belief of disruption entails. This section addresses both flawed elements of the reasonable belief of disruption standard by looking at the root of the issues. This section concludes by offering a solution to addressing these flaws in the future.

#### 1. The Erroneous Need to Be Deferential to “Close Working Relationships”

The emphasis on “close working relationships” originated in *Pickering*, where the Court found that the teacher’s work relationship with the board of education and superintendent were not of the nature that would require personal loyalty to remain functional.<sup>112</sup> The Court expanded on the “close working relationship” in *Connick*, holding, “When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment

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<sup>110</sup> 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, 310 (2019).

<sup>111</sup> *But see* Hudson, *supra* note 99 (urging courts to require employers to demonstrate how the workplace was “actually undermined” by the employee’s public speech).

<sup>112</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968).

is appropriate.”<sup>113</sup> In modern case law, courts have followed in *Connick’s* footsteps by offering heightened deference to the judgment of particular employers when analyzing whether they had a reasonable belief for terminating employees.<sup>114</sup> Under this reasoning, the reasonable belief of disruption standard is appropriate; yet, employees in particular fields are constantly disadvantaged because their careers involve “close working relationships.”<sup>115</sup>

For example, police departments are one workforce where there has been an emphasis on deference.<sup>116</sup> In *Gillis*, the Sixth Circuit expressed that police departments have “legitimate and powerful interests in regulating speech by their employees.”<sup>117</sup> As a result, the court found that the correctional officers’ memorandum could disrupt the legitimate interests of law enforcement because the effects of the memorandum’s release could have potentially harmed or led to deaths of staff and inmates under their control.<sup>118</sup> Another justification courts have found for providing deference to police departments is that they are “given more latitude” in regards to disciplinary actions because they are designated to maintain public safety and order.<sup>119</sup>

Similarly, another type of public safety department, fire departments, has also been offered heightened deference from courts.<sup>120</sup> In *Grutzmacher*, the Court afforded “substantial weight” to the fire department’s interests.<sup>121</sup> The court found that fire departments were interested in promoting solidarity, along with trust and internal

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<sup>113</sup> *Connick v. Myers*, 461 U.S. 138, 151–52 (1983).

<sup>114</sup> *See Gillis v. Miller*, 845 F.3d 677, 684 (6th Cir. 2017) (“We have long recognized ‘the importance of deference’ to law enforcement officials when speech threatens to undermine the functions of organizations charged with maintaining public safety.”) (quoting *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989)); *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 345 (4th Cir. 2017) (noting that fire companies have an interest in promoting workplace efficiency and therefore offering “substantial weight” to interest in limiting disharmony).

<sup>115</sup> *Pickering*, 391 U.S. at 570.

<sup>116</sup> *See, e.g., Cherry v. Pickell*, 188 F. App’x 465, 469–70 (6th Cir. 2006) (“[I]n the context of police departments, we have emphasized that the court should show ‘deference to the city’s judgment on the matter of discouraging public dissension within its safety forces.’” (quoting *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989))).

<sup>117</sup> *Gillis*, 845 F.3d at 684.

<sup>118</sup> *Id.* at 687.

<sup>119</sup> *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 740 (3d Cir. 2015) (emphasis omitted) (quoting *Nixon v. City of Houston*, 511 F.3d 494, 498 (5th Cir. 2007)).

<sup>120</sup> *See Janusaitis v. Middlebury Volunteer Fire Dep’t*, 607 F.2d 17, 26 (2d Cir. 1979) (quoting *Pickering*, 391 U.S. at 570) (“When lives may be at stake in a fire, an esprit de corps is essential to the success of the joint endeavor. Carping criticism and abrasive conduct have no place in a small organization that depends upon common loyalty—harmony among coworkers.”).

<sup>121</sup> *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 345 (4th Cir. 2017).

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harmony.<sup>122</sup> Police departments and fire departments often work together to protect the lives of one another and endangered civilians, which has been viewed as heightening the need for loyalty, discipline, and workplace harmony.<sup>123</sup>

Public school teachers have also been viewed as requiring a “degree of public trust not found in many other positions of public employment.”<sup>124</sup> In *Munroe*, the court articulated that because of this unique position, it was important to look at the reactions of both parents and students who viewed the teacher’s blog posts, which referenced some of her students.<sup>125</sup> The court gave deference to their views by describing them as “participants in public education, without whose cooperation public education as a practical matter cannot function.”<sup>126</sup> Effectively, the interests not of the school teacher or even the school district, but rather the interests of non-employees, influenced the teacher’s future.<sup>127</sup>

Courts’ continuous deference to police departments, fire departments, and school systems have, in a way, reversed and further complicated the First Amendment framework. *Pickering* and its progeny moved away from the concept elucidated in *McAuliffe v. Mayor of New Bedford’s* early proclamation that public employees do not have a right to free speech.<sup>128</sup> While employers should have some level of control over their public employees to support workplace efficiency, public employees cannot repeatedly lose their right to speak online. Public employers should not be allowed to control their employees’ speech just because they accept positions as police officers, firefighters, or teachers. As such, a certain modification to the reasonable belief of disruption test must be made to balance the disadvantages public

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<sup>122</sup> *Id.* See also *Goldstein v. Chestnut Ridge Volunteer Fire Cor.*, 218 F.3d 337, 355 (4th Cir. 2000) (“[V]olunteer fire companies have a strong interest in the promotion of camaraderie and efficiency, and we thus accord . . . substantial weight for these articulated interests.”); *Janusaitis v. Middlebury Volunteer Fire Dep’t*, 607 F.2d 17, 26 (2d Cir. 1979) (“When lives may be at stake in a fire, an *esprit de corps* is essential to the success of the joint endeavor.”).

<sup>123</sup> *Bennet v. Metro. Gov’t of Nashville & Davidson Cty.*, 383 F. Supp. 3d 790, 804 (M.D. Tenn. 2019).

<sup>124</sup> *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475 (3rd Cir. 2015) (quoting *Munroe v. Cent. Bucks Sch. Dist.*, 34 F. Supp. 3d 532, 539 (E.D. Pa. 2014)).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (quoting *Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110, 1121 (7th Cir. 2013)).

<sup>127</sup> See *id.* The court also described teachers as acting *in loco parentis* for students, which adds a condition teachers accept when taking on public employment. *Id.* See also *Craig*, 736 F.3d at 1119 (“An employer may have more leeway in restricting the speech of an employee whose position requires contact with the public.”).

<sup>128</sup> *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

employees inherently have because of their social media use. Therefore, courts should adopt a modified version of the reasonable belief of disruption test to combat this type of deference and simultaneously ensure public employees have their constitutionally guaranteed right to freedom of speech.

## 2. Defining What It Means to Have a Reasonable Belief of Disruption

Another flaw stemming from the reasonable belief of disruption standard is a lack of clarity over what it means for an employer to have a reasonable belief to justify adverse employment action. In *Gillis*, *Grutzmacher*, and *Munroe* discussed above, the courts justified their decisions to rule in favor of the employer by accepting the employer's reasonable belief of disruption.<sup>129</sup> Of course, opponents of the reasonable belief of disruption test believe that employers could "fabricate a 'reasonable belief'" to satisfy the Supreme Court's articulated standard.<sup>130</sup> The standard's subjectivity may leave public employees in vulnerable situations because employers' decisions are based on speculative beliefs.<sup>131</sup> Justice O'Connor cautioned in *Waters* that:

[T]here will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.<sup>132</sup>

Justice O'Connor addressed that there will not always be one correct solution to address these issues.<sup>133</sup> There is a lack of precision that comes along with the reasonable belief of disruption standard because there is no exact definition of reasonableness. The reasonable belief of disruption standard parallels the reasonable person standard,

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<sup>129</sup> *Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017); *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 345 (4th Cir. 2017); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 478 (3rd Cir. 2015).

<sup>130</sup> Thalia Olaya, Note, *Public Employees' First Amendment Speech Rights in the Social Media World: #Fire of #Fire-d*, 36 HOFSTRA LAB. & EMP. L.J. 431, 476 (2019). See *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion) (offering "substantial weight to government employers' reasonable predictions of disruption.").

<sup>131</sup> *Niewialkowski*, *supra* note 105, at 993-94.

<sup>132</sup> *Waters v. Churchill*, 511 U.S. 661, 678 (1994).

<sup>133</sup> *Id.*

commonly utilized in negligence cases.<sup>134</sup> This reasonableness test protects the interests of the employers, but it does not offer them complete control over terminating their employees by requiring a showing of a reasonable belief of disruption.

One possible solution to reconciling these difficulties in determining whether employers had a reasonable belief of disruption is mandating that government employers implement social media policies. By doing so, employers would have guidance over what employees can and cannot post on social media.<sup>135</sup> If employees then decided to bring suits, the employers' social media policies could assist courts' applications of the *Pickering* balancing test. If an employee was terminated for activity not restricted in the policy, a court will likely lean more toward protecting an employee's speech rights as a matter of public concern.<sup>136</sup> Alternatively, if an employee's activity dealt with conduct restricted by the policy, then a court would likely find the employer's decision was the result of promoting workplace efficiency.<sup>137</sup> In applying the *Pickering* balancing test, courts should be more receptive to an employer's reasonable fear argument when the employer can point to a provision of a social media policy that specifically prohibits the speech in question.

#### V. RECOMMENDED SOCIAL MEDIA POLICY: WHAT EMPLOYERS CAN DO TO RESOLVE THE FLAWS OF THE REASONABLE BELIEF OF DISRUPTION STANDARD

A social media policy, "together with the employee's signed acknowledgment of receiving it and being bound by its terms, is usually the first—and best—line of defense to employee privacy claims."<sup>138</sup> Social media policies should not overly restrict an employee's ability to utilize social media, but they should also be stringent enough to protect workplace integrity.<sup>139</sup> Striking the right balance might be challenging for employers, but this section will offer guidance on crafting an

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<sup>134</sup> *Reasonable Person*, LEGAL INFORMATION INST. (2020). The reasonable person is "[t]he hypothetical reasonable person [who] behaves in a way that is legally appropriate." *Id.*

<sup>135</sup> *Id.* (addressing that "[w]e the public want the people with the most knowledge to speak on matters of public policy.").

<sup>136</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("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.").

<sup>137</sup> See *id.*

<sup>138</sup> BROWNING, *supra* note 9, at 87.

<sup>139</sup> Stacy Rapacon, *How Using Social Media Can Get You Fired*, CNBC (Feb. 5, 2016, 10:00 AM), <https://www.cnbc.com/2016/02/05/how-using-social-media-can-get-you-fired.html>.

enforceable social media policy that protects both the employer's and employee's rights. This section provides suggestions for private and public employees when drafting social media policies and considers the practices of private and public entities. First, this section will explore the need for concise policies that specifically address what can be discussed online. Next, it will focus on requiring employees to distinguish between articulating their views and purporting to articulate the views of their employers. Finally, this section will discuss the need to shield speech that touches on matters of public concern.

#### A. *Tailoring the Social Media Policy*

To many people, the ability to use social media, including throughout the workday, is critical for a job.<sup>140</sup> Checking social media is more than just a pastime; it is a way to keep up with what is happening in the world.<sup>141</sup> Public employers should be cautious in limiting employees' social media usage. Just as the *Pickering* test proffers, there is a need in the modern realm of social media usage to strike a balance between a public employee's interest in discussing matters of public concern online and an employer's interest in maintaining workplace harmony.<sup>142</sup>

This section discusses the need for employers to draft narrowly tailored social media policies. Having a narrowly tailored social media policy in place would benefit both the employee and the employer: it would help employees understand what they can post online without fear of facing repercussions, and it would afford employers protection against unduly skeptical forms of judicial review.

Employers should be cautious when drafting social media policies to avoid incorporating provisions that prohibit employees from posting anything at all. For example, the Fourth Circuit in *Liverman* critiqued the City of Petersburg's Police Department's broad social media policy that prohibited the distribution of any information "that would tend to discredit or reflect unfavorably upon the [Department] or any other City

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<sup>140</sup> See NANCY FLYNN, *THE SOCIAL MEDIA HANDBOOK: RULES, POLICIES, AND BEST PRACTICES TO SUCCESSFULLY MANAGE YOUR ORGANIZATION'S SOCIAL MEDIA PRESENCE, POSTS, AND POTENTIAL 2* (2012) ("'Generation Standby' workers (younger employees who never fully switch off from the Internet at work or home) say that they would turn down employment if the boss did not allow them to access social networking sites or personal email during working hours.").

<sup>141</sup> Peter Suci, *More Americans Are Getting Their News from Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), <https://www.forbes.com/sites/petersuci/2019/10/11/more-americans-are-getting-their-news-from-social-media/#52ff79543e17>.

<sup>142</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

of Petersburg Department or its employees.”<sup>143</sup> The court found the policy could potentially affect the public in different ways, such as keeping the public from knowing whether the department was running safely if employees were unable to engage in online discussions about the department.<sup>144</sup> The flaws in this policy highlight the need for specificity in social media policies, because if the department had provided employees with specific examples of issues that could not be discussed online, such as high-risk or undercover cases, the court may have enforced the department’s social media policy and dismissed the employee’s suit.

Recently, a *Washington Post* reporter’s tweet about past sexual-assault allegations against Kobe Bryant led to public uproar.<sup>145</sup> The reporter, Felicia Sonmez, was placed on leave to determine whether she violated the company’s social media policy,<sup>146</sup> which required journalists to “refrain from writing, tweeting or posting anything—including photographs or video—that could objectively be perceived as reflecting political, racial, sexist, religious or other bias or favoritism.”<sup>147</sup> Even though Sonmez was reinstated because she was subsequently found not to have been in “clear and direct violation” of the social media policy, this incident demonstrates the need for narrower social media policies.<sup>148</sup> While the *Washington Post*’s inclusion of the language “objectively be perceived” leans toward a more tailored view of what is appropriate online speech, the policy also overly restricts employees from speaking on many important topics online.<sup>149</sup> While the First Amendment’s free speech protections only apply to government employees, the *Washington Post*’s actions illustrate the sweeping effects social media activity can have on employers and employees.<sup>150</sup>

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<sup>143</sup> *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016).

<sup>144</sup> *Id.* at 408.

<sup>145</sup> See Rachel Abrams, *Washington Post Suspends a Reporter After Her Tweets on Kobe Bryant*, NY TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/business/media/kobe-bryant-washington-post-felicia-sonmez.html>.

<sup>146</sup> *Id.*

<sup>147</sup> Wash. Post Staff, *Policies and Standards*, WASH. POST (Jan. 1, 2016), <https://www.washingtonpost.com/policies-and-standards/>.

<sup>148</sup> Paul Farhi, *Washington Post Clears Reporter Who Tweeted Link to Kobe Bryant Rape Allegations*, WASH. POST (Jan. 28, 2020, 10:41 PM), [https://www.washingtonpost.com/lifestyle/style/washington-post-clears-reporter-who-tweeted-link-to-kobe-bryant-rape-allegations/2020/01/28/74728a32-421a-11ea-b5fc-eefa848cde99\\_story.html](https://www.washingtonpost.com/lifestyle/style/washington-post-clears-reporter-who-tweeted-link-to-kobe-bryant-rape-allegations/2020/01/28/74728a32-421a-11ea-b5fc-eefa848cde99_story.html).

<sup>149</sup> Wash. Post Staff, *supra* note 147.

<sup>150</sup> See Tom Spiggle, *What Felicia Sonmez’s Tweets About Kobe Bryant Tell Us About the Free Speech Rights of Employees*, FORBES (Feb. 4, 2020, 1:27 PM), <https://www.forbes.com/sites/tomspiggle/2020/02/04/what-felicia-sonmezs-recent-tweets-about-kobe-bryant-tell-us-about-the-free-speech-rights-of-employees/#7b7fa4773af5>.

Public employers cannot try to control their employees' online speech by developing overly restrictive policies. It is nearly impossible for employers to anticipate all types of social media that could be problematic. This is a potential flaw in creating concise social media policies that leave employers in vulnerable situations if they cannot predict some form of disruptive speech.<sup>151</sup> Employers should focus on reaching a balance between advancing their rights and those of their employees by drafting narrower social media policies. Avoiding rash terms like "any information 'that would tend to discredit or reflect unfavorably upon'" the employer, or even as the *Washington Post* restricts anything "that could objectively be perceived" as discussing an array of topics in a favorable way is one pivotal step to moving away from a broad policy.<sup>152</sup> By steering clear of such terms, employers can minimize their potential liability if former employees bring litigation.<sup>153</sup> Employers can also encourage their employees to use good judgment when engaging in online activity and guide employees by designating specific topics particular to their fields that should not be discussed.<sup>154</sup> While this may be challenging and unpredictable, employers can always update their social media policies and notify employees of changes if they find new topics that should not be discussed online.

#### B. *Representing One's Thoughts*

While it is important that public employers protect their reputations, their employees also have a competing First Amendment right to freedom of speech. Employees can create personal social media accounts and engage in online conversations with other users. Yet, there is still a looming concern of employers that their employees will post something potentially destructive online.<sup>155</sup> To protect employers

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<sup>151</sup> See Susan C. Hudson & Karla K. Roberts, *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 770–71 (2012).

<sup>152</sup> See *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016); Wash. Post Staff, *supra* note 147.

<sup>153</sup> Michael R. Blum, *The Risks of Social Media Use by Employees, and How Public Employers Can Create Strong Social Media Policies*, FOSTER SWIFT (July 27, 2017), <https://www.fosterswift.com/communications-Social-Media-Employers-Policy-Speech.html>.

<sup>154</sup> See Kathy Vanderziel, *Challenges and Issues in Creating a Social Media Policy*, LEXISNEXIS (Aug. 18, 2012), <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2012/08/18/challenges-and-issues-in-creating-a-social-media-policy.aspx>.

<sup>155</sup> See Benedetto Cristofani, *Companies are Increasingly Worried About What Their Employees Say*, THE ECONOMIST (Feb. 27, 2020), <https://www.economist.com/international/2020/02/27/companies-are-increasingly-worried-about-what-their-employees-say> ("Employers say they need to restrict the expression of certain views in order to create inclusive workplaces.").

from facing the public's wrath because of this speech, employers should require employees to distinguish their views from those of their employer. This may help minimize the backlash employers face. By including this condition in their social media policies, employers will allow employees to offer their views online but also demonstrate to other users that those are their personal views.

In the private employment context, the National Labor Relations Board (NLRB) has considered whether the requirement that employees use personal disclaimers on their social media posts was enforceable.<sup>156</sup> In August 2019, the NLRB reviewed CVS Health's requirement that employees use personal disclaimers such as, "tweets my own," "views my own," or "[t]he[se] opinions . . . are the personal opinions of the original authors, not those of CVS Health."<sup>157</sup> The NLRB found the policy mandating employees to use disclaimers lawful because employees could place these requirements on their social media accounts, rather than each individualized post to demonstrate that their online activity was solely their views.<sup>158</sup> While this is in the private employment realm, the NLRB's reasoning could also apply to public employees. It would be simple for employees to include a general provision in their profiles, emphasizing that these are their individual views.

If a public employee had one of these disclaimers on his or her account and was subsequently terminated for online activity, this type of provision would ease the challenges courts face when conducting the *Pickering* analysis. Disclaimers are critical because they inform the public that the employee's post or comment was "made in the author's individual capacity and express[ed] that individual's opinions and beliefs, not those of the employer."<sup>159</sup> With the majority of courts applying the reasonable belief of disruption standard,<sup>160</sup> mandating that employees use a disclaimer would help illustrate that the employer lacked a reasonable belief that disruption could occur because the online activity solely represented the employee's views. As there is often difficulty in separating an employee's personal and work views,

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<sup>156</sup> Memorandum from Jayme L. Sophir, Assoc. Gen. Counsel U.S. Gov't Nat'l Labor Relations Bd., to Mori Rubin, Reg'l Dir. 10-11 (Aug. 15, 2019) (on file with NLRB), <https://apps.nlr.gov/link/document.aspx/09031d4582d1e93c>.

<sup>157</sup> *Id.* Other provisions that will not be analyzed discussed refraining from utilizing social media to make employment recommendations and a general caution to use social media appropriately by refraining from discussing complaints that "could be resolved more constructively through the appropriate channels consistent with the Company's commitment to maintain a diverse and safe workplace." *Id.* at 11. The NLRB found both provisions to be facially lawful. *Id.* at 11-12.

<sup>158</sup> *Id.* at 11.

<sup>159</sup> Hudson & Roberts, *supra* note 151, at 772.

<sup>160</sup> *See* Section 0.

the usage of a disclaimer may minimize the likelihood that an employee's social media activity is read as the shared view of his or her employer.<sup>161</sup> These types of disclaimers would be particularly effective when employees use online platforms to discuss their employers or topics that concern their employer's work.<sup>162</sup> There remains the concern that an individual's employer could be identified by information or other posts located within social media accounts.<sup>163</sup> Even though this is a potential concern, requiring that employees place disclaimers either on controversial posts or permanently placed on their social media accounts will help advance both the employer and the employee's interests.

### C. Addressing a Matter of Public Concern

As previously noted, there is a significant need for narrowly construed social media policies that offer public employees the chance to engage in online discussions on social media.<sup>164</sup> While public employees have a First Amendment right to free speech,<sup>165</sup> the *Pickering* test mandates that the speech deals with a matter of public concern.<sup>166</sup> This appears to be a straightforward requirement, but there is a need for employers to describe in their social media policies the extent speech must address matters of public concern to be considered protected. Since Americans now "are arguably more socially and politically conscious than previous generations and actively use social media to convey their thoughts, debate important topics, and fight for causes," employers need to vigilantly define what it means to be a matter of public concern.<sup>167</sup>

Some topics address matters of public concern but should not be discussed online to protect the employer's interests. Confidential information about the employer, if discussed online, could affect the

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<sup>161</sup> See William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427, 489 (2013).

<sup>162</sup> *It May Be Time to Update Your Workplace Social Media Policy...*, GENERAL COUNSEL PC (Nov. 12, 2019), <https://www.generalcounselaw.com/it-may-be-time-to-update-your-workplace-social-media-policy/>.

<sup>163</sup> See Melanie Pinola, *Managing Your Personal and Professional Online Profiles*, LIFEWIRE (Jan. 20, 2020), <https://www.lifewire.com/social-networking-strategies-for-personal-and-professional-use-2378017> (proposing different strategies for employees if they want to use social media for both personal and work-related purposes).

<sup>164</sup> See *supra* Section V.O.

<sup>165</sup> U.S. CONST. amend. I.

<sup>166</sup> See *Connick v. Myers*, 461 U.S. 138, 146–48 (1983).

<sup>167</sup> S. Kumar, *Why Monitoring Employees' Social Media is a Bad Idea*, TIME (May 22, 2015, 11:41 AM), <https://time.com/3894276/social-media-monitoring-work/>.

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employer's business or negatively affect its reputation.<sup>168</sup> To protect confidential information and remind employees about the need for confidentiality regarding certain discussions, employers should integrate their confidentiality policy into their social media policy if one already exists.<sup>169</sup> If one does not exist, employers should include a provision in the social media policy that informs employees of specific topics that should not be discussed online because of its confidential nature.

But if a public employee's speech does not discuss confidential information, the social media policy should include a provision explaining that speech discussing matters of public concern is protected. For example, a former dental assistant recently alleged she was terminated for her Facebook posts supporting President Donald Trump.<sup>170</sup> Her posts led to a man leaving a negative review on the Facebook page of the dentist's office, addressing that the employee should not be "spouting racist comments on Facebook."<sup>171</sup> While this stems from the private employment realm, this incident serves as a cautionary tale for both employers and employees. The employee exercised her First Amendment right to free speech by supporting a political view, but one online user believed this was the shared view of the dentist's office.<sup>172</sup>

By including a provision that allows employees to discuss matters of public concern, even if the online activity only slightly relates to something of the public's interest, employers will be advancing the goals of the *Pickering* test. An example of a provision discussing public concern was offered in *Liverman*.<sup>173</sup> The provision provided officers the ability to discuss matters of public concern, as long as the comments did not "disrupt the workforce, interfere with important working relationships or efficient workflow, or undermine public confidence in the officer."<sup>174</sup> The court did not uphold the City of Petersburg's social

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<sup>168</sup> See Hudson & Roberts, *supra* note 151, at 782.

<sup>169</sup> *Id.*

<sup>170</sup> Joshua Rhett Miller, *Wisconsin Woman Claims She was Fired for Pro-Trump Facebook Posts*, NY POST (Jan. 16, 2020, 3:04 PM), <https://nypost.com/2020/01/16/wisconsin-woman-claims-she-was-fired-for-pro-trump-facebook-posts/>.

<sup>171</sup> *Id.*

<sup>172</sup> It is important to note that even though she had a right to freedom of speech, since this was a private employee, she did not have protection from being terminated by her employer for her online activity.

<sup>173</sup> *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016).

<sup>174</sup> *Id.*

media policy, but noted that this portion of the policy offered a narrow restriction.<sup>175</sup>

Employers should include a provision, like the employer in *Liverman* did, to ensure that employees are granted an ability to discuss matters that deal with public concern online. Concerns may arise as to what level the speech must engage in public concern to warrant First Amendment protection, but this Comment does not attempt to define a bright-line rule for what speech reaches this level. Employers can include examples of topics that would constitute a matter of public concern, such as working conditions and wages, but can also explain that the list is non-exhaustive. This would protect both the employer's and employee's interests by leaving both open to demonstrating that an employee's speech does or does not discuss a matter of public concern. Finally, employers should ensure that they include examples of how speech could affect the overall workplace to show employees the significant effect their speech can have. In doing so, employers will educate employees on what they need to be cautious about posting on social media.

#### VI. CONCLUSION

Public employees have a fundamental right to use social media in their daily lives.<sup>176</sup> Employees should have the ability to post, comment, or "like" on social media sites. Employers also have a justified interest in protecting their reputation and avoiding backlash from their employee's online activity. Lower courts have attempted to address the interests of both government employers and their employees by applying the legal framework that had been developed by the Supreme Court beginning in *Pickering v. Board of Education*. This Comment delved into the flaws of *Pickering* and its progeny that resulted in a circuit split among courts over whether the *Pickering* balancing test required employers to demonstrate proof that the employee's social media activity actually disrupted the workplace, or merely that employers had a reasonable belief that disruption could occur from the speech.

With most circuits adopting the reasonable belief of disruption standard, this standard should uniformly be applied by all circuits for cases involving social media. The progression of technology could not have been anticipated; therefore, the constitutional framework,

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<sup>175</sup> *Id.* at 409.

<sup>176</sup> See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (emphasizing that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights").

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including that of the *Pickering* test, must be modified. By modifying the reasonable belief of disruption test, employers will not be unfairly advantaged by having the ability to preemptively terminate employees for any questionable social media activity. Rather, by requiring employers to incorporate concise social media policies, employees will have guidance for what they can post on social media. Implementing social media policies will also allow employers to predetermine specific topics they do not want employees to discuss online.

Social media usage is not going away anytime soon. Therefore, employees cannot lose the opportunity to engage in “the modern public square.”<sup>177</sup> By retaining the reasonable belief of disruption standard but modifying it to require employers to have social media policies in place, employers and employees will have both of their interests balanced. Implementing social media policies is a simple and cost-efficient way to modify the legal framework that governs public employee speech claims. Thus, to protect employees’ ability to use social media, employers must detail their rights through social media policies.

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<sup>177</sup> *Id.*