IMPROVING THE *PICKERING* STANDARD TO STRENGTHEN THE FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES

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INTRODUCTION 76
I. THE DEVELOPMENT OF THE FIRST AMENDMENT RIGHT TO FREE SPEECH APPLIED TO PUBLIC EMPLOYEES 80
A. The Trajectory of Free Speech Decisions: From Bad Tendency to Strict Scrutiny 80
B. The Trajectory of Free Speech Rights for Public Employees: From No Freedom to Limited Freedom 83
1. When Protecting the Employee's Free Speech Rights Outweighs the Employer's Efficient Operations: *Pickering* and *Dougherty* 84
2. When an Employer's Efficient Operations Outweighs the Protection of an Employee's Free Speech Rights: *Roe*, *Dible*, and *Munroe* 87
C. A Tort Standard for Determining Actual Harm to Business Operations 88
II. A RELIC OF THE PAST: THE *PICKERING* STANDARD IS INCOMPATIBLE WITH FREE SPEECH LAW TODAY 90
A. The *Pickering* Balancing Test is a Relic of the Bad Tendency Standard 91

* J.D. Candidate, Thomas Jefferson School of Law, 2018. I would like to thank my wife, Robyn, for her unwavering support through this project and always. Thank you to the Law Review editorial staff for their priceless contributions, especially Kim Cruz, Lisa Field, Bridget Madden, Eleanor Murphy and Editor in Chief, Jennifer Martin. Also, a special thanks to Constitutional Law Professor Brian Wildenthal and Law Review Editor in Chief Liku Madoshi for their encouragement and insight.

B. Repressing Public Employee Free Speech Rights Corrodes the Free Speech Rights of Others 94
1. The Application of the *Pickering* Standard Represses Free Speech Because it Causes Employees to Self-Censor 95
2. The Application of the *Pickering* Standard Represses Free Speech Because it Promotes a Climate of Government Secrecy and Corruption..... 95
3. The Application of the *Pickering* Standard Represses Free Speech Because it Subjects Public Employees to More Restrictions than Non-Public Employees. 96
III. AN OBJECTIVE STANDARD TO USE WITHIN THE TRADITIONAL *PICKERING* TEST 97
A. Borrowing an Objective Standard of Damages from Tortious Interference..... 97
B. The New Standard Illustrated through Case Decisions..... 99
C. Describing How a Court Should Apply the Tortious Interference Standard in Public Employee Free Speech Cases..... 101
IV. DISCARDING THE BAD TENDENCY TEST FOREVER..... 102

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[1]

INTRODUCTION

Even though the First Amendment provides seemingly bullet-proof protection from government restrictions of speech, individuals still suffer punishment for normal acts of expression.[2] Government organizations, often at the municipal and local levels, can still restrict the speech of government employees through disciplinary action and

1. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).
2. U.S. CONST. amend. I; *see* Virginia v. Black, 538 U.S. 343, 359 (2003) (explaining the short list of narrowly defined types of speech that are not protected from government censure).

job termination.[3] The government is most likely to restrict an employee's speech when the employee's messages criticizes government or presents unpopular and disturbing content.[4]

Courts often find it more important to assist the government employer rather than protect the public employee's rights, and this has a chilling effect on public employee speech.[5] Since over twenty million public employees serve in a multitude of capacities, courts need a different approach that ensures the court places employee free speech rights on par with the protection afforded to every other citizen.[6] Whether or not an employer considers a public employee's speech commendable or socially reprehensible, the employee deserves First Amendment protection.[7]

In 2016, during labor union meetings, Todd Lynch criticized the New London, Connecticut police chief's management of the department.[8] Lynch, a police officer, spoke in various settings as a union member claiming poor management and inefficiency of the police department.[9] When the police chief retaliated with administrative discipline against him, Lynch complained in district court against the retaliation.[10] After the district court denied the city's request for summary judgment, the Second Circuit Court of Appeals heard the city's interlocutory appeal and reversed the district court's decision upholding the city's punishment of Lynch.[11] The Court of

3. *See* Lynch v. Ackley, 811 F.3d 569, 574-76 (2d Cir. 2016) (punishing a city employee after he criticized the police chief).

4. *Id.*

5. *See* Laird v. Tatum, 408 U.S. 1, 13-14 (1972) (explaining an organizational tendency to stifle speech).

6. *See* U.S. Dept. of Commerce, *Statistical Abstract of the United States* at 330 (tbl. 525, 120 ed. 2000); Laura Dallago, *Silence or Noise? The Future of Public Employees Free Speech Rights and the United States Supreme Court's Jurisprudence on the Scope of the Right*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 239, 241- 43 (2016) (stating that "legal scholars" admit there is a need for "more clarity" in this area of law); *see also* Lindsay A. Hitz, Note, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 WASH & LEE L. REV. 1151, 1168 (2010) (explaining the practice of the Eighth Circuit of insisting upon "a more concrete depiction of disruption" when applying the *Pickering* balancing test).

7. Hitz *supra* note 6, at 1168.

8. *Lynch,* 811 F.3d at 574-76.

9. *Id*.

10. *Id*. at 575.

11. *Id.*at 575-76.

Appeals reasoned the police officer's speech "threatened to disrupt [the chief's] ability to administer the [police force] effectively."[12]

Similar to *Lynch*, in 2004 and 2008, the Supreme Court and the Ninth Circuit Court of Appeals found that the speech of two additional police officers disrupted effective operations.[13] In the first case, *The City of San Diego v. Roe*, the Supreme Court upheld the firing of a police officer agreeing with the city that the speech impaired efficiency of police operations.[14] In *Roe*, an off duty police officer produced erotic videos of himself and distributed them on the Internet.[15] The Supreme Court held the city blameless of restricting the officer's First Amendment right by deciding the videos discredited the police force and disrupted efficient operations.[16]

Likewise, in the second case, *Dible v. City of Chandler*, the Ninth Circuit Court of Appeals decided that Ronald Dible of Chandler, Arizona, also an off-duty police officer, and his wife, set up computers and video equipment in their home to legally produce and publish adult videos.[17] When the police administrators discovered the videos, the police department fired Dible.[18] The Court of Appeals upheld Dible's punishment because the police department feared the speech might disrupt normal operations.[19]

Historically viewed, the judicial approach used for determining whether a public employer rightfully punished a public employee for speech is similar to the repressive approach of the early twentieth century.[20] In that era, courts applied a "bad tendency" standard where an employer could punish a defendant for virtually any speech critical of government action or policy.[21] In the first decades of the twentieth century, the government, with Supreme Court support, suppressed

12. *Id*. at 583.

13. City of San Diego v. Roe, 543 U.S. 77, 78 (2004); Dible v. City of Chandler, 515 F.3d 918, 928 (9th Cir. 2008).

14. *Roe*, 543 U.S. at 84.

15. *Id*. at 78.

16. *Id*.

17. *Dible,* 515 F.3d at 928.

18. *Id*. at 923.

19. *Id*.

20. *See* Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 234-38 (2000) (explaining the bad tendency approach in relation to punishment of Tom Patterson in *Patterson v. Colorado*, 205 U.S. 454 (1907)).

21. *Id*.

virtually any speech it deemed objectionable when an official speculated that the speech tended to obstruct a government objective.[22] The Supreme Court used the "bad tendency" standard in *Patterson v. Colorado*. In *Patterson*, the Supreme Court held Tom Patterson in contempt of court when it found that critical newspaper editorials he wrote might interfere with matters pending before the Colorado Supreme Court.[23] Fortunately for First Amendment protection, around 1919, Justice Holmes began to see the free speech in a new light and suggested a more concrete standard in his dissent in *Abrams v. United States*.[24] This more concrete standard became the prevailing philosophy and initiated a more tolerant free speech doctrine in later twentieth century Supreme Court decisions.[25]

Since the general judicial standards for handling free speech have evolved to relying on objective evidence of actual or impending harm, the standards applied to public employee speech should also evolve. [26] An objective and quantifiable standard will afford public employee free speech protection that is more consistent with the philosophy of the First Amendment.[27] It will achieve greater government openness when public employees have the freedom to speak from an insider's perspective.[28] An objective approach will provide more equitable results for employees with the livelihood and ability to support their families at stake. Finally, an objective standard protects vulnerable public employees from losing their jobs due to a capricious, offended employer who finds the employee's speech critical or disturbing.[29]

Part I of this Note introduces the seminal cases that govern both modern free speech and public employee speech and gives case examples. Part II argues that courts still apply the repressive and

22. *See id* at 235-36. ("[T]he courts adopted a narrow view of the types of speech that were protected by the First Amendment.").

23. Patterson v. Colorado, 205 U.S. 454, 462-63 (1907).

24. Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting).

25. *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 111, 112 (2013) (quoting the full text of a letter from Judge Hand to Justice Holmes criticizing the "bad tendency" rule); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

26. HEALY, *supra* note 25, at 112 Hitz, *supra* note 6, at 1168.

27. Hitz, *supra* note 6, at 1168.

28. *See* Garcetti v. Ceballas, 547 U.S. 410, 412 (2006).

29. *See* Nicole M. Rementer, Note, *An Imbalanced Public Concern: The Case for Strict Scrutiny of Pure Freedom of Association Cases in Public Employment*, 19 COMMLAW CONSPECTUS 179, 195 (2010).

rejected bad tendency standard to cases involving public employees with far-reaching negative consequences. Part III proposes a standard derived from tortious interference, requiring a showing of concrete damages to ensure a fair and just result for both the public employee and the public employer.[30]

I. THE DEVELOPMENT OF THE FIRST AMENDMENT RIGHT TO FREE SPEECH APPLIED TO PUBLIC EMPLOYEES

The First Amendment declares that "Congress shall make no laws . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[31] Accordingly, the national tradition that recognizes a right to free speech has its origins in the Constitution and the modern interpretations that developed during the early twentieth century.[32] During the early twentieth century, the Supreme Court decisions on free speech evolved into a modern, more tolerant interpretation compared to standards used in earlier cases such as *Abrams v. United States*.[33]

A. The Trajectory of Free Speech Decisions: From Bad Tendency to Strict Scrutiny

From the end of the nineteenth century into the start of the twentieth, several Supreme Court opinions upheld punishment of persons under the "bad tendency" standard when the Court speculated that the speech had a tendency to cause an undefined and negative effect on a government aim.[34] For example, the Supreme Court applied the bad tendency standard in *Patterson v. Colorado*.[35] In *Patterson*, Justice Holmes held a newspaper in contempt because articles and accompanying cartoons critical of the Colorado Supreme Court could

30. *See* VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S, TORTS: CASES AND MATERIALS, 1120, 1156 (12th ed. 2010) (describing the particularity required when asserting damages for interference with economic relationships).

31. U.S. CONST. amend. I.

32. *See* Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1289 (1998).

33. Abrams v. United States, 250 U.S. 616, 628 (1919); *see* Curtis, *supra* note 20, at 232-35 (commenting that understanding the development of First Amendment freedoms is much like reconstructing Paleolithic history from an incomplete fossil record).

34. HEALY, *supra* note 25, at 103.

35. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

obstruct the administration of justice.[36] Simply by disparaging "the motives and conduct" of the Colorado Supreme Court in matters still pending, the Court decided that the newspaper had created a tendency towards interfering with carrying out justice.[37] The Supreme Court repeatedly applied the same bad tendency test in multiple decisions during the early twentieth century, most notably in *Debs v. United States* (1919), where a World War I era socialist's speech opposed tyrannical capitalist interests, then in *Schenk v. United States* (1919), where defendants mailed leaflets imploring potential draftees to violate draft orders, and finally in *Abrams v. United States* (1919), where anarchists also distributed leaflets opposing the draft.[38]

In *Debs*, Eugene Debs delivered a speech in 1918 for which prosecutors accused him of attempting to incite insubordination, acting disloyal to the United States, and obstructing recruiting.[39] Debs worked as a labor activist and had developed notoriety for his anti-war and socialist opinions.[40] Debs' speech advocated socialism and discouraged listeners from enlisting in the military during World War I.[41] Debs was convicted for violating the Espionage Act and imprisoned.[42] Debs thereafter asserted his First Amendment right as a defense against his conviction.[43] In the majority opinion, Justice Holmes wrote that if Debs' speech "used words tending to obstruct the recruiting service he meant that they should have that effect," and that the Court could punish him for his speech.[44]

In *Schenck,* defendants were convicted on of three counts of violating the Espionage Act for conspiring to print and distribute

36. *Id.*

37. *Id*. at 462-63.

38. *See* Debs v. U.S., 249 U.S. 211, 216 (1919) (holding that the defendant intended the effect that his speech might cause); *see also* Schenck v. United States, 249 U.S. 47-49, 52 (1919) (holding that the "tendency" and the "intent" combined to make the speech illegal); Abrams v. United States, 250 U.S. 616, 628 (1919) (holding the expression was illegal because it had a "tendency" to "hinder the success of the government . . . .").

39. *Debs*, 249 U.S. at 212.

40. HEALY, *supra* note 25, at 84-85.

41. *Debs,* 249 U.S. at 210-11.

42. *Id*.; *see* Espionage Act of 1917, 18 U.S.C. § 792 *et seq.* (2012), 40 Stat. 219, c. 30, tit. 1 § 3 (1917) (making it criminal when the United States was at war to (1) make false reports with intent to interfere with the government, (2) attempt to cause insubordination, and (3) attempt to obstruct the recruiting services).

43. *Debs*, 249 U.S. at 212.

44. *Id.* at 216.

leaflets to new military recruits denouncing forced conscription.[45] The leaflets informed the potential recruits that they had a right to oppose the draft and that powerful financial and banking interests were coercing them to be drafted through intimidation.[46] The Court affirmed the guilty verdict on all counts finding a "clear and present danger" that the leaflets would obstruct the war effort and that the speakers intended such obstruction.[47]

In *Abrams*, the native Russian defendants made various attempts at printing and distributing leaflets critical of the United States involvement in World War I.[48] The *Abrams* defendants planned to distribute five thousand printed leaflets by tossing them out of windows in New York City.[49] Once again, the majority held that when people speak, they intend the effect that the speech might provoke.[50] Justice Holmes, who had previously written the majority opinion in *Debs* and *Schenck*, wrote the dissenting opinion in *Abrams*.[51] In dissent, Justice Holmes disagreed that Abrams presented a clear and present danger to any government objective, especially military recruiting[52] "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger . . . or have any appreciable tendency to do so."[53]

After *Abrams*, when the Supreme Court heard free speech cases, it often adhered to Justice Holmes' dissent in *Abrams*. The Court consistently struck down speech restrictions based merely on an abstract possibility of a negative effect upon a case-dependent government objective.[54] Currently, the Court applies strict scrutiny to most government restrictions to speech, which requires the government to show that it has a compelling interest and that the manner used to suppress the speech is the least restrictive means to achieve that

45. Schenck v. United States, 249 U.S. 47, 48-9 (1919).
46. *Id.* at 51.
47. *Id*. at 52-53.
48. Abrams v. United States, 250 U.S. 616, 617-18 (1919).
49. *Id*. at 618.
50. *Id*. at 621.
51. *Id.* at 624 (Holmes, J., dissenting).
52. *Id.* at 628.
53. *Id.*
54. R.A.V. v. St. Paul, 505 U. S. 377, 403 (1992) (White, J., concurring).

interest.[55] The First Amendment does not protect all categories of speech excluding: (1) incitement to immediate lawlessness or violence, (2) fighting words, (3) defamation and (4) threats.[56] If private speech does not fall under one of the unprotected categories, the courts afforded the speech First Amendment protection, and any government restriction of it must pass strict scrutiny.[57]

B. The Trajectory of Free Speech Rights for Public Employees: From No Freedom to Limited Freedom

The cases governing First Amendment rights of public employees differ from the cases governing First Amendment rights of the general public.[58] From the turn of the nineteenth century into the twentieth century, public employers could limit an employee's speech both on and off the job because the court considered public employment a privilege separate from any constitutional right to free speech.[59] The courts justified this deference to employers by rationalizing that employees did not have an obligation to remain employed under unsatisfactory conditions.[60] The courts based this finding on the prevailing contemporary interpretation of economic freedom, and the Supreme Court used it to avoid deciding against employers in most employment discharge cases.[61] For example, in *Lochner v. New York* the Court implied that employees freely choose where they work, and any government regulation on workplace conditions limits the freedom of both employers and employees.[62]

This interpretation of economic freedom, and an employee's freedom to quit his job, guided the Court's decisions in public

55. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (striking down a law that criminalized assembling to teach labor union organizing because the government could not show a compelling state interest and it was not the least restrictive means for achieving an interest).

56. Virginia v. Black, 538 U.S. 343, 359 (2003).

57. *See, e.g.*, McCullen v. Coakley, 134 S.Ct. 2518, 2542 (2014) (Scalia, J., concurring) (criticizing the majority opinion dictum for deviating from the standard approach for applying strict scrutiny to content based speech restrictions).

58. Dallago, *supra* note 6, at 241.

59. *Id.*

60. *See* Lochner v. New York 198 U.S. 45, 57 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.").

61. *Id*.

62. *Id.*

employee free speech claims.[63] For example, in *McAuliffe v City of New Bedford*, where a policeman claimed that the court's ruling violated his First Amendment rights, Justice Holmes famously quipped, that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[64]

1. When Protecting the Employee's Free Speech Rights Outweighs the Employer's Efficient Operations: Pickering*, and* Dougherty

Since the 1960s, court decisions began to reflect an appreciation for the special value that public employees bring to political discourse: the ability to further government transparency, and accountability.[65] In *Pickering v. Board of Education*, the Supreme Court noted the value of public employees' speech when it applied a balancing test that considers whether protecting a public employee's free speech rights outweighs the interest of the public employer.[66] *Pickering* involved Marvin Pickering, a high school teacher, who wrote a letter to a newspaper that attacked the school board on several grounds including how it managed "bond issue proposals" and how it allocated "financial resources between the schools' educational and athletic programs."[67]

The school fired Pickering because of the letter he wrote to the editor.[68] Ultimately, the Supreme Court held that firing Pickering constituted a violation of his constitutional right to free speech.[69] In *Pickering*, the Court established a balancing test that allows the government to discipline its employees for speech when the disciplinary action furthers the efficiency of the government's business.[70] The Court also held that when the government acts as an employer, it has more authority to restrict speech of its employees than it does to restrict the speech of non-employees.[71] The *Pickering* test has endured decades of application and has received only two

63. *See* McAuliffe v City of New Bedford, 29 N.E. 517, 517-518 (Mass. 1892) (implying that government employment was a privilege and not a right).

64. *Id.*

65. Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).

66. *Id.* at 568.

67. *Id.* at 566.

68. *Id.* at 564.

69. *Id*. at 565.

70. Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 305 (2015).

71. *Id*.

significant clarifications in the Supreme Court decisions *Connick v. Myers* and *Garcetti v. Ceballos*.[72] *Connick* limited the protection to speech that involves a matter of public concern and *Garcetti* eliminated protection to speech expressed while on the job.[73]

The crux of the *Pickering* decision is the balance between the disruption of efficiency suffered by the employer and the employee's right to speak. The Third Circuit Court of Appeals in *Dougherty v. School District of Philadelphia* identified four proxies for disruption of efficiency in the *Pickering* balancing test.[74] The first proxy asks whether the speech undermined a "close working relationship" that depended upon "personal loyalty" and confidential discretion.[75] The second proxy questions whether the speech had a likelihood to impede the ability of the supervisors to maintain workplace discipline.[76] The third proxy asks whether the speech created disharmony in the workforce, and the fourth queries whether the speech "impeded the performance of the [employee's] duties, or interferes with the regular operation of the School District."[77]

In *Dougherty*, a school district dismissed Dougherty, the Director of Operations, because he made allegations to the *Philadelphia Inquirer* of wrongdoing by the District Superintendent and Deputy Superintendent.[78] Dougherty alleged that the Superintendent disregarded state rules and district policy by funneling lucrative contracts to a favored contractor.[79] Relying on Dougherty's allegations, the *Philadelphia Inquirer* published several articles accusing the superintendent of improper favoritism in regards to the

72. *See* Connick v. Myers, 461 U.S. 138, 149-51 (1983) (discussing the application of the *Pickering* balancing test to interoffice communications and an interoffice questionnaire that the government employer found objectionable); *see* Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006) (distinguishing written speech conducted during the exercise of "official duties" from the written public expression in *Pickering*); Kitrosser, *supra* note 70 ("In *Connick v Myers*, the Court clarified that employee speech is subject to protection . . . only when it involves a matter of public concern. In *Garcetti*, the Court added that speech is unprotected, even if it involves a matter of public concern, when it is part of the employee's job.").

73. *See Connick,* 461 U.S. at 149-51; *Garcetti,* 547 U.S. at 421-22; Kitrosser, *supra* note 70.

74. Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 991–93 (3d Cir. 2014).

75. *Id.* at 992.

76. *Id*.

77. *Id*. at 991.

78. *Id.* at 983-84.

79. *Dougherty*, 772 F.3d at 992.

specific contractor.[80] The Superintendent responded to these allegations by initiating an investigation intending to discover who leaked the information to the newspaper.[81] The investigation revealed that Dougherty leaked the information, and the school district discharged him soon after.[82]

The *Dougherty* court decided that Dougherty's speech did not violate the first and second proxies because the employee's position did not entail a close relationship with the superintendent and the speech did not impede the workforce discipline.[83] The court also concluded that Dougherty did not violate the last two proxies by noting that if the government suffered any harm, it was not attributable to Dougherty's speech.[84] The *Dougherty* court held that any disruption that the school district suffered was caused by the reaction of the superintendent to the speech—including conducting an investigation, suspending employees, and firing Dougherty.[85]

Pickering and *Dougherty* are examples of courts deciding that the employee's free speech rights outweighed the employer's quest for efficient business operations.[86] These decisions describe a method to balance the free speech interest of the employee against the needs of the employer.[87] And in each case the employee prevailed.[88] But, in other cases, the employer prevails because a court decides that the harm to the employer's efficient operations outweighs the employee's rights.[89]

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80. *Id.* at 984.

81. *Id*.

82. *Id.*

83. *Id*.

84. Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 984 (3d Cir. 2014).

85. *Id.*; *see also* Czurlanis v. Albanese, 721 F.2d 98, 100-01 (3d Cir. 1983) (explaining that the harm that the employer suffered was due to reactions to the retaliatory punishment the employer brought against Czurlanis and not because of Czurlanis' speech).

86. *See supra* Part I.B.1.

87. *See supra* Part I.B.1.

88. *See supra* Part I.B.1.

89. Lynch v. Ackley, 811 F.3d 569, 575-76, 584 (2d Cir. 2016); City of San Diego v. Roe, 543 U.S. 77, 78 (2004); Dible v. City of Chandler, 515 F.3d 918, 923 (9th Cir. 2008).

2. *When an Employer's Efficient Operations Outweighs the Protection of an Employee's Free Speech Rights:* Roe*,* Dible*, and* Munroe

Three notorious cases provide perspective about how courts apply the *Pickering* standard and the four proxies to decide public employee speech claims. The first two cases involve police officers who established erotic websites using the officers' personal time and resources.[90] In *City of San Diego, Cal. v. Roe*, an officer videotaped himself in various erotic performances wearing a generic police uniform costume and sold police uniform paraphernalia.[91] The Court held that these videos "brought the mission of the employer and professionalism of [police] officers into serious disrepute."[92] The Court concluded that the First Amendment did not protect Roe from reprisal because the content of the website was not a matter of public concern.[93]

In *Dible v. City of Chandler*, a police officer established a for-profit website that displayed erotic videos of himself and his wife in sexual conduct.[94] There, the court noted that a member of the public insulted one police officer referring to Dible's videos, and potential recruits asked questions about the website.[95] As a result, the appellate court accepted the employer's assertion that the conduct was detrimental to efficient operation.[96]

The third case, *Munroe v. Century Bucks School District*, involves a schoolteacher who established a weblog entitled *Where are we going, and why are we in this handbasket*?[97] In this blog, which had only nine subscribers, Munroe commented sarcastically about the characteristics of the students she taught and some of her frustrations teaching them.[98] However, "she did not expressly identify either where she worked or lived, the name of the school where she taught, or the names of her

90. *Roe*, 543 U.S. at 78; *Dible*, 515 F.3d at 922.
91. *Roe*, 543 U.S. at 78.
92. *Id*. at 81.
93. *Id.* at 84.
94. *Dible,* 515 F.3d at 922.
95. *Id.* at 928.
96. *See id.* at 928 (commenting that Dible's expression compromised respect for officers and their safety).
97. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 458 (3d Cir. 2015).
98. *Id*. at 458-61.

students."[99] Nevertheless, someone who accessed the blog identified the blog owner as Munroe and reported the blog contents to the school principal, who disciplined Munroe.[100] In its decision to uphold the firing of the teacher, the Third Circuit Court of Appeals noted school administrator's reports which insinuated Munroe's blog as the cause for the district office receiving numerous requests from parents asking the school to refrain from assigning their children to the teacher's class.[101] The court's opinion also noted that the school board had discretion on how to handle the parent's opt-out requests, implying that the board had no obligation to submit to them.[102] Nevertheless, based on these requests and the employer's opinion that the teacher's speech negatively affected her performance, the court found that Munroe's interest in free speech did not outweigh the employer's harm.[103]

As *Roe*, *Dible*, and *Munroe* show, some courts struggle applying the *Pickering* standard when deciding whether an employee's speech disrupted the public employer's operations. Yet, in general, trial courts are accustomed to applying a disruption of operations standard in tort litigation. A disruption of operations standard includes actual disruption as a required element to find interference with economic relations or interference with contract.[104]

C. A Tort Standard for Determining Actual Harm to Business Operations

Tortious interference with prospective economic relations and interference with contract relies on a calculation of damages to business operations to determine liability of a defendant.[105] Tortious interference provides for recovery against parties who interfere with a claimant's valid expectation of a profitable business relationship.[106] A claim for tortious interference requires five elements: (1) expectancy of a profitable relationship with a third party, (2) knowledge of the defendant of the expectancy, (3) the defendant's intent to disrupt the

99. *Id*. at 458.
100. *Id*. at 461-62.
101. *Id.* at 477-78.
102. *Munroe*, 805 F.3d at 462.
103. *See id.* at 472 (holding that Munroe was entitled to only minimal weight under the Pickering balancing test).
104. SCHWARTZ, *supra* note 30, at 1120.
105. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 341 (5th ed. 2013).
106. *Id*.

relationship with the third party, (4) the defendant's conduct is the actual cause of the disruption, and (5) actual economic loss, mental distress and even punitive damages.[107]

When considering the element of damages, tortious interference uses a special damages standard to show harm to a business.[108] Under the special damages standard, courts generally apply objective tests to decide whether a defendant actually interfered with a plaintiff's business.[109] The plaintiff must either specify particular customers who ceased doing business with the plaintiff or produce detailed statistics and expert proof that eliminates any other possible causation.[110]

The court requires concrete evidence of harm for plaintiffs to prevail in tortious interference claims, and these claims fail if the description of damages is too speculative.[111] Three cases, *Gieseke v. IDCA*, *Coyne's & Co. v. Enesco, LLC.*, and *Ethan Allen, Inc. v. Georgetown Manor, Inc*., illustrate what courts expect for damages in tortious interference proceedings. In *Gieseke v. IDCA*, majority shareholders of a corporation sued IDCA claiming that it had badly damaged the company's reputation when it converted the plaintiff's equipment and changed the plaintiff's registered mailing addresses.[112] The court held that such facts did not establish damages to an expectation of economic advantage.[113] In *Coyne's & Co. v. Enesco, LLC.,* the defendant wrongfully retained shipping documents which prevented the plaintiff from receiving expected products.[114] The *Coyne* court held such facts sufficient to establish that the defendant had interfered with the plaintiff's ability to receive products.[115]

Additionally, in *Ethan Allen, Inc. v. Georgetown Manor, Inc*., the respondent claimed damages for loss of sales because of Ethan Allen's tortious interference.[116] After Georgetown informed Ethan Allen Inc., that it would no longer carry Ethan Allen products in its show rooms,

107. *Id*. at 341-43.
108. SCHWARTZ, *supra* note 30, at 1120.
109. *Id.*
110. *Id.*
111. *Id.*
112. Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc., 844 N.W.2d 210, 213 (Minn. 2014).
113. *Id.* at 222.
114. Coyne's & Co. v. Enesco, LLC, 565 F.Supp.2d 1027, 1040-41 (D. Minn. 2008).
115. *Id.*
116. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994).

Ethan Allen purchased a one-page newspaper advertisement telling readers of the split.[117] The advertisement accused Georgetown of failing to repay debts and suggesting that customers visit Ethan Allen to satisfy unfulfilled orders with Georgetown.[118] The *Ethan Allen* court found the Georgetown's tortious interference claim was too speculative because Georgetown had no tangible existing contract with future customers.[119]

In summary, the general trajectory of free speech rights has become more liberal since *Debs*.[120] At about the same time, the free speech rights of government employees have become more restrictive because of the *Pickering* standard.[121] And the tortious interference standard of *Ethan Allen, Geiseke*, and *Coyne* illustrates how a court would handle a civil claim for interference with business relations by requiring accusers to show real, tangible loss of economic potential before any damages are awarded.[122]

II. A RELIC OF THE PAST: THE *PICKERING* STANDARD IS INCOMPATIBLE WITH FREE SPEECH LAW TODAY

The *Pickering* public speech balancing test effectively subjects public employees to the repressive bad tendency standard of the early twentieth century.[123] A deciding court bases the bad tendency standard on subjective opinion, and does not require concrete evidence of any actual negative effects.[124] Courts should update the standard to require concrete facts of actual disruption to public efficiency or the direct likelihood of such a disruption. This more concrete approach comes from the concept of damages in tortious interference claims.[125]

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117. *Id*.

118. *Id.*

119. *Id*. at 815.

120. *See supra* Part I. A.

121. *See supra* Part I. B. 1-2.

122. *See supra* Part I. C.

123. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

124. *See Abrams,* 250 U.S. at 629 (Holmes, J., dissenting) (explaining that the "tendency" requirement is subjective, even nonsensical, because the results that the majority feared were impossible outcomes from the defendant's meager acts).

125. *See* Hitz, *supra* note 6, at 1168, (arguing that a standard of actual disruption is needed to protect public employees who blog, and recommends that the Supreme Court and Congress develop such a standard). However, unlike Hitz, this Note stops short of recommending what the standard should be, and lacks the comparison of the early

A. The Pickering *Balancing Test is a Relic of the Bad Tendency Standard*

The *Pickering* test resembles the bad tendency test of the early twentieth century by the ways it restricts free speech. The *Pickering* balancing test represses public employees' free speech like the old bad tendency approach in two ways: (1) it allows the government to fire or punish an employee merely because it does not like what the employee said and (2) it gives the employer an unfair advantage by allowing a low standard of proof when the employer asserts disruption of business operations.[126]

The defective bad tendency test did not require any actual negative result to a government aim and made a tenuous connection between the speaker's intent and a speculative outcome.[127] The bad tendency test assumed that a person intended the effect that his speech might produce without analysis of his real intent or whether the intended effect would likely occur.[128] Applying the bad tendency test allowed the government to repress virtually any speech of which it did not approve.[129]

Modern courts apply the *Pickering* balancing test against public employees similarly to the historical application of the bad tendency test by early twentieth century courts. When the government finds content offensive, regardless of the employee's real purpose for speech, the government may punish the employee.[130] The government does not admit that it objects to the content of the speech because doing so would raise strict scrutiny.[131] Instead, the court punishes the speaker because the court ascribes intent to bring about a speculative bad outcome as a result of the employee's speech.[132] A comparison of the

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twentieth century standard to the *Pickering* approach to dealing with public employee free speech cases.

126. *See generally* Kitrosser, *supra* note 70, at 306 (discussing how the balancing test puts the government in two separate roles, one as sovereign and one as an employer, with the employer role being repressively stronger).

127. *See Abrams,* 250 U.S. at 629 (1919) (Holmes, J., dissenting).

128. *See id.* at 621 (declaring that the defendants intended the harm that was possible); *see id. at* 629 (Holmes, J., dissenting) (explaining the impossibility of the defendant's act to cause the results that the majority feared).

129. *See id.* at 624 (complaining that the speech might embarrass the government).

130. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 81 (2004) (describing the officer's expression as "debased" and "indecent").

131. R.A.V. v. St. Paul, 505 U. S. 377, 403 (1992) (White, J., concurring).

132. *Roe*, 543 U.S. at 81.

Debs, *Schenck*, and *Abrams* decisions with modern public employee speech cases highlights the similarities between the bad tendency test and the application of the *Pickering* balancing test.

First, recall that in *Roe,* the police office sold erotic videos for financial gain.[133] The court had no evidence that the officer intended to besmirch the professionalism of the San Diego Police Department.[134] However, the Court ascribed to him an intent to bring the professionalism of the officers into disrepute because it speculated that such an effect would inevitably result from Roe's conduct.[135] Similarly, the Supreme Court in *Debs, Schenck,* and *Abrams* could not specify any instance where the speech produced the actual negative effect they claimed it would likely produce.[136] Moreover, in *Dible*, the appellate court ascribed a bad intent where the police officer intended to produce legal erotic videos for fiduciary gain.[137] As evidence against Dible, the court's decision cited only two items: (1) occasional instances where a member of the public insulted a police officer about the website and (2) a few occasions where potential employees referred to the website during interviews with police recruiters.[138] Based only on that limited evidence, the court ascribed to Dible the intent to create a climate that would obstruct recruiting, increase the dangerous aspects of police duty, and decrease public respect of the police force because such outcomes could result from the videos.[139]

Likewise, in *Munroe* where the schoolteacher only intended to share her life thoughts, feelings, and experiences in a weblog of nine subscribers, the court ascribed to her the intent to disrupt the efficient operations of the school.[140] There, the court found that the teacher had no free speech protection because it could reasonably conclude that her blog impeded school operations based on a number of parents asking

133. *Id*. at 78.

134. *See supra* Part I.B.2. (concluding that the professional reputation of the police officers was negatively affected by the existence of the erotic videos, but not citing evidence that Roe intended to besmirch the police officers' reputation).

135. *Id*. at 81.

136. Debs v. U.S., 249 U.S. 211, 216 (1919); *Roe*, 543 U.S. at 81.

137. Dible v. City of Chandler, 515 F.3d 918, 922 (9th Cir. 2008).

138. *Id.* at 923.

139. *Id.* at 928.

140. *See* Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 462 (3d Cir. 2015) (explaining that multiple parental requests to opt-out was a disruption to operations). However, missing from the court opinion is any indication that a parental request to opt-out obligated the administration to comply with the request. *Id.*

whether the school could withdraw their child from her class.[141] Thus, because the blog offended some parents and a few students, the court presumed that a sufficient negative effect existed. And, without any other evidence of actual impediment to effectiveness, the court upheld firing Munroe.[142]

One might argue that the courts are not ascribing any actual intent in these three cases because the decisions lack terms of art or language alluding to the bad tendency standard of the early twentieth century.[143] However, courts need not repeat the exact terminology to effectively produce the same results. Indeed, these several repressive court decisions inferred intent on the punished employee from the incidental effects that resulted from the public organization's punishment of the employee.[144]

Second, the *Pickering* test also represses public employees' free speech rights because it weighs heavily in favor of the employer.[145] Courts default to accepting the government's speculative conclusions because the *Pickering* test forces the court to decide between two different roles of government.[146] On the one hand, the government has strict limits as to how much it can restrict a person's free speech rights.[147] On the other hand, when the government acts as an employer, it has significant power to limit its employees' speech—a power it does not enjoy over the general public.[148] The *Pickering* test combines these two disparate roles of government in a confusing way.[149] Because of

141. *See id.* at 477-78. It is not the subject of this paper, but not only is the court applying a bad tendency type of standard, they are also employing the discarded heckler's veto. *See* Feiner v. New York, 340 U.S. 316, 331 (1951) (Douglas, J dissenting).

142. *See Munroe*, 805 F.3d. at 482-84 (Ambro, J. dissenting) (asserting that the district had no evidence of impeded performance and that the media "firestorm" was actually the cause of any deleterious effect).

143. *See* Abrams v. U.S. 250 U.S. 616, 621 (1918) ("Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.").

144. *See, e.g.*, *Munroe*, 805 F.3d at 462 (placing the blame on Munroe for parents expressing their preference for a preferred classroom and teacher).

145. *See* Kitrosser, *supra* note 70, at 307 (discussing how the balancing test puts the government in two separate roles, one as sovereign and one as an employer—the employer role being the stronger one).

146. *See id.*

147. *See id.*

148. See *id.*

149. *See id.*

the confusion about which role the government plays in public employee speech cases and the lack of a concrete standard to use, the courts simply rely on the government managers' speculation that the speech negatively affected the government's operations.[150]

Why does it matter? After all, even if a relic of the bad tendency test was applied to public employees Pickering and Dougherty, it produced fair results for them. Pickering and Dougherty prevailed in their cases.[151] However, accepting the historical relic as good enough is a mistake. *Pickering* and *Dougherty* resulted in rulings for the employees only because both reported on potential corruption, a type of public employee speech where courts tend to agree with the employee.[152] Even *Pickering* and *Dougherty* could have turned out differently because the court based its decision on subjective factors.[153] The long string of cases where the employee loses represent the more typical outcome—namely, *Roe*, *Dible*, *Munroe*, *Lynch*, and *Connick*.

B. Repressing Public Employee Free Speech Rights Corrodes the Free Speech Rights of Others

Munroe, Dible, and *Roe* illustrate the deficiency of the *Pickering* test. Subjecting public employees to the *Pickering* balancing test creates potentially corrosive effects on the free speech rights of other citizens.[154] First, applying this repressive standard for public employee speech has a chilling effect on employees and silences those citizens most likely to know about government corruption and most able to report it.[155] Second, this repressive standard is unfair to public employees because it stifles even casual and incidental speech for fear

150. *See generally* Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 472 (3d Cir. 2015) (resting the holding on subjective factors claimed by the government).

151. Pickering v. Bd. of Educ., 391 U.S. 563, 574-75 (1968); Dougherty v. Sch. Dist., 772 F.3d 979, 992 (3d Cir. 2014).

152. *See Pickering,* 391 U.S. at 566 (giving an example of the type of speech that a court is likely to protect; speech that draws attention to possible government corruption); *see also Dougherty*, 772 F.3d at 992 (reporting possible corruption of the superintendent).

153. *See supra* Part I. B. 1.

154. Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1393 (2016) ("[P]urpose tests can deter speech even when the speaker lacks the forbidden purpose.").

155. Dallago, *supra* note 6, at 263 ("By preventing government employees from engaging in what some may characterize as constructive criticism in favor of blind loyalty, there is a risk that innovative or change-producing ideas may be lost.").

of saying something that aggravates a superior.[156] Finally, it harms the general society because when government managers can stop employee speech on the mere assertion that it might disrupt operations, it creates an environment of governmental secrecy and intrigue where a democracy should be open and collaborative.[157]

1. The Application of the Pickering *Standard Represses Free Speech Because it Causes Employees to Self-Censor*

Public employees are often the most informed about issues involving government and the most qualified to speak about public issues.[158] The courts should reject legal standards that tend to stifle public employee speech in order to encourage the free flow of ideas.[159] The *Pickering* standard often discourages colleagues of punished employees from participating in even casual speech for fear that the employer will carry out the identical reprisal against them.[160] Certainly, colleagues of Natalie Munroe kept their opinions quiet when they witnessed the school district fire Munroe for casual blogging and inadvertent comments about her classroom.[161]

2. The Application of the Pickering *Standard Represses Free Speech Because it Promotes a Climate of Government Secrecy and Corruption*

The bad tendency test as applied by *Pickering* creates a climate of secrecy and intrigue in the workplace which permeates to non-governmental relations in the community by letting managers escape public accountability. For example, in *Dougherty,* immediately after the *Philadelphia Inquirer* published the articles, the superintendent opened an investigation, seemingly for the sole purpose of identifying the source of the information and to punish the source.[162] Indeed, the superintendent suspended several employees immediately, pending the investigation.[163] The superintendent wanted to silence the source of the leak because the news made her accountable to the public for her

156. *E.g.,* Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 984 (3d Cir. 2014).
157. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
158. Pickering v. Bd. of Educ., 391 U.S. 563, 572-73 (1968).
159. *Abrams,* 250 U.S. at 630 (Holmes, J., dissenting).
160. *Pickering*, 391 U.S. at 574.
161. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 458 (3d Cir. 2015).
162. Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 984 (3d Cir. 2014).
163. *Id.*

selection of the replacement contractor.[164] Likewise, in *Pickering*, the school board wanted to fire Pickering because his accounts to the press made the school board accountable for the way they used the district's budget.[165]

3. *The Application of the* Pickering *Standard Represses Free Speech Because it Subjects Public Employees to More Restrictions than Non-Public Employees*

The bad tendency standard as applied under the *Pickering* balancing test is unfair to public employees because they cannot exercise basic freedom of expression enjoyed by other Americans. Recall that Munroe created a weblog about general topics: work, baking, and yoga.[166] Members of our society commonly weblog and some estimate that there are over four hundred and fifty million blogs in the English language.[167] However, Munroe is an example of how merely creating a weblog can pose a risk to a public employee's job.[168] An American governmental organization fired Munroe because they did not like her opinion about her job as an elementary school teacher.[169]

Also, employers treated police officers Dible and Roe unfairly and held them to a different standard than any other American for their speech. The employers fired them for creating edgy but legal videos.[170] In contrast, the government does not prosecute a non-public employee for producing and selling adult erotic videos because non-public employees have a fundamental right to possess obscene material in the home.[171] Hence, the court punished officers Roe and Dible for speech in which non-public employees freely engage.

Thus, courts subject government employees to repressive standards that curtail their speech because courts allow too much

164. *Id*.

165. Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968).

166. *Munroe*, 805 F.3d at 458.

167. James Haynes, *So How Many Blogs Are There, Anyway?,* HAT TRICK AND ASSOCIATES (February 1, 2010, 7:35 PM) http://www.hattrickassociates.com/2010/02/how_many_blogs_2011_web_content/ [https://perma.cc/A49Q-4SWS].

168. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 458 (3d Cir. 2015).

169. *Id.*

170. *See, e.g.*, Dible v. City of Chandler, 515 F.3d 918, 922 (9th Cir. 2008) (describing the video content).

171. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

deference to the employer's accusation of impaired business effectiveness. This results in unfair treatment of public employees and supports secrecy and corruption in government. Courts should apply a more concrete standard to make these cases fairer and to enhance government openness. The court should incorporate this standard in a legal solution that would preclude government employers from firing employees solely because the employers find the speech offensive. The solution should require the government to show, in concrete terms, that the employee's speech resulted in an actual disruption of operations.[172]

III. AN OBJECTIVE STANDARD TO USE WITHIN THE TRADITIONAL *PICKERING* TEST

To make a concrete determination that the speech caused a disruption of government operations, courts should apply a process that borrows from another area of law, tortious interference to business relations. The proposed solution provides a straightforward step-by-step analysis that courts should consider before any determination of whether an employee's speech concerns the public or the job.[173] This simple analysis will uncover whether the public employer disciplined the employee merely because the speech offended a government member or whether the government suffered actual disruption to efficient operations. In the first step, the court determines which of the four proxies of *Dougherty* is at issue.[174] If the third or fourth proxy of *Dougherty* is at issue, the court should require a showing of concrete harm.[175] Next, the court considers whether the employee's speech caused the disruption or if the employer's retaliation to the speech caused the disruption.

A. Borrowing an Objective Standard of Damages from Tortious Interference

For a plaintiff to prevail in a claim for tortious interference to business relations or to contract, she must show objective evidence of

172. Hitz*, supra* note 6, at 1168.

173. *See* Dallago, *supra* note 6, at 256-57 (explaining the *Garcetti* and *Connick* decisions describe situations where the *Pickering* standard is inadequate for deciding if defendant violated the plaintiff's First Amendment rights).

174. *See* Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 992 (3d Cir. 2014) (analyzing the four proxy factors).

175. *Id.*

harm and that the defendant's action caused that harm.[176] The solution proposed here borrows from this strict requirement, and places the requirement on the government entity that wishes to punish an employee. It would require the government to show specific damages and how the employee's conduct caused those damages.[177]

First, the court should determine which proxy factor or combination of proxy factors from *Dougherty* allegedly disrupted the public entity.[178] If the employee's speech allegedly breached the first or second proxy of *Dougherty*, harmed a confidential relationship or incited workplace insubordination, the court can make a decision based on the facts and the solution is unnecessary.[179] However, if the employee's speech allegedly breached the third and fourth proxies, then the solution applies, and the court should analyze the allegation according to standards borrowed from tortious interference.[180] Courts should never accept mere speculation of potential negative effects in place of tangible evidence.[181] For proxy one, as the court in *Dougherty* required of the school board, courts should require the government to prove that the employee's speech irreparably damaged a tangible close and confidential working relationship.[182] For proxy two, the court should look for evidence of tangible factors to find clear disobedience, blatant and belligerent disrespect, or sabotage.[183] If the government alleges a disruption the third or fourth proxy, the court should apply a tortious interference standard.[184]

Applying a tortious interference standard, the court should insist on tangible evidence of impairment to operations or real economic harm to the public employer as result of the breach of the third or fourth proxy. Economic harm in a public employment sense would consider factors such as increased costs to perform the same operation, which

176. SCHWARTZ, *supra* note 30, at 1120; DIAMOND, *supra* note 105, at 341.

177. SCHWARTZ, *supra* note 30, at 1120; DIAMOND, *supra* note 105, at 341.

178. *See Dougherty,* 772 F.3d at 992 (drawing conclusions based on factual evidence submitted, considering the proxies, and deciding that none of the proxies were present).

179. *See supra* text accompanying notes 75 and 76.

180. *See supra* text accompanying note 77.

181. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 815 (Fla. 1994).

182. *Dougherty*, 772 F.3d at 992.

183. *See* John Phillips, *What is 'Insubordination'?*, 14 NO. 2 TENN. EMP. L. UPDATE 3 (Feb. 1999).

184. *Dougherty*, 772 F.3d at 992; SCHWARTZ, *supra* note 30, at 1120; DIAMOND, *supra* note 105, at 341.

entails a straightforward budget analysis process.[185] Likewise, tangible evidence of impaired effective operations would consider widely accepted criteria for effective operations. For example, a court could determine the effectiveness of a fire department by evidence of whether it could put an appropriate number of fully manned fire battalions in service over a given period.[186] For effectiveness of a teacher or a classroom, the court should look to factors accepted by professional teaching experts as indicative of effectiveness such as the classroom environment, student compliance, and academic success.[187]

The third step of this solution requires the government employer to show that any harm suffered did not result from the employer's own action against the employee.[188] This step requires the government employer to rebut with evidence of causation any inference that the employer's reaction to the speech caused the apparent disruption to effective operations.[189] In *Munroe*, one judge in dissent recognized that the case acquired notoriety due to the public's reaction when the government began disciplinary action against the employee.[190] The dissent recognized that a blog of nine subscribers alone could hardly cause a disruption to effective school operation.[191]

B. The New Standard Illustrated Through Case Decisions

If the respective courts had applied this three-step analysis, they would have invalidated the firing of Roe, Dible, and Munroe. Invalidating the firing of these three government employees and other similarly situated government employees would be a more equitable result. But even more importantly, invalidating their firing would

185. *See* Frank Johnson, *Financial Accounting for Local and State School Systems Chapter 6,* NAT'L CTR. FOR EDUC. STATISTICS (2003), https://nces.ed.gov/pubs2004/h2r2/ch_6.asp [https://perma.cc/HTL9-YNUR] (describing structures of financial systems in schools for tracking expenses which, if followed, would shed light on increased costs that could be attributable to damage to effective operations).

186. Kevin Wilson, *Fire Department Staffing: A Need, Not a Want,* FIRE ENGINEERING (Aug. 1, 2009), http://www.fireengineering.com/articles/print/volume-162/issue-8/features/fire-department-staffing-a-need-not-a-want.html.

187. Marcia Powell, *5 Ways to Make Your Classroom Student-Centered*, EDUCATION WEEK TEACHER (Dec. 24, 2013), http://www.edweek.org/tm/articles/2013/12/24/ctq_powell_strengths.html [https://perma.cc/LSF6-Q433].

188. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 481 (3d Cir. 2015) (Ambro, J. dissenting).

189. *Id*.

190. *Id.*

191. *Id*. at 458, 481.

mitigate the tendency for government employees to self-censor, and it would foster more government openness.[192]

In *Munroe*, where Munroe's blog only had nine subscribers and Munroe carefully avoided identifying herself, the school, or any of the students, the government employer failed every step of the new standard.[193] In the first step, the court did not find impairment of close working relationships or an inability for supervisors to maintain discipline among other employees.[194] In the second step, the government employer presents no evidence of disharmony in the workforce, but instead relies on implication that disharmony existed from the complaints of outsiders, some parents and a few students.[195] The government employer also fails to show that Munroe's speech impeded her performance as a teacher. In determining whether Munroe's performance impeded the school, the court should have required the employer to show actual damages to the level required for tortious interference as illustrated in *Gieseke* and *Ethan Allen*.[196] Actual damages as applied to Munroe's performance should have required the court to consider the effect of her speech on accepted professional measures of teacher and classroom effectiveness.[197]

Applying the three-step approach to *Roe* and *Dible*, should require an analysis similar to the that for *Munroe.* The government would have failed at step one because it did not specify any damage to close-working relationships or show that supervisors did not have the ability to maintain workforce discipline because of the officers' speech. Focusing on step two, the government supervisor failed to show an actual disruption to efficient operations or that the officers' performance was impeded.[198] Under an objective standard from tortious interference, the government failed to present evidence of actual harm. Applying an objective test, the court should have required

192. *See supra* Part II.B.

193. *Munroe*, 805 F.3d at 458.

194. *Id.* at 464.

195. *Id*.

196. Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc., 844 N.W.2d 210, 222 (Minn. 2014); Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 815 (Fla. 1994).

197. Powell, *supra* note 187.

198. *See Munroe*, 805 F.3d at 462 (using what amounted to a discredited heckler's veto as evidence of actual disruption while admitting that a parental "opt-out" was not compulsory on the school board); Feiner v. New York, 340 U.S. 316, 331 (1951) (Douglas, J dissenting)).

evidence based on factors like whether the speech degraded or likely degraded government emergency services.[199]

Lastly, in all three cases, the court's inquiry should not stop even if the court finds a concrete damage. Instead, the court should ultimately consider whether the employee's speech truly caused any impairment to effective operations or whether the reaction to the employer's attempt to discipline the employee caused the impairment.[200]

C. Describing How a Court Should Apply the Tortious Interference Standard in Public Employee Free Speech Cases

When a government employer defends against a complaint for violating an employee's free speech rights because the speech harmed efficient operations, a court should require the defendant to answer six quantifiable questions.[201] Question one: what is the measurable factor of efficient operations that the defendant is presenting?[202] Question two: what is the relevant authoritative basis for asserting that factor's effect on efficient operations?[203] Here, the court should require the defendant to show either expert testimony or scholarly publications describing that factor as an element of efficient operation for the government function. Question three: what was the measure of that factor just prior to the speech incident?[204] Question four: what was the measure after the incident?[205] Question five: does that change represent a decline in the measure of effectiveness?[206] Question six: describe how the government determined that the decline is attributable to the employee's speech and how it cannot be attributed to any other factor.[207] The answers to these questions should provide a court with

199. Wilson, *supra* note 186.

200. *Munroe*, 805 F.3d at 481 (Ambro, J. dissenting).

201. Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968).

202. *See supra* Part I. C. (explaining that Georgetown Inc.'s speculative belief of future lost customers was not enough to satisfy tortious wrongdoing, but that conversion of shipping documents was a tortious interference); *see also supra* Part III. A. (giving examples of measures of effective government operations published by professional associations or subject matter experts).

203. *See supra* Part III. A.

204. *See supra* Part III. A.

205. *See supra* Part III. A.

206. *See supra* Part III. A.

207. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 481 (3d Cir. 2015) (Ambro, J. dissenting) (referring to the comments in dissent that any harm that the school district

an objective basis for deciding whether actual harm to efficient operations occurred and whether that harm can be attributed to the employee's speech.

IV. DISCARDING THE BAD TENDENCY TEST FOREVER

Public employees face complex standards for determining whether the First Amendment protects their speech.[208] In several cases, courts have punished public employees for their expression in different contexts: grievances, government accountability, and casual off-duty expression.[209] Punishing these employees under the current *Pickering* standard results in unfair treatment. To mitigate against harsh and unfair results, the approach used to evaluate public employee speech should rely on a concrete standard.

Since the early twentieth century, the trend of the nation's courts in applying free speech rights has been toward more freedom and less restrictions.[210] However, over the same period, courts have restrained public employee free speech rights and have subjected them to a balancing test. The old bad tendency standard has resurfaced in the way that courts apply the balancing test to public employees.[211] The balancing test heavily weighs to the advantage of the employer. By favoring the employer, the balancing test promotes employee self-censoring, and unfairly creates a secretive climate in government.

The courts should update the balancing test to rely less on speculative evidence and instead to rely an objective standard drawn from tortious interference. Courts should employ tortious interference standards of damages for determining if employee speech impedes the effectiveness of government operations because tortious interference uses concrete and objective standards to evaluate damages.[212]

Lawyers and judges should look beyond the *Pickering* balancing test to find standards of real harm before they punish citizens for controversial expression just because they happen to work for the government.

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suffered was due to the board's reaction to Munroe's blog and not the blog content itself).

208. Rementer, *supra* note 29, at 195.

209. *See supra* Part I. B.

210. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

211. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (describing the balancing test that weighs the interests of the teacher against the interests of the government entity).

212. SCHWARTZ, *supra* note 30, at 1120.