

Recklessly False Statements in the Public-Employment Context

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During the course of a high profile criminal prosecution, a police officer accuses the District Attorney of fabricating evidence. Days before a bond election, a teacher accuses school board members of misusing public funds. In cases like these, government employers often seek to discipline public employees for making controversial or imprudent statements about matters of public concern. In *Pickering v Board of Education*, the Supreme Court held that a public employee's true or negligently false statements about matters of public concern are protected by the Constitution unless the government employer's interest in efficiently performing its public duties outweigh the First Amendment interests in the employee's speech.¹ Many courts have construed this holding to require that the employee's speech be protected unless the employer establish actual harm resulting from the employee's statements.² The *Pickering* Court, however, expressly declined to decide whether statements by public employees about matters of public concern are constitutionally protected when those statements are knowingly or recklessly false.³

Since *Pickering*, the Supreme Court has on several occasions considered the First Amendment interests in the speech of public employees. Although it has refined other aspects of the *Pickering* analysis,⁴ the Court has not resolved the question of when, if

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¹ 391 US 563, 568 (1968). The Supreme Court has identified two First Amendment interests in the speech of public employees: the public's interest in hearing what the employee has to say, and the employee's personal interest in speaking out on public matters. See *Waters v Churchill*, 114 S Ct 1878, 1887 (1994) (plurality opinion).

² See, for example, *Johnson v Multnomah County*, 48 F3d 420, 424 (9th Cir 1995), cert denied, 115 S Ct 2616 (1995); *American Postal Workers Union v United States Postal Service*, 830 F2d 294, 303-04 & nn 10-13 (DC Cir 1987); *Rankin v McPherson*, 483 US 378, 388-92 (1987). But see *Waters*, 114 S Ct at 1887.

³ 391 US at 574 n 6.

⁴ See, for example, *Mt. Healthy City School District Board of Education v Doyle*, 429 US 274, 287 (1977) (allocating burden of persuasion in cases where reason for disciplinary

ever, recklessly or knowingly false statements of public employees about matters of public concern are protected by the Constitution.⁵

The lower courts that have faced this issue have taken conflicting approaches. With some exceptions, these courts have staked out two main positions. The first position holds the recklessly or knowingly false statements of public employees per se unprotected by the First Amendment.⁶ From this position it follows that a public employer can discipline with relative impunity an employee who makes recklessly or knowingly false statements: because the Constitution does not protect such statements, the employer need not establish that its interest in efficiently performing its duties outweighs the First Amendment interests in the employee's speech.⁷

The second position rejects the per se approach, holding instead that the recklessly false statements of public employees might under some circumstances be protected by the First Amendment.⁸ Courts taking this position hold that the recklessness and falsity of an employee's statement are no more than factors to be considered in balancing the First Amendment interests in the employee's speech against the employer's interest in efficiently performing its public duties. From this position it follows that a public employee cannot be disciplined for making recklessly false statements about a matter of public concern absent a showing of actual harm resulting from those statements.⁹

action is disputed); *Connick v Myers*, 461 US 138, 147 (1983) (holding public employees' speech about matters of merely private concern constitutionally unprotected); *Waters*, 114 S Ct at 1889 (prescribing duty of care required of public employer in determining what employee said where content of employee's statement is disputed).

⁵ See, for example, *Johnson*, 48 F3d at 422-23; *Santos v Miami Region, United States Customs Service*, 642 F2d 21, 25 (1st Cir 1981). But see *Hanneman v Breier*, 528 F2d 750, 755 (7th Cir 1976); Ian H. Morrison, Note, *The Case for Minimal Regulation of Public Employee Free Speech: A Critical Analysis of the Federal Honoraria Ban Controversy*, 48 Wash U J Urban & Contemp L 141, 156 n 81 (1995).

⁶ See, for example, *Brenner v Brown*, 36 F3d 18, 20 (7th Cir 1994).

⁷ See, for example, *Gossman v Allen*, 950 F2d 338, 342-43 (6th Cir 1991). While, under this approach, the employer's actions would not be constrained by the First Amendment, the employer would still be subject to common law requirements of tort and contract, as well as constitutional due process requirements. See, for example, *id* at 341-43 (dismissing discharged plaintiff's First Amendment claims, but refusing to dismiss her state law claims).

⁸ See, for example, *Johnson*, 48 F3d at 423-24.

⁹ *Id* at 424; *American Postal Workers*, 830 F2d at 303-04 & nn 10-13; *Brasslett v Cota*, 761 F2d 827, 845-46 (1st Cir 1985).

This Comment argues that public employees' recklessly false statements of fact¹⁰ should be held per se unprotected by the First Amendment, provided their recklessness and falsity are established by clear and convincing evidence. Such treatment of recklessly false statements would be consistent with the Supreme Court's treatment of public employees' speech concerning purely private matters, as well as with its defamation jurisprudence. Such an approach would also reconcile the primary policy concerns underlying the conflicting lower court cases. The government's interest in efficiently providing public services would be protected by allowing it to discipline employees who make recklessly false statements without having to prove actual harm resulting from those statements. The First Amendment interests in public employees' truthful and uninhibited speech about public matters would be protected by the heightened evidentiary standard. Moreover, by providing a clear rule, this approach would promote judicial economy while limiting the potential for arbitrary judicial decision making.

Section I of this Comment discusses *Pickering* and *Connick v Myers*,¹¹ the most significant refinement of *Pickering*, to provide the legal context in which the lower court decisions arise. Section II discusses the factual settings, holdings, and rationales of representative lower court decisions. Section III briefly examines the Supreme Court's treatment of recklessly false statements in the context of defamation law. Section IV argues that the principles of defamation law should be applied in the public-employment context to resolve the conflict and confusion in the lower court decisions.

I. THE PICKERING-MYERS FRAMEWORK

The free speech rights of public employees are governed primarily by *Pickering v Board of Education*.¹² This case arose

¹⁰ This Comment focuses primarily on recklessly false statements. No court has suggested that knowingly false statements should be protected by the First Amendment. See, for example, *Neubauer v City of McAllen*, 766 F2d 1567, 1579 (5th Cir 1985) (flatly asserting that such statements would be per se unprotected). The analysis, however, applies a fortiori to knowingly false statements. Moreover, this Comment deals only with statements of fact. It does not address the constitutional protection due statements of opinion or ideas; it is settled law that "[u]nder the First Amendment there is no such thing as a false idea." *Gertz v Robert Welch, Inc.*, 418 US 323, 339 (1974).

¹¹ 461 US 138 (1983).

¹² 391 US 563 (1968). Earlier case law had established the principle that individuals do not forfeit First Amendment protections by entering public employment. See, for example, *Keyishian v Board of Regents*, 385 US 589, 605 (1967).

after Marvin Pickering, an Illinois high school teacher, was discharged for sending a letter to the local newspaper criticizing the fiscal policy and practices of the board and the district superintendent. At a hearing reviewing his dismissal, the school board alleged Pickering's letter contained numerous false statements that damaged the professional reputations of board members and school administrators by unjustifiably impugning their integrity and competence. The board also argued that Pickering's statements would likely disrupt faculty discipline and create conflict "among teachers, administrators, the Board of Education, and the residents of the district."¹³ The board heard testimony about the veracity of the statements in Pickering's letter, and found the statements false as charged.¹⁴ The school board neither heard evidence nor made specific findings regarding any actual damage caused by Pickering's letter. The state courts upheld the dismissal.¹⁵

On review, the Supreme Court firmly rejected the notion, suggested by the state supreme court, that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . ."¹⁶ However, the Court acknowledged that the state, as employer, has a greater interest in regulating the speech of its employees than it has, as sovereign, in regulating the speech of its citizens generally.¹⁷ Accordingly, the Supreme Court held that "the interests of the teacher, as citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁸

In response to the school board's argument that his dismissal was justified because his letter contained false statements,

¹³ *Pickering*, 391 US at 564-67.

¹⁴ *Id.* at 567.

¹⁵ *Id.*

¹⁶ *Id.* at 568, citing, among other authority, *Keyishian*, 385 US at 605-06.

¹⁷ *Pickering*, 391 US at 568. While the *Pickering* Court explicitly stated only that the government's interest in regulating the speech of its employees differs significantly from its interest in regulating the speech of its citizens, the context of *Pickering*, as well as its language, makes clear the former interest is greater than the latter. See, for example, language quoted in note 21. Later cases have so interpreted *Pickering*. See, for example, *Waters v Churchill*, 114 S Ct 1878, 1886-88 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign."); *Myers*, 461 US at 143-47 (Under *Pickering*, public-employment decisions can sometimes be based on speech that would be protected if the employee were a private citizen.).

¹⁸ *Pickering*, 391 US at 568.

Pickering urged the Court to adopt the rule of *New York Times Co. v. Sullivan*, and find his statements protected unless recklessly or knowingly false.¹⁹ The Court, however, declined to adopt the *New York Times* rule as a general standard "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal"²⁰ The Court did, however, gesture to the language of *New York Times*, noting that despite its "disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit," in a case like Pickering's, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."²¹ Even so, the Court pointedly limited its holding, noting in a footnote that:

Because we conclude that [Pickering's] statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown

¹⁹ Id at 569, citing *New York Times Co. v. Sullivan*, 376 US 254, 279-80 (1964). *New York Times* held that a public official could not recover damages for a defamatory falsehood absent proof that the statement had been made with knowledge of its falsity or with reckless disregard for truth. For a discussion of *New York Times*, see text accompanying notes 82-86.

²⁰ *Pickering*, 391 US at 569.

²¹ Id at 574. The Court distinguished Pickering's situation from other conceivable scenarios. First, the Court left open the possibility that even true statements might furnish legitimate grounds for dismissal in some circumstances:

It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

Id at 570 n 3. Second, the Court left open the possibility that negligent falsehoods might furnish legitimate grounds for dismissal in other contexts:

We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to real facts.

nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.²²

In a separate opinion, Justice White strenuously objected to the majority's inclusion of this footnote, chiding the Court for "gratuitously suggest[ing] that when statements are found to be knowingly or recklessly false, it is an open question whether the First Amendment still protects them unless they are shown or can be presumed to have caused harm."²³ Instead, Justice White argued that prior cases clearly established that "[d]eliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment."²⁴ Accordingly, Justice White argued that public employees could be disciplined "without violation of the First Amendment for knowingly or recklessly making false statements regardless of their harmful impact."²⁵

In *Connick v Myers*, a case involving an assistant district attorney who was dismissed "for circulating a questionnaire concerning internal office affairs,"²⁶ the Supreme Court further refined the balancing test adopted in *Pickering*. The *Myers* Court held that the First Amendment interests in a public employee's statements need be balanced against the government's interest in efficiently providing public services only if the employee's statements can be "fairly characterized as constituting speech on a matter of public concern."²⁷ The Supreme Court did not find public employees' speech about private matters "totally beyond the protection of the First Amendment," nor did it hold that "speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction."²⁸ Rather, the Supreme Court held that:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual

²² Id at 574 n 6.

²³ Id at 583 (White concurring in part and dissenting in part).

²⁴ Id, citing *Garrison v Louisiana*, 379 US 64, 75 (1964).

²⁵ *Pickering*, 391 US at 584 (White concurring in part and dissenting in part).

²⁶ 461 US 138, 140 (1983).

²⁷ Id at 146. Where the objectionable speech deals in part with matters of private concern, and in part with matters of public concern, *Pickering* balancing must still be applied. *Myers*, 461 US at 149-50.

²⁸ *Myers*, 461 US at 147.

circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.²⁹

Accordingly, under *Myers*, a court must first make a threshold finding that a public employee's statements dealt with matters of public concern before it may perform the *Pickering* balancing test.³⁰

Pickering, then, leaves open the question of whether the recklessly false statements of public employees can ever be protected by the First Amendment. And while the practical effect of *Myers* is to hold statements by public employees concerning matters of solely private concern per se unprotected,³¹ the case does not address the constitutional status of public employees' recklessly or knowingly false statements.³²

II. THE LOWER COURT DECISIONS

Not surprisingly, *Pickering* and *Myers* have provided little guidance to the lower federal courts that have considered the issue of whether the First Amendment ever protects recklessly false statements by public employees about matters of public concern. Some circuits have found such statements per se unprotected. Others have rejected this approach, treating recklessness and falsity as no more than factors to be considered in balancing the free speech interests in the employee's statements against the employer's interest in efficiently performing its public duties. This Section will discuss leading cases representing each of these positions.

²⁹ Id. Earlier in its opinion, the Court noted its concern that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id at 146.

³⁰ See, for example, *Rankin v McPherson*, 483 US 378, 384 (1987); *American Postal Workers Union v United States Postal Service*, 830 F2d 294, 300 (DC Cir 1987).

³¹ While the Court explicitly avoided finding private speech per se unprotected, *Myers*, 461 US at 147, the holding that employment decisions based on statements of private concern will not be reviewed by the courts, id at 146-47, amounts to very much the same thing in practice. Other courts have so interpreted *Myers*. See, for example, *Waters*, 114 S Ct at 1884; *Johnson v Multnomah County*, 48 F3d 420, 423 (9th Cir 1995).

³² But compare *Wulf v City of Wichita*, 883 F2d 842, 858 & n 24 (10th Cir 1989) (suggesting recklessly false statements might properly be considered as addressing matters of no public concern, and therefore per se unprotected under *Pickering* and *Myers*), with *Johnson*, 48 F3d at 422-24 (rejecting this argument).

A. The Per Se Approach

One recent example of a circuit decision declaring the recklessly false speech of public employees per se unprotected is *Brenner v Brown*.³³ Despite the somewhat unusual nature of the decision,³⁴ the underlying facts of this case are simple. Patricia Brenner, an employee at the Department of Veterans Affairs, apparently had difficulty getting along with her supervisor and lodged numerous written complaints with various management personnel, culminating in a formal complaint to the Department. Brenner accused her supervisor of harassing her and giving her an excessive workload.³⁵ After the Department rejected her complaint, Brenner began sending inflammatory letters to public figures, including her state and national senators, insinuating, *inter alia*, that her supervisor was mentally unstable.³⁶

In response to these letters, the Department of Veterans Affairs reprimanded Brenner for "making false or defamatory statements about VA personnel."³⁷ Soon thereafter Brenner was denied a promotion; this prompted her to file suit against the Department alleging she had been reprimanded and denied a promotion in retaliation for the complaints she had made about her supervisor.³⁸

The Seventh Circuit found that "[a]ny adverse employment action suffered by plaintiff was not the result of any protected speech; instead, it was a reasonable response by her employer to outrageous and unsupported defamatory remarks."³⁹ The court made alternative holdings supporting its decision that Brenner's speech was constitutionally unprotected. First, following *Myers*, the court found Brenner's speech to be unprotected because it dealt with matters of entirely private concern.⁴⁰ Second, it held that even if Brenner's speech involved matters of public concern,

³³ 36 F3d 18 (7th Cir 1994).

³⁴ Two points, in particular, mark *Brenner* as an unusual case. First, it was originally written as an unpublished disposition, but was later published upon request. *Id.* at 18 n 1. The decision, accordingly, is announced in a terse per curiam opinion. Second, although it was argued as a Title VII case, the circuit court appears to have treated *Brenner* as if it were a First Amendment case. See *id.* at 19-20.

³⁵ *Id.* at 20.

³⁶ *Id.* at 20 n 4. Brenner also accused her supervisor of "using Gestapo tactics, being a Hitler, a communist, a fascist, and a guard dog" *Id.*

³⁷ *Id.* at 20.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*, citing *Myers*, 461 US at 146-49, and *Waters v Churchill*, 114 S Ct 1878, 1887 (1994) (plurality opinion).

it was unprotected because "an employee's speech is not protected where it is [] made with a reckless disregard for the truth, or is otherwise profane and disparaging."⁴¹

The Seventh Circuit is not alone in declaring public employees' recklessly false statements per se unprotected. The Fifth Circuit took essentially the same position in *Megill v Board of Regents*⁴² and *D'Andrea v Adams*.⁴³ Because both of these cases predate the Fifth Circuit's partition, they represent the law of the Eleventh Circuit as well.⁴⁴ The Eighth Circuit also appears to have taken the position that recklessly false statements are per se unprotected in *McGee v South Pemiscot School District R-V*.⁴⁵ And the Federal Circuit appears to have agreed in *Henry v Department of the Navy*.⁴⁶

⁴¹ *Brenner*, 36 F3d at 20. This conclusion seems consistent with earlier Seventh Circuit precedent. See, for example, *Hanneman v Breier*, 528 F2d 750, 755 (7th Cir 1976) (Where the only state interest asserted in disciplining a public employee is in preventing publication of false and derogatory statements, the state must prove the challenged statements knowingly or recklessly false.); *O'Brien v Town of Caledonia*, 748 F2d 403, 407 n 2 (7th Cir 1984) (A public employee's speech is entitled to First Amendment protection unless it contains knowingly or recklessly false statements.).

⁴² 541 F2d 1073, 1085 (5th Cir 1976). The *Megill* court appears to have held even negligently false statements unprotected: "The First Amendment protects the right to make a statement. It does not, however, clothe a person with immunity when his statements are shown to be false and inaccurate, when their truth could be easily ascertained." Id. See also Richard Hiers, *Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U Fla J L & Pub Pol 169, 220-21 (1993) (interpreting *Megill* as concluding, sub silentio, that recklessly false speech is per se constitutionally unprotected).

⁴³ 626 F2d 469, 473-74 n 2 (5th Cir 1980) (observing that "[t]he 'knowing or reckless falsehood' is not protected by the Constitution," but finding the speech in question not recklessly false), quoting *Garrison v Louisiana*, 379 US 64, 75 (1964). See also *Reeves v Claiborne County Board of Education*, 828 F2d 1096, 1100 (5th Cir 1987) ("Of course, statements that were knowingly false or in reckless disregard of the truth would not be protected."); *Jett v Dallas Independent School District*, 798 F2d 748, 758 (5th Cir 1986) ("[T]he First Amendment generally protects false statements unless they were made knowingly or with a reckless disregard for the truth."). These decisions may be undermined by dictum in *Moore v City of Kilgore*, 877 F2d 364, 376 (5th Cir 1989). See note 69 and accompanying text.

⁴⁴ Even if the Fifth Circuit's postpartition decision in *Moore* has undermined the per-se-unprotected position in that circuit, *Megill* and *D'Andrea* remain good law in the Eleventh Circuit. See generally Hiers, 5 U Fla J L & Pub Pol at 220 (cited in note 42) (relying on these decisions in his survey of current Eleventh Circuit law).

⁴⁵ 712 F2d 339, 342 (8th Cir 1983) (A teacher's speech about matters of public interest is protected by the First Amendment unless it "contains knowingly or recklessly false statements, undermines the ability of a teacher to function, or interferes with the operation of the school.").

⁴⁶ 902 F2d 949, 953 (Fed Cir 1990) (upholding dismissal of public employee for making "patently false and unfounded accusations" against employer and for refusing to do legitimately assigned work). Compare *Fiorillo v United States Department of Justice, Bureau of Prisons*, 795 F2d 1544, 1555 (Fed Cir 1986) (Newman dissenting) ("Even false

Although the issue arises in a slightly different context, several official immunity cases also support the position that public employees' recklessly false statements are per se unprotected by the First Amendment. In *Gossman v Allen*, for example, the Sixth Circuit considered a claim brought by Catherine Gossman, who had been fired by the Louisville and Jefferson County Board of Health.⁴⁷ Gossman had been an inspector in the Waste Water Treatment Program, but was involuntarily transferred to the Rodent Control Division after a dispute with her supervisor over enforcement priorities. At her new post, Gossman continued to criticize the activities of the Waste Water Treatment Program, writing "letters to state and federal officials urging investigation of alleged favoritism and other improprieties in the program."⁴⁸ She later made similar allegations in a public hearing, in letters to the editor written under a pseudonym, and in an affidavit filed in a federal enforcement proceeding against a local waste water treatment plant. David Allen, Gossman's supervisor at Rodent Control, fired her for undermining public confidence, causing internal discord, and impairing the Board of Health's ability to perform its duties.⁴⁹

Gossman filed a § 1983 claim, naming Allen among the defendants. Allen claimed qualified immunity.⁵⁰ Explicitly finding that "*Pickering* does not prevent a public employer from terminating employees who knowingly or recklessly make false statements,"⁵¹ the court held the defense of qualified immunity would be available to Allen if a reasonable official could believe Gossman had knowingly or recklessly made false statements.⁵² Without deciding whether Gossman's statements to the media and the court were in fact knowingly or recklessly false, the court found that a reasonable official could have believed them to be so, and granted Allen qualified immunity.⁵³

Gossman, then, explicitly treats recklessly false statements by public employees as per se unprotected by the Constitution. *Powell v Gallentine*, a Tenth Circuit decision involving the quali-

statements are subject to the protection of the First Amendment absent a showing that they were 'made either with knowledge of their falsity or with reckless disregard for their truth or falsity.'"), quoting *Pickering*, 391 US at 573.

⁴⁷ 950 F2d 338, 340 (6th Cir 1991).

⁴⁸ Id at 340.

⁴⁹ Id.

⁵⁰ Id at 340-41.

⁵¹ Id at 343.

⁵² Id at 342.

⁵³ Id at 342-43.

fied-immunity defense, can be read to support the same proposition.⁵⁴

Although none of the courts finding the recklessly false statements of public employees per se unprotected provides explicit discussion of the arguments supporting this position, these decisions sometimes cite Supreme Court cases holding recklessly false statements unprotected by the First Amendment in the context of defamation law.⁵⁵ Also present in these cases, though usually implicit, is the feeling that reckless falsehoods have no constitutional or social value, and that public employers therefore have a strong interest in curtailing such speech.⁵⁶ Both of these supporting strands are reminiscent of Justice White's separate opinion in *Pickering*.⁵⁷

The effect of applying this sort of per se analysis is to require a threshold inquiry into the recklessness and falsity of an employee's statement as a prerequisite to performing the *Pickering* balancing test. If the statement is found recklessly false, there is no need to weigh the First Amendment interests in the employee's speech against the interest of the public employer in efficiently performing its duties: the free speech interests in the unprotected statement can never outweigh the employer's interest in curtailing it. The public employee, accordingly, can be dismissed with relative impunity for making recklessly false

⁵⁴ 992 F2d 1088, 1091 (10th Cir 1993) (denying qualified-immunity defense even though defendant thought plaintiff's statements false: "even false allegations are entitled to First Amendment protection, unless they were knowingly or recklessly made"), citing *Pickering*, 391 US at 574. See also *Johnson v Multnomah County*, 48 F3d 420, 423 (9th Cir), cert denied, 115 S Ct 2616 (1995) (reading *Powell* to support proposition that reckless falsehoods are per se constitutionally unprotected). But see *Moore v City of Wynnewood*, a more recent Tenth Circuit case assuming the constitutional protection due public employees' reckless falsehoods still to be an open question. 57 F3d 924, 933 (10th Cir 1995). Several recent cases and unpublished dispositions dealing with the qualified-immunity defense reach the same result. See, for example, *Williams v Kentucky*, 24 F3d 1526, 1535 (6th Cir 1994) (following *Gossman*); *Donahue v Casey*, 1994 WL 146161, *3 (9th Cir) (unpublished opinion) ("[O]utright lying certainly does not have First Amendment protection. Simply put, 'there is no constitutional value in false statements of fact.'"), quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974).

⁵⁵ See, for example, *D'Andrea*, 626 F2d at 473-74 n 2 (citing *Garrison*); *Hanneman*, 528 F2d at 755 (citing *New York Times*). Compare Judge Bork's dissent in *American Postal Workers Union v United States Postal Service*, 830 F2d 294, 322 & n 2 (DC Cir 1987) (citing various defamation cases).

⁵⁶ See, for example, *Donahue*, 1994 WL 146161 at *3 (stating that false statements of fact lack constitutional value), citing *Gertz*, 418 US at 340; *Brenner*, 36 F3d at 20 (classifying reckless falsehoods with speech that is profane and disparaging); *Hanneman*, 528 F2d at 755 (recognizing state interest "in preventing publication of false and derogatory statements" by public employees).

⁵⁷ See text accompanying notes 23-25.

statements. The treatment of recklessly false statements, then, is analogous to the treatment given speech concerning merely private matters in *Myers*.⁵⁸

B. The Balancing Approach

Other courts have rejected the position that recklessly false speech is per se unprotected by the Constitution. A recent, thoughtful decision taking this approach is *Johnson v Multnomah County*.⁵⁹ This case arose from a suit filed by Jan Johnson, a former county employee who had been dismissed for "making statements to coworkers and others accusing [her immediate supervisor] of mismanagement and possible criminal conduct."⁶⁰ The county argued that Johnson's "statements were not upon matters of public concern because they were false and made with a reckless disregard for the truth."⁶¹ Alternatively, the county contended that "recklessly false statements, like statements about matters of no public interest, are per se unprotected by the First Amendment," and accordingly "the public employer

⁵⁸ See text accompanying notes 26-30. When combined with the *Myers* rule, the per se approach leads to a three-step inquiry. First, the court must determine whether the disciplined employee's speech dealt with a matter of public concern. If it dealt with a matter of purely private concern, it is per se unprotected, and the court need inquire no further. If the speech dealt with a matter of public concern, however, the court must next determine whether the employee's speech contained knowingly or recklessly false statements of fact. If the speech contained such falsehoods, it is per se unprotected, and the court need proceed no further. Only if both these thresholds are passed must the court balance the government's interest in efficiently performing its duties against the First Amendment interests in the employee's speech. For an example of this approach, see Judge Newman's dissent in *Fiorillo*, 795 F2d at 1555-61.

⁵⁹ 48 F3d 420 (9th Cir), cert denied, 115 S Ct 2616 (1995).

⁶⁰ Id at 421-22.

⁶¹ Id at 422. Compare this defense with the approach taken by the Tenth Circuit in *Wulf v City of Wichita*:

[P]resumably, the issue of the truth or falsity of the statements at issue is relevant to both the threshold public concern analysis and the balancing required under *Pickering*. It is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern.

883 F2d 842, 858 n 24 (10th Cir 1989). This clever attempt to fit recklessly false statements into the existing framework of *Pickering* and *Myers* may reach the same result as the more straightforward position that recklessly false statements are per se constitutionally unprotected. *Johnson* regards *Wulf* as essentially supporting this position. *Johnson*, 48 F3d at 423. But see *Moore v City of Wynnewood*, 57 F3d 924, 933 (10th Cir 1995) (interpreting *Wulf* as supporting the opposite position). See also text accompanying notes 112-14.

need show no injury to its legitimate interests before taking adverse actions in retaliation."⁶²

Noting a circuit split as to whether "recklessly false statements are per se unprotected or whether the recklessness should be considered as one of the factors in the *Pickering* balance of interests," the *Johnson* court surveyed the conflicting decisions, found the cases taking the balancing approach more persuasive, and, after discussing policy considerations supporting its decision, held that:

[R]ecklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.⁶³

Applying this analysis to Johnson's complaint, the court found that the statements for which she was dismissed "substantially involved matters of public concern."⁶⁴ Because it was unable to find, as a matter of law, either that Johnson's statements were recklessly false or that the county's "legitimate administrative interests outweigh[ed] the First Amendment interest in Johnson's freedom of speech," the court reversed the district court's grant of summary judgment in favor of Multnomah County.⁶⁵

As the *Johnson* court noted, it was not alone in rejecting the position that the recklessly false speech of public employees is per se unprotected by the First Amendment. The First Circuit had earlier taken the same position in *Brasslett v Cota*,⁶⁶ and

⁶² *Johnson*, 48 F3d at 422-23.

⁶³ Id at 424. This pronouncement seems consistent with the Ninth Circuit's earlier language in *Donovan v Reinbold*, 433 F2d 738, 742 (9th Cir 1970) ("Assuming, *arguendo*, that the statements were both false and libelous, the article nevertheless fell within the protection of the First Amendment."). But because it is unclear whether the libel in question would have been governed by the *New York Times* requirement of reckless or knowing falsity, 376 US at 279-80, *Donovan*'s language is somewhat ambiguous standing alone.

⁶⁴ *Johnson*, 48 F3d at 424.

⁶⁵ Id at 427.

⁶⁶ 761 F2d 827, 840-41 (1st Cir 1985). Citing *Pickering*, the *Brasslett* court wrote:

Although the fact that a statement is recklessly false may well create a presumption that the employee's interest in uttering it is subordinate to the government's interest in suppressing it, the Court has preserved the possibility that such a statement

the D.C. Circuit appears to have done the same in *American Postal Workers Union v United States Postal Service*.⁶⁷ And despite early decisions to the contrary,⁶⁸ the Fifth Circuit's decision in *Moore v City of Kilgore* may also reject the per se approach.⁶⁹

The courts rejecting the position that the recklessly false statements of public employees are per se unprotected by the First Amendment have been far more explicit and thorough in presenting the arguments supporting their position than have the courts taking the opposing view.⁷⁰ These courts have given two main arguments for rejecting the per se approach.

First, the courts have expressed concern that the per se approach might chill valuable contributions to public debate by government employees.⁷¹ Public employees have "special access

might be protected if it resulted in no actual harm to the employer. . . . Thus a finding that Brasslett's statements were malicious is but a factor to be weighed in the balancing of interests.

Id. The court also found that Brasslett's statements were not in fact recklessly or knowingly false. Id.

⁶⁷ 830 F2d 294, 299 (DC Cir 1987) (apparently agreeing with the district court that "[o]therwise protected speech cannot lose its constitutional protection solely by virtue of containing a knowingly or recklessly false statement, absent a showing of the harmful nature of the speech"), quoting *American Postal Workers Union v United States Postal Service*, 598 F Supp 564, 570 (D DC 1984). The court went on to find that the speech in question was not recklessly false. 830 F2d at 306. In a spirited dissent, Judge Bork argued that under *Pickering* and *Myers* a public employee was entitled to less—not more—protection than a libel defendant, 830 F2d at 324-25 nn 3-4 (Bork dissenting), that the speech in question was knowingly false, id at 322, and that under the law of defamation knowingly false statements do not enjoy constitutional protection, id at 322 n 2. Bork argued for applying this standard from defamation law in the public-employment context. Id at 324 n 3.

⁶⁸ See notes 42-43 and accompanying text.

⁶⁹ 877 F2d 364, 376 (5th Cir 1989) ("Before the City's interest in the accurate dissemination of information may carry any weight in the *Pickering/Connick* balance, the City must prove that Moore made false statements of fact with either knowledge of their falsity or with reckless disregard of their truth or falsity."). See also *Johnson*, 48 F3d at 423 (listing *Moore* among cases rejecting the position that reckless falsehoods are per se unprotected).

⁷⁰ Moreover, this approach has been defended by at least one student commentator. See Leslie S. Blickenstaff, Note, *Don't Tip the Scales! The Actual Malice Standard Unjustifiably Eliminates First Amendment Protection for Public Employees' Recklessly False Statements*, 80 Minn L Rev 911 (1996). On the other hand, the best arguments supporting the per se approach are found not in the opinions taking this approach, but in Justice White's separate opinion in *Pickering*, 391 US at 582-84 (concurring in part and dissenting in part), and Judge Bork's dissent in *American Postal Workers*, 830 F2d at 315-30 (Bork dissenting).

⁷¹ *Johnson*, 48 F3d at 424. This position echoes the concern originally expressed in *Pickering* itself. See *Pickering*, 391 US at 572 ("Teachers are . . . the members of a community most likely to have informed and definite opinions as to how funds allotted to the

to facts relevant to debates on issues of public concern," and there is a significant First Amendment interest in encouraging them "to speak freely and make that information available."⁷² Although recklessly false statements themselves have no constitutional value, "[t]here is a real danger that stripping all First Amendment protection from recklessly false statements may inhibit the flow of accurate information from public employees who are uncertain about whether they have accumulated a legally sufficient factual basis for their statements."⁷³ Accordingly, these courts say, recklessly false speech should not be penalized unless it causes actual injury sufficient to outweigh the chilling effects of such penalization.⁷⁴

Second, the courts have been reluctant to apply the rules of defamation law to public-employment disputes. The *Johnson* court implied that the First Amendment interest in free speech requires that recklessly false speech not be punished in any context absent some countervailing government interest; in defamation law, this countervailing interest has taken the form of "compensating citizens who have suffered damages from such false statements."⁷⁵ Yet this countervailing interest is lacking in the public-employment context, because, as the *American Postal Workers* court made clear, "[u]nder the first amendment, as interpreted by the Supreme Court in *New York Times v. Sullivan*, the government may not punish a private citizen for damage caused to its own reputation. . . . '[D]efamation of the government is an impossible notion for a democracy.'"⁷⁶ As a result, these courts say, the constitutional protection of recklessly false statements in the context of public-employee disputes must be determined by *Pickering* balancing rather than in accordance with the rules governing private defamation actions.⁷⁷ *Pickering* balancing requires that the public employer show actual injury to its legitimate interests that outweighs the free speech interests in the public employee's reckless falsehoods.⁷⁸ Interestingly, this argu-

operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."). For an evaluation of this argument, see text accompanying notes 154-64.

⁷² *Johnson*, 48 F3d at 424.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ 830 F2d at 309-10, quoting Harold Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 S Ct Rev 191, 205.

⁷⁷ See *American Postal Workers*, 830 F2d at 309-10.

⁷⁸ *Johnson*, 48 F3d at 424.

ment sweeps considerably beyond the *Pickering* Court's concern over the factual variety of public-employment cases that underlay its reluctance to apply the law of defamation across the board in this context.⁷⁹

The effect of rejecting the per se approach is that a public employee cannot be disciplined unless the employer shows actual injury to a legitimate interest that outweighs the interests in the employee's speech.⁸⁰ Even courts that reject the per se approach, however, attach only slight weight to the free speech interests in public employees' recklessly false statements;⁸¹ a showing of actual harm to a legitimate government interest, accordingly, is probably sufficient, as well as necessary, to tip the *Pickering* balance in favor of the public employer.

III. LESSONS FROM THE LAW OF DEFAMATION

Public-employment law is neither the only nor the most significant context in which the Supreme Court has considered the constitutional status of recklessly false statements. Indeed, defamation law provides a wealth of analysis on this subject. Before considering how recklessly false statements should be treated in public-employment cases, it is therefore necessary to examine briefly the constitutional treatment such statements have received in the defamation context.

Any discussion of the Supreme Court's constitutional defamation jurisprudence must begin with *New York Times Co. v. Sullivan*.⁸² This suit involved a common law libel action filed by L.B. Sullivan, a city commissioner of Montgomery, Alabama, against the *New York Times*. Sullivan alleged that an advertisement published in the *New York Times* falsely described police reactions to civil rights protests in Montgomery. Although the advertisement did not mention him by name, Sullivan argued that because he was the commissioner responsible for supervising the police department, the false statements could be read as

⁷⁹ See 391 US at 569. For an evaluation of this argument, see text accompanying notes 137-50.

⁸⁰ See, for example, *Johnson*, 48 F3d at 424; *American Postal Workers*, 830 F2d at 303-04 & nn 10-13; *Brasslett*, 761 F2d at 845-46.

⁸¹ See, for example, *Johnson*, 48 F3d at 426 ("While there is a First Amendment interest in protecting recklessly false statements . . . that interest is certainly very limited."); *Brasslett*, 761 F2d at 840 ("[T]he fact that a statement is recklessly false may well create a presumption that the employee's interest in uttering it is subordinate to the government's interest in suppressing it . . .").

⁸² 376 US 254 (1964).

referring to him and thus constituted defamation. A state court jury awarded Sullivan five hundred thousand dollars in damages, and the Alabama Supreme Court affirmed.⁸³

The United States Supreme Court reversed. The Court acknowledged that the advertisement contained false statements of fact and that the evidence supported a finding that the *New York Times* had negligently failed to discover these misstatements.⁸⁴ However, the Court held that a public official could recover damages for a defamatory falsehood relating to his official conduct only by proving "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁸⁵ Moreover, the Court held that the public official must prove actual malice by clear and convincing evidence.⁸⁶

In *Garrison v Louisiana*, the Court extended the *New York Times* standard to criminal defamation prosecutions as well as civil defamation suits.⁸⁷ Later, *New York Times* was extended once again, to cover defamation suits brought by public figures, as well as those brought by public officials.⁸⁸ The Court defined public figures as those who do not hold public office, but are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."⁸⁹

Two subsequent cases marked the limits of the *New York Times* standard. In *Gertz v Robert Welch, Inc.*, the Supreme Court declined to apply the *New York Times* test to defamation

⁸³ Id at 256-58.

⁸⁴ See id at 287-88.

⁸⁵ Id at 279-80.

⁸⁶ See id at 285-86 ("[T]he proof presented to show actual malice lack[ed] the convincing clarity which the constitutional standard demands . . ."). See also *Gertz v Robert Welch, Inc.*, 418 US 323, 342 (1974) (Public officials or figures "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth").

⁸⁷ 379 US 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. . . . [Moreover,] only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.").

⁸⁸ *Curtis Publishing Co. v Butts*, 388 US 130, 164 (1967) (Warren concurring). Chief Justice Warren was joined by four other Justices on this point. Id at 170 (Black, joined by Douglas, concurring); id at 172 (Brennan, joined by White, concurring). See also *Gertz*, 418 US at 336 ("Although Mr. Justice Harlan announced the result . . . , a majority of the Court [in *Curtis Publishing Co.*] agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.'").

⁸⁹ *Curtis Publishing Co.*, 388 US at 164 (Warren concurring).

actions brought by private plaintiffs.⁹⁰ Instead, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a . . . defamatory falsehood injurious to a private individual."⁹¹ Even in this context, however, the *Gertz* Court did not entirely abandon the *New York Times* standard: although recovery of actual damages could be predicated on a showing of negligent falsehood, the Court held that states could permit recovery of presumed or punitive damages only where liability was "based on a showing of knowledge of falsity or reckless disregard for the truth."⁹²

The Court further limited the *New York Times* standard in *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, a defamation case brought by a construction contractor against a credit reporting agency that had issued a false credit report to the contractor's creditors.⁹³ Although the contractor failed to show that the credit agency's false statements were either knowing or reckless, the Court upheld an award of presumed and punitive damages against the agency.⁹⁴ Relying heavily on *Myers*, the Court held that where false and defamatory statements do not involve matters of public concern, "permitting recovery of presumed and punitive damages . . . absent a showing of 'actual malice' does not violate the First Amendment . . ."⁹⁵

In establishing and refining the constitutional limitations on the law of defamation, *New York Times* and its progeny carefully considered the purpose of the First Amendment, as well as the constitutional value of true, negligently false, and recklessly or knowingly false statements. These cases also thoughtfully examined the potential chilling effects on the free flow of accurate information that might result from penalizing various kinds of false statements.

New York Times and its progeny reveal the fundamental social policies animating the First Amendment. First, free expression about public matters is critically important to democratic self-government.⁹⁶ Free political discussion ensures that govern-

⁹⁰ 418 US 323, 342-43 (1974).

⁹¹ *Id.* at 347.

⁹² *Id.* at 349.

⁹³ 472 US 749, 751-52 (1985).

⁹⁴ *Id.* at 752-53.

⁹⁵ *Id.* at 763.

⁹⁶ See *Garrison*, 379 US at 74-75 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

ment will be responsive to the will of the people, so that change may be obtained by lawful means.⁹⁷ Second, the First Amendment aims at the dissemination of truth, and "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."⁹⁸ Upon these values, as reflected in the First Amendment, rests the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."⁹⁹

Statements of ideas and opinions, as well as accurate statements of fact, well serve the policies underlying the First Amendment and thus merit constitutional protection.¹⁰⁰ The defamation cases are ambivalent, however, about the constitutional value of false but sincerely believed factual statements. Although *Garrison* suggests the "honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech,"¹⁰¹ *Gertz* flatly states that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on public issues.'"¹⁰²

Regardless of whether honest factual errors have any constitutional value, however, such statements are "inevitable in free

⁹⁷ *New York Times*, 376 US at 269 ("The constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"), quoting *Roth v United States*, 354 US 476, 484 (1957).

⁹⁸ *New York Times*, 376 US at 270, quoting *United States v Associated Press*, 52 F Supp 362, 372 (S D NY 1943).

⁹⁹ *New York Times*, 376 US at 270. Accord *Garrison*, 379 US at 75. Compare *Pickering*, 391 US at 573 ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment.").

¹⁰⁰ See, for example, *Garrison*, 379 US at 74 (In the law of defamation, "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."). Of course, truthfulness is not a factor when ideas and opinions are at issue. *Gertz*, 418 US at 339-40 ("Under the First Amendment there is no such thing as a false idea."); *New York Times*, 376 US at 271 ("[C]onstitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"), quoting *NAACP v Button*, 371 US 415, 445 (1963).

¹⁰¹ 379 US at 75. See also *id* at 73 ("[U]tterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."); *New York Times*, 376 US at 279 n 19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"), quoting John Stuart Mill, *On Liberty* 15 (Oxford 1947).

¹⁰² *Gertz*, 418 US at 340, quoting *New York Times*, 376 US at 270. See also *Dun & Bradstreet*, 472 US at 767-69 (White concurring) (arguing that erroneous information frustrates First Amendment values).

debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'¹⁰³ Rules penalizing honest factual errors on a theory of either strict liability or negligence risk deterring true as well as false speech. If public figures could recover damages on such a basis, "would-be critics of official conduct [might] be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."¹⁰⁴

Although negligent falsehoods must be protected to avoid chilling accurate speech, knowingly or recklessly false statements need not be so protected.¹⁰⁵ Such statements fall into the "class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"¹⁰⁶ Accordingly, "the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection."¹⁰⁷

Not only do knowingly or recklessly false statements lack constitutional value, such statements actually undermine those democratic values central to the First Amendment:

At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. . . . [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.¹⁰⁸

¹⁰³ *New York Times*, 376 US at 271-72, quoting *Button*, 371 US at 433. Accord *Gertz*, 418 US at 340-41 ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

¹⁰⁴ *New York Times*, 376 US at 279.

¹⁰⁵ *Garrison*, 379 US at 75; *New York Times*, 376 US at 279-80.

¹⁰⁶ *Garrison*, 379 US at 75, quoting *Chaplinsky v New Hampshire*, 315 US 568, 572 (1942).

¹⁰⁷ *Garrison*, 379 US at 75.

¹⁰⁸ *Id* (citations omitted). As this quotation illustrates, defamation law generally finds no difference—either morally or legally—between recklessly false statements and knowingly false statements.

New York Times and its progeny, then, stand for the following propositions. First, in defamation law, false statements of fact are held to have little or no constitutional value. Although innocent or negligently false statements may have slight value, recklessly false statements are without constitutional value and actually undermine the goals of the First Amendment. Second, in order to prevent chilling constitutionally protected accurate speech, innocent and negligent falsehoods must be protected in some contexts. Third, recklessly false speech need not be protected to avoid chilling constitutionally protected speech, provided recklessness and falsity be proved by clear and convincing evidence. Finally, provided recklessness and falsity be proved in this manner, defamation law permits recovery premised solely on presumed damages.¹⁰⁹

IV. A PROPOSAL

The current confusion among the circuits clearly indicates that *Pickering* and *Myers* do not adequately address the proper degree of protection due public employees' recklessly false statements about matters of public concern. To resolve this confusion, this Comment proposes that courts apply principles from the Supreme Court's well developed body of defamation jurisprudence to public-employment disputes involving statements about matters of public concern that are alleged to be recklessly false. Specifically, the courts should hold that (1) recklessly or knowingly false statements of public employees are per se unprotected by the First Amendment, but (2) the recklessness and falsity of such statements must be proved by clear and convincing evidence.¹¹⁰

This approach would lead to a more coherent public-employment law and a more consistent First Amendment jurisprudence generally. It would also adequately protect the legitimate First Amendment interests in public employees' speech while promoting judicial economy, governmental efficiency, and the rule of law.

¹⁰⁹ For a discussion of the status of presumed damages in the law of defamation, see generally W. Page Keeton, ed, *Prosser and Keeton on the Law of Torts* § 112 at 795-97, § 116A at 842-43 (West 5th ed 1984 & Supp 1988).

¹¹⁰ Under this approach, a public employer could discharge an employee without showing actual harm to a legitimate interest provided either (1) the employee's speech involved no matters of public concern, or (2) it were shown by clear and convincing evidence that the employee's speech was knowingly or recklessly false. Compare note 58.

A. Toward a Coherent Public-Employment Jurisprudence

The suggested approach would promote coherence within the *Pickering-Myers* framework. Under *Myers*, public employees' statements about matters of solely private concern are treated as if they were per se unprotected by the First Amendment.¹¹¹ Courts should treat public employees' recklessly false statements the same way for two reasons.

First, one might argue that recklessly false statements by definition do not constitute matters of public concern. Given the *Garrison* Court's position that such statements are antithetical to "the premises of democratic government,"¹¹² it is possible to maintain, as the Tenth Circuit did in *Wulf v City of Wichita*, that "it is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern."¹¹³ If, as *Wulf* suggests, recklessly false statements do not address matters of public concern, then, under *Myers*, they are effectively per se unprotected by the Constitution.¹¹⁴

Even if this argument be inconclusive, and recklessly false statements cannot fairly be equated with statements dealing with matters of solely private concern, it does not follow that they should receive greater protection than statements about private matters. Rather, there are good reasons recklessly false statements deserve even less protection than private statements. Recklessly false statements have, at best, very little constitutional value;¹¹⁵ more plausibly, they have no constitutional value whatsoever.¹¹⁶ By contrast, while the Court in *Myers* held that statements about matters of merely private concern lack sufficient constitutional protection to justify application of the *Pickering* balancing test, it explicitly acknowledged that such statements have some constitutional value that might be protected, for example, in a defamation suit.¹¹⁷ Since recklessly false statements do not have sufficient constitutional value to be protected in a defamation suit, *Myers* would seem to imply that

¹¹¹ See *Myers*, 461 US at 146-47. See also note 31 and accompanying text.

¹¹² 379 US at 75.

¹¹³ 883 F2d 842, 858-59 n 24 (10th Cir 1989).

¹¹⁴ See note 61.

¹¹⁵ See note 81 and accompanying text.

¹¹⁶ See text accompanying notes 105-08.

¹¹⁷ *Myers*, 461 US at 147. See also text accompanying notes 28-29.

statements about matters of merely private concern have more constitutional value than do recklessly false ones.¹¹⁸

This implication makes good sense in light of the dual First Amendment interests in the speech of public employees.¹¹⁹ On the one hand, the public's interest in hearing what the employee has to say is served neither by recklessly false statements of fact nor by statements of merely private concern. Recklessly false statements contribute neither to the free discussion of public affairs necessary to democratic government nor to the dissemination of truth,¹²⁰ rather, recklessly false statements frustrate both of these goals.¹²¹ Similarly, statements of merely private concern are by definition of little interest to the public. On the other hand, the public employee would seem to have a greater personal interest in speaking about private matters than in making recklessly false statements about matters of public concern.

Given these relative valuations, it would be anomalous to treat speech concerning private matters as per se unprotected in a *Pickering* case, but not to treat recklessly false speech in the same way. Under the *Johnson* approach, where recklessness and falsity are mere factors to consider in applying the *Pickering* balancing test, employee A could be summarily dismissed for an insulting but true statement concerning a matter of merely private concern, while employee B could not even be reprimanded for a reckless and defamatory falsehood about a matter of public concern absent a showing of specific, actual harm to a legitimate government interest. Anomalous as the result appears, however, it is even more peculiar when one realizes that the law of defamation would reach precisely the opposite result, allowing recovery against B, who is immune from reprimand by his employer, but barring recovery against A, who can be fired with impunity. The proposed approach would resolve this anomaly by treating recklessly false statements of fact and statements about matters of merely private concern analogously.

¹¹⁸ Compare *Garrison*, 379 US at 75 (Recklessly false speech falls into one of *Chaplinsky's* narrow and well defined classes of constitutionally valueless expression.), with *Myers*, 461 US at 147 (Speech on purely private matters does not fall into one of *Chaplinsky's* narrow and well defined classes.).

¹¹⁹ See note 1.

¹²⁰ See text accompanying notes 96-99.

¹²¹ See text accompanying note 108.

B. Toward a Consistent Free Speech Jurisprudence

In looking beyond the particular context of public-employment disputes to free speech jurisprudence generally, it is essential to remember two crucial points. First, under *Pickering*, the government as employer has a greater interest in regulating the speech of individuals as employees than the government as sovereign has in regulating the speech of individuals as citizens.¹²² As *Myers* explicitly recognizes, it follows from this premise that the government has a greater interest in regulating the imprudent or potentially disruptive speech of its employees than it has in preventing the defamatory statements of ordinary citizens.¹²³ In taking this position, *Pickering* and *Myers* are on sound practical footing, for there are many instances in which the needs of public employers require restrictions on employee speech that would be intolerable if applied to citizens generally. For example, national security interests would justify the discharge of an employee who made true public statements that revealed classified, sensitive information—especially if that information compromised the security of American soldiers or intelligence agents stationed abroad.¹²⁴ To allow the punishment of true statements under the law of defamation, however, would be intolerable.¹²⁵ In other situations, government interests would justify the discipline of public employees who make negligently false statements. For example, a police department could legitimately reprimand a police officer for carelessly filing false charges against an innocent individual, even if that individual were a public figure.¹²⁶ By contrast, to allow public figures to recover damages for defamation from private citizens who falsely but negligently accused them of crimes would dangerously chill public discourse.¹²⁷

¹²² See 391 US at 568. Accord *Waters v Churchill*, 114 S Ct 1878, 1886-88 (1994) (plurality opinion). See also note 17.

¹²³ See *Myers*, 461 US at 147 ("For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.").

¹²⁴ Compare *Pickering*, 391 US at 570 n 3, quoted in note 21.

¹²⁵ See *Garrison*, 379 US at 74.

¹²⁶ Compare *Neubauer v City of McAllen*, 766 F2d 1567, 1580 (5th Cir 1985) ("[T]he Constitution does not prevent the discharge of police officers for negligently misrepresenting material facts in making reports to their superiors on matters which directly pertain to the functioning or business of the police force and which the reporting officer observed in the course of his duties."); *Pickering*, 391 US at 572, quoted in note 21.

¹²⁷ See text accompanying notes 103-04.

Second, the Supreme Court's defamation cases have found recklessly false statements lacking in social value, dangerous to democratic self-government, and per se unprotected by the Constitution.¹²⁸ Moreover, defamation cases have given careful attention to the relative First Amendment value of truthful statements, negligent falsehoods, and reckless falsehoods. The *Pickering-Myers* public-employment cases have not.¹²⁹

Given first, the conclusion of *Myers* that the government has a greater interest in regulating the imprudent or potentially disruptive speech of its employees than it has in preventing the defamatory statements of ordinary citizens, and second, the well considered position of the defamation cases that recklessly false statements are per se unprotected by the Constitution, it is difficult to escape the conclusion that the recklessly false statements of public employees should be per se unprotected by the First Amendment. Although the true statements of public employees may have special value due to the employees' unique access to certain types of information, surely reckless falsehoods do not become socially valuable merely because they are uttered by public employees rather than private citizens. Moreover, the dangers reckless falsehoods pose to the democratic process appear greater in the public-employment context than in defamation law generally, given the special trust and responsibility held by many public employees. Not only do such employees appear to have access to information unavailable to the general public, they may also be in a position to benefit personally from falsehoods used to "unseat the public servant or even topple an administration."¹³⁰

To maintain, as *Johnson* and similar cases do, that the recklessly false statements of public employees are sometimes protected by the First Amendment creates the anomalous possibility that absent a specific showing of actual harm, a public employer might be unable even to reprimand an employee for making a recklessly false statement about a colleague that, under the law of defamation, would support an action for libel. Given clear and convincing evidence that the statement was recklessly false, an action for defamation would lie, even if the colleague were a

¹²⁸ *Garrison*, 379 US at 75; *Gertz*, 418 US at 340.

¹²⁹ Nothing in any of the *Pickering-Myers* cases compares to the thoughtful analysis in *New York Times*, 376 US at 269-72; *Gertz*, 418 US at 339-41; and *Garrison*, 379 US at 73-75.

¹³⁰ *Garrison*, 379 US at 75.

public figure.¹³¹ And provided the statement were recklessly false, damages could be presumed, even though no actual harm were shown.¹³² Under the reasoning in *Johnson*, however, the employee could not even be reprimanded for the defamatory statements. Absent a showing of actual harm, the employee's free speech interest would dominate the *Pickering* balance.¹³³ This anomaly seems intolerable given that the government has a greater interest in regulating the speech of its employees than in regulating the speech of citizens sued for defamation.

Adopting the standards of defamation law in the context of public employment would not only eliminate the anomaly described above, it would also decrease confusion and promote consistency generally within First Amendment jurisprudence.¹³⁴ Beginning with *Pickering*, the public-employment cases have regularly cited cases from the Supreme Court's defamation jurisprudence.¹³⁵ Moreover, the Supreme Court's defamation cases sometimes cite cases from the *Pickering* line.¹³⁶ Given the licentiousness of this relationship, a formal union of these artificially discrete lines of authority would well serve the interests of consistency and clarity.

Two specific objections have been made to this proposed merger. First, *Johnson* and *American Postal Workers* suggest that the government's interest in protecting the reputation of individuals justifies greater speech restrictions in defamation cases than may be applied in public-employment cases, where this interest is lacking.¹³⁷ Second, the Court in *Pickering* expressed a reluctance to adopt wholesale the principles of defamation law within the public-employment context, given the great variety of factual settings in which public-employment disputes arise.¹³⁸

The gentle response to the first objection is that these cases fail to identify accurately the government interest involved in

¹³¹ See *New York Times*, 376 US at 279-80.

¹³² See *Gertz*, 418 US at 349.

¹³³ See *Johnson*, 48 F3d at 424.

¹³⁴ See, for example, *American Postal Workers*, 830 F2d at 324 n 3 (Bork dissenting) ("[A]n analogy between public employee speech and libelous speech is both necessary to a consistent first amendment jurisprudence and permitted by the case law. The Supreme Court routinely analyzes first amendment issues by examining cases involving the first amendment in various legal contexts.").

¹³⁵ See, for example, *Pickering*, 391 US at 573 (citing *New York Times* and *Garrison*); *Myers*, 461 US at 145 (citing *Garrison*); *Rankin v McPherson*, 483 US 378, 387 (1987) (citing *New York Times*).

¹³⁶ See, for example, *Dun & Bradstreet*, 472 US at 760-61 (citing *Myers*).

¹³⁷ See text accompanying notes 75-79.

¹³⁸ *Pickering*, 391 US at 574, quoted in text accompanying note 20.

public-employment cases. The interest is not, despite the court's facile assertion in *American Postal Workers*, in maintaining the government's "public image."¹³⁹ Rather it is the powerful interest the government has in allowing its agencies to efficiently carry out the duties they are required by law to perform.¹⁴⁰ Reckless falsehoods frequently undermine this interest,¹⁴¹ even though actual harm may be difficult to establish.¹⁴²

A more telling response, however, is that *Johnson* and *American Postal Workers* turn *Pickering* and *Myers* on their heads. The latter cases, after all, hold that government has a *greater* interest in regulating the speech of its public employees than it has in regulating the speech of its private citizens. Accordingly, under *Myers*, public employees can be dismissed without any showing of harm for making true private statements that their public employers consider objectionable.¹⁴³ And, under *Pickering*, public employees can be dismissed for making true statements about matters of public concern, provided the government establish actual harm sufficient to outweigh the employees' free speech interests.¹⁴⁴ In neither case would an action lie for defamation.¹⁴⁵

Moreover, *Johnson*, *Brasslett*, and *American Postal Workers* all suggest that the free speech interests in a public employee's recklessly false statements would be outweighed by any showing of harm to a legitimate government interest.¹⁴⁶ By taking this position, these cases concede both the negligible weight of the First Amendment interests in public employees' reckless false-

¹³⁹ 830 F2d at 309. Even this interest is not without significance. *Rankin*, 483 US at 400 (Scalia dissenting) ("A public employer has a strong interest in preserving its reputation with the public.").

¹⁴⁰ *Pickering*, 391 US at 568.

¹⁴¹ Compare Bork's dissent in *American Postal Workers*:

The majority apparently believes that under *Pickering* and *Connick v Myers* the analysis is different in government employee discharge cases from that appropriate in defamation cases. There is no reason whatever why that should be so. Just as we do not allow writers freely to defame others by surrounding the defamation with political discussion, we cannot allow employees freely to damage and disrupt government agencies by surrounding their falsehoods with political remarks.

830 F2d at 324 n 3 (Bork dissenting).

¹⁴² *Id* at 327 ("[M]any injuries that everyone would agree do occur are provable, if at all, only with a difficulty disproportionate to the proof's usefulness.").

¹⁴³ 461 US at 146-47.

¹⁴⁴ 391 US at 570 n 3.

¹⁴⁵ See *Garrison*, 379 US at 74.

¹⁴⁶ See note 81 and accompanying text.

hoods and the compelling nature of the countervailing government interests.

Given the relative strength of the competing interests, it would seem reasonable to follow the lead of defamation law and allow the government to presume harm to its legitimate interests whenever a public employee makes a statement that is knowingly or recklessly false.¹⁴⁷ For, at the very least, the government has an obvious and independent interest in curtailing deliberate and reckless falsehoods by its employees.¹⁴⁸

Finally, *Johnson* and *American Postal Workers* misread the Court's treatment of recklessly false statements in the context of defamation law. The defamation cases do not hold that the First Amendment interest in protecting recklessly false statements is outweighed by the countervailing state interest in protecting the reputation of individuals; rather they hold that *no* First Amendment interest in protecting recklessly false statements exists, and thus no countervailing government interest is necessary to justify suppressing such speech.¹⁴⁹ A careful reading reveals that the *Gertz* Court's purpose in invoking the countervailing state interest in protecting the reputation of individuals is not to justify penalizing recklessly false statements at all, but rather to justify extending liability to falsehoods that are merely negligent.¹⁵⁰

The second objection, that the factual variety of public-employment cases precludes the adoption of categorical rules from defamation law, is more easily answered. It must be emphasized, first, that *Pickering's* reluctance to equate public-employment and defamation law arose less from the concern that public employees' recklessly false speech should sometimes be protected than from the belief that public employers should in some circumstances be free to discipline employees for true or negligently false statements.¹⁵¹

¹⁴⁷ See *Gertz*, 418 US at 349 (damages may be presumed from recklessly false defamatory statements). Compare *American Postal Workers*, 830 F2d at 329 (Bork dissenting) ("In the context of both libel and public employment cases 'evidence' of harm has been taken to mean proof of the damaging nature of the statement and its circulation.").

¹⁴⁸ See *Hanneman v Breier*, 528 F2d 750, 755 (7th Cir 1976) (recognizing government interest in preventing public employee's publication of false and derogatory statements); *Brasslett*, 761 F2d at 839 (same); *Garrison*, 379 US at 75 (arguing that reckless falsehoods undermine the democratic process).

¹⁴⁹ *Gertz*, 418 US at 340 ("[T]here is no constitutional value in false statements of fact."); *Garrison*, 379 US at 75 ("[T]he false statement made with reckless disregard of the truth[] do[es] not enjoy constitutional protection.").

¹⁵⁰ See *Gertz*, 418 US at 341-43.

¹⁵¹ Compare note 21 with text accompanying note 22.

In any event, the admittedly wide variety of factual settings in which public-employment cases arise should not prevent adoption of a rule holding public employees' recklessly false statements per se unprotected by the First Amendment. Similarly wide varieties of factual settings exist in many other areas of the law. Factual variety, standing alone, may suggest caution in adopting generally applicable rules, but it should not dictate that rules never be fashioned at all. The lack of clear rules provokes litigation and confusion, which generally continue until the law becomes more certain.

Moreover, nearly thirty years have passed since *Pickering* was decided. In 1968 the law of defamation was extremely fluid and controversial, and it is not difficult to imagine the Court's reluctance to adopt in public-employment cases principles from an unsettled body of law.¹⁵² In 1996, however, defamation law's treatment of recklessly false statements dealing with matters of public concern is relatively settled. Also, since *Pickering*, decisions like *Gertz* have thoughtfully examined the relative constitutional value of truthful, negligently false, and recklessly false statements. These decisions are now available to guide the courts in the *Pickering-Myers* context.

Finally, both the lower courts and the Supreme Court itself have faced numerous public-employment cases since *Pickering*. Despite the factual variety of these cases, the courts have rarely if ever found it necessary to extend constitutional protection to public employees' recklessly false statements.¹⁵³ After twenty-

¹⁵² See, for example, the Court's fractured opinions in *Curtis Publishing Co. v Butts*, 388 US 130 (1967); and *Rosenbloom v Metromedia, Inc.*, 403 US 29 (1971). Compare Justice Blackmun's concurrence in *Gertz*:

The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position . . . If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount.

418 US at 354 (Blackmun concurring).

¹⁵³ See *Pickering*, 391 US at 574 (School board failed to show plaintiff's statements were knowingly or recklessly false.); *Johnson*, 48 F3d at 427 ("On the state of the record, therefore, we cannot find as a matter of law that Johnson's allegations were false or reckless."); *American Postal Workers*, 830 F2d at 306 (Employee's speech did not constitute "false statements of fact."); *Brasslett*, 761 F2d at 843-44 ("[T]he trial judge, in finding that the plaintiff knowingly or recklessly made false statements . . . impermissibly indulged in every conceivable inference against the plaintiff."); *Moore*, 877 F2d at 376 (City failed to show plaintiff's statements were knowingly or recklessly false.). But compare *Donovan v Reinbold*, 433 F2d 738, 742 (9th Cir 1970) ("Assuming, *arguendo*, that the statements

eight years, several Supreme Court decisions, and numerous lower court cases, it seems safe to say that the courts have gathered sufficient information about public-employment disputes to justify acceptance of a general rule holding recklessly false statements per se unprotected by the First Amendment. Such a rule, applied consistently throughout the sphere of free speech jurisprudence, would alleviate the confusion readily apparent in the conflicting circuit decisions, and would provide useful guidance to courts, government employers, and public employees.

C. Final Policy Considerations

The final argument made against the per se approach asserts that although the recklessly false speech of public employees has no constitutional value, the accurate speech of such employees about matters of public concern has great First Amendment value, given their special access to information highly relevant to debate on public issues.¹⁵⁴ Because erroneous statements are inevitable in free debate and must be protected if the freedoms of expression are to have the breathing space they need to survive, constitutional protection must be afforded to some false statements. Accordingly, the argument goes, courts must provide recklessly false statements some protection to avoid chilling the flow of accurate information from public employees who are unsure whether they have accumulated a legally sufficient factual basis for speaking.¹⁵⁵

Protecting recklessly false statements, however, is unnecessary to avoid chilling accurate speech, provided recklessness and falsity must be proved by clear and convincing evidence. The defamation cases have given searching and thorough consideration to the amount of breathing space necessary to protect accu-

were both false and libelous, [they] nevertheless fell within the protection of the First Amendment." See also note 63.

¹⁵⁴ See *Pickering*, 391 US at 572; *Johnson*, 48 F3d at 424. The argument focuses not on the public employee's personal free speech interest, but rather on the public's interest in hearing what government employees have to say. Certainly a public employee's personal interest in free speech is not greater than that of private citizens generally. Instead, the argument appears tacitly to assume that the public has a greater interest in the speech of public employees—because of their special access to important information—than it has in the speech of citizens generally. Even if this dubious proposition were true, it would apply only to the truthful speech of such employees. By the same reasoning, however, the reckless falsehoods of such employees would be more insidious than the reckless falsehoods of private citizens generally, and the government would have a correspondingly greater interest in curtailing such speech. See text accompanying note 130.

¹⁵⁵ *Johnson*, 48 F3d at 424.

rate speech, while the *Pickering-Myers* cases do little but cite defamation cases for the proposition that some false speech must be protected if accurate speech is to be uninhibited.¹⁵⁶ The defamation cases have required that recklessness and falsity be proved by clear and convincing evidence,¹⁵⁷ and have held that negligently false speech must frequently be protected if accurate speech is to be undeterred.¹⁵⁸ As long as these two conditions are met, however, the defamation cases have consistently held that recklessly false speech need not be protected to prevent the chilling of accurate speech.¹⁵⁹ It is difficult to see why the same rule would not adequately protect the First Amendment interests in the speech of public employees.

It must also be emphasized that only false statements of fact are unprotected: "Under the First Amendment there is no such thing as a false idea."¹⁶⁰ Accordingly, the per se approach would not affect the First Amendment protection given public employees' expression of opinions and beliefs.

Moreover, the circuit courts have generally been hesitant to find recklessly false statements of fact in public employees' speech, sometimes going to great lengths to avoid doing so. In *American Postal Workers*, for example, Joseph Gordon, a postal employee, published an article in a union newsletter in which he stated he had read the contents of a "right to work" mailing during his sorting duties.¹⁶¹ When questioned by the Postal Service, Gordon admitted he had fabricated this statement for dramatic effect.¹⁶² The Postal Service discharged Gordon, on the grounds that he had either flaunted breaking the law or published a knowing falsehood, either of which would undermine public confidence in the integrity of the mails.¹⁶³ The D.C. Circuit, however, held that "Gordon did not intend to convey to his readers 'false statements of fact.' Rather, he wrote a fictional account of how he encountered the [] 'right to work' petition in an attempt 'to show the irony of the labor force . . . handling mail

¹⁵⁶ Compare *New York Times*, 376 US at 269-72; *Garrison*, 379 US at 73-75; and *Gertz*, 418 US at 339-41, with *Pickering*, 391 US at 573 (citing *New York Times*); and *Johnson*, 48 F3d at 424 (citing *Gertz* and *New York Times*).

¹⁵⁷ See note 86 and accompanying text.

¹⁵⁸ See notes 103-04 and accompanying text.

¹⁵⁹ See, for example, *Garrison*, 379 US at 73-75; *Gertz*, 418 US at 339-41. See also text accompanying notes 105-08.

¹⁶⁰ *Gertz*, 418 US at 339.

¹⁶¹ 830 F2d at 297.

¹⁶² The employee also published a retraction in the next month's newsletter. Id at 298.

¹⁶³ See id at 298-99.

such as this.” Gordon’s speech, accordingly, constituted “narrative fiction,” and was protected by the First Amendment.¹⁶⁴ This case illustrates well the courts’ reluctance to find public employees’ statements recklessly false, even absent the clear and convincing standard of proof. This reluctance suggests the fear that refusing to protect reckless falsehoods would chill public employees’ speech may be more imagined than real. To the extent this fear is legitimate, however, it should be adequately protected by the heightened evidentiary standard.

In addition to protecting the legitimate First Amendment interests in public employees’ accurate statements regarding matters of public concern, this Comment’s proposal would promote governmental efficiency and judicial economy.¹⁶⁵ Establishing a clear rule that excludes recklessly false statements from the *Pickering* balancing test would increase the ability of public employers to discipline employees for statements that are obviously both false and reckless without requiring intrusive judicial oversight. In those close cases that go to court, the court’s focus would shift away from an attempt to balance elusive interests and indefinite harms toward a determination of whether the employee’s statement was false, and if so, whether the statement was made with reckless disregard for the truth. The first inquiry is a simple question of fact, of the sort the courts are well equipped to answer; although the latter inquiry is not without difficulties, the courts have extensive experience in determining mens rea in criminal and other contexts. Moreover, by clarifying the respective rights of public employers and employees, the proposal would promote predictability and the rule of law, thereby reducing the possibility of arbitrary decisions while increasing the ability of both employers and employees to make and execute speech and employment decisions efficiently.

CONCLUSION

It is time to answer the question left open in *Pickering v Board of Education* nearly thirty years ago. The recklessly false statements of public employees should be held per se unprotected

¹⁶⁴ Id at 306. The court compared the employee’s “narrative fiction” to political satire such as “Swift’s *Gulliver’s Travels*, . . . [and] Garry Trudeau’s daily *Doonesbury* comic strip.” Id.

¹⁶⁵ The Supreme Court has emphasized the importance of governmental efficiency and judicial economy in the public-employment context. See, for example, *Myers*, 461 US at 146-47; *Waters v Churchill*, 114 S Ct 1878, 1888 (1994) (plurality opinion).

by the Constitution, provided the statements be shown both reckless and false by clear and convincing evidence. This approach would promote consistency both within the specific framework of *Pickering-Myers* public-employment disputes and within the larger context of free speech jurisprudence. It would also adequately safeguard the legitimate First Amendment interests in the free speech of public employees while promoting governmental efficiency, judicial economy, and the rule of law.

