Washington Law Review

Volume 87
Number 3 *In Memoriam: Professor Emeritus Richard O. Kummert*

10-1-2012

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Thomas E. Hudson

TALKING DRUGS: THE BURDENS OF PROOF IN POST-*GARCETTI* SPEECH RETALIATION CLAIMS

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Abstract: Law Enforcement agencies fire their employees for speaking out in favor of drug legalization, which leads the employees to sue their former employers for violating their First Amendment Free Speech rights. These employee claims fall under the U.S. Supreme Court's complex speech retaliation test, most recently articulated in *Garcetti v. Ceballos*. The analysis reveals that circuit courts are inconsistent as to who bears the burden of proving that they prevail under "*Pickering* balancing," and how they should construct that burden. This Comment argues that U.S. Supreme Court precedent demands that the employer bears the "*Pickering* balancing" burden, and that the Court should require employers to meet their burden with clear and convincing evidence. Further, when applying the speech retaliation test to law enforcement employees criticizing the war on drugs, the Court should rule that it constitutes speech as a "citizen on a matter of public concern," and should abandon the quasi-military rule when engaging in "*Pickering* balancing."

INTRODUCTION

"[L]egalization of drugs would end the drug war and related violence in Mexico."[1] Following his statement, Bryan Gonzalez's employer—the United States Custom and Border Patrol—fired him for the content of his speech.[2] Gonzalez's case is not unique—state and federal employers alike have fired employees for verbally opposing the drug war.[3] Similarly, public employers have fired employees for associating with Law Enforcement Against Prohibition (LEAP), an organization that supports legalizing marijuana and ending the drug war.[4]

These new cases highlight a doctrine that the U.S. Supreme Court created in *Pickering v. Board of Education*.[5] That doctrine grants public employees the right to sue government employers for termination in violation of the First Amendment if their termination is based on speech

1. Complaint at 3, Gonzalez v. Manjarrez, Jr., No. CV 11-29 (W.D. Tex. Jan. 20, 2011) [hereinafter *Gonzalez* Complaint] (quote summarizing a report of what Gonzalez said).

2. *Id.* at 4.

3. Marc Lacey, *Police Officers Find That Dissent on Drug Laws May Come With a Price*, N.Y. TIMES, Dec. 3, 2011, at A11; *see generally* Miller v. Mohave Cnty., No. CV-11-8182-PCT-FJM, 2012 WL 1078828 (D. Ariz. Mar. 30, 2012).

4. Lacey, *supra* note 3, at A11; *see, e.g.*, *Gonzalez* Complaint, *supra* note 1, at 3–4 (summarizing a report of what Gonzalez said).

5. 391 U.S. 563 (1968).

made as "a citizen on a matter of public concern."[6] Over time, the Court has complicated the speech retaliation test developed in *Pickering* (speech retaliation test) by splitting it into three prongs of ever increasing detail.[7] The Court's creation and modification of these three prongs have greatly narrowed the situations in which employees can prevail on a speech retaliation suit.[8]

A court engages in a three-prong test when assessing an employee's speech retaliation claim for comments about the war on drugs. The employee must prevail on each of the three separate prongs to win a speech retaliation suit. The first prong requires a court to ascertain whether or not the speech is made as a citizen on a matter of public concern.[9] If the employee proves that he or she prevails on this first prong, a court will subject the claim to the second prong, which the Court refers[10] to as "*Pickering* balancing."[11] This balancing analysis requires a court to determine whether the employee's interest in speaking outweighs the employer's interest in efficiently running a law enforcement agency.[12] Finally, where a court finds that the employee prevails on both the first and second prongs, a court will engage in a third prong, requiring it to determine whether the speech actually caused the employee's termination.[13]

While the first and third prongs of the speech retaliation test have clearly established burdens of proof, the second prong—*Pickering* balancing—does not. The courts have failed to reach a consensus regarding which party has the burden of proof. In fact, the courts have failed even to define the burden.

Pickering balancing's lack of clarity in regards to its burden leads to unpredictable and overabundant litigation because the employers' and employees' rights are not clearly delineated. The lack of clarity will lead

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6. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). Note that the source of the procedural authority to sue, like with most other Constitutional lawsuits, is 42 U.S.C. § 1983. Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 590–91 (2008).

7. Beth Anne Roesler, Garcetti v. Ceballos*: Judicially Muzzling the Voices of Public Sector Employees*, 53 S.D. L. REV. 397, 416 (2008).

8. *See id.* at 398–99, 416, 419 (stating that the Court has greatly narrowed the speech retaliation test).

9. *Garcetti*, 547 U.S. at 418.

10. *Id.*

11. Bd. of Cnty. Com'rs, v. Umbehr, 518 U.S. 668, 678 (1996).

12. *See* Stanley v. City of Dalton, 219 F.3d 1280, 1289 (11th Cir. 2000) (applying "*Pickering* balancing" in a police officer employment context).

13. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

to costly litigation, as courts struggle to conduct an unclear balance of the employer and employee interests. Clarifying the balancing's burden of proof will not only streamline litigation, but will also help prevent employees from being fired for offensive speech by more effectively informing employers and employees as to their rights and responsibilities. Part I of this Comment will discuss the prevalence of law enforcement employers firing their employees for speaking out against drug laws. Part II will outline the modern speech retaliation test and its three main prongs, including each prong's unique burden of proof. Part III will argue that the Court should place a burden of clear and convincing evidence on the employer whenever the Court conducts *Pickering* balancing. Part IV will apply the speech retaliation test to instances where law enforcement employees criticize the war on drugs, and will argue that the Court should apply the speech retaliation test in a manner that favors employee speech.

I. STATE AND FEDERAL LAW ENFORCEMENT AGENCIES HAVE RECENTLY FIRED THEIR EMPLOYEES FOR OPPOSING THE DRUG WAR

Law enforcement agencies have recently fired their employees for verbally opposing the war on drugs.[14] Employers have fired employees for such speech both inside and outside of the workplace.[15] Consider Bryan Gonzalez, a New Mexico Border Patrol agent,[16] who made a number of controversial assertions while talking with a coworker during his shift break.[17] These included a statement that the "legalization of drugs would end the drug war and related violence in Mexico,"[18] and mention of the website LEAP.[19]

Gonzalez's coworker reported these comments.[20] After an internal investigation, Gonzalez's superior fired him, stating that Gonzalez had "personal views that were contrary to the core characteristics of Border Patrol Agents, which are patriotism, dedication, and esprit de corps."[21]

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14. *See generally* Lacey, *supra* note 3; *Gonzalez* Complaint, *supra* note 1, at 3–4; Miller v. Mohave Cnty., No. CV-11-8182-PCT-FJM, 2012 WL 1078828, at *1 (D. Ariz. Mar. 30, 2012).

15. *See generally* Lacey, *supra* note 3.

16. *Gonzalez* Complaint, *supra* note 1, at 3.

17. *Id.*

18. *Id.*

19. *Id.* LEAP is an organization of law enforcement members who support drug decriminalization. *Id.*

20. *Id.*

21. *Id.*

Gonzalez had no administrative remedy because he was a probationary employee when he was fired.[22] Gonzalez subsequently brought a lawsuit[23] for speech retaliation in violation of the First Amendment's guarantee of free speech.[24]

Gonzalez's case is one of a number of recent cases. Joe Miller, a local probation officer in Mohave County, Arizona, is currently suing for speech retaliation.[25] His employer fired him for signing a letter—in his personal capacity—from LEAP. The letter supported Proposition 19, which proposed to legalize the recreational use of marijuana in California.[26] The government argued that because Miller's signature included his job title, the public could misinterpret Miller's personal support to constitute the parole agency's endorsement of the initiative. Miller countered that because the letter had a disclaimer at the bottom stating that "[a]ll agency affiliations are listed for identification purposes only[,]"[27] it was sufficiently clear that he was speaking as a private citizen, rather than on behalf of his law enforcement employer.

Another speech retaliation case occurred a few years before Gonzalez and Miller began their suits. Mountlake Terrace Police sergeant Jonathan Wender settled his wrongful termination suit for $815,000.[28] One of his key legal arguments[29] was that the government violated the First Amendment by retaliating against him for speaking out against the drug war (both internally and in the press).[30] Because this argument was part of his successful claim, pro-marijuana legalization groups have taken this case as a victory for their cause.[31] This comment will next discuss the multi-pronged speech retaliation test that governs the cases discussed above.

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22. *Id.* Gonzalez was a new hire, and his employment was subjected to a standard "probationary" status for his first two years. *Id.* at 2. He was fired before those two years ran out. *Id.*

23. When this Comment went to publication, the case was still ongoing.

24. *Gonzalez* Complaint, *supra* note 1, at 5.

25. Lacey, *supra* note 3, at A11; Miller v. Mohave Cnty., No. CV-11-8182-PCT-FJM, 2012 WL 1078828, at *2–3 (D. Ariz. Mar. 30, 2012).

26. Lacey, *supra* note 3, at A11; *Miller*, 2012 WL 1078828, at *1. The voters failed to pass Proposition 19. John Hoeffel & Maria L. La Ganga, *Youth Vote Falters; Prop. 19 Falls Short*, L.A. TIMES, Nov. 3, 2010, at A17.

27. Lacey, *supra* note 3, at A11.

28. *Id.* at A15.

29. Many issues crossing many areas of law complicate this case. *See generally* First Amended Complaint, Wender v. Snohomish Cnty., No. CV 07-0197 Z (W.D. Wash. Oct. 25, 2007) [hereinafter *Wender* Complaint].

30. *Id.* at 9–10, 13.

31. *See* Lacey, *supra* note 3, at A15.

II. THE COURT MUST ENGAGE IN A MULTI-PRONGED TEST WHEN ANALYZING A SPEECH RETALIATION CLAIM

Although government employees can challenge a termination as unconstitutional speech retaliation,[32] not all employee speech is protected,[33] and not all protected speech can sustain a claim for retaliatory dismissal.[34] The modern speech retaliation claim requires a court to analyze three separate prongs, each with a unique burden of proof. Recently, *Garcetti v. Ceballos*[35] blurred the lines between the prongs, further complicating the three-prong test.

A. A Modern Speech Retaliation Claim Requires Courts to Conduct a Three-Prong Test, with Each Element Having Its Own Burden of Proof

Over time, the Court has developed a jurisprudence governing the free speech rights of public employees.[36] The Court's primary purpose in early cases was to establish that a speech retaliation claim actually existed.[37] As a result, the older speech retaliation cases did not employ a multi-prong test.[38] However, the Court's legal framework to address a

32. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006) (providing an example of a speech retaliation claim). The Court decided to apply this speech retaliation doctrine to a plaintiff *private school* in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 299–300 (2007). The school sued the local sports association (which it voluntarily contracted with) for speech retaliation, because the association punished the school for violating its recruiting rules. *Id.* at 294–95. While in this case the Court ruled against the plaintiff school, *id.* at 304, the Court's application of *Pickering* suggests that in the future the Court could protect not only individual government employees, but also private organizations and corporations from speech retaliation by the public agencies they contract with, *id.* at 299–300. *See also id.* at 306 (Thomas, J., concurring in the judgment) (criticizing the Court's extension of speech retaliation doctrine to a public body, rather than an employee). The possibility that the Court will extend this doctrine to private entities is particularly likely given the Court's desire to give the same First Amendment protections to corporations and organizations that it provides individuals. *See, e.g.*, Citizens United v. Fed. Election Comm'n, __ U.S. __,130 S. Ct. 876, 913 (2010) (ruling that "the Government may not suppress political speech on the basis of the speaker's corporate identity[,]" hence "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations").

33. Connick v. Myers, 461 U.S. 138, 147–48 (1983) (establishing that speech is not protected if and when its value is limited to the employment context).

34. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("[E]ven termination because of *protected speech* may be justified when legitimate countervailing government interests are sufficiently strong.") (emphasis added).

35. 547 U.S. 410 (2006).

36. *See Garcetti*, 547 U.S. at 418 (discussing "*Pickering* and the cases decided in its wake").

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

38. *See, e.g.*, *id.* (showing how the speech retaliation test was discussed in broad amorphous terms at this time); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977).

speech retaliation claim evolved over time.[39]

During this evolution, the Court broke the speech retaliation test down into a multi-faceted inquiry.[40] Today, the speech retaliation test's three prongs are (1) whether the employee speaks as a citizen on a matter of public concern,[41] (2) whether the employee's interest in speaking outweighs the employer's interest "in promoting the efficiency of the public services it performs,"[42] and (3) whether the proposed speech caused the employee's termination.[43]

1. Employees Bear the Burden of Proving that They Made Their Speech as a Citizen on a Matter of Public Concern

The first prong requires that the employee speaks as a citizen on a matter of public concern.[44] The employee bears the burden of proof for this prong.[45] *Garcetti* greatly narrowed the speech retaliation test[46] by splitting this first prong—the citizen on a matter of public concern

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39. *See* Roesler, *supra* note 7, at 398–99 ("[Following *Pickering*] [s]ubsequent cases served to narrow and refine the [speech retaliation] test by focusing on the methods used and factors employed in administering the balancing test."); *see also* Kathryn B. Cooper, Garcetti v. Ceballos: *The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 74 (2006). *Compare Pickering*, 391 U.S. at 574–75, *with Garcetti*, 547 U.S. at 418. The Court decided *Mt. Healthy* in 1977. The most important case law did not occur until after 1980, including *Connick*, *Rankin v. McPherson*, 483 U.S. 378 (1987), *Waters v. Churchill*, 511 U.S. 661 (1994), and *Garcetti*. Note that the fact that these questions arise as § 1983 civil rights lawsuits may bear responsibility for the Court's decision to narrow the speech retaliation doctrine over time, as the fear of lawsuits drives many of the Court's decisions. *See* Nahmod, *supra* note 6, at 590–94 (discussing how the § 1983 setting effects the underlying merits of the Constitutional Claim).

40. *See* Nahmod, *supra* note 6, at 569–70, 577–78 (explaining the Court's shift from an "ad hoc" balancing system to a system of "categorical balancing"). While the Court used to determine employee speech protection based on an amorphous rebalancing in each case, today's employee speech protection is determined based on which of a series of discrete categories the speech falls into. *Id. at* 569–70. *See* Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175, 189 (2008) (explaining the breakdown of the balancing of interests into two-prongs).

41. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); *see also* Connick v. Myers, 461 U.S. 138, 147–48 (1983).

42. *Pickering*, 391 U.S. at 568.

43. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

44. *Garcetti*, 547 U.S. at 418.

45. *See* Sheppard v. Beerman, 317 F.3d 351, 355 (2d Cir. 2003); *see also Garcetti*, 547 U.S. at 418 ("The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment *cause of action* based on his or her employer's reaction to the speech.") (emphasis added) (citations omitted); Connick v. Myers, 461 U.S. 138, 147–48 (1983).

46. *See* Roesler, *supra* note 7, at 419 (explaining that the Court has greatly narrowed what can sustain a Speech Retaliation claim for a public employee).

prong—into two sub-elements of its own: (1) a "citizen" sub-element and (2) a separate "matters of public concern" sub-element.[47] The citizen sub-element requires that employees' speech is not "pursuant to their official duties,"[48] and the matters of public concern sub-element preserves the original determination of whether or not the speech is related to issues of public importance.[49] This section will first discuss the matters of public concern sub-element and then the citizen sub-element.

a. The First Amendment Only Protects Employees Who Speak on a Matter of Public Concern

Pickering established that in order to sustain a speech retaliation claim, an employee must prove that his or her speech addressed "matter[s] of public concern."[50] Conversely, speech that "primarily concerns an issue that is 'personal in nature and generally related to [the speaker's] own situation,' such as his or her assignments, promotion, or salary," is not a matter of public concern.[51] In *Pickering*, Marvin Pickering, a public school teacher, wrote a letter to the editor of a newspaper opposing a proposed tax measure designed to increase funding to the school that employed him.[52] Pickering not only wrote to oppose the tax, but also to criticize the school board's conduct in its previous attempts to promote past tax increase proposals.[53] He also questioned the school's motives in passing the latest proposal.[54]

Applying the principle of *New York Times Co. v. Sullivan*[55]—a case creating broad First Amendment protection in the libel context—the Supreme Court ruled that a public employer cannot terminate a teacher

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47. Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) (explaining how the Court bifurcated the "citizen on a matter of public concern" inquiry), *cert. denied*, Byrne v. Jackler, __ U.S. __, 132 S. Ct. 1634 (2012) (mem.). It also had a great effect on the second "*Pickering* balancing" prong. *See infra* Part II.A.2.

48. *Garcetti*, 547 U.S. at 421.

49. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); *see also Connick*, 461 U.S. at 147–48.

50. 391 U.S. at 574.

51. *Jackler*, 658 F.3d at 236 (alteration in original) (quoting Ezekwo v. NYC Health & Hosp. Corp., 940 F.2d 775, 781 (2d Cir. 1991)).

52. 391 U.S. at 566.

53. *Id.*

54. *Id.* Notably, he closed his letter by stating: "I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration." *Id.* at 578.

55. 376 U.S. 254 (1964).

for speech like Pickering's.[56] The Court reasoned that because the speech addressed a tax sent to the public for a vote, it constitutes speech made as a citizen on "a matter of legitimate public concern."[57] Thus, the *Pickering* Court held that while there is no "right" to employment, the First Amendment still greatly limits the government's power to terminate employees addressing matters of public concern."[58]

Further, the *Pickering* Court stated that protecting speech on matters of public concern is important for reasons beyond the individual's interest in speaking.[59] Society benefits from listening to the speech of those working in the government[60] because their public positions give them unique knowledge and experience regarding the public organizations that employ them.[61] Protecting this societal benefit has remained important to the Court in subsequent decisions.[62]

Courts determine on a case-by-case basis whether a given instance of speech qualifies as speech made on a matter of public concern.[63] Courts will analyze "the content, form, and context of a given statement, as revealed by the whole record."[64] To receive protection, the speech must "be fairly considered as relating to any matter of political, social, or other concern to the community."[65] A plurality declared that instead of leaving the question to a court's factual finding, the *employer's reasonable belief* determines what the employee said for the purposes of conducting the speech retaliation test.[66]

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56. *Pickering*, 391 U.S. at 574–75.

57. *Id.* at 571.

58. *Id.* at 568 ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.") (alteration in original) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967)).

59. *See* Garcetti v. Ceballos, 547 U.S. 410, 433 (2006).

60. *See Pickering*, 391 U.S. at 571–72.

61. *See Garcetti*, 547 U.S. at 433.

62. *See, e.g.*, *id.* at 419; City of San Diego v. Roe, 543 U.S. 77, 82 (2004); United States v. Nat'l Treasury Emp. Union, 513 U.S. 454, 470 (1995).

63. Connick v. Myers, 461 U.S. 138, 147–48 (1983).

64. *Id.*

65. *Id.* at 146.

66. Waters v. Churchill, 511 U.S. 661, 677–78 (1994). The *Waters* plurality reasoned that the employer is entitled to use his own, flexible procedures to determine what the employee said, without the judiciary using its far stricter fact-finding procedures (constrained by the rules of evidence, etc.) to second guess the employer's reasonable conclusions. *Id.* at 675–76. The plurality could not get a majority because it argued that the Court should ensure that the employer's belief was "reasonable." *Id.* at 677–78. This "reasonableness" requires that the employer "tread with a certain amount of care[,] . . . the care that a reasonable manager would use before making an employment decision . . . of the sort involved in the particular case." *Id.* Justices Scalia, Kennedy, and Thomas, while supporting that the employer's belief should control, argued that the Court

Although a court must analyze the employee speech in its entirety, *Givhan v. Western Line Consolidated School District*[67] establishes that the speech's actual content—as opposed to whether the employee spoke in public or private—controls whether the speech addresses matters of public concern.[68] In *Givhan*, a teacher named Bessie Givhan complained privately to her employer about her school's racially discriminatory policies.[69] The school terminated Givhan for her complaints, and she sued for speech retaliation.[70] Like the teacher in *Pickering*, Givhan commented on an important public issue—racial discrimination in schools.[71] But unlike Pickering, who made his comments publically in a newspaper, Givhan made her comments to her superior in private.[72] Thus, the Court had to decide whether this difference between private and public communication affected the matters of public concern analysis.

The Court determined that the First Amendment protects Givhan's speech as a matter of public concern, even though her speech was made privately.[73] The actual content of the speech is the most important factor in determining whether it is made on matters of public concern, rather than the location of the speech.[74]

Rankin v. McPherson[75] demonstrates that the offensiveness of the speech in question does not change whether it touches on matters of public concern.[76] *Rankin* dealt with Ardith McPherson, who served as a clerical worker in a local county law enforcement agency.[77] She talked with her coworker—who was also her boyfriend—about a news report

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should accept the employer's belief regardless of whether said belief is reasonable. *Id.* at 686 (Scalia J., concurring in the judgment).

67. 439 U.S. 410 (1979).

68. *See id.* at 414.

69. *Id.* at 411–13.

70. *Id.* at 411–12.

71. *Id.* at 411–13.

72. *Id.* at 412, 414.

73. *Id.* at 414.

74. *See id.* Whether the employee made the speech in private or public is not *controlling*. However, the Court may still *consider* this as part of the speech's context. *See* Connick v. Myers, 461 U.S. 138, 147–48 (1983) (stating that analyzing a claim requires analysis of "the content, form, and context of a given statement, as revealed by the whole record").

75. 483 U.S. 378 (1987).

76. Note however, that the Court may consider offensiveness a great deal on the second "*Pickering* balancing" prong discussed in Part II.A.2.

77. *Rankin*, 483 U.S. at 380–81.

that an assassin had shot President Ronald Reagan.[78] McPherson criticized Ronald Reagan's policies and said "if they go for him again, I hope they get him."[79] Her boss learned of this comment and fired her.[80] The Court stated that while her speech may be "inappropriate or controversial," it nevertheless qualifies as speech on matters of public concern.[81] The Court reasoned that speech regarding an attempted assassination of the country's leader is an issue of importance to the public.[82]

Pickering, *Givhan*, and *Rankin* all protected statements on matters of public concern—those statements which have value outside of the employment context. In contrast, the Court in *Connick v. Meyers*[83] declined to extend First Amendment protection to speech on matters of private concern, where the speech's value was limited to the employee's workplace.[84] District Attorney Harry Connick Sr. transferred his subordinate, Sheila Meyers, to another area of the criminal court over her objections.[85] In an attempt to garner support against her transfer, Meyers sent a questionnaire to all of her coworkers, asking them to comment on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[86] Connick fired Meyers for distributing this questionnaire, and Meyers sued for speech retaliation.[87]

The Court ruled that Meyer's questionnaire did not significantly address matters of public concern, because its value was almost exclusively limited to "matters only of personal interest."[88] The Court reasoned that because the questionnaire was limited to a discussion of internal workplace policies and conflicts, it had "only a most limited"

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78. *Id.* at 381.

79. *Id.*

80. *Id.* at 381–82. The Court reiterated its position that death threats are not protected speech, but determined that Meyers' speech did not qualify as a threat. *Id.* at 386–87.

81. *Id.* at 386–87.

82. *Id.* at 386.

83. 461 U.S. 138 (1983).

84. *Id.* at 147–48.

85. *Id.* at 140–41.

86. *Id.* at 141.

87. *Id.*

88. *See id.* at 147, 154. The Court admitted that *one* question, the question discussing whether employees felt "pressure[] to work in political campaigns," did regard a "matter of public concern." *Id.* at 149. However, the Court ruled that "*Pickering* balancing" favored the employer in this case in regards to that question. *Id.* at 149–54.

"public concern" component.[89] Practicality motivated the Court's holding as "government offices could not function if every employment decision became a constitutional matter."[90] Through its holding in *Connick*, the Supreme Court effectively narrowed the definition of matters of public concern to only protect that speech which the public has an interest in hearing.[91]

In *City of San Diego v. Roe*,[92] the Court extended the *Connick* principle—that the First Amendment does not protect speech criticizing the workplace if that speech has no public concern component—to purely private speech unrelated to commentary on the employee's workplace. In *Roe*, an off-duty police officer made and sold a pornographic video featuring himself in a police uniform.[93] The Police department fired him for distributing this video.[94] The Court upheld the termination, ruling that the video did not address a matter of public concern because pornographic videos have no connection to necessary public information.[95]

b. After Garcetti v. Ceballos, *Courts Must Analyze a Citizen Sub-Element by Determining Whether an Employee's Speech Was Pursuant to Official Duties*

Garcetti v. Ceballos added a new citizen sub-element to the speech retaliation test's first prong. In *Garcetti*, a defense attorney gave Deputy District Attorney Richard Ceballos a case to review.[96] Ceballos reviewed it and concluded that the arrest warrant contained serious errors.[97] He wrote a memo to his superiors, recommending dismissal of the case.[98] Ceballos argued with his superiors when they decided to pursue the case over his objections and later reiterated his concerns about the warrant in court.[99] When he was denied a promotion and assigned lower level

89. *Id.* at 148, 154.

90. *Id.* at 143.

91. *See id.* at 148.

92. 543 U.S. 77 (2004).

93. *Id.* at 78.

94. *Id.*

95. *Id.* at 84–85.

96. Garcetti v. Ceballos, 547 U.S. 410, 413–14 (2006). Ceballos said that "it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases." *Id.*

97. *Id.* at 414.

98. *Id.*

99. *Id.* at 414–15.

cases, Ceballos sued for speech retaliation.[100]

The Court resolved this case by creating an independent sub-element from the word "citizen" in speech made as citizens on a matter of public concern.[101] Before *Garcetti*, the Court had considered speech "made as a citizen on matter of public concern" to comprise a single test of whether the speech addressed matters of public concern.[102] After *Garcetti*, if the employee spoke pursuant to official duties, then the speech did not constitute speech made as a citizen, regardless of whether the speech addressed matters of public concern.[103]

The Court stated that speech directly related to a job assignment is pursuant to official duties, and is denied protection.[104] The Court stated that speech is not pursuant to official duties simply because the speech addresses the subject matter of the employee's job.[105] Rather, pursuant to official duties is only that speech with a direct connection to the employee's particular assignments.[106] Thus, because Ceballos' speech was directly connected to his workplace assignment, his speech is unprotected as pursuant to employment duties.[107]

When a court analyzes whether an employee spoke pursuant to official duties under the new citizen sub-element, it engages in two inquiries. First a court must determine the scope of the duties. Second, a court must determine how the contested speech relates to those duties.[108] Because employees originally had the burden of proving whether they made their speech as a citizen on matters of public concern, they now must prove both that they made their speech as citizens, and that their speech addressed matters of public concern.[109] If an employee cannot prove both, then that employee cannot sustain a claim.[110]

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100. *Id.* at 415. Ceballos' superiors denied any retaliation whatsoever, as well as denying that Ceballos' speech qualifies as protected even if they did retaliate. *Id.*

101. *See* Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) (explaining how the Court split the "citizen on a matter of public concern" prong), *cert. denied*, Byrne v. Jackler, __ U.S. __, 132 S. Ct. 1634 (2012) (mem.).

102. *See supra* Part II.A.1.a.

103. *Garcetti*, 547 U.S. at 421.

104. *Id.* at 421–22.

105. *Id.* at 421.

106. *Id.* at 422.

107. *Id.* at 421, 424.

108. Decotiis v. Whittemore, 635 F.3d 22, 31 (1st Cir. 2011).

109. *See* Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) (explaining how the Court bifurcated the "citizen on a matter of public concern" prong), *cert. denied*, __ U.S. __, 132 S. Ct. 1634 (2012) (mem.).

110. *See id.*

Although the Court identified the new citizen sub-element, it refused to create a framework to help lower courts define what qualifies as pursuant to employment duties.[111] However, the *Garcetti* Court stated that "the proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform."[112] Thus the first inquiry of the citizen sub-element requires the court to determine what the employee actually does, rather than relying upon the employee's job description.[113]

The circuit courts, in attempting to apply *Garcetti's* citizen sub-element, have considered the following:

> [W]hether the employee was commissioned or paid to make the speech in question, the subject matter of the speech, whether the speech was made up the chain of command, whether the employee spoke at her place of employment, whether the speech gave objective observers the impression that the employee represented the employer when she spoke, whether the employee's speech derived from special knowledge obtained during the course of her employment, and whether there is a so-called citizen analogue to the speech.[114]

Courts use these factors to determine whether speech is pursuant to official duties, and thus whether the speech is made as a citizen.[115]

Circuit courts have divided into two groups regarding which factor deserves the greatest weight. Some circuits have ruled that speech made "up the chain of command to their superiors," constitutes speech pursuant to official duties.[116] Other circuits have ruled that employee speech is pursuant to official duties if the employees' speech directly

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111. *Garcetti*, 547 U.S. at 424.

112. *Id.* at 424–25. This is designed in large part to prevent employers from "creating excessively broad job descriptions." *Id.* at 424. Justice Souter expressed this concern in his dissent, *id.* at 431 n.2, whose words have arguably become prophetic, as seen in *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1280, 1284 (11th Cir. 2009). In *Abdur-Rahman*, inspectors persistently asked for information about sewer overflows from their government employer. *Id.* at 1280. In response, the employer changed the inspectors' enumerated job duties to include inspection of sewer overflow, and fired them within two months. *Id.* The Eleventh Circuit upheld the termination in part because the employer fired the employee for complaints made immediately after the change in employment duties, as opposed to the information requests pre-dating the change. *Id.* at 1284.

113. *Decotiis*, 635 F.3d at 31; *Garcetti*, 547 U.S. at 424–25.

114. *Decotiis*, 635 F.3d at 32 (citations omitted).

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

116. Tyler Wiese, *Seeing Through the Smoke: "Official Duties" in the Wake of* Garcetti v. Ceballos, 25 A.B.A. J. LAB. & EMP. L. 509, 515–19 (2010). This includes the Fifth, Sixth, Seventh, and Tenth Circuits. *Id.* at 516.

relates to their "assigned responsibilities."[117] In any event, requiring employees to prove that they spoke pursuant to their official duties greatly lowers the employee's chances of success, by increasing the difficulty of proving the first prong.[118]

2. The Pickering *Balancing Prong Requires a Court to Balance Employee Interests in Speaking Against Employer Interests in an Efficient Workplace*

If an employee proves both the citizen and matters of public concern sub-elements of the speech retaliation test's first prong,[119] a court moves to the second prong, called *Pickering* balancing.[120] This balancing requires a court to weigh the employee's interest in speaking as a citizen on a matter of public concern against the employer's interest "in promoting the efficiency of the public services it performs through its employees."[121] While it is clear that employees bear the burden of proving by a preponderance of the evidence that they prevail on the first prong,[122] no such clarity exists for the second prong's burden of proof. This section will first explain the *Pickering* balancing prong, and then explain the "quasi-military" rule applicable to that prong. Finally, this section will explain that the circuit courts are confused as to the *Pickering* balancing prong's burden of proof.

a. Pickering *Balancing Requires a Court to Balance the Employee's Free Speech Interest in Speaking Against the Employer's Interest in Promoting Workplace Efficiency*

Pickering balancing is the speech retaliation test's second prong, and occurs only after an employee establishes that his or her speech was spoken as a citizen on a matter of public concern.[123] This balancing analysis requires a court to balance the employee's interest in speaking as a citizen on a matter of public concern against the employer's interest "in promoting the efficiency of the public services it performs through its employees."[124]

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117. *Id.* at 519–23. This includes the Fourth, Ninth, Eleventh, and D.C. Circuits. *Id.* at 519 n.96.

118. *See* Roesler, *supra* note 7, at 419 (explaining that the Court has greatly narrowed the test).

119. *Garcetti*, 547 U.S. at 416.

120. *See id.* at 418; Bd. of Cnty. Com'rs v. Umbehr, 518 U.S. 668, 678 (1996).

121. *Garcetti*, 547 U.S. at 417.

122. *See supra* Part II.A.1.a.

123. *Garcetti*, 547 U.S. at 418.

124. *See id.* at 418–19 (explaining that the Court must consider the employer's interest in "the

A court conducting *Pickering* balancing determines the damage of the citizen speech to the efficiency of the employer's workplace.[125] The Court's analysis requires examining the time, the place, and the manner of the speech.[126] The Supreme Court has consistently stated that no factor is dispositive and has refused to set a clear standard.[127] Instead, the trial court must decide each case on its unique facts.[128]

Certain principles guide the court's case-by-case analysis. Government agencies may only restrict employee speech to the extent that it is "necessary for their employers to operate efficiently and effectively."[129] When it acts as an employer, the State has "broader discretion"[130] to regulate speech than when it is acts as a sovereign.[131] Therefore, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from a regular member of the general public."[132]

The Court considers the "nature" of the employee's speech, the employee's particular job within the government agency, and the overall purpose of that agency,[133] when determining whether the employee's speech disrupts his or her workplace.[134] The Court has required that "restrictions [the employer] imposes must be directed at speech that has some potential to affect the entity's operations."[135] So even if speech would disrupt other workplaces, the employer can only restrict it if it disrupts the employee's particular workplace.[136]

Consider *Rankin*, for example, where the Court ruled in favor of

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efficient provision of public services").

125. *See id.*

126. Connick v. Myers, 461 U.S. 138, 152 (1983).

127. *Id.* at 154 ("Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged.") (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968)); *see also* Rankin v. McPherson, 483 U.S. 378, 384–85 (1987) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.") (quoting *Connick*, 461 U.S. at 147–48).

128. *See supra* note 127.

129. *Garcetti*, 547 U.S. at 419.

130. *Id.* at 418.

131. *Id.*

132. *Id.*

133. Rankin v. McPherson, 483 U.S. 378, 392 (1987).

134. *Id.*

135. *Garcetti*, 547 U.S. at 418.

136. *See id.*

McPherson—an employee who expressed her hope that someone would assassinate President Reagan.[137] In *Rankin*, the Court conducted *Pickering* balancing and ruled that McPherson's interest in stating her hope that someone would kill President Reagan outweighed her employer's interest in workplace harmony.[138] McPherson served as a clerical worker in a local law enforcement agency but had no connection to the law enforcement work.[139] The Court thus did not think that the death wish would seriously harm the functioning of McPherson's workplace.[140]

Conversely, consider *Connick*, where the Court upheld Sheila Meyers' termination for her speech criticizing the operation of the prosecutor's office where she worked.[141] In *Connick*, *Pickering* balancing led the Court to rule against the employee because her questionnaire concerned her personal workplace grievances.[142] Thus, the more attenuated the connection between the employee's speech and her work, the more likely that the employee's interests will outweigh the employer's interests,[143] because the speech is less likely to threaten workplace harmony if it has nothing to do with the employee's job.[144]

Connick addressed the question of how to deal with speech that was mostly of private concern but had a small amount of public concern. In *Connick*, the Court explained that the employer's burden of proving that

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137. *Rankin*, 483 U.S. at 386.

138. *Id.* at 380, 392. Justice Powell cast the deciding vote. In his concurrence he stated:

> There is no dispute that McPherson's comment was made during a private conversation with a co-worker who happened also to be her boyfriend. She had no intention or expectation that it would be overheard or acted on by others. . . . If a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful. To the extent that the full constitutional analysis of the competing interests is required, I generally agree with the Court's opinion.

Id. at 393 (Powell, J., concurring).

139. *Id.* at 392.

140. *Id.*

141. Connick v. Meyers, 461 U.S. 138, 147–48 (1983).

142. *See id.* at 152.

143. *Compare id.*, *with Rankin*, 483 U.S. at 390–92.

144. *Rankin*, 483 U.S. at 392; *see also Connick*, 461 U.S. at 152. This general concept of the importance of the speech's connection to the workplace in analyzing "*Pickering* balancing" is what the *Garcetti* Court used to form the "citizen" sub-element, disallowing suits where the speech is "pursuant to official duties" from even reaching "*Pickering* balancing." *See* Garcetti v. Ceballos, 547 U.S. 410, 422–24 (2006) (explaining how *Connick* and *Pickering* support the *Garcetti* holding).

it prevails on *Pickering* balancing varies depending on how strongly connected the speech is to matters of public concern.[145] The Court determined that the questionnaire at issue was almost devoid of public concern.[146] However the Court determined that one question, regarding pressure to participate on political campaigns, constituted a matter of public concern.[147] The Court said "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[148] Thus, the greater the connection between the speech at issue and matters of public concern, the more protection it is entitled to, and vice versa.[149] Because the speech in *Connick* "touched upon matters of public concern in only a most limited sense,"[150] the employer had a low burden.[151] Meyers lost under *Pickering* balancing because of that low burden.[152]

The location where the speech occurred matters more in the *Pickering* balancing analysis than in the previous citizen on a matter of public concern analysis.[153] Where the speech is public, the Court will primarily focus on how the content of the speech affects work-place harmony.[154] Where the speech is private, the court will consider the time, place, and manner of the speech and how such factors affect work-place

145. *Connick*, 461 U.S. at 150.

146. *Id.* at 154 ("Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy.").

147. *Id.* at 149.

148. *Id.* at 150.

149. *See id.*; *see also* Jackler v. Byrne, 658 F.3d 225, 237 (2d Cir. 2011), *cert. denied*, Byrne v. Jackler, No. 11-517, 2012 WL 603078 (U.S. Feb. 27, 2012).

150. *Connick*, 461 U.S. at 154.

151. *See id.* at 149–50, 154 (explaining that the District Court placed too high a burden on the employer, because "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships").

152. *See id.*

153. *Compare* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414, 415 n.4 (1979), *with Connick*, 461 U.S. at 149-50, 154.

154. *Givhan*, 439 U.S. at 415 n.4 ("Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the *content* of his statements that the court must assess to determine whether they in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally. . . . Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.") (internal quotation marks omitted).

harmony.[155]

b. Some Lower Courts Apply Pickering *Balancing with Increased Deference Towards Quasi-Military Employers*

Some circuit courts have applied the second prong—*Pickering* balancing—with heightened deference towards employers who qualify as quasi-military organizations.[156] Quasi-military organizations are those organizations possessing a strong connection to public safety, including police officers,[157] firefighters,[158] and border patrol agents.[159] Courts adopting the theory assert that when conducting the balancing analysis, courts should allow quasi-military organizations extra deference in firing disobedient employees because the employers' public safety purpose increases their "need to secure discipline, mutual respect, trust and particular efficiency among the ranks."[160] Thus, these circuit courts give employers extra deference in the public safety context, greatly benefiting such quasi-military employers at the expense of employee speech.

Circuit courts that adopt the quasi-military rule justify it by extending the Supreme Court's holding in *Kelley v. Johnson*[161] to the speech retaliation context.[162] In *Kelley*, a police officer challenged the police department's hair grooming regulations under the Fourteenth Amendment right to liberty (as opposed to a First Amendment free speech challenge).[163] The Supreme Court ruled that the regulations did not violate his Fourteenth Amendment right to liberty.[164] The Court stated that regardless of whether the quasi-military exception applied in

155. *See id.* ("Private expression . . . may in some situations bring additional factors to the Pickering calculus," including "the manner, time, and place in which [the speech] is delivered"); *see also* Rankin v. McPherson, 483 U.S. 378, 389 (1987) (indicating the importance of time, place, and manner with private speech, suggesting that "[t]here is no suggestion that any member of the general public was present or heard McPherson's statement" in justifying protecting her speech under "*Pickering* balancing").

156. *See, e.g.*, Oladeinde v. City of Birmingham, 230 F.3d 1275, 1293 (11th Cir. 2000); Kokkinis v. Ivkovich, 185 F.3d 840, 845 (7th Cir. 1999); Dunn v. Carroll, 40 F.3d 287, 292 (8th Cir. 1994); U.S. Dep't of Justice v. Fed. Labor Relations Auth., 955 F.2d 998, 1004 (5th Cir. 1992).

157. *Oladeinde*, 230 F.3d at 1293.

158. Figueroa-Rodrigues v. Lopez-Rivera, 878 F.2d 1488, 1489 (1st Cir. 1998).

159. *U.S. Dep't of Justice*, 955 F.2d at 1004.

160. Anderson v. Burke Cnty., 239 F.3d 1216, 1222 (11th Cir. 2001) (quoting Hansen v. Soldenwagner, 19 F.3d 573, 577 (11th Cir. 1994)) (citation omitted).

161. 425 U.S. 238 (1976).

162. *See, e.g.*, *Hansen*, 19 F.3d at 577.

163. Kelley v. Johnson, 425 U.S. 238, 239–41 (1976).

164. *Id.* at 248–49.

this case, the police department had a unique need to maintain its "esprit de corps."[165] The Court considered it "highly significant" that the police officer limited his challenge to his Fourteenth Amendment interest.[166] Employers are entitled to far more deference in regards to employees' liberty challenges than those "based on the explicit language of the First Amendment."[167] Thus, because the police officer in *Kelley* was asserting only a Fourteenth Amendment liberty challenge, the court gave greater deference to the employer than it would have if it were a free speech claim. The deference given to employers regarding Fourteenth Amendment liberty claims led the Court to apply rational basis review to the case and uphold the hair grooming regulations.[168]

c. The Circuits Inconsistently Interpret Who Bears the Burden of Proving Pickering *Balancing*

The circuit courts are not consistent in their interpretation of who bears the burden of proving *Pickering* balancing. Most circuits have stated that the specific burden courts will apply when engaging in the balancing prong belongs with the *employer*.[169] However, the Eleventh Circuit has consistently ruled that the burden on the balancing analysis belongs with the *employee*.[170] Meanwhile, the Tenth Circuit goes back and forth on who has the burden.[171]

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165. *Id.* at 246. "This view was based upon the Court of Appeals' reasoning that the 'unique judicial deference' accorded by the judiciary to regulation of members of the military was inapplicable because there was no historical or functional justification for the characterization of the police as 'para-military.' But the conclusion that such cases are inapposite, however correct, in no way detracts from the deference due Suffolk County's choice of an organizational structure for its police force." *Id.*

166. *Id.* at 244–45 ("Respondent has sought the protection of the Fourteenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the police department . . . . We think . . . [this distinction] is highly significant."). At the Supreme Court level, only dissents have suggested that an organization's "quasi-military" nature should apply in the First Amendment context. *See* Saye v. Williams, 452 U.S. 926, 929 (1981) (Rehnquist, J., dissenting); *see also* Rankin v. McPherson, 483 U.S. 378, 401 (1987) (Scalia, J., dissenting).

167. *See supra* note 166.

168. *Kelley*, 425 U.S. at 247.

169. *See, e.g.*, Eng v. Cooley, 552 F.3d 1062, 1071 (9th Cir. 2009); Commc'ns Workers of Am. v. Ector Cnty. Hosp. Dist., 467 F.3d 427, 436–37 (5th Cir. 2006); McGreal v. Ostrov, 368 F.3d 657, 672 (7th Cir. 2004); Melzer v. Bd. of Educ., 336 F.3d 185, 193 (2d Cir. 2003); Kincade v. City of Blue Springs, 64 F.3d 389, 397 (8th Cir. 1995); Watters v. City of Phila., 55 F.3d 886, 895 (3d Cir. 1995); Am. Postal Workers Union v. U.S. Postal Serv., 830 F.2d 294, 303–04 (D.C. Cir. 1987).

170. *See, e.g.*, Douglas v. DeKalb Cnty., 308 F. App'x 396, 399 n.1 (11th Cir. 2009); Boyce v. Andrew, 510 F.3d 1333, 1342 n.12 (11th Cir. 2007); Anderson v. Burke Cnty., 239 F.3d 1216, 1219 (11th Cir. 2001).

171. *See* Moore v. City of Wynnewood, 57 F.3d 924, 933 (10th Cir. 1995) (stating in one

The circuit courts' confusion stems from the fact that the Supreme Court's jurisprudence is insufficiently clear as to whether employees or employers bear the burden of proving that they prevail on *Pickering* balancing. Most of the time, the Court has avoided the issue, saying only that the Court must balance.[172] In *Mt. Healthy Board of Education v. Doyle*,[173] the Court stated that the employee must establish that his speech was "constitutionally protected."[174] It also said that *Pickering* balancing constituted a factor of whether speech was "constitutionally protected," implying that employees have the burden of proving that they prevail under the analysis.[175]

However, properly reading the Supreme Court's jurisprudence reveals that the employer bears the burden of proving *Pickering* balancing.[176] *Rankin* solidifies this principle with the following language:

> Because McPherson's statement addressed a matter of public concern, *Pickering* next requires that we balance McPherson's interest in making her statement against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *The State bears a burden of justifying the discharge on legitimate grounds*.[177]

Most circuits have followed the Court's lead in these cases and required

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paragraph that "[the plaintiff] must still show that his interest in the speech outweighed the government's countervailing interest in regulating the speech to maintain an effective working environment," but stating in another paragraph that "the *State's* burden in justifying a particular discharge varies depending upon the nature of the employee's expression"). *Compare* Saurini v. Adams Cnty. Sch. Dist., 191 F. App'x 628, 632 (10th Cir. 2006) (implying that the burden is with the employee to establish "*Pickering* balancing" by stating that "[i]f these three factors [including "*Pickering* balancing"] are met, the burden *shifts* to the employer to establish [the fourth factor]") (emphasis added), *with* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1207 (10th Cir. 2007) ("Apparently, [the District Court's determination that the *employee* failed to prove "*Pickering* balancing"] is premised on an error of law, as the *employer* bears the burden of justifying its regulation of the employee's speech.") (emphasis in original) (citing Connick v. Myers, 461 U.S. 138, 150 (1983)).

172. *See* White v. State, 131 Wash. 2d 1, 14, 929 P.2d 396, 405 (1997) ("The Supreme Court does not discuss the [*Pickering* balancing prong] in terms of burdens of proof but rather says that 'it is the court's task' to balance the interests of the employee against the interests of the employer and to determine, as a matter of law, which of those interests is greater.") (citing Waters v. Churchill, 511 U.S. 661, 667–69 (1994); *Connick*, 461 U.S. at 142; Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968); Rankin v. McPherson, 483 U.S. 378, 385–86 (1987)).

173. 429 U.S. 274 (1977).

174. *Id.* at 287.

175. *Id.* at 284 (quoting *Pickering*, 391 U.S. at 569).

176. *Rankin*, 483 U.S. at 388.

177. *Id.* (emphasis added) (citations omitted).

the employer to prove that it prevails on *Pickering* balancing.[178]

3. The Employee's Protected Speech Must Have Caused the Termination

If the employee makes it through the first citizen on a matter of public concern prong and the second *Pickering* balancing prong, the Court moves to the third "causation" prong, which requires a court to determine whether the employee's speech caused his termination.[179] Causation has two sub-elements of its own.[180] The burden of proof is on the employee for causation's first sub-element, and on the employer for the second sub-element.[181]

The Court defined the nature of the causation prong in *Mt. Healthy*. In *Mt. Healthy*, a public school chose not to rehire a teacher who made inappropriate and offensive comments on a regular basis.[182] However, one of the school's key reasons for refusing to rehire him was that he wrote a memorandum criticizing the school's new dress code.[183] The school promoted the dress code with the design of increasing support for proposed school bonds.[184] The teacher delivered the speech to a radio disc jockey, who broadcasted it on the radio.[185] The trial court ruled that the radio address was "clearly constitutionally protected."[186]

The *Mt. Healthy* Court created a causation prong with two sub-elements.[187] The Court explicitly gave the burden of proof to the employee for the first sub-element and to the employer for the second sub-element.[188] For the first sub-element, the employee must prove to a court that his or her protected speech was a "substantial factor"

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178. *See supra* note 169.

179. *Mt. Healthy*, 429 U.S. at 287.

180. *Id.*

181. *Id.*

182. Among other things, Doyle made obscene gestures to cafeteria staff, and made comments to a teacher that resulted in said teacher slapping him. *Id.* at 281–82.

183. *Id.* at 282–83.

184. *Id.* at 282.

185. *Id.* at 282–83.

186. *See id.* at 283 ("The District Court . . . concluded that respondent Doyle's telephone call to the radio station was 'clearly protected by the First Amendment' . . . . The District Court did not expressly state what test it was applying in determining that the incident in question involved conduct protected by the First Amendment, but simply held that the communication to the radio station was such conduct. The Court of Appeals affirmed in a brief *per curiam* opinion.") (citations omitted).

187. *See id.* at 287.

188. *Id.*

contributing to his or her termination.[189] Once the employee establishes this, the second sub-element allows the employer to affirmatively defend against the suit by proving by a preponderance of the evidence that it would have fired the employee even if the employee had not uttered the protected speech.[190]

B. Garcetti *Blurred the Distinction Between the Citizen on a Matter of Public Concern Prong and the* Pickering *Balancing Prong, Further Complicating the Speech Retaliation Analysis*

Until recently, the three prongs discussed above comprised the speech retaliation test: (1) citizen on a matter of public concern, (2) *Pickering* balancing, and (3) causation. However, the *Garcetti* Court further complicated this framework by blurring the lines between the first and second speech retaliation prongs.

In *Garcetti*, the Court created a "citizen" sub-element to the first prong of speech retaliation, and used it to hold that Ceballos' speech was unprotected because it was pursuant to his employment duties.[191] One of the Court's main rationales for doing this was that when *balancing* the employee and employer interests in the context of workplace assignments, the employer's interest in workplace effectiveness is entitled to additional weight.[192]

Garcetti's rationale blurs the first and second prongs by using the second prong's balancing test to justify adopting the citizen sub-element of the first prong.[193] In doing this, the Court balanced the employer's interests against the employee's when analyzing the *first* prong of speech retaliation.[194] Such a mixing of prongs is contrary to the Court's

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189. *See id.*

190. *See id.* The Court remanded the case to the trial court to determine whether Doyle's claim survived the new holding. *Id.* The district court determined that the employer succeeded on the second sub-element, as the School Board "established by a preponderance of the evidence that Doyle would not have been renewed because of the incidents—exclusive of the radio incident—which had occurred during the year or so prior to the nonrenewal." Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ., 670 F.2d 59, 61 (6th Cir. 1982) (quoting the trial court and upholding the trial court's ruling on remand).

191. *See* Jackler v. Byrne, 658 F.3d 225, 235, 238 (2d Cir. 2011) (citing *Garcetti*, 547 U.S. at 420–22), *cert denied* Byrne v. Jackler, __ U.S. __, 132 S. Ct. 1634 (2012) (mem.).

192. Garcetti v. Ceballos, 547 U.S. 410, 422–23 (2006) ("[The Court's holding] is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity.").

193. *See* Nahmod, *supra* note 6, at 571.

194. *See id.*

traditional test, which did not engage in *Pickering* balancing until the employee prevailed on the first prong.[195] Despite this, the *Garcetti* Court states that the balancing should not occur where the speech fails to pass the citizen sub-element of the first prong.[196]

Thus, the *Garcetti* Court created a new underlying principle that extends beyond the citizen sub-element.[197] Where employee speech *clearly* fails to prevail on the second prong of *Pickering* balancing, a court will dispose of the claim at the first prong without addressing the second prong.[198] The Court's maneuver serves as a kind of preliminary *Pickering* balancing, as the Court will deny categories of speech protection where *Pickering* balancing strongly disfavors such speech before technically reaching that very balancing analysis.[199] The Court's decision provides another method of disposing of the employee's claim at the first prong, thus increasing the difficulty an employee faces in establishing a claim.

III. PUBLIC EMPLOYERS SHOULD HAVE TO PROVE THE *PICKERING* BALANCING PRONG BY CLEAR AND CONVINCING EVIDENCE

As discussed above, the speech retaliation test consists of three prongs. The first is to determine whether the speech is made as a citizen on a matter of public concern. The second prong requires a balancing of the employee's interest in speaking against the employer's interest in running an efficient workplace. Finally, the Court considers the third prong of causation.

Pickering balancing has an unclear burden of proof.[200] This Comment argues first that employers should have the burden of proving that they prevail under the balancing analysis, and second that the Court should set the employer's burden at clear and convincing evidence.

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195. *See supra* Part II.A.2.

196. *Garcetti*, 547 U.S. at 423 ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, *there is no warrant* for a similar degree of scrutiny.") (emphasis added).

197. *See* Nahmod, *supra* note 6, at 571.

198. *See id.*

199. Sheldon Nahmod points out that this serves as part of the Court's trend of moving away from "ad hoc balancing" where the court does an uncontrolled balancing at each case to "categorical balancing," where what speech is protected turns on which of a series of discrete categories it falls into. *See* Nahmod, *supra* note 6, at 569–73.

200. *See supra* notes 169–71 and accompanying text.

A. Supreme Court Precedent Indicates that the Employer Should Bear the Burden of Proof on Pickering *Balancing*

Much confusion exists as to whether the burden of proof on the second prong of *Pickering* balancing should fall on the employer or the employee.[201] However, an analysis of Supreme Court precedent shows that employers should have the burden of proving that they prevail on *Pickering* balancing.[202] *Mt. Healthy* is the only Supreme Court precedent cited by the minority of courts that place the burden of this balancing analysis on the employee.[203] In *Mt. Healthy*, the Court said that the burden of proving that the employee's speech was constitutionally protected was "properly placed upon [the employee]."[204] It stated that *Pickering* balancing is a factor in determining whether speech is constitutionally protected.[205] Some courts have interpreted this statement to mean that employees bear the burden of proving that they prevail on *Pickering* balancing.[206]

However, the courts are incorrect in interpreting *Mt. Healthy* as setting the *Pickering* balancing burden against the employee. First, *Mt. Healthy* addressed a question of the burden of causation, which is entirely different from the balancing analysis.[207] *Mt. Healthy* is properly read as being limited to the causation question, which is irrelevant to the question of the burdens of *Pickering* balancing.[208]

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201. *Compare* Anderson v. Burke Cnty., 239 F.3d 1216, 1219 (11th Cir. 2001) (stating that the employee must prove "*Pickering* balancing"), *with* Robinson v. York, 566 F.3d 817, 822 (9th Cir. 2009) (stating that the burden is with the employer); *see also* White v. State, 131 Wash. 2d 1, 13, 929 P.2d 396, 404–05 (1997) ("The nature of the balancing analysis required under *Pickering* . . . appear[s] to have created some confusion with respect to which party has the 'burden of proving' [it].").

202. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) (stating that the employer must prove "*Pickering* balancing").

203. *See, e.g.*, *Anderson*, 239 F.3d at 1219 (stating that the employee must prove "*Pickering* balancing"); Moore v. City of Wynnewood, 57 F.3d 924, 931 (10th Cir. 1995).

204. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

205. *Id.* at 284 ("[W]hether speech of a State employee is constitutionally protected expression necessarily entails striking '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.'") (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

206. *See Anderson*, 239 F.3d at 1219.

207. *See Mt. Healthy*, 429 U.S. at 286–87 (addressing whether the employer could defend by proving that the employer would have fired the employee even in absence of the protected speech).

208. *See id.* at 284–85 (stating that the Court accepts the district court's ruling on "*Pickering* balancing" and then moves on to the "Causation" question); *see also* Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 592 n.5 (1993) ("It was, if anything, those dicta themselves—uninvited, unargued, and unnecessary to the Court's holdings—which insulted [the

Second, and most importantly, the Court decided *Mt. Healthy* before much of the case law that fractured speech retaliation law into a complex series of prongs and sub-elements.[209] When the Court decided *Mt. Healthy*, speech retaliation law constituted one large amorphous principle, not yet broken down into the previously discussed parts.[210] The Court had not broken down the test because the Court's primary purpose in *Pickering* was to state that a balancing analysis actually existed.[211] The Court waited until future cases to clarify the analysis.[212]

The Court specified the doctrine in the 1980s with cases such as *Connick* and *Rankin*, long after deciding *Mt. Healthy*.[213] In clarifying, the Court separated the citizen on a matter of public concern prong from the *Pickering* balancing prong.[214] At that time, the Court clarified that the determination of whether speech is constitutionally protected does not *include Pickering* balancing, but instead *precedes* it.[215]

In *Board of County Commissioners v. Umbehr*,[216] the Court added further support to this ordering of the speech retaliation test.[217] *Umbehr* states that after the employee proves that his conduct qualifies as constitutionally protected, "termination because of [that speech] may be justified when legitimate countervailing government interests are sufficiently strong."[218] Thus, *Pickering* balancing occurs only after a court has determined that the speech is constitutionally protected.

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virtue of judicial restraint]; and we would add injury to insult by according them precedential effect.").

209. The Court decided *Mt. Healthy* in 1977. The most important case law did not occur until after 1980, including *Connick*, *Rankin*, and *Garcetti*. *See* Garcetti v. Caballos, 547 U.S. 410 (2006); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983).

210. *See supra* Part II.A.

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

212. *See* Roesler, *supra* note 7, at 398–99 ("[Following *Pickering*,] [s]ubsequent cases served to narrow and refine the [Speech Retaliation] test by focusing on the methods used and factors employed in administering the balancing [prong]."); *see also* Cooper, *supra* note 39, at 74.

213. *See Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 149–50; *see also Garcetti*, 547 U.S. at 418. A similar doctrinal split occurred between "a citizen on a matter of public concern," resulting in a sub-element for "citizen," and a separate sub-element for "matters of public concern." *See* Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) (citing *Garcetti*, 547 U.S. at 420–22), *cert denied* Byrne v. Jackler, __ U.S. __, 132 S. Ct. 1634 (2012) (mem.); *see also* Dale, *supra* note 40, at 189 (explaining the breakdown of the balancing of interests into two prongs).

214. *See supra* note 213.

215. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996). *Compare Pickering*, 391 U.S. at 568, *with Garcetti*, 547 U.S. at 418 (showing how the speech retaliation doctrine has changed over time).

216. 518 U.S. 668 (1996).

217. *Id.* at 675.

218. *Id.*

As the speech retaliation test has evolved, the Court gave employees the burden of proving that they spoke as a citizen on a matter of public concern[219] but gave employers the burden of proving that they prevail on *Pickering* balancing.[220] When discussing the balancing analysis in *Rankin*, the Court stated that "*[t]he State bears a burden of justifying the discharge on legitimate grounds*."[221] *Rankin* shows that when the Court reaches the *Pickering* balancing prong the Court requires the employer to prove that its justification for terminating the employee outweighs the employee's interest in speaking.

While *Rankin* provides the Court's most direct statement that the employer bears the burden of proof under *Pickering* balancing, many Supreme Court cases lend additional support to this assertion.[222] For example, the *Connick* Court stated that "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[223] *Garcetti* also supports the assertion that employers bear the burden of proof when the Court conducts *Pickering* balancing. *Garcetti* states that once the Court reaches that second prong, "the question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[224]

The speech retaliation test's underlying rationale further supports that the employer has the burden of proving that it prevails on *Pickering* balancing.[225] *Pickering*'s underlying rationale is that because the State has unique and important interests as an employer, those interests justify courts granting the government greater deference in regulating its employees' speech.[226]

Thus, regulating employee speech is different only because the

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219. Sheppard v. Beerman, 317 F.3d 351, 355 (2d Cir. 2003); *see also* Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) (explaining how the Court bifurcated the "citizen on a matter of public concern" prong), *cert. denied*, Byrne v. Jackler, __ U.S. __, 132 S. Ct. 1634 (2012) (mem.).

220. *See Rankin*, 483 U.S. at 388 (stating that the employer must prove "*Pickering* balancing").

221. *Id.* at 388 (emphasis added).

222. *See* Connick v. Myers, 461 U.S. 138, 150 (1983); *see also* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

223. *Connick*, 461 U.S. at 149–50. While the *Connick* Court ruled that the court placed *too high* of a burden on the state in the particular case, it made clear that the *employer* always bears the burden of proof on *Pickering* balancing. It is simply a burden set at different levels depending on the particular case. *See id.*

224. *Garcetti*, 547 U.S. at 418.

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

226. *See id.* ("[T]he State has interests as an employer in regulating the speech of its employees that *differ significantly* from those it possesses in connection with regulation of the speech of the citizenry in general.") (emphasis added).

employer's interests "differ significantly" from regulating citizen speech.[227] If speech reaches *Pickering* balancing, the employee has already shown that he spoke as a citizen on matters of public concern.[228] Therefore the employee has already demonstrated that his speech is equivalent to the speech of a general citizen in *Pickering*'s terms.[229] Once the employee has made this showing, courts should require the employer to counteract the employee's proven assertion—that his speech is the speech of a regular citizen—by proving that the employment context justifies regulating the employee's speech in a manner significantly different than a regular citizen's speech.

B. The Court Should Require the State to Prove Pickering *Balancing with Clear and Convincing Evidence*

As the previous section demonstrates, the burden of proof on the *Pickering* balancing prong is properly placed with the State.[230] However, while the question of who bears the burden is confusing, so too is the question of how the Court should apply this burden.[231] This confusion encourages courts to conduct the balancing in a haphazard manner to reach a desired result in each case, rather than engaging in rigorous analysis.[232]

Clarifying the height of the employer's burden will help tidy up the speech retaliation test. This section argues that only speech having the strongest connection to matters of public concern ever reaches the *Pickering* balancing prong of the current speech retaliation test, and thus all such speech is entitled to a higher burden of proof. This section also argues that because clear and convincing evidence is the standard that courts use to raise the burden against the State in the First Amendment context, courts should extend this practice to the speech retaliation context.

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227. *See id.*

228. *See Garcetti*, 547 U.S. at 418.

229. *See id.*

230. *See supra* Part III.A.

231. Anne Gasperini DeMarco, *The Qualified Immunity Quagmire in Public Employees' Section 1983 Free Speech Cases*, 25 REV. LITIG. 349, 377–78 (2006) (explaining the "widely different evidentiary burdens" that courts apply).

232. *Id.* at 365–66.

1. The Employer Should Have to Satisfy a High Burden of Proof for Employee Speech That Reaches Pickering *Balancing*

Employers should face a high burden in proving that their interests outweigh those of employees for speech surviving to the *Pickering* balancing prong because speech that reaches this second prong has the strongest connection to matters of public concern. *Connick* declared that "*Pickering* unmistakably states . . . that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[233] Thus, the closer that speech is related to "internal office policy," the lower the burden of proof.[234] Likewise, the stronger the employee's argument that the speech is made as "a citizen on a matter of public concern," the higher the burden of proof the employer should face.[235]

Consider this scaling burden of proof in light of the modern speech retaliation jurisprudence. With every case, the Court has narrowed the speech that qualifies as that made by a citizen on a matter of public concern.[236] The narrowing occurred in *Connick*, when the Court ruled that protection did not extend to people speaking on internal employment issues.[237] The *Waters* principle supported by seven justices of the Court—that what the employer *believes* the employee said controls[238]—further increases the likelihood employers will prevail by consistently favoring the employer where a legitimate dispute exists as to what the employee said.

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233. Connick v. Myers, 461 U.S. 138, 150 (1983). In *Connick*, the Court overturned the district court for placing too high of a burden on "*Pickering* balancing." *Id.* at 154. However, the Supreme Court only did this because they believed that Meyer's speech "touched upon matters of public concern in only a most limited sense," *id.*, determining that her speech was "most accurately characterized as an employee grievance concerning internal office policy." *Id.* The Court determined that her speech was therefore entitled to the lowest of *Connick*'s floating burden. *See id.* at 149–50, 154.

234. *Id.* at 153–54.

235. *See id.* at 150; *see also* McBee v. Jim Hogg Cnty., 730 F.2d 1009, 1017 (5th Cir. 1984) (explaining that the *Pickering* balancing prong "require[es] a stronger showing of disruption as the employees' speech moves closer to core 'public concerns'") (citing *Connick*, 103 S. Ct. at 1692).

236. Roesler, *supra* note 7, at 419 (explaining that the Court has greatly narrowed the speech retaliation test).

237. *See* Karin B. Hoppmann, *Concern with Public Concern: Toward A Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 1018 (1997) (explaining that *Connick*, by requiring the employee to prove that his speech regards "matters of public concern," switched First Amendment jurisprudence from making protection of speech the default (with narrow exceptions for the State) to making State regulating speech the default (with the employee having to get into a narrow exception of "matters of public concern")).

238. *See supra* note 66 and accompanying text.

The Court narrowed the speech retaliation test even further in *Garcetti*. To even reach *Pickering* balancing, employees must now prove not only that their speech relates to matters of public concern but also that the speech was not pursuant to their official duties.[239] If they cannot prove both sub-elements, then the Court never reaches the balancing prong, which only comes after the employee establishes that he or she is speaking as a citizen on matters of public concern.[240]

Following *Garcetti*, courts must engage in a preliminary *Pickering* balancing at the citizen on a matter of public concern prong before even reaching *Pickering* balancing itself.[241] Preliminary *Pickering* balancing further narrows the test, as employees fired for speech that is far out of balance in favor of the employer have their cases dismissed before reaching the balancing analysis.[242]

The narrowing of the test means that the speech, which still manages to pass the first prong and reach *Pickering* balancing, constitutes that speech with the strongest connection to matters of public concern. Combining this with *Connick*'s statement—that the employer's burden of proving that it prevails under the balancing analysis increases where the speech has a stronger relationship to matters of public concern—reveals that speech reaching *Pickering* balancing in the modern jurisprudence is entitled to a high burden of proof.[243] Thus the Court should require employers to face a high burden of proof when arguing that speech making it to *Pickering* balancing is sufficiently disruptive to outweigh the employee's protected interests.[244]

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239. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

240. *See id.* at 418.

241. *See supra* Part II.B.

242. *See supra* notes 197–99 and accompanying text.

243. *See* Connick v. Myers, 461 U.S. 138, 150–54 (1983).

244. Note that Justice Souter's dissent in *Garcetti* indirectly supports this. Souter stated that the court should make the second prong of "*Pickering* balancing" harsher against employees whose speech is "pursuant to their official duties." *Garcetti*, 547 U.S. at 434–35 (Souter, J., dissenting). Souter's goal in harshly applying "*Pickering* balancing" was to make it *less friendly* to the employee *as an alternative* to the majority's even *more* employee unfriendly "citizen" sub-element. *Id.* Therefore, because the majority instituted the restrictive "citizen" sub-element, there is no need for "*Pickering* balancing" itself to have strict application, and the Court should therefore interpret it leniently against the employee. *Id.* at 433–34 (explaining that the Court chose to protect employer's interest in running a harmonious workplace by making the categorical "citizen" exclusion *as an alternative* to Souter's idea of making the *Pickering* balancing prong harsher).

2. The Court Should Use Clear and Convincing Evidence to Raise the Employer's Burden of Proof Under Pickering *Balancing*

The Court should apply a high burden against the State when conducting *Pickering* balancing, by setting that burden at clear and convincing evidence. In other First Amendment contexts, courts apply a clear and convincing evidence standard in order to provide extra assurance that burden-holders have proven their case before courts take action against speech.[245]

In *New York Times Co. v. Sullivan*, the Court required that the plaintiff prove "actual malice" with "convincing clarity," in order to sustain a libel claim against a public figure.[246] It did this because of the crucial importance the First Amendment has in the press context.[247] The clear and convincing evidence requirement provided an extra level of protection to ensure that the plaintiff actually proved actual malice, before the Court took action.[248] The Court's intent in using the higher evidentiary burden was to ensure that courts do not accidently restrict speech too greatly.[249]

The *Pickering* balancing prong is very similar to the libel context. In both situations, the Court wants to ensure that employee speech with the strongest connection to matters of public concern is not restricted beyond what the First Amendment allows.[250] It is true that courts have established that the public employer has greater interests in the employment context than in other free speech contexts such as libel.[251]

However, the employer's unique interests in the employment context are relevant only to what the employer must prove, not the procedural burden of proof placed upon the employer. In *Sullivan*'s libel context, the plaintiff had to prove the high substantive standard of actual

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245. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 255 n.28 (1990) (Stevens, J., concurring in part and dissenting in part) ("The purpose of this standard of proof, [is] to reduce the chances of inappropriate decisions . . . .").

246. 376 U.S. 254, 285–86 (1964). The Court has maintained this requirement. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 508 (1991); Stepnes v. Ritschel, 663 F.3d 952, 963 (8th Cir. 2011).

247. *New York Times Co.*, 376 U.S. at 270–71.

248. *See id.* at 279–83.

249. *See id.* at 282–83; *see also Harper*, 494 U.S. at 255 n.28 (Stevens, J., concurring in part and dissenting in part) ("The purpose of [the clear and convincing evidence] standard of proof, [is] to reduce the chances of inappropriate decisions . . . .").

250. *Compare New York Times Co.*, 376 U.S. at 282–83, *with* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (both discussing the importance of avoiding too much restriction of speech).

251. *Pickering*, 391 U.S. at 568.

malice.[252] The Court set the burden of proof at convincing clarity to provide extra insurance that the accuser proved actual malice before the State took action.[253]

In the speech retaliation context, the employer bears the burden of proof on the more employer-friendly substantive standard of *Pickering* balancing.[254] This balancing standard is far more generous to the State than actual malice[255] or the First Amendment's traditional "narrowly tailored to promote a compelling Government interest"[256] test. Thus the lowered substantive standard of *Pickering* balancing provides the necessary additional weight to employer interests.[257] Setting the procedural burden at clear and convincing evidence to provide extra insurance that the employer has met its burden under the balancing does not prevent the balancing prong's substantive standard from sufficiently taking the State's interests as an employer into account.

Thus, courts should extend the practice of requiring the government to prove its case with clear and convincing evidence in First Amendment contexts to *Pickering* balancing. Requiring the State to meet this high procedural burden will ensure that the employer has fully proven its claim of workplace disruption before acting against speech. Meanwhile, the balancing's substantive nature will protect the government's unique interests as an employer.

IV. COURTS SHOULD FAVOR EMPLOYEE SPEECH WHEN ANALYZING LAW ENFORCEMENT EMPLOYEES COMMENTING ON THE DRUG WAR

This section will argue that courts should analyze speech from law enforcement employees opposing the war on drugs in a manner that favors the employee speech. First, courts should rule that plaintiffs pass the first prong of speech retaliation, as commentary on the war on drugs

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252. *New York Times Co.*, 376 U.S. at 285–86.

253. *See Harper*, 494 U.S. at 255 n.28 (Stevens, J., concurring in part and dissenting in part).

254. *See supra* Part II.A.2.

255. *Compare Pickering*, 391 U.S. at 568, *with New York Times Co.*, 376 U.S. at 279–80 (showing how much more speaker-friendly the "actual malice" standard is than the "*Pickering* balancing" prong).

256. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. 2006) (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000)). *Compare Pickering*, 391 U.S. at 568, *with Blagojevich*, 469 F.3d at 646 (citing *Playboy Entm't Group, Inc.*, 529 U.S. at 813) (showing how much more speaker-friendly the narrowly tailored to a compelling state interest standard is than the *Pickering* balancing prong).

257. *See supra* note 256.

is made as a citizen on a matter of public concern. Second, when engaging in the second prong of *Pickering* balancing, courts should refuse to apply the quasi-military rule because Supreme Court precedent does not support its existence.

A. Courts Should Rule that Commentary on the War on Drugs Constitutes Speech as a Citizen on a Matter of Public Concern

When law enforcement employees fired for commenting on the war on drugs sue for First Amendment speech retaliation, courts should rule that the speech is citizen speech because it is not pursuant to official duties and because the speech proposes a change in public policy.

1. Commentary Concerning the War on Drugs Constitutes Citizen Speech Because Such Speech Is Not Pursuant to Official Duties

Courts should rule that drug enforcement employees commenting on the war on drugs generally are not speaking pursuant to their official duties. The *Garcetti* Court ruled that Ceballos made his speech pursuant to official duties because the commentary leading to his firing constituted a critical part of an official assignment.[258] Because Ceballos' employers fired him for speech arising directly from that assignment, the Court ruled it pursuant to official duties.[259]

Where employers fire employees for commenting on their specific job assignments or complaining directly to their superiors, then the employers have a strong case under *Garcetti*. However, in the cases of commentary on the war on drugs discussed above, the employees are typically speaking either off the cuff or out in public.[260] Further, they are speaking in general terms about the government's drug policy, rather than a particular assignment or mission designed to effectuate that policy.[261]

While the speech addresses matters related to their workplace's subject matter, this does not mean that the speech is pursuant to their official duties, regardless of whether the Court applies the "assigned responsibilities" or "up the chain of command" analysis.[262] Speech on the war on drugs (at least in the above cases) was not made to a superior,

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258. Garcetti v. Ceballos, 547 U.S. 410, 414–15, 421–22 (2006). The speech regarded a report on the sufficiency of a warrant. *Id.*

259. *Id.*

260. *See supra* Part I.

261. *See supra* Part I.

262. *See supra* notes 116–18 and accompanying text.

and thus was not "up the chain of command." Further, the speech did not constitute part of an actual assignment and thus did not relate to the employee's "assigned responsibilities."[263]

The speech at issue in the above cases is more analogous to the speech that the Court upheld in *Rankin*.[264] The Court felt comfortable adding the citizen sub-element in *Garcetti* only because it would not touch speech unrelated to work assignments.[265] Thus the pursuant to their official duties rule only touches speech directly related to workplace assignments.[266] Thus, speech in support of a policy position, not related to an employee's work assignment, is exactly the speech *Garcetti* protected.[267]

2. Commentary on the War on Drugs Addresses Matters of Public Concern by Proposing a Change in Public Policy

Courts should not only rule that commentary on the war on drugs is citizen speech, but should also rule that such speech addresses matters of public concern, because the speech proposes a change in public policy. The Court has stated that one of the key determinants of whether speech addresses a matter of public concern is whether the speech will help inform the public.[268] Not only does the employee have a right to deliver speech that will inform the public, but the public gains important information in hearing opinions from employees, because employees can contribute their unique knowledge about their government employer's work.[269] For this reason, speech that informs the public is speech addressing matters of public concern.

The speech of employees on the "front lines" of the drug war—such as police officers and border patrol agents—constitutes the epitome of speech on matters of public concern. After all, these employees have direct contact with the successes and failures of the war on drugs. Therefore, they are uniquely qualified in knowledge and experience to comment on whether the drug war should continue. Law enforcement employees' unique knowledge on the subject of the drug war is analogous to the unique knowledge that the teacher in *Pickering* had

263. *See supra* notes 116–18 and accompanying text.

264. *See* Rankin v. McPherson, 483 U.S. 378, 380–86 (1987).

265. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).

266. *See id.* at 422–23.

267. *See id.*

268. City of San Diego v. Roe, 543 U.S. 77, 84 (2004).

269. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968).

regarding education.[270] This is exactly the type of speech that the Court wanted to protect with the speech retaliation test, and therefore courts should rule that such speech addresses a matter of public concern.

B. Courts Should Not Apply the Quasi-Military Rule When Analyzing Pickering *Balancing Because Supreme Court Precedent Does Not Support It*

When engaging in the second prong of *Pickering* balancing, courts should refuse to apply the quasi-military rule because Supreme Court precedent does not support its existence. The only case cited in support of the idea that courts should conduct the balancing analysis with increased deference to a quasi-military employer is *Kelley v. Johnson*[271]—where the Supreme Court cited a need for esprit de corps in ruling that a police officer's Fourteenth Amendment liberty interests did not permit him to challenge his employer's hair grooming regulations.[272]

However, the Court in *Kelley* explicitly distinguished this case from the First Amendment context.[273] The Court found it highly significant that the police officer brought a Fourteenth Amendment challenge, because such claims entitle employers to far broader deference than those challenges "based on the explicit language of the First Amendment."[274] With this in mind, the Court applied a rational basis review to the police officer's claim.[275]

Courts are wrong to extend the *Kelley* holding to the First Amendment context because the Court explicitly divorced that holding from the First Amendment context. Thus, because all other authority for

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270. *See id.* at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

271. 425 U.S. 238 (1976).

272. *Id.* at 246–49.

273. *Id.* at 244–45.

274. *Id.* ("Respondent has sought the protection of the Fourteenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the police department . . . . We think . . . [this distinction] is highly significant."). At the Supreme Court level, only dissents have suggested that an organization's "quasi-military" nature should apply in the First Amendment context. *See* Saye v. Williams, 452 U.S. 926, 929 (1981) (Rehnquist, J., dissenting); *see also* Rankin v. McPherson, 483 U.S. 378, 401 (1987) (Scalia, J., dissenting).

275. *Kelley*, 425 U.S. at 247; *see also* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641, (1994) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.") (quoting City of Los Angeles v. Preferred Commc'ns, 476 U.S. 488, 496 (1986)).

the "quasi-military" rule is derived from *Kelley*, courts should abandon the quasi-military rule when analyzing the *Pickering* balancing prong of the speech retaliation test.

CONCLUSION

When an employee sues his or her government employer—claiming that the employer terminated him or her in violation of the First Amendment right to free speech—courts conduct a three-pronged speech retaliation test. The first prong requires the employee to prove that his or her speech was made as a citizen and addresses a matter of public concern. The second prong, called *Pickering* balancing, constitutes a balancing of the employee's interest in speaking against the employer's interest in maintaining a harmonious and effective work place. The final prong requires courts to determine whether the employee's protected speech caused the termination.

Supreme Court precedent demonstrates that the employer bears the burden of showing that it prevails under *Pickering* balancing. Because employees must prove that they prevail on the increasingly narrow first prong before reaching the balancing analysis, only that speech with the strongest connection to speech as a citizen on a matter of public concern reaches *Pickering* balancing. Combining this with *Connick*'s rule—that the burden of proof on the State rises along with the strength of the speech's connection to matters of public concern—reveals that courts should require the employer to prove that it prevails on *Pickering* balancing under the high burden of clear and convincing evidence.

When applying the speech retaliation test to law enforcement employees commenting on the war on drugs, courts should rule in a manner that favors employee speech. Courts should rule that the speech is made as a citizen because it is not directly related to the employee's work assignments, and that the speech addresses a matter of public concern because the speech discusses public policy. When engaging in *Pickering* balancing the Court should not apply the quasi-military exception, because Supreme Court case law lends no support to such an application. The Court's adoption of these policies will help ensure that citizens like Bryan Gonzalez, Joe Miller, and Jonathan Wender remain free to contribute their knowledge and expertise to the marketplace of ideas without the Government unreasonably depriving them of their livelihoods.