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"Like" It or Not:

Employees' Rights and Responsibilities on Social Media

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I. SOCIAL MEDIA

"Thank you Kanye, very cool!"[1]

"Attorney-client privilege is dead!"[2]

"When you're already $500 billion DOWN, you can't lose!"[3]

Social media has invaded all aspects of American life, including communications from the President of the United States, as provided above. Roughly two-thirds of U.S. adults report using Facebook.[4] An astonishing 94% of 18-24-year-olds use YouTube. The average American household owns 2.6 Apple products.[5] Teenagers now say they prefer texting their friends rather than talking to them face-to-face.[6] Social media dominates American life. People spend significant portions of their day updating their feeds, creating posts, and checking out other people's social media pages as well. As a result, the average American lives in a near-perpetual state of connectivity, oftentimes with people they neither know nor ever see. The President of the United States uses Twitter as a way to control how his agenda gets broadcasted to the American people, amongst other things. Increasingly, city governments and other political subdivisions now use social media to conduct public business and interact with constituents. Public employees (and all social media users) can post their unfiltered thoughts on nearly anything: weather, family, friends, sports, politics, even their employer.

This paper addresses the complexities of social media for public entities, and specifically the requirements for municipal governments with regard to employee use of social media. It will address the framework for public employee free speech, modern case law examples involving social media, political advertising, state public information laws, and guidelines for city social media policies.

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[1] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 25, 2018, 12:33 PM), https://twitter.com/realdonaldtrump/status/989225812166696960?lang=en.
[2] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 10, 2018, 4:07 AM), https://twitter.com/realdonaldtrump/status/983662868540346371?lang=en.
[3] Donald J. Trump (@realDonaldTrump), Twitter, (Apr. 4, 2018, 6:20 AM), https://twitter.com/realdonaldtrump/status/981521901079146499.
[4] Monica Anderson and Aaron Smith, *Social Media Use in 2018*, PEW RESEARCH CENTER (Mar. 1, 2018), http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/.
[5] Steve Liesman, *America loves its Apple. Poll finds that the average household owns more than two Apple products*, CNBC (Oct. 10, 2017), https://www.cnbc.com/2017/10/09/the-average-american-household-owns-more-than-two-apple-products.html.
[6] Erika Edwards and Maggie Fox, *More teens addicted to social media, prefer texting to talking*, NBC NEWS (Sept. 10, 2018).

II. LEGAL FRAMEWORK FOR PUBLIC EMPLOYEE SPEECH

A. PICKERING V. BOARD OF EDUCATION

Marvin Pickering, a teacher at a school district in Illinois, sent a letter to the local newspaper in connection to a proposed tax increase.[7] His letter criticized the way in which the board and superintendent handled past proposals to raise new revenue for the district.[8] In addition, the letter charged the superintendent with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.[9] The board dismissed Pickering on the grounds that writing and publishing the letter proved "detrimental to the efficient operation and administrations of the schools of the district."[10] At the board hearing, members of the board argued that the letter made false statements impugning the board and school administration.[11] Furthermore, the board charged that the letter would disrupt faculty discipline and foment controversy amongst district employees as well as members of the community.[12] Pickering filed suit, claiming the First and Fourteen Amendments protected his writing the letter.[13]

The Supreme Court held that absent proof false statements knowingly or recklessly made, a teacher's exercise of his or her right to speak on issues of public importance may not furnish the basis for dismissal from public employment.[14] The Court found that none of the statements in the letter criticized anyone Pickering worked with directly, and that while he made some erroneous claims regarding district spending, he did not do so knowingly or recklessly.[15] However, the Court did recognize the need for government entities to operate effectively.[16] In doing so, the Court established what is now referred to as the *Pickering* balance test. In matters of public employee free speech, courts must balance the interests of a public employee, as a citizen, commenting upon matters of public concern and interest against the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[17]

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[7] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).
[8] *Id.* at 564, 566.
[9] *Id.* at 566.
[10] *Id* at 564.
[11] *Id.* at 566-67.
[12] *Id.* at 567.
[13] *Id*. at 564.
[14] *Id*. at 574.
[15] *Id.* at 569-74.
[16] *Id*. at 568.
[17] *Id*.

B. Mt. Healthy v. Doyle

In *Mt. Healthy v. Doyle*, a school district did not renew a teacher's contract at the recommendation of the superintendent following a number of events calling into question the teacher's professionalism.[18] The teacher, Fred Doyle, engaged in an argument that became so heated that another teacher slapped him, he referred to students as "sons of bitches," and made an obscene gesture to two girls after they failed to obey commands he made in his capacity as cafeteria supervisor.[19] Finally, Doyle discussed the substance of a district memorandum regarding teacher dress and public support for bond issues during a call with a local radio disc jockey.[20] The Board of Education chose not to renew his contract, citing his "notable lack of tact in handling professional matters," as well as the radio incident and obscene gesture.[21]

The Supreme Court vacated the lower court's decision, and remanded the case.[22] The Court reasoned that Doyle's call to the radio station constituted a protected statement made by a private citizen on a matter of public concern.[23] Because Doyle had no tenure, the Board could have discharged him for no reason, but they could not discharge him for exercising his constitutionally protected First Amendment freedoms.[24] The trial court properly placed upon Doyle the burden to prove that the protected conduct played a substantial factor in the Board's decision not to rehire, and Doyle carried that burden.[25] However, the Supreme Court also held the trial court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to Doyle's re-employment even in the absence of the protected conduct.[26]

C. Connick v. Myers

Over a decade later, the Supreme Court walked back *Pickering* towards the interest of employers in *Connick v. Myers*. In *Connick*, an assistant district attorney, Sheila Myers, sparred with her superiors after they informed Myers of an imminent transfer to another department within the office.[27] Myers responded by distributing a questionnaire to other staff members in the district attorney's office.[28] The questionnaire addressed the office transfer policy, office morale, the

[18] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281-82 (1977).
[19] *Id*. at 281-82.
[20] *Id*. at 282-83.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 283.
[24] *Id*. at 283-84.
[25] *Id.* at 287.
[26] *Id*.
[27] *Connick v. Myers*, 461 U.S. 138, 140 (1983).
[28] *Id.* at 141.

need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.[29] The District Attorney quickly terminated Myers for her refusal to accept the transfer and insubordination.[30] Myers filed suit, alleging wrongful termination because she exercised her constitutionally protected right of free speech.[31] The District Court sided with Myers, and the Fifth Circuit affirmed.[32]

The Supreme Court reversed on the basis that the District Court and Fifth Circuit erred in striking the *Pickering* balancing test in favor of Myers.[33] The Court reasoned that *Pickering* leads to the conclusion that if the questionnaire did not constitute speech on a matter of public concern, the Court did not need to scrutinize the reasons for Myers' discharge.[34] Moreover, when employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.[35]

The Court also noted that not all private speech by public employees falls outside of the protection of the First Amendment.[36] When employee speech touches solely on personal matters, that federal courts should not review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[37] Instead, the courts must ensure citizens are not deprived of fundamental rights by virtue of working for the government.[38] Finally, the Court found that courts should consider the content, form, and context of a given statement to determine whether employee speech addresses a matter of public concern.[39]

D. Rankin v. McPherson

Ardith McPherson worked as deputy in the office of the Constable of Harris County, Texas.[40] While officially titled "Deputy," McPherson only performed clerical work at a desk with no telephone, and essentially no access to the public. In March 1981, after hearing over the office radio of an attempt on President Ronald Reagan's life, McPherson remarked to another employee that if such an

[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id.* at 142.
[33] *Id.*
[34] *Id.* at 146.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id.* at 147-48.
[40] *Rankin v. McPherson*, 483 U.S. 378, 380 (1987).

attempt occurred again, she "hope[d] they get him." When asked about the statement by her supervisor, McPherson admitted making the statement, but said she did not mean anything by it.[41] The supervisor promptly terminated McPherson, who responded by filing a section 1983 claim.[42] The Supreme Court granted certiorari after an appeal from a remand by the Fifth Circuit.[43]

The Supreme Court affirmed the Fifth Circuit's conclusion that, however ill-advised, McPherson's opinion did not make her unfit for her job in the Constable's Office.[44] The Court found that "it is clearly established" that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.[45] Citing *Mt. Healthy*, the Court noted that the city could have fired McPherson for any reason or no reason at all, it could not terminate her for exercising her First Amendment rights.[46] The Court then found that McPherson's statement plainly addressed a matter of public concern, and noted "the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[47] Accordingly, the Court proceeded to apply the *Pickering* balancing test to determine her interest in making the statement against the interest of the State in promoting the efficiency of the public services it performs.[48] In doing so, the Court held that because of McPherson's clerical role with the office, her private speech posed minimal danger to the agency's successful functioning.[49]

E. Garcetti v. Ceballos

Richard Ceballos, a deputy district attorney, filed suit against the Los Angeles County District Attorney's Office after a series of alleged retaliatory employment actions in response to Ceballos' handling of an affidavit.[50] Specifically, Ceballos disagreed with his supervisors regarding the legal sufficiency of an affidavit used to obtain a search warrant in a pending criminal case.[51] Ceballos expressed his misgivings verbally as well as through a memorandum to his supervisors.[52] These misgivings boiled over in an allegedly heated meeting between Ceballos, his supervisors, and employees from the sheriff's department.[53]

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[41] *Id*. at 382.
[42] *Id*.
[43] *Id*.
[44] *Id*. at 383.
[45] *Id*.
[46] *Id*. at 384.
[47] *Id*. at 387.
[48] *Id*. at 384.
[49] *Id.* at 390-91.
[50] *Garcetti v. Ceballos*, 547 U.S. 410, 414-15 (2006).
[51] *Id*. at 415.
[52] *Id*. at 414.
[53] *Id*.

The defense would eventually call Ceballos to testify about his concerns with the affidavit in a trial court hearing on the matter.[54] In the aftermath of those events, the District Attorney's Office purportedly reassigned Ceballos to another position, transferred him to another courthouse, and denied him a promotion.[55] Ceballos eventually filed suit alleging First and Fourteenth Amendment violations.[56] The District Court granted summary judgment for the District Attorney's Office, and the Ninth Circuit reversed on the grounds that Ceballos' allegations of wrongdoing in the memorandum constituted a matter of public concern.[57]

The Supreme Court once again applied *Pickering*, and reversed the Ninth Circuit's decision because Ceballos did not make his statements as a private citizen, but rather as pursuant to his official duties as a deputy district attorney.[58] The Court reasoned that *Pickering* and its progeny identified two inquiries to guide interpretation of constitutional protections accorded to public employee speech.[59] The first requires determining whether the employee spoke as a citizen on a matter of public concern.[60] 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.[61] If the answer is yes, then the possibility of a First Amendment claim arises.[62] 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.[63] This consideration reflects the importance of the relationship between the speaker's expressions and employment.[64] A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.[65]

Using this reasoning, the Court found that the Ceballos made his expressions pursuant to his duties as a calendar deputy district attorney.[66] The fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case distinguished his case from those

[54] *Id.* at 414-15.
[55] *Id*.
[56] *Id*. at 415.
[57] *Id*.
[58] *Id.* at 421.
[59] *Id*. at 418.
[60] *Id.*
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id.* at 421.

in which the First Amendment protected against discipline.[67] Therefore, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[68]

III. SOCIAL MEDIA CASE LAW

A. Graziosi v. City of Greenville Mississippi

The Greenville Police Department ("GPD") terminated Susan Graziosi, a 25-year sergeant with the Department, after inflammatory comments she posted on the public Facebook page of the Mayor of Greenville.[69] Her termination came days after she returned from a suspension for violating multiple sections of the GPD's Policy and Procedure Manual during her response to a domestic disturbance call.[70] During a meeting before her suspension, several officers expressed to Chief Freddie Cannon a desire to attend the funeral of a police officer killed in the line of duty in Pearl, Mississippi.[71] Specifically, Cannon considered sending a patrol car to the funeral, but ultimately decided against for budgetary reasons.[72] Upon learning that no member of the GPD attended the funeral, Graziosi posted the following statement on her Facebook page while off-duty on her home computer:

> I just found out that Greenville Police Department did not send a representative to the funeral of Pearl Police Officer Mike Walter, who was killed in the line of duty on May 1, 2012. This is totally unacceptable. I don't want to hear about the price of gas-officers would have gladly paid for and driven their own vehicles had we known the city was in such dire straights [sic] as to not to be able to afford a trip to Pearll, Ms. [sic], which, by the way, is where our police academy is located. The last I heard was the chief was telling the assistant chief about getting a group of officers to go to the funeral. Dear Mayor, can we please get a leader that understands that a department sends officers of [sic] the funeral of an officer killed in the line of duty? Thank you. Susan Graziosi.[73]

Several of Graziosi's Facebook friends "liked" her post and left comments, and she replied to many of those comment, including the following response:

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[67] *Id.*
[68] *Id*.
[69] *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 33 (5th. Cir. 2015).
[70] *Id*. at 734.
[71] *Id*.
[72] *Id*.
[73] *Id*.

> [W]e had something then that we no longer have. . .LEADERS. I don't know that trying for 28 is worth it. In fact, I am amazed everytime [sic] I walk into the door. The thing is the chief was discussing sending officers on Wednesday (after he suspended me but before the meeting was over). If he suddenly decided we "couldn't afford the gas" (how absurd - I would be embarrassed as a chief to make that statement) he should have let us know so we could have gone ourselves. Also, you'll be happy to know that I will no longer use restraint when voicing my opinion on things. Ha![74]

That same evening, Graziosi posted her initial statement to then-Mayor Chuck Jordan's public Facebook page.[75] Fifteen minutes later, she posted "[i]f you don't want to lead, can you just get the hell out the way."[76] A fellow officer replied praising her posts.[77] Chief Cannon initiated an internal affairs investigation, and the investigating officers found that Graziosi violated three sections of the Department's Policy and Procedure Manual.[78] The City thereafter terminated her employment, and Graziosi filed suit.[79] The trial court granted summary judgment and found that even if Graziosi spoke as a citizen on a matter of public concern, evidence existed that Graziosi's post caused actual disruption within the GPD.[80] Therefore, Greenville's interests in maintaining discipline and good working relationships within the department outweighed her interest in speaking as a citizen on a matter of public concern.[81]

The Fifth Circuit affirmed the trial court's grant of summary judgment.[82] However, it disagreed with the trial court's characterization of Graziosi's statements as those of a public employee.[83] Specifically, the Court found that because Graziosi did not make her statements within the ordinary scope of her duties as a police officer that her Facebook posts should fall under the speech of a private citizen.[84] Applying *Connick*, the Court evaluated the content, form, and context of her statements.[85]

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[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*. at 734-35.
[79] *Id*. at 735.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 741.
[83] *Id*. at 737.
[84] *Id.* at 738.
[85] *Id*.

The Court agreed that the content of her speech addressed a dispute over an intra-department decision, rather than a matter of public concern.[86] The Court held that speech exposing or otherwise addressing malfeasance, corruption, or breach of the public trust, especially within a police department, touches upon matters of public concern.[87] Here, Graziosi's statements "quickly devolved into a rant" about Chief Cannon's leadership and demanded that he "get the hell out of the way."[88] Graziosi's concession that her anger at Chief Cannon's decision prompted her to make the Facebook posts only served to reinforce the notion that her posts came as a result of her malcontent rather than concern for the public welfare.[89]

Looking to the form of her statements, the Court found that her posts on the Mayor's public Facebook page weighed in favor of a finding that Graziosi spoke on a matter of public concern.[90] The Mayor's page served as a community bulletin board upon which members of the Greenville community could lobby the Mayor to take a particular action or apprise members of the community of events occurring in town or things of general interest.[91] Therefore, the form of Graziosi's posts on a medium accessible to the community proved primarily public.[92]

Finally, the context of her statements weighted against a finding that she spoke on a matter of public concern.[93] Graziosi made the posts immediately after returning to work from an unrelated suspension.[94] Furthermore, Graziosi admitted she made the posts because of her anger at Chief Cannon's decision not to send a representative to the funeral of a fallen officer.[95] As a result, the Court found that she made her speech in the context of a private employee-employer dispute, and this militated against a finding of public speech.[96]

B. Liverman v. City of Petersburg

Two police officers, Herbert Liverman and Vance Richards, lost their jobs after violating the Department's social networking policy, which governed the use of social media platforms.[97] The central provision of that policy ("Negative Comments Provision") stated:

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[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id.* at 739.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th. Cir. 2016).

> Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.[98]

Another provision ("Public Concern Provision") specified the following regarding statement of public concern and work efficiency, effectively restating the *Pickering* balancing test:

> Officers may comment on issues of general or public concern (as opposed to personal grievances) so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer. The instances must be judged on a case-by-case basis.[99]

On June 17, 2013, while off-duty, Herbert Liverman posted the following statement concerning the police promotions on his Facebook page:

> Sitting here reading posts referencing rookie cops becoming instructors. Give me a freaking break, over 15 years of data collected by the FBI in reference to assaults on officers and officer deaths shows that on average it takes at least 5 years for an officer to acquire the necessary skill set to know the job and perhaps even longer to acquire the knowledge to teach other officers. But in todays [sic] world of instant gratification and political correctness we have rookies in specialty units, working as field training officer's and even as instructors. Becoming a master of your trade is essential, not only does your life depend on it but more importantly the lives of others. Leadership is first learning, knowing then doing.[100]

More than thirty people liked or commented on this post. Richards, also off-duty at the time, commented as follows:

> Well said bro, I agree 110%... Not to mention you are seeing more and more younger Officers being promoted in a Supervisor/ or roll. It's disgusting and makes me sick to my stomach DAILY. LEO Supervisors should be promoted by experience… And what comes with experiences are "experiences" that "they" can pass around to

[98] *Id*. at 404.
[99] *See id*. at 404-05.
[100] *Id*. at 405.

> the Rookies and younger less experienced Officers. Perfect example, and you know who I'm talking about….. How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2yrs experience in the street? Or less as a matter of fact. It's a Law Suit waiting to happen. And you know who will be responsible for that Law Suit? A Police Vet, who knew tried telling and warn the admin for promoting the young Rookie who was too inexperienced for that roll to begin with. Im with ya bro…..smh[101]

Liverman and Richards went back and forth over several additional comments on the original post.[102] As a result of the posts, both Liverman and Richards received oral reprimands and six months' probation for violating the social media policy. However, both the City Manager and Human Resources Director advised them that the discipline would not affect their eligibility for promotion.[103] However, several weeks later Chief John Dixon altered the qualifications for promotion to expressly exclude any officers on probation from participating in the promotion process.[104] Accordingly, when Liverman and Richards applied for open sergeant positions, the Department notified them they did not have eligibility to sit for the promotional exam.[105] Liverman and Richards filed a six-count complaint in federal district court.[106]

The district court granted Liverman summary judgment on his claim that the social networking policy infringed his right to free speech, but nonetheless found that Chief Dixon was entitled to qualified immunity because the policy fell within a gray zone.[107] On Liverman's challenge to the disciplinary action, the court found that qualified immunity again shielded Dixon's decision because the contours of protected speech in this area were not clearly established.[108] The district court next denied relief on Richards's challenges to the policy and the discipline, holding that Richards's speech was purely personal and thus not protected by the First Amendment.[109] For both of their retaliation claims, the court concluded that the subsequent internal investigations were not retaliatory.[110] The officers appealed.[111]

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[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id.* at 406.
[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.

The Fourth Circuit struck down the social networking policy as unconstitutionally overbroad.[112] Here, the Court noted that the particular attributes of social media fit comfortably within the existing balancing inquiry of *Pickering* and *Connick*.[113] Moreover, social media platforms amplify the distribution of the speaker's message, but can exponentially increase the potential for departmental disruption.[114] For statutes or regulations that operate as a prior restraint on speech, the government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the government.[115]

Here, the Court found that "no doubt" existed as to whether the Department's policy regulates officers' right to speak on matters of public concern.[116] Additionally, the Court characterized the restraint as a "virtual blanket prohibition of all speech critical of the government employer."[117] The terms of the Negative Comments Provision prevents officers from making unfavorable comments on the operations and policies of the Department, arguably the cornerstone matter of public concern.[118] Further, the Court found that the Department failed to satisfy its burden of demonstrating actual disruption to its mission, noting that "the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restriction on officers' freedom to debate matters of public concern."[119]

C. Grutzmacher v. Howard County

Kevin Patrick Buker served as a Battalion Chief with the Howard County, Maryland Department of Fire and Rescue Services ("the Department).[120] Buker brought suit against the Department, alleging that they fired him in retaliation for exercising his First Amendment free-speech rights and that the Department's social media policy was facially unconstitutional under the First Amendment.[121]

On January 20, 2013, Buker watched coverage of a gun control debate in his office and posted the following statement to his Facebook page while on-duty:

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[112] *Id*. at 407.
[113] *Id*.
[114] *Id*.
[115] *Id*. (Discussing *United States v. Nat' Treasury Employees Union*, 513 U.S. 454, 459-68 (1995), striking down a statute banning federal employees from receiving compensation for speeches, appearances, or articles. The Supreme Court applied *Pickering* to a wholesale deterrent to a broad category of expression by a massive number of potential speakers. *NTEU*, 513 U.S. at 467).
[116] *Id*. at 407-08.
[117] *Id*.
[118] *Id*. at 408.
[119] *Id.* at 408-09.
[120] *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 336 (4th. Cir. 2017).
[121] *Id*. at 336-37.

"[m]y aide had an outstanding idea.. lets [sic] all kill someone with a liberal… then may we can get the outlawed too! Think of the satisfaction of beating a liberal to death with another liberal… its [sic] almost poetic."[122] Twenty minutes later, Mark Grutzmacher, a county volunteer paramedic, replied with the following comment: "[b]ut… was it an "assault liberal"? Gotta pick a fat one, those are the 'high capacity' ones. Oh… pick a black one, those are more 'scary.' Sorry had to perfect on a cool idea!"[123]

After becoming aware of the posts, Buker's supervisors directed him to review his recent Facebook posts and remove anything inconsistent with the Department's social media policy.[124] Although Buker maintained that the posts complied with the social media policy, he removed the January 20th posts.[125] A few hours after informing his supervisor that he had removed the posts, Buker posted the following to his Facebook Wall:

> To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirley in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.[126]

After a Facebook friend responded to the post asking why Buker had to remove the posts if they did not address the Department, Buker replied with the following comment:

> Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Governement recently published a Social media policy, which the Department then published it's own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . sad day. To lose the First Ammendment [sic] rights I fought to ensure, unlike the WIDE majority of the Government I serve.[127]

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[122] *Id*. at 338.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*. at 339.

The Department responded by moving Buker out of field operations to an administrative assignment pending the results of an internal investigation.[128] The Department noted the racial overtones of Grutzmacher's post, and internally believed that Buker "endorsed" the post by replying to it.[129] Approximately three weeks later, a member of a Department-affiliated company posted a picture of an elderly woman with her middle finger raised, and the words "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE[.] I'LL POST WHATEVER THE F*** I WANT[.]"[130] The words "for you, Chief" accompanied the post, and Buker "liked" the post.[131] The Department terminated Buker less than a month later for his Facebook activity, and Buker brought suit against the Department[132]

The Fourth Circuit, hearing the case on appeal, found that the Department's interest in efficiency and preventing disruption outweighed Buker's interest in speaking in the manner he did regarding gun control and the Department's social media policy, and upheld the termination.[133] The Court determined that at least some of Buker's Facebook activity implicated matters of public concern, although it declined to decide whether the series of his posts and "like" constituted a single expression of speech.[134] Regardless, the Court found that Buker's social media activity interfered with and impaired Department operations as well as working relationships within the Department.[135] In addition, the Court noted that fire departments have a strong interest in promoting camaraderie and efficiency and accorded substantial weight to that interest.[136]

D. Knight First Amendment Institute at Columbia University v. Trump

In March 2009 Donald Trump created the Twitter account with the account name "@realDonaldTrump." Before his inauguration, he used the account to tweet about a variety of topics, including popular culture and politics.[137] Since his inauguration in January 2017, President Trump has used the account as a channel for communicating and interacting with the public about his administration, and occasionally for issues unrelated to official government business.[138] The public at large can view his tweets without being signed into Twitter, and anyone who

[128] *Id*.
[129] *Id*.
[130] *Id*. ("F***" was not censored in the original post).
[131] *Id*.
[132] *Id*. at 339-340
[133] *Id*. at 345.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 552 (S.D.N.Y. 2018).
[138] *Id*. at 552.

wants to follow the account can do so.[139] President Trump has not issued any rule or statement purporting to limit the speech of those who reply to his tweets, either by form or subject matter.[140]

Since the President's inauguration, Daniel Scavino, the White House Social Media Director and Assistant to the President, assists President Trump's use of the account.[141] The account addresses a myriad of government issues, including promoting the President's legislative agenda; announcing official decisions; engaging with foreign leaders, and challenging media organizations.[142] The National Archives and Records Administration has advised the White House that the President's tweets from the account constitute official records that require preservation under the Presidential Records Act.[143] Both President Trump and Mr. Scavino have access to the account, including the ability to block and unblock users.[144]

All of the plaintiffs use Twitter, tweeted a message critical of the President or his policies at the account, and all found themselves blocked from viewing the account shortly thereafter.[145] As a result of the President's blocking their accounts, none of the individual plaintiffs can view the account; directly reply to the President's tweets; or use the @realDonaldTrump webpage to view the comment threads associated with the President's tweets while logged into their accounts.[146] While workarounds do exist that allow the plaintiffs to view the account, they all require more work than non-blocked Twitter users must exert to view the President's tweets.[147]

The United States District Court for the Southern District of New York held that the comment section, or the interactive space where Twitter users can reply to a tweet by @realDonaldTrump, constitutes a designated public forum, and blocking users for critical tweets amounted to viewpoint discrimination.[148] The Court found that the users of the account blocked the plaintiffs for posting tweets in which they criticized the President or his polices, and that the First Amendment prohibited the continued exclusion of the plaintiffs as a result of their viewpoint.[149]

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[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id*.
[146] *Id*.
[147] *Id*. at 554.
[148] *Id*. at 574-75.
[149] *Id*.

The Court also differentiated between Twitter's two features for limiting user interaction: muting and blocking.[150] The "muting" feature allows a user to remove an account's tweets from the user's timeline without unfollowing or blocking that account.[151] Blocking, by contrast, goes further.[152] Blocking another user means the blocking user will not see any tweets posted by the blocked user.[153] However, blocking another user means that user cannot see or reply to any tweets from the blocker's account, unlike muting.[154] The Court found that the President could exercise his right to ignore certain speakers by muting those accounts without restricting the ability of those users to access and reply to the @realDonaldTrump account, rather than by blocking them.[155] The Court issued declaratory relief, stating that "the blocking of individual plaintiffs from the @realDonaldTrump account because of their expressed political views violates the First Amendment."[156]

IV. POLITICAL ADVERTISING

A. Political Advertising Laws

Nearly every state in the country prohibits public officials from using state funds for political purposes.[157] For example, Texas Elections Code chapter 255 governs the requirements for political advertising at the state level.[158] More specifically, it regulates disclosure requirements for political advertisements, and prohibits the use of public funds for the purpose of political advertising. The latter of those two provisions implicates public employees and municipal governments in a few ways.

B. Prohibition on Advocacy in Election Advertisements

In spring 2018, Texas Attorney General Ken Paxton issued cease and desist letters to multiple school districts engaged in alleged electioneering.[159] Specifically, the letters addressed the use of official district social media accounts

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[150] *Id*. at 576.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *Id*. at 577.
[156] *Id*. at 579.
[157] TEX. ELEC. CODE § 255.003; CAL. GOV'T CODE § 8314; FLA. STAT. § 104.31; OR. REV. STAT. § 260.432; IOWA CODE § 68A.505; *50 STATE TABLE: STAFF AND POLITICAL ACTIVITY – STATUTES*, NATIONAL CONFERENCE OF STATE LEGISLATORS (APR. 13, 2018), http://www.ncsl.org/research/ethics/50statetablestaffandpoliticalactivitystatutes.aspx
[158] TEX. ELEC. CODE § 255.003.
[159] AG Paxton Dispatches Letters to Three School Districts to Halt Unlawful Electioneering, THE ATTORNEY GENERAL OF TEXAS (Feb. 14, 2018), https://texasattorneygeneral.gov/news/releases/ag-paxton-dispatches-letters-to-three-school-districts-to-halt-unlawful-ele

for political advertising.[160] In one such instance, a district superintendent tweeted a message thanking a political candidate for "standing up for public ed" and encouraged people to vote in the upcoming primary election.[161] Subsequently, one of the social media accounts for a high school in the district retweeted that post.[162] The Office of the Attorney General ("OAG") stated that the district promulgated and published communications directed for or against candidates and measures, and that these actions violated Texas law.[163] Finally, the OAG requested that the district withdraw the cited communications as well as any similar communications, and cease from making any further communications designed to support or oppose certain political candidates.

City employees should refrain from using municipal social media accounts to engage in electioneering. Actions such as liking a post on Facebook or retweeting a post authored by a private citizen likely constitute endorsements, and will run afoul of state laws prohibiting public agencies from making such endorsements.

C. Employee Use of City Funds to Create Political Advertisements

States that prohibit the use of public funds typically include the use of public time and equipment. The following constitute a few relevant examples of such laws:

> It shall be unlawful for any public servant to devote any time or labor during usual office hours toward the campaign of any other candidate for office or for the nomination to any office, or to circulate an initiative or referendum petition or to solicit signatures, or to use any office or room furnished at public expense to distribute any campaign materials.[164]

> An employee may not engage in political activity: While on duty; In any room or building occupied in the discharge of official duties; By utilizing any state resources or facilities; While wearing a uniform or official insignia identifying the office or position of

[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] Cleve W. Doty, *Request to Cease and Desist Unlawful Electioneering*, THE ATTORNEY GENERAL OF TEXAS (Feb. 14, 2018), https://www.texasattorneygeneral.gov/files/epress/Brazosport_ISD_Demand_Letter.pdf?cachebuster:22.
[164] ARK. CODE ANN. § 7-1-103.

the employee; or When using any vehicle owned or leased by the state or any agency or instrumentality of the state.[165]

Laws such as these likely do not just implicate the use of a city social media account or a city computer to create or publish political advertising. It will likely also include posting from private accounts while working on city time. For example, a city employee named Rob Swanson sits at his desk working on a project for the Parks and Recreation department of Fictional City, in the imaginary state of Franklin. Franklin law states that "an officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising." Since his supervisor has meetings all morning, Rob decides to pull out his laptop and spend twenty minutes putting the finishing touches on a document advocating for the passage of an upcoming ballot measure slashing funding for municipal agencies. Thrilled with his work, he then posts the document to his Facebook, Twitter, and Instagram. Has Rob violated Franklin law by creating and posting a political advertisement on his personal social media using his own laptop?

Likely yes. Since Rob created the post while working on Fictional City time, Rob used public funds to create political advertising. While he did not use city equipment or post on a city social media account, he still create the advertisement during city working hours. As a result, Rob violated the Franklin law.

V. STATE PUBLIC INFORMATION LAWS

A. What are State Public Information Laws?

All fifty states and the District of Columbia have laws modeled after the federal Freedom of Information Act.[166] These laws govern public access to governmental records with the intention of promoting accountability and transparency for state agencies.[167]

In Texas, for example, the Texas Public Information Act ("TPIA" or "the Act") provides the public with the right to request access to government information.[168] The Act applies to information of "every governmental body." Government Code section 552.003(1)(A) defines "governmental body" to mean, in part: a board, commission, department, committee, institution, agency, or office that is within or is created by one or more elected or appointed members.[169] The definition includes a municipal governing body in the state, as well as a number

[165] MO. REV. STAT. § 36.157
[166] *State sunshine laws*, BALLOTPEDIA (2018), https://ballotpedia.org/State_sunshine_laws.
[167] *Id*.
[168] Office of the Attorney Gen. of Tex., *Public Information Act Handbook 2018* i (2018).
[169] TEX. GOV'T CODE § 552.003(1)(A).

of other types of local government agencies.[170] The law applies to municipal government as well as subdivisions such as fire and police departments.

B. What is Public Information?

Texas construes public information law broadly to assure compliance from state officials and agencies. Specifically, the TPIA defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance, or in connection with the transaction of official business.[171] This includes information produced by a governmental body as well as on behalf of the governmental body if the body owns the information, has a right of access to the information, or spends/contributes public money for the purpose of writing, producing, collecting, assembling, or maintain the information.[172] Finally, public information also includes information made by an individual officer or employee of a governmental body in the officers or employees official capacity and the information pertains to official business of the governmental body.[173] Official business means any matter over which a governmental body has any authority, administrative duties, or advisory duties.

The Act applies to recorded information in almost every imaginable form, including: paper; film; a magnetic, optical, solid state, or other device that can store an electronic signal; tape; Mylar; and any physical material on which information may be recorded including linen, silk and vellum.[174] The Act also defines the media *containing* public information, rather than recording mediums, including: a book, letter, document, e-mail, Internet posting, text message, instant message, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, Photostat, sound recording, map, drawing, and a voice, data, or video representation held in computer memory.[175]

It appears that drafters of the Act intended to cover every conceivable medium of public information possible, and these lengthy lists demonstrate the broad coverage of the TPIA. Municipal employees faced with the question contemplating whether an official document or communication falls into the purview of the TPIA, would likely do well to err on the side of caution and consider the document covered.

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[170] *Id.*
[171] TEX. GOV'T CODE § 552.002(a)(1)-(2).
[172] TEX. GOV'T CODE § 552.002(a)(2).
[173] TEX. GOV'T CODE § 552.002(a)(3).
[174] TEX. GOV'T CODE § 552.002(b).
[175] TEX. GOV'T CODE § 552.002(c).

C. State Public Information Laws and Social Media

State public information laws implicate directly social media use for government employees in a number of ways. First, the official accounts used by municipal governments and agencies produce content subject to the Act under certain circumstances. Municipal employees manage these accounts, and must recognize the public information implications of posting communications or communicating with other entities and private citizens through the account. Second, employees who use their own private social media accounts to conduct official business for a city or municipality may subject those accounts to disclosure under the Act.

VI. Social Media Policy Guidelines

Cities should create and maintain social media policies outlining appropriate employee social media use. More specifically, the policy should define social media and social media use, set standards for the approving who may create and operate the accounts, outline the allowed networks, require language indicating the official nature of the account, security practices, records management, and content restrictions. For example, Marin County, Oregon outlines the following content as prohibited in official posts:

A. Profane language or content;
B. Content that promotes, fosters or perpetuates discrimination of protected classes;
C. Sexual harassment content;
D. Solicitations of commerce or advertisements including promotion or endorsement;
E. Promotion or endorsement of political issues, groups or individuals;
F. Conduct or encouragement of illegal activity;
G. Information that may tend to compromise the safety or security of the public or public systems;
H. Content intended to defame any person, group or organization;
I. Content that violates a legal ownership interest of any other party, such as trademark or copyright infringement;
J. Making or publishing of false, vicious or malicious statements concerning any employee, the County or its operations;
K. Violent or threatening content;
L. Disclosure of confidential, sensitive or proprietary information;

M. Advocating for alteration of hours, wages, and terms and conditions of employment (applies to County employees only).[176]

Setting clear standards will help prevent employee abuse or misuse of official social media accounts. Training and reminders regarding the potential dangers of misusing the accounts will also help maintain compliance with state records retention laws, preclude election law violations, and prevent offensive or inappropriate posts from employees. Any guidelines regarding private employee use of social media should avoid overly broad language to avoid impinging upon employee First Amendment rights, as outlined in the cases discussed above. When employees do post inappropriate or potentially disruptive content on social media, make sure to retain and appropriately document those posts in the event an investigation or discipline becomes necessary.

VII. CONCLUSION

As social media becomes nearly omnipresent in the public and private lives of Americans, city governments should work to create the resources and policies necessary to prevent interference with official duties and responsibilities without running afoul of employee constitutional rights or state information and records laws. It seems likely case law addressing employee social media use will only increase, especially as Millennials and Generation Z enter the workforce en masse. By complying with state laws, and keeping in mind the First Amendment implications of social media use, cities can create a social media policy that everyone "likes."

[176] Matthew L. Hymel, *Social Media Use*, COUNTY OF MARIN (Apr. 3, 2012), https://www.marincounty.org/depts/ad/divisions/management-and-budget/administrative-policies-and-procedures/administrative-regulation-no-1_25.