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THESIS

**SOCIAL MEDIA SCREENING
OF HOMELAND SECURITY JOB APPLICANTS AND
THE IMPLICATIONS ON FREE SPEECH RIGHTS**

by

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March 2019

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**SOCIAL MEDIA SCREENING OF HOMELAND SECURITY JOB APPLICANTS
AND THE IMPLICATIONS ON FREE SPEECH RIGHTS**

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ABSTRACT

Social media screening of homeland security job applicants may infringe on their free-speech rights, which diminishes homeland security agencies as defenders of the law and hampers their recruitment efforts. When homeland security employers screen the social media of job applicants, what are the free-speech rights of those applicants, and do existing social-media screening policies support or undermine applicants' free-speech rights? Content analysis of existing case law reveals no established precedent for the free-speech rights of government job applicants. Legal and social science analysis indicates applicants should enjoy the full First Amendment protections of private citizens and not be subject to the same limitations placed on public employees. Publicly available social media screening policies have elements that may chill free speech by encouraging applicants to self-restrict social media activity. Homeland security agencies should be aware that social media screening may impair the free-speech rights of job applicants, notify applicants when they will screen social media profiles, provide clear guidance on what speech is considered disqualifying, and avoid suggesting that social media screening is used to perpetuate the existing agency culture.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACLU	American Civil Liberties Union
ADA	Americans with Disabilities Act
COPA	Child Online Protection Act
EMT	emergency medical technician
FDNY	New York City Fire Department
FLETC	Federal Law Enforcement Training Centers
IACP	International Association of Chiefs of Police
MPD	Metropolitan Police Department, District of Columbia
SMS	social media screening

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EXECUTIVE SUMMARY

Homeland security employers (e.g., police departments, fire departments, and federal agencies) that engage in social media screening (SMS) of their job applicants should be aware of the risk of infringing on the applicants' free-speech rights and take steps to mitigate that risk. The law on free-speech protections for homeland security job applicants is not established though the need for it is becoming increasingly important, as social media provides an expansive and permanently documented platform for examining individual speech. Without clear jurisprudence, homeland security employers may inadvertently pressure applicants to self-restrict their speech.

Increasingly, homeland security background investigations include applicants' social media history, whereby employers look for inflammatory statements or behavior indicating the potential for future misbehavior. As of 2016, Career Builder reported that 60 percent of employers engage in SMS, and the International Association of Chiefs of Police reported that 58 percent of police departments use SMS.¹ Homeland security employers, particularly, must screen unfit applicants due to the sensitive nature of their operations and the public-facing nature of their employees.² However, homeland security employers should also consider the possible costs of SMS, including infringing on the free-speech rights of job applicants.

The infringement of the free-speech rights of homeland security job applicants is not a theoretical problem and has practical implications for homeland security employers. First, homeland security employers should serve as leaders in protecting all rights including free speech. Many homeland security employers recognize this responsibility. For

¹ Lauren Salm, "70 Percent of Employers Are Snooping Candidates' Social Media Profiles," Career Builder, June 15, 2017, <https://www.careerbuilder.com/advice/social-media-survey-2017>; and International Association of Chiefs of Police, "Social Media Survey" (Alexandria, VA: Center for Social Media, 2010), <http://www.iacpsocialmedia.org/wp-content/uploads/2017/01/Survey-Results-Document.pdf>.

² David Bradford, "Police Officer Candidate Background Investigation: Law Enforcement Management's Most Effective Tool for Employing the Most Qualified Candidate," *Public Personnel Management* 27, no. 4 (December 1998): 423, <https://doi.org/10.1177/009102609802700401>; and Matthew Tobia, "The Importance of Fire Department Background Investigations," *Fire Rescue Magazine*, April 28, 2013, <http://www.firerescuemagazine.com/articles/print/volume-8/issue-6/management-and-leadership/the-importance-of-fire-department-background-investigations.html>.

example, the Federal Bureau of Investigation’s mission statement includes the obligation to “protect civil rights” and its core value of “rigorous obedience to the Constitution of the United States.”³ If homeland security employers disregard the risk that SMS diminishes civil rights, they are hampering their mission while attempting to achieve it.

Second, SMS can hinder recruitment and diversification efforts by homeland security employers. Police departments are already facing a recruitment challenge, as documented in RAND’s 2010 report *Police Recruitment and Retention for the New Millennium*, which documents the inflow and outflow dynamics that challenge departments in fully staffing their ranks.⁴ In the context of this recruiting challenge, SMS of applicants may dissuade some individuals from applying for homeland security jobs. For example, the local media in Cleveland reports, “Many blacks cite stigma and cop culture [and] avoid police recruiters.”⁵ If candidates have posted to a Black Lives Matter group or “liked” such a group on Facebook, they may doubt their ability to be hired by a police agency. Homeland security employers should take this possibility seriously and work to protect applicants’ free-speech rights to encourage recruitment efforts.

To evaluate whether SMS harms the free-speech rights of homeland security job applicants, this thesis considers two research questions: When homeland security employers screen the social media of job applicants, what are the free-speech rights of those applicants, and do publicly available social-media screening policies of homeland security employers support or undermine applicants’ free-speech rights?

To answer these research questions, this thesis proceeds in five steps. First, it provides background on the constitutional right to free speech, with a focus on the rights of government employees. The First Amendment provides for the right to speak freely

³ “Mission & Priorities,” Federal Bureau of Investigation, accessed December 3, 2018, <https://www.fbi.gov/about/mission>.

⁴ Jeremy M. Wilson et al., *Police Recruitment and Retention for the New Millennium* (Santa Monica, CA: RAND, 2010), https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG959.pdf.

⁵ Phil Trexler and Tom Meyer, “Many Blacks Cite Stigma and Cop Culture, Avoid Police Recruiters,” WKYC, May 9, 2018, <https://www.wkyc.com/article/news/investigations/many-blacks-cite-stigma-and-cop-culture-avoid-police-recruiters/95-550249949>.

without government interference.⁶ Case law affirms that private citizens have the broadest protections for speech.⁷ However, courts have approved limitations on public employees, whose speech is protected only when the employee speaks “as a private citizen” about “a matter of public concern,” and the speaker’s interest in exercising their right to free speech is greater than the interest of the public employer in effective operations.⁸ Courts have continued to use this jurisprudence in the internet age, applying it to disputes around Facebook likes and social media policies.⁹

Second, this thesis presents a content analysis of existing case law to confirm there is no established precedent for the free-speech rights of government job applicants. In content analysis, the researcher analyzes a body of human communications for patterns to answer a research question.¹⁰ Here, the LexisNexis database—which includes over 180 million federal and state court cases—served as the body of communications. After sorting for those cases most likely to establish a rule on the free-speech rights of government job applicants, 192 cases were reviewed. The vast majority of those cases were unrelated to free-speech rights of job applicants. The few that were related were distinguishable and did not specifically establish the free-speech rights of public job applicants.

Third, this thesis evaluates legal arguments and concludes that applicants should enjoy the full First Amendment protections of private citizens and not be subject to the limitations placed on public employees. Analysis of existing jurisprudence for incumbent public employees to homeland security job applicants indicates applicants should be treated as private citizens.¹¹ Analogous case law on free speech—such as precedents on loyalty oaths and unconstitutional conditions of employment—indicates that homeland security

⁶ U.S. Const. amend. I; and *United States v. Stanley*, 109 U.S. 3, 11 (1883).

⁷ *Texas v. Johnson*, 491 U.S. 397 (1989).

⁸ *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁹ *Bland v. Roberts*, 730 F.3d 368 (2013); and *Liverman v. City of Petersburg*, 844 F.3d 400 (2016).

¹⁰ Paul Leedy and Jeanne Ellis Ormrod, *Practical Research: Planning and Design* (New York: Pearson, 2016), 257.

¹¹ *Pickering*, 391 U.S. 563; *Garcetti*, 547 U.S. 410; and *Connick*, 461 U.S. 138.

job applicants would suffer various forms of government pressure to self-restrict their speech.¹² Furthermore, counter-arguments in favor of restricting the speech of applicants—such as a rule that fear of having one’s speech restricted is insufficient to create standing to sue—can be distinguished as not addressing the specific concerns of homeland security job applicants.¹³

Fourth, this thesis evaluates social science arguments and concludes that ethical, economic, and sociological theories support protecting homeland security job applicants’ free-speech rights. Ethical arguments for SMS are countered by homeland security employers’ responsibility to serve as role models and to consider the efficiency of SMS in a larger context.¹⁴ Economic theories indicate SMS is unjustified because of the lack of an opportunity for applicants to develop a contractual employer–applicant relationship and the factors in a cost–benefit formula argue against regulating applicant speech.¹⁵ Sociological research indicates that applicants may alter their social media profiles to fulfill perceived employer desires and that homeland security employers risk groupthink by unconsciously selecting applicants whose social-media profiles match their views.¹⁶

¹² *Elfbrandt v. Russell*, 384 U.S. 11 (1966); and Kathleen M. Sullivan, “Unconstitutional Conditions,” *Harvard Law Review* 102 (May 1989): 1415, <https://doi.org/10.2307/1341337>.

¹³ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013).

¹⁴ Harald Schmidt, Kristin Voigt, and Ezekiel J. Emanuel, “The Ethics of Not Hiring Smokers,” *New England Journal of Medicine* 368, no. 15 (April 2013): 1369–71, <https://www.nejm.org/doi/pdf/10.1056/NEJMp1301951>; and Mark V. Roehling, “Weight Discrimination in the American Workplace: Ethical Issues and Analysis,” *Journal of Business Ethics* 40, no. 2 (October 2002): 183, <https://doi.org/10.1023/a:1020347305736>.

¹⁵ Bruce Barry, *Speechless: The Erosion of Free Expression in the American Workplace* (San Francisco: Berrett-Koehler Publishers, 2007), 214, <http://ebookcentral.proquest.com/lib/ebook-nps/detail.action?docID=322124>; Robert C. Bird, “Employment as a Relational Contract,” *Journal of Business Law* 8, no. 1 (2005): 149, <https://www.law.upenn.edu/journals/jbl/articles/volume8/issue1/Bird8U.Pa.J.Lab.&Emp.L.149%282005%29.pdf>; and Richard Posner, “Free Speech in an Economic Perspective,” *Suffolk University Law Review* 20, no. 1 (1986): 8, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2897&context=journal_articles.

¹⁶ Mark Leary and Robin Kowalski, “Impression Management: A Literature Review and Two-Component Model,” *Psychological Bulletin* 107, no. 1 (January 1990): 39, <http://dx.doi.org/10.1037/0033-2909.107.1.34>; Julie Wade and Phil Roth, “Social Media and Personnel Selection: How Does New Technology Change an Old Game?,” in *Proceedings of the 36th International Conference on Information Systems: Exploring the Information Frontier*, ed. Traci Carte, Armin Heinzl, and Cathy Urquhart (Atlanta: Association for Information Systems, 2015), 2, <https://pdfs.semanticscholar.org/0cfa/0ec9c04baba52a70c98ba35c8931ef697537.pdf>; and James E. Ricciuti, “Groupthink: A Significant Threat to the Homeland Security of the United States” (master’s thesis, Naval Postgraduate School, 2009), 40, <https://www.hsd1.org/?abstract&did=762428>.

Fifth, this thesis analyzes two publicly available policy documents related to the SMS of homeland security job applicants: the Washington, D.C., Metropolitan Police Department’s social media policy for applicants and the International Association of Chiefs of Police’s guidance on how to appropriately engage in SMS.¹⁷ Both documents take some steps toward protecting free-speech rights for homeland security job applicants, such as encouraging or requiring efforts to inform applicants of the SMS process and give applicants the opportunity to explain potentially problematic speech. However, many aspects of the documents increase the risks to applicant free-speech: the documents are vague as to what types of speech are unacceptable, they encourage applicants to self-restrict their speech, and they seek to perpetuate the existing law enforcement culture.

Given this background and analysis, this thesis outlines steps homeland security employers should take to protect the rights of their job applicants, possible future research, and potential legal action. Homeland security employers can take affirmative steps such as providing clear notice about SMS and providing examples of disqualifying speech. Also, homeland security employers can take preventative steps—such as carefully wording their recruitment materials—to avoid implying SMS will serve as enforcement of a speech code and resisting the temptation to evaluate applicant social media activity as if it were the activity of incumbent employees. Future research could explore the social construct of social media. For example, as social media continue to proliferate, do people view it as becoming more serious and due more protections or less serious and due fewer protections? Future legal action—possibly sponsored by a free-speech rights advocacy group such as the American Civil Liberties Union—could provide the opportunity for judicial resolution of the question of the level of speech protections to which applicants are entitled.

Homeland security employers must recruit the best talent to fulfill their missions, and social media screening provides additional and unique information when engaging in background investigations. However, unlike traditional background investigation

¹⁷ Metropolitan Police Department of the District of Columbia, *Social Media Checks for Background Investigations*, SO-16-06 (Washington, DC: Metropolitan Police Department, June 3, 2016), https://go.mpdonline.com/GO/SO_16_06.pdf; and Andrée Rose et al., *Developing a Cybervetting Policy for Law Enforcement* (Alexandria, VA: International Association of Chiefs of Police, December 2010), <http://www.iaacsocialmedia.org/wp-content/uploads/2017/02/CybervettingReport-2.pdf>.

techniques, social media screening includes the possibility that homeland security employers will infringe on the free-speech rights of their applicants. Homeland security employers should recognize these rights, acknowledge the risk that social media screening may affect these rights, and take steps to minimize the effects of social media screening on these rights.

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I. INTRODUCTION

In March 2013, the *New York Post* discovered racist, misogynistic, and anti-Semitic tweets by Joe Cassano, an emergency medical technician (EMT) with the New York City Fire Department (FDNY).¹ The *New York Post* article revealed Cassano had suggested that “MLK could go kick rocks,” proposed forcing all women to have breast-enhancement surgery, and explained that he “liked Jews about as much as Hitler.”² After the revelations, Cassano was forced to resign, ending a brief and ugly career with the FDNY.

That is, until December 2017 when the FDNY hired Cassano as a firefighter.³ While working as an EMT, Cassano had separately applied for the rank of firefighter.⁴ That application proceeded on its own timeline, including a written exam, physical exam, and background investigation.⁵ After he passed these steps, the FDNY re-hired Cassano.⁶ The outrage was swift, including a rally at city hall with members of the city council, the National Association of Colored People, and the FDNY Vulcans—the department’s black firefighter fraternal group.⁷

The *New York Post* provided a free service for which many employers have spent time and resources: social media screening (SMS) of applicants’ social media history. Employees with a history of controversial social media can spark protests and lawsuits, especially in the current environment of racial unrest and revelations of sexual harassment. Technology has developed to expose these proclivities and screen for them. However, free-

¹ David Seifman, “EMT Son of FDNY Commish Resigns after Vile, Racist Twitter Rant,” *New York Post*, March 18, 2013, <https://nypost.com/2013/03/18/emt-son-of-fdny-commish-resigns-after-vile-racist-twitter-rant/>.

² Seifman.

³ Seifman, “EMT Son of FDNY Commish Resigns”; and Susan Edelman and Linda Massarella, “Hateful Son of Ex-FDNY Commish Hired as City Firefighter,” *New York Post*, December 20, 2017, <https://nypost.com/2017/12/02/hateful-son-of-ex-fdny-commish-hired-as-city-firefighter/>.

⁴ Edelman and Massarella, “Hateful Son of Ex-FDNY Commish.”

⁵ Edelman and Massarella.

⁶ Edelman and Massarella.

⁷ Edelman and Massarella.

speech jurisprudence has not kept pace with technological progress, leaving homeland security job applicants exposed to the potential that SMS will infringe on their free-speech rights.

A. PROBLEM STATEMENT

Homeland security employers (e.g., police departments, fire departments, and federal agencies) that screen the social media of their job applicants should be aware of the risk of infringing on the applicants' free-speech rights and take steps to mitigate that risk. The law on free-speech protections for homeland security job applicants is not established and is becoming increasingly important, as social media provide an expansive and permanently documented platform for individual speech. The law on free-speech restrictions for public employees is well established with ample case law governing incumbent employees. However, a case law review indicates no precedent regarding homeland security job applicants.

Applicants' free-speech rights may be affected when homeland security employers conduct background investigations before hiring. Such investigations include background checks for criminal records, drug use, and integrity. Increasingly, the investigations include the applicants' social media history, whereby employers look for inflammatory statements or behavior indicating the potential for future misbehavior. As of 2016, Career Builder reported that 60 percent of employers engage in SMS, and the International Association of Chiefs of Police reported that 58 percent of police departments use SMS.⁸

According to Diane Arthur, employers use background checks to “predict acceptable or unacceptable on-the-job behavior, allow employers to identify potentially unfit workers, and flush out factors that could prove detrimental on the job.”⁹ In general, William Woska notes employers have a “special duty . . . to investigate the prospective

⁸ Lauren Salm, “70 Percent of Employers Are Snooping Candidates’ Social Media Profiles,” Career Builder, June 15, 2017, <https://www.careerbuilder.com/advice/social-media-survey-2017>; and International Association of Chiefs of Police, “Social Media Survey” (Alexandria, VA: Center for Social Media, 2010), <http://www.iacpsocialmedia.org/wp-content/uploads/2017/01/Survey-Results-Document.pdf>.

⁹ Diane Arthur, *Recruiting, Interviewing, Selecting & Orienting New Employees* (New York: American Management Association, 2005), 232–233, <https://ebookcentral.proquest.com/lib/ebook-nps/detail.action?docID=243074>.

employee's background when placing an individual in a position of trust.”¹⁰ Homeland security employers, particularly, must screen unfit applicants due to the sensitive nature of their operations and the public-facing nature of their employees.¹¹

Screening an applicant’s social media accounts may violate free-speech rights in two ways. First, employers may violate the rights of individual applicants by rejecting their employment applications based on past social media speech that the employer deems disqualifying for future employment. Second, employers may chill the speech of an entire group by establishing SMS policies that lead applicants to self-restrict their speech.

Employers are likely unaware that they may be violating applicants’ rights because they are unlikely to face lawsuits. Regarding individual applicants, applicants may not know the reason they were not hired and, even if they did know, they might be unable to afford the attorney fees to sue. Regarding the chilling effect, the group faces a collective action problem in which they lack the ability to gather similar applicants.

B. IMPLICATIONS FOR HOMELAND SECURITY EMPLOYERS

The infringement of the free-speech rights of homeland security job applicants is not a theoretical problem and has practical implications for homeland security employers. First, homeland security employers should serve as leaders in protecting all rights including free speech. Many homeland security employers recognize this responsibility. For example, the Federal Bureau of Investigation’s mission statement includes the obligation to “protect civil rights” and its core value of “rigorous obedience to the Constitution of the

¹⁰ William Woska, “Legal Issues for HR Professionals: Reference Checking/Background Investigations,” *Public Personnel Management* 36, no. 1 (2007): 87, <https://doi.org/10.1177/009102600703600106>.

¹¹ David Bradford, “Police Officer Candidate Background Investigation: Law Enforcement Management’s Most Effective Tool for Employing the Most Qualified Candidate,” *Public Personnel Management* 27, no. 4 (December 1998): 423, <https://doi.org/10.1177/009102609802700401>; and Matthew Tobia, “The Importance of Fire Department Background Investigations,” *Fire Rescue Magazine*, April 28, 2013, <http://www.firerescuemagazine.com/articles/print/volume-8/issue-6/management-and-leadership/the-importance-of-fire-department-background-investigations.html>.

United States.”¹² If homeland security employers disregard the risk that SMS diminishes civil rights, they are hampering their mission while attempting to achieve it.

Second, social media screening can hinder recruitment and diversification efforts by homeland security employers. Police departments are already facing a recruitment challenge, as documented in RAND’s 2010 report *Police Recruitment and Retention for the New Millennium*, which documents the inflow and outflow dynamics that challenge departments in fully staffing their ranks.¹³ In the context of this recruiting challenge, the SMS of applicants may dissuade some individuals from applying for homeland security jobs. For example, the local media in Cleveland reports that “many blacks cite stigma and cop culture [and] avoid police recruiters.”¹⁴ If candidates have posted to a Black Lives Matter group or “liked” such a group on Facebook, they may rethink their ability to be hired by a police agency. Homeland security employers should take this possibility seriously and work to protect applicants’ free-speech rights to encourage recruitment efforts.

C. RESEARCH QUESTIONS

1. When homeland security employers screen the social media of job applicants, what are the free-speech rights of those applicants?
2. Do publicly available social-media screening policies of homeland security employers support or undermine applicants’ free-speech rights?

D. LITERATURE REVIEW

Because social media screening is a form of employment background check, this literature review discusses academic views on background checks by examining their

¹² “Mission & Priorities,” Federal Bureau of Investigation, accessed December 3, 2018, <https://www.fbi.gov/about/mission>.

¹³ Jeremy M. Wilson et al., *Police Recruitment and Retention for the New Millennium* (Santa Monica, CA: RAND, 2010), https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG959.pdf.

¹⁴ Phil Trexler and Tom Meyer, “Many Blacks Cite Stigma and Cop Culture, Avoid Police Recruiters,” WKYC, May 9, 2018, <https://www.wkyc.com/article/news/investigations/many-blacks-cite-stigma-and-cop-culture-avoid-police-recruiters/95-550249949>.

frequency, efficacy, and legality. It investigates the traditional background checks of criminal records as well as drug and integrity tests by reviewing academic and government research, case law, and human resource management publications. Within this context, it examines SMS using similar sources.

1. Criminal Background Checks

Homeland security employers often use criminal records when conducting background checks on job applicants. In 2017, The National Association of Professional Background Screeners reported that 83 percent of surveyed employers checked candidates against a national crime database, and 87 percent checked candidates against a county or state crime database.¹⁵ Similarly, the Society for Human Resource Management reported that 69 percent of surveyed employers used criminal background checks in 2012.¹⁶ Public employers are even more aggressive: As early as 2001, Connerley, Arvey, and Bernardy indicated 50 percent of surveyed municipalities conducted criminal background checks on all municipal employees, and 100 percent conducted checks on all police officer and firefighter candidates.¹⁷

There is mixed evidence on the effectiveness of criminal background checks, both on recidivism of criminal activity and on work performance. On recidivism, the U.S. Department of Justice has reported clear evidence by convicted criminals.¹⁸ However, Blumstein and Nakamura have determined that the likelihood of recidivism declines with

¹⁵ National Association of Professional Background Screeners, *National Survey: Employers Universally Using Background Checks to Protect Employees, Customers and the Public* (Raleigh, NC: National Association of Professional Background Screeners, 2017), <https://pubs.napbs.com/pub.cfm?id=6E232E17-B749-6287-0E86-95568FA599D1>.

¹⁶ “Background Checking—The Use of Criminal Background Checks in Hiring Decisions,” Society for Human Resource Management, July 19, 2012, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx>.

¹⁷ Mary Connerley, Richard Arvey, and Charles Bernardy, “Criminal Background Checks for Prospective and Current Employees: Current Practices among Municipal Agencies,” *Public Personnel Management* 30, no. 2 (June 2001): 175, <https://doi.org/10.1177/009102600103000204>.

¹⁸ Matthew Durose, Alexia Cooper, and Howard Snyder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (Washington, DC: Bureau of Justice Statistics, 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

passing time to match that of the general population.¹⁹ For example, for those first arrested for assault at the age of 20, the likelihood of a second arrest declines to match that of the general population after 3.3 years.²⁰ Similar patterns hold for burglary (3.2 years) and robbery (4.4 years).²¹ On work performance, there is limited research on the linkage between criminal records and poor work performance. One study actually counters most expectations; in 2016, Lundquist, Pager, Strader studied U.S. military enlistments and showed that those arrested for felonies were no more likely to be terminated than those without arrest records and were 32 percent more likely to be promoted.²²

Criminal background checks are subject to legal restrictions based on case law and legislation. For years, case law has prohibited denying employment because of an arrest record, typically because it causes a disparate impact under the Civil Rights Act of 1964.²³ Similarly, courts have ruled against a blanket policy of denying employment based on convictions unless the employer can demonstrate a link between the conviction and the duties and responsibilities involved with the position.²⁴ Recent legislation has confirmed this trend. As of 2017, the National Employment Law Project reports that 29 states have “ban the box” laws that prohibit inquiring about criminal history before a job interview.²⁵

2. Drug Tests as Background Checks

Homeland security employers have used drug tests as a form of background checks for years. In 1986, President Ronald Regan established the Federal Drug Free Workforce

¹⁹ Alfred Blumstein and Kiminori Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks,” *Criminology* 47, no. 2 (May 2009): 327, <https://doi.org/10.1111/j.1745-9125.2009.00155.x>.

²⁰ Blumstein and Nakamura, 339.

²¹ Blumstein and Nakamura, 339.

²² Jennifer Hicke Lundquist, Devah Pager, and Eiko Strader, “Does a Criminal Past Predict Worker Performance? Evidence from America’s Largest Employer,” *Social Forces* 96, no. 3 (2018): 1051, <https://doi.org/10.1093/sf/sox092>.

²³ *Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221 (D.C. Cir. 1981).

²⁴ *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013).

²⁵ Beth Avery, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies,” National Employment Law Project, August 1, 2017, <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

Program, requiring that federal agencies establish drug-testing programs for incumbents and applicants.²⁶ Homeland security agencies are the most likely to use drug screening, with 95.4 percent of local law enforcement agencies using drug testing as of 2007.²⁷ With the government’s leadership, the private sector followed: *The Washington Post* reports that the percent of employers testing at least some of their applicants rose from 21 percent in 1987 to 81 percent in 1996, but then declined to 62 percent in 2004.²⁸

This decline may be due to a growing body of research questioning the effectiveness of drug tests. One of the first and most cited studies is a 1987 study by the U.S. Postal Service that tracked the employment outcomes of almost 5,000 job applicants, over half of whom tested positive for drug use.²⁹ The study found that marijuana users had 55 percent more industrial accidents and a 78 percent increase in absenteeism; cocaine users had 85 percent more industrial accidents and a 145 percent increase in absenteeism.³⁰ However, subsequent research has shown a weaker linkage between drug-use and counter-productive work behavior. For example, the National Academy of Sciences considered that older workers—who are less likely to use drugs—are more experienced and therefore less likely to have accidents.³¹ When normalizing for this and similar correlations, the National Academy of Sciences found no “evidence of the deleterious effects of drugs—other than alcohol—on safety and other job performance indicators.”³²

²⁶ Exec. Order No. 12564, 51 Fed. Reg. 32,889 (1986), <https://www.archives.gov/federal-register/codification/executive-order/12564.html>.

²⁷ Brian Reaves, *Local Police Departments, 2007* (Washington, DC: Bureau of Justice Statistics, December 2010), 11, <https://www.bjs.gov/content/pub/pdf/lpd07.pdf>.

²⁸ Lydia DePillis, “Companies Drug Test a Lot Less Than They Used To—Because It Doesn’t Really Work,” *Washington Post*, March 10, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/03/10/companies-drug-test-a-lot-less-than-they-used-to-because-it-doesnt-really-work/?utm_term=.4969db140a83.

²⁹ Craig Zwerling, James Ryan, and Endel John Orav, “The Efficacy of Pre-Employment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcomes,” *Journal of Occupational Medicine* 264 no. 20 (November 1992): 2639, <https://doi.org/10.1001/jama.1990.03450200047029>.

³⁰ Zwerling, Ryan, and Orav, 2643.

³¹ Jacques Normand, Richard O. Lempert, and Charles O’Brien, *Under the Influence? Drugs and the American Work Force* (Washington, DC: National Academy Press, 1994), 135, <https://ebookcentral.proquest.com/lib/ebook-nps/reader.action?docID=3376672&query=>.

³² Normand, Lempert, and O’Brien, 107.

The legal standards for drug testing consist of questions about searches under the Fourth Amendment. In 1989, the Supreme Court determined that drug tests of incumbent employees constituted Fourth Amendment “searches” and, therefore, must be “reasonable.”³³ That same day, in a different case, the Supreme Court ruled blanket testing could be reasonable if the employer balanced the privacy interests of the employee with the special needs of government employment, holding that the employees “required to carry firearms in the line of duty . . . have a diminished expectation of privacy.”³⁴ Similarly, the D.C. Circuit Court of Appeals upheld blanket testing of employees with clearance to classified information.³⁵ Although the standard for testing applicants—as distinct from incumbent employees—has not been tested at the Supreme Court level, the Ninth Circuit used the same standard for evaluating drug testing policies for applicants, holding that public employers can only insist on drug tests for applicants for positions that are “safety sensitive.”³⁶

3. Integrity Tests as Background Checks

Integrity testing is the practice of using a battery of questions to determine an applicant’s proclivity for unethical behavior.³⁷ Statistics on the frequency of integrity testing are limited. In 1990, the U.S. Office of Technology Assessment estimated that 5,000 to 6,000 employers were using integrity tests.³⁸ The Society for Human Resource Management indicates that integrity tests became popular with employers after the 1988 Employee Polygraph Protection Act prohibited private employers from requiring

³³ Skinner v. Railway Labor Executives’ Association, 489 U.S. 602 (1989).

³⁴ National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

³⁵ Harmon v. Thornburgh, 878 F. 2d 484 (D.C. Cir. 1989).

³⁶ Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008).

³⁷ *Encyclopedia of Industrial and Organizational Psychology*, s.v. “integrity testing,” accessed January 18, 2018, <https://doi.org/10.4135/9781412952651.n138>.

³⁸ U.S. Congress, Office of Technology Assessment, *The Use of Integrity Tests for Pre-Employment Screening*, OTA-SET-442 (Washington, DC: Government Printing Office, September 1990), 1, <https://www.princeton.edu/~ota/disk2/1990/9042/9042.PDF>.

employees to submit to a polygraph.³⁹ However, by 2012, a Society for Human Resource Management poll indicated that only 20 percent of private employers used personality tests—a broader test that includes integrity aspects.⁴⁰

Although statistics on how frequently employers use integrity tests are sparse, there is considerable research on the effectiveness of integrity tests. The U.S. Office of Technology Assessment was one of the first to examine integrity tests systematically, finding inconclusive evidence on their effectiveness.⁴¹ For example, the office found that the tests correctly identified applicants as dishonest who later stole from their employers 94 percent of the time.⁴² But the tests also classified applicants as dishonest who never stole from their employers 73–97 percent of the time.⁴³ More recently, researchers have attempted to measure the integrity test’s predictive validity—the correlation between the test and some future measure it aims to predict.⁴⁴ Van Iddekinge et al. conducted a meta-analysis of 104 studies and found integrity tests had a predictive validity level of .32—a small but positive linkage explaining about 10 percent of counter-productive work behavior.⁴⁵ In contrast, Muel Kaptein conducted a 2015 study comparing the effectiveness of various ethics programs (e.g., having a code of ethics, ethics training, or an ethics reporting line) and found “no evidence that pre-employment screening is helpful [in reducing unethical behavior].”⁴⁶

³⁹ Bill Roberts, “Your Cheating Heart,” Society for Human Resource Management, June 1, 2011, <https://www.shrm.org/hr-today/news/hr-magazine/pages/0611roberts.aspx>.

⁴⁰ “SHRM Poll: Most Employers Don’t Use Personality Tests,” Society for Human Resource Management, February 1, 2012, <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/MostEmployersDontUsePersonalityTests.aspx>.

⁴¹ U.S. Congress, Office of Technology Assessment, *Use of Integrity Tests*, 8.

⁴² U.S. Congress, Office of Technology Assessment, 57.

⁴³ U.S. Congress, Office of Technology Assessment, 57.

⁴⁴ *Encyclopedia of Research Design*, s.v. “predictive validity,” accessed February 4, 2018, <http://dx.doi.org/10.4135/9781412961288.n328>.

⁴⁵ Chad Van Iddekinge et al., “The Criterion-Related Validity of Integrity Tests: An Updated Meta-Analysis,” *Journal of Applied Psychology* 97, no. 3 (May 2012): 499, <https://doi.org/10.5465/ambpp.2010.54500471>.

⁴⁶ Muel Kaptein, “The Effectiveness of Ethics Programs: The Role of Scope, Composition, and Sequence,” *Journal of Business Ethics* 132, no. 2 (December 2015): 429, <https://doi.org/10.2139/ssrn.2464004>.

Legally, courts have reviewed integrity tests as possibly violative of the Americans with Disabilities Act (ADA), the federal implied right to privacy, and a state's express right to privacy. Regarding the ADA, employers should take care that an integrity test does not qualify as a "medical exam," as it did when a sheriff's office had a psychologist conduct a series of personality tests on an applicant.⁴⁷ Regarding federal privacy, although the Supreme Court has established an implied right to privacy, Kimberli Black found "legislatures and courts have not extended this right to prohibit personality testing by public employers."⁴⁸ At the state level, Rhode Island and Massachusetts passed statutes prohibiting integrity tests.⁴⁹ Moreover, California's constitution includes an amendment specifically granting "privacy" as an inalienable right and enforcing it against both public and private actors.⁵⁰ Thus, California has case law invalidating a personality test, using the stringent "compelling interest" standard to rule against an employer whose integrity test included matters of religious attitudes and sexual orientation.⁵¹

4. Social Media Screening

Social media screening, also known as cyber-vetting or social network screening, is the practice of employers searching for publicly available information online, particularly on social media sites, about potential hires.⁵² SMS is increasingly important given the proliferation of social media and their effect on communications. As to proliferation, the Pew Research Center reports that social media penetration of the U.S. population grew from 5 percent to 69 percent from 2005 to 2016.⁵³ As to the effect, John

⁴⁷ Barnes v. Cochran, 944 F.Supp. 897 (S.D. Fla. 1996).

⁴⁸ Kimberli Black, "Personality Screening in Employment," *American Business Law Journal* 32, no. 1 (May 1994): 69, <https://doi.org/10.1111/j.1744-1714.1994.tb00931.x>.

⁴⁹ Larry R. Seegull and Emily J. Caputo, "When a Test Turns into a Trial," *Business Law Today* 15, no. 3 (January/February 2006), <https://apps.americanbar.org/buslaw/blt/2006-01-02/caputo.html>.

⁵⁰ Cal. Const., art. 1, § 1.

⁵¹ Soroka v. Dayton Hudson Corp., 18 Cal. App. 4th 1200 (1991).

⁵² Brenda Berkelaar, "Cybervetting, Online Information, and Personnel Selection," *Management Communication Quarterly* 28, no. 4 (November 2014): 479, <https://doi.org/10.1177/0893318914541966>.

⁵³ "Social Media Fact Sheet," Pew Research Center, January 12, 2017, <http://www.pewinternet.org/fact-sheet/social-media/>.

Suler has documented the “online disinhibition effect,” arguing that online communication prompts people to act in ways they would not when in person because the medium provides anonymity, escapism into an online persona, and the removal of in-person social cues.⁵⁴ These factors combined with the permanent documentation of the internet make SMS attractive to employers. The remainder of this literature review discusses the following features of SMS: (a) the cost–benefit factors from a homeland security employer’s perspective, (b) the frequency of its use, (c) research on its effectiveness, and (d) the current laws governing SMS.

a. Cost–Benefit Factors of Using SMS

Homeland security employers generally find the cost–benefit calculation of SMS attractive. Benefits include reducing the risk of disruptive employees, ensuring smooth legal operations, and protecting themselves from negligent hiring lawsuits. First, disruptive employees generally exhibit bad judgment that hinders public safety agencies from working with their communities: a Fort Lauderdale police officer who offered racist statements on his Facebook account, a Utah police officer who posted a racist comment on a photo, and a Chicago police officer who espoused Islamophobia on the internet.⁵⁵ Although each example cites to an incumbent employee, SMS can prevent new applicants with such proclivities from joining public safety agencies.

Second, for some agencies, the content of their employees’ social media could disrupt legal operations. In the regular course of operations, federal agents and police officers must often testify in court. Defense attorneys may attempt to “impeach”

⁵⁴ John Suler, “The Online Disinhibition Effect,” *Cyber Psychology & Behavior* 7, no. 3 (June 2004): 321, <https://doi.org/10.1089/1094931041291295>.

⁵⁵ Amanda Batchelor, “Fort Lauderdale Police Officer Fired over Social Media Posts,” WPLG, June 29, 2015, <https://www.local10.com/news/local/fort-lauderdale/fort-lauderdale-police-officer-fired-over-social-media-posts>; Lauren Steinbrecher, “Utah Police Officer Resigns amid Internal Investigation into Racist Post on Facebook,” Fox 13 (Salt Lake City), June 15, 2017, <http://fox13now.com/2017/06/15/utah-police-officer-resigns-amid-internal-investigation-into-racist-post-on-facebook/>; and “Chicago Cop Cited for Racist and Threatening Facebook Posts,” *U.S. News and World Report*, November 22, 2017, <https://www.usnews.com/news/best-states/illinois/articles/2017-11-22/veteran-chicago-police-officer-cited-for-62-rule-violations>.

testimony—to undermine its truthfulness.⁵⁶ A common impeachment method is noting prior inconsistent statements.⁵⁷ Defense attorneys have successfully used social media statements as prior inconsistent statements to impeach police officer testimony. For example, when a New York City police officer posted that he was “watching ‘Training Day’ to brush up on proper police procedure,” defense attorneys successfully argued that the viewing of “Training Day”—a movie that celebrates police corruption—contradicted the officer’s testimony that he had not planted a gun on the defendant.⁵⁸ The accused was found not guilty.⁵⁹

Third, SMS can protect employers from exposing themselves to the legal risk of negligent hiring lawsuits, which are founded on the idea that employers can be liable for the actions of employees if the employer failed to “exercise reasonable care in choosing or retaining an employee.”⁶⁰ Employers fare poorly in these cases and lose 73 percent of those that go to jury trials.⁶¹ Courts impose a higher duty of care on employers when the position includes greater exposure to the public and a chance for harm.⁶² Therefore, public safety employers may consider how SMS reduces their risk of a negligent hiring suit. For example, *Fire Engineering*, a firefighting management magazine, recommends SMS to minimize the risk of negligent hiring suits.⁶³

⁵⁶ “Federal Rules of Evidence: Rule 608,” Cornell Law School Legal Information Institute, accessed January 17, 2018, https://www.law.cornell.edu/rules/fre/rule_608.

⁵⁷ Cornell Law School Legal Information Institute.

⁵⁸ Jim Dwyer, “The Officer Who Posted Too Much on Myspace,” *New York Times*, March 10, 2009, <http://www.nytimes.com/2009/03/11/nyregion/11about.html>.

⁵⁹ Dwyer.

⁶⁰ Nesheba Kittling, “Negligent Hiring and Negligent Retention: A State by State Analysis,” American Bar Association, November 6, 2010, https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/087.authcheckdam.pdf.

⁶¹ Edward Appel, *Cybervetting: Internet Searches for Vetting, Investigations, and Open-Source Intelligence* (Boca Raton, FL: CRC Press, 2015), 29, <https://www.taylorfrancis.com.libproxy.nps.edu/books/9781482238853>.

⁶² Kittling, “Negligent Hiring and Negligent Retention.”

⁶³ David Comstock Jr., “Background Checks,” *Fire Engineering*, April 1, 2008, <http://www.fireengineering.com/articles/print/volume-161/issue-4/departments/volunteers-corner/background-checks.html>.

Costs to employers include the direct costs of conducting investigations and the indirect cost of reducing applicants' perception of the employer. First, the direct costs of SMS are considered low. Cooley and Parks-Yancy determined, "Some employers have reduced their recruitment and screening costs by 50 percent" compared to in-person interview techniques.⁶⁴ Saby Ghoshray, when studying the erosion of privacy by SMS, noted employers use SMS because of "its ease of access and cost advantage."⁶⁵ A 2009 report developed by the Director of National Intelligence studied the cost of SMS for incumbents applying for classified security clearances and estimated the SMS cost per applicant at \$375 to \$650.⁶⁶ Furthermore, the *Washington Post* reported in 2016 that private screening firms charge from \$100 to \$500 for SMS of an applicant.⁶⁷

Second, SMS has indirect costs, such as reducing applicant interest in working for the employer. When Stoughton, Thompson, and Meade tested this theory in two studies, they found that applicants who were told they had been evaluated by SMS viewed the potential employer as less attractive and had an increased likelihood of suing the employer.⁶⁸ In the first study, student volunteers were surveyed after being informed that a potential employer had searched their social media profiles.⁶⁹ The students who were

⁶⁴ Delonia Cooley and Rochelle Parks-Yancy, "Impact of Traditional and Internet/Social Media Screening Mechanisms on Employers' Perceptions of Job Applicants," *Journal of Social Media in Society* 5, no. 3 (2016): 160, <http://thejsms.org/index.php/TSMRI/article/view/180>.

⁶⁵ Saby Ghoshray, "The Emerging Reality of Social Media: Erosion of Individual Privacy through Cyber-Vetting and Law's Inability to Catch Up," *John Marshall Review of Intellectual Property Law* 12 no. 3 (2013): 558, <https://repository.jmls.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1307&context=ripl>.

⁶⁶ Director of National Intelligence, *Considering Web Presence in Determining Eligibility to Access Classified Information: A Pilot Study* (Washington, DC: Director of National Intelligence, 2009), https://www.eff.org/files/20100514_odni_socialnetworking.pdf.

⁶⁷ Lisa Rein, "Want a Security Clearance? Feds Will Now Check Your Facebook and Twitter First," *Washington Post*, May 13, 2016, https://www.washingtonpost.com/news/powerpost/wp/2016/05/13/want-a-security-clearance-feds-will-now-check-your-facebook-and-twitter-first/?utm_term=.0b9936aee23c.

⁶⁸ William Stoughton, Lori Thompson, and Adam Meade, "Examining Applicant Reactions to the Use of Social Networking Websites in Pre-Employment Screening," *Journal of Business and Psychology* 30, no. 1 (March 2015): 73, <https://doi.org/10.1007/s10869-013-9333-6>.

⁶⁹ Stoughton, Thompson, and Meade, 77.

screened viewed the employer 5 percent less favorably than those who were not screened.⁷⁰ In the second study, freelance workers were surveyed after applying for a hypothetical job.⁷¹ Those who were screened viewed the employer 20 percent less favorably and were 11 percent more likely to litigate.⁷² When engaging in SMS, public safety agencies risk poisoning their image with potential employees.

b. Frequency of SMS

Private employers are increasingly using SMS to check on candidates—although research differs on the scale of usage. Career Builder has surveyed employers annually about SMS and found the practice has increased significantly.⁷³ The Society for Human Resource Management conducts a similar survey.⁷⁴ Results of both surveys are summarized in Table 1.

⁷⁰ Stoughton, Thompson, and Meade, 78. Attractiveness was measured on a Likert-type scale, with answers ranging from strongly disagree to strongly agree, using statements such as “For me, this company would be good place to work.”

⁷¹ Stoughton, Thompson, and Meade, 81.

⁷² Stoughton, Thompson, and Meade, 84. Attractiveness and intention to litigate were measured on a Likert-type scale, with answers ranging from strongly disagree to strongly agree, using statements such as “An organization that uses a hiring system like this would likely be sued by applicants.”

⁷³ Salm, “70 Percent of Employers Are Snooping.”

⁷⁴ “Using Social Media for Talent Acquisition,” Society for Human Resource Management, September 20, 2017, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Social-Media-Recruiting-Screening-2015.aspx>.

Table 1. Summary of Surveys of Employer Use of Social Media Screening⁷⁵

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Career Builder										
SMS of candidate	22%	45%	53%	NA	37%	39%	43%	52%	60%	70%
Internet search of candidate	NA	NA	43%	NA	NA	NA	45%	51%	59%	69%
Society for Human Resource Management										
SMS of candidate	13%	NA	NA	18%	NA	20%	NA	NA	39%	NA
Internet search of candidate	34%	NA	NA	26%	NA	28%	NA	NA	34%	NA

Homeland security employers are also using SMS at increasing rates, with large agencies initiating the policy at various times. As to large agencies, the Department of Homeland Security initiated an SMS program for incumbents and applicants in 2015.⁷⁶ Similarly, in 2016, the Director of National Intelligence announced an SMS program for security clearances of any government employee, requiring that applicants reveal the names of hidden Facebook “friends” and all active Twitter aliases.⁷⁷ As to smaller agencies, Tufts, Jacobson, and Stevens surveyed 172 local government agencies in North Carolina, South Carolina, and Georgia, finding that only 14 percent conduct SMS and 23 percent use internet searches.⁷⁸ Also, the International Association of Chiefs of Police

⁷⁵ Salm, “70 Percent of Employers Are Snooping”; and Society for Human Resource Management, “Using Social Media for Talent Acquisition.”

⁷⁶ Department of Homeland Security, Office of Intelligence and Analysis, *Official Usage of Publicly Available Information*, Policy Instruction IA-900 (Washington, DC: Department of Homeland Security, January 13, 2015), https://www.aclu.org/sites/default/files/field_document/dhs_policy_re_official_use_of_public_social_media_info_-_01.13.2015.pdf.

⁷⁷ Director of National Intelligence, Collection, Use, and Retention of Publicly Available Social Media Information in Personnel Security Background Investigations and Adjudications, Security Executive Agent Directive 5 (Washington, DC: Director of National Intelligence, May 12, 2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/SEAD5-12May2016.pdf>.

⁷⁸ Shannon Howle Tufts, Willow S. Jacobson, and Mattie Sue Stevens, “Status Update: Social Media and Local Government Human Resource Practices,” *Review of Public Personnel Administration* 35, no. 2 (2015): 201, <https://doi.org/10.1177/0734371x14558066>.

surveyed small and midsized police departments and found that SMS has been steadily increasing.⁷⁹ The results are summarized in Table 2.

Table 2. Social Media Screening of Police Department Applicants⁸⁰

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
International Association of Chiefs of Police										
SMS of candidate	NA	NA	37%	44%	51%	49%	54%	58%	58%	NA

c. Research on the Effectiveness of SMS

Research on the effectiveness of SMS focuses on two questions: Did SMS discover illegal or unwanted behavior by the candidate, and is unwanted behavior on the internet indicative of unwanted behavior as an employee?

First, numerous surveys have sought to determine whether SMS finds unwanted online behavior. Edward Appel’s research indicates that approximately 10 percent of applicants have items online that warrant concern over their suitability (e.g., drug or alcohol use, personal financial troubles, or sexual/criminal/racial issues).⁸¹ Career Builder’s annual survey contributes to this question; the results are summarized in Table 3.

⁷⁹ International Association of Chiefs of Police, “Social Media Survey.” This citation is representative of press releases from previous years that the author used to build the summary table.

⁸⁰ International Association of Chiefs of Police.

⁸¹ Appel, *Cybervetting*, 49–55.

Table 3. Unwanted Behavior Revealed by Social Media Screening⁸²

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Career Builder										
Discovered unwanted behavior	34%	35%	43%	NA	34%	43%	51%	48%	49%	44%
- Provocative photos	NA	NA	NA	NA	49%	50%	46%	46%	46%	39%
- Drugs/alcohol	NA	NA	NA	NA	45%	48%	41%	40%	43%	38%
- Discriminatory comments	NA	NA	NA	NA	28%	28%	28%	29%	33%	32%

Second, academic research attempts to confirm the suspected link between unwanted behavior online and unwanted behavior in person. Stoughton, Thompson, and Meade categorized online behavior into “badmouthing” and “substance-use” postings and then compared their frequency to the results of a personality questionnaire measuring employee agreeableness, extraversion, and conscientiousness.⁸³ The results indicated that “online badmouthing behaviors can be used to infer relatively low agreeableness. In addition, postings related to alcohol and drug use can be said to be online manifestations of extraversion.”⁸⁴ Measures on conscientiousness were not statistically significant.⁸⁵ Although this study successfully linked online and in-person behavior, it merely considered in-person behavioral traits, not actual counter-productive work behavior.

d. Laws Governing SMS

Legislatures and courts have established some laws governing SMS. These laws cover the possibility of discrimination, obligations under the Fair Credit Reporting Act, and laws prohibiting employers from requesting social media passwords. Although there are tangential references to free speech, there seems to be no established rule of law on SMS and its impact on free speech.

⁸² Salm, “70 Percent of Employers Are Snooping.”

⁸³ William Stoughton, Lori Thompson, and Adam Meade, “Big Five Personality Traits Reflected in Job Applicants’ Social Media Postings,” *Cyberpsychology, Behavior, and Social Networking* 16, no. 11 (November 2013): 803, <https://doi.org/10.1089/cyber.2012.0163>.

⁸⁴ Stoughton, Thompson, and Meade, 803.

⁸⁵ Stoughton, Thompson, and Meade, 803.

First, courts have found that employers may inadvertently discriminate against applicants by discovering protected characteristics through SMS. The Equal Employment Opportunity Commission is charged with enforcing anti-discrimination laws such as the Civil Rights Act, the Equal Pay Act, the Age Discrimination Act, and the Americans with Disabilities Act.⁸⁶ Collectively, these laws prohibit discrimination based on race, color, sex, religion, national origin, age, and disability.⁸⁷ For employers, even cursory SMS may divulge the applicants' membership in such a category and expose employers to the risk of litigation for even subconscious discrimination. For example, Alessandro and Fong found that Muslim candidates were 13 percent less likely to receive interview invitations than Christian candidates.⁸⁸ Similarly, SMS may disparately impact certain minorities who are more inclined to have social media accounts or less inclined to preemptively edit them for SMS. Pew Research Center reports that Facebook use among racial subsets is roughly consistent among whites (71 percent), blacks (67 percent), and Latinos (73 percent), but Instagram use varies significantly (21 percent, 38 percent, and 34 percent, respectively).⁸⁹ Therefore, an SMS screen that surveys Instagram could have a disparate impact on blacks and Latinos without any intent to discriminate.

Second, the Fair Credit Reporting Act (FCRA) imposes obligations on employers when they outsource SMS to a third party. Congress passed the FCRA in 1970, granting enforcement power to the Federal Trade Commission, which has interpreted the FCRA broadly to include SMS reports generated by third-party firms.⁹⁰ Third-party firms create

⁸⁶ "Federal Laws Prohibiting Job Discrimination: Questions and Answers," U.S. Equal Employment Opportunity Commission, November 21, 2009, <https://www.eeoc.gov/facts/qanda.html>.

⁸⁷ U.S. Equal Employment Opportunity Commission.

⁸⁸ Alessandro Acquisti and Christina Fong, "An Experiment in Hiring Discrimination via Online Social Networks" (unpublished thesis, July 17, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031979.

⁸⁹ Jens Manuel Krogstad, "Social Media Preferences Vary by Race and Ethnicity," Pew Research Center, February 3, 2015, <http://www.pewresearch.org/fact-tank/2015/02/03/social-media-preferences-vary-by-race-and-ethnicity/>.

⁹⁰ Maneesha Mithal to Renee Jackson (official letter, Federal Trade Commission, May 9, 2011), https://www.ftc.gov/sites/default/files/documents/closing_letters/social-intelligence-corporation/110509socialintelligenceletter.pdf. Note that this is merely a letter, not a law or regulation, and has not yet been challenged in court.

reports that provide useful information without disclosing membership in a protected category.⁹¹ If an employer uses a third-party service and decides not to hire an applicant, the FCRA requires that the employer “provide job applicants with their background report, summary of rights, and a ‘real opportunity’ to contest the contents of the background report.”⁹² If the employer instead conducts SMS in-house, the employer risks litigation, as it may discover an applicant’s protected status as defined under anti-discrimination laws.⁹³ Thus, employers using SMS may find themselves in a legal catch-22.

Third, Congress has considered and numerous states have passed laws prohibiting employers from requesting social media passwords from applicants. At the federal level, Representative Elliot Engle (D, NY) proposed language for the Social Networking Online Protection Act; it has been standing in committee since 2013.⁹⁴ States have been more successful. The National Council on State Legislatures, which annually updates state adoptions, indicates 26 states have enacted laws prohibiting employers from requesting social media passwords.⁹⁵ The issue has been well researched at law schools; numerous law review articles have been written in favor of and against these laws.⁹⁶

⁹¹ “Social Media Screening,” Risk Aware, accessed January 17, 2018, <http://riskaware.com/our-products/social-media-screening/>; and Mat Honan, “I Flunked My Social Media Background Check, Will You?,” Gizmodo, July 7, 2011, <https://gizmodo.com/5818774/this-is-a-social-media-background-check>.

⁹² *Moore v. Rite Aid Headquarters Corp.*, No. 13-1515, LEXIS 69747, *13 (E.D. Pa. May 28, 2015).

⁹³ See previous paragraph.

⁹⁴ H.R. 537, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/537>.

⁹⁵ “State Social Media Privacy Laws,” National Council on State Legislatures, November 6, 2018, <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-username-and-passwords.aspx>.

⁹⁶ Timothy Buckley, “Password Protection Now: An Elaboration on the Need for Federal Password Protection Legislation and Suggestions on How to Draft It,” *Cardozo Arts & Entertainment Law Journal* 31 (2013): 875, <http://www.cardozoaelj.com/wp-content/uploads/2013/08/Buckley-31.3.pdf>; Jordan Blanke, “The Legislative Response to Employers’ Requests for Password Disclosure,” *Journal of High Technology Law* 14 (2014): 442, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2826710; Megan Davis, “Too Much Too Soon? A Case for Hesitancy in the Passage of State and Federal Password Protection Laws,” *University of Pittsburgh Journal of Technology Law & Policy* 14 (Spring 2014): 252, <https://tlp.law.pitt.edu/ojs/index.php/tlp/article/view/142>; and Courtney Lario, “What Are You Looking At?: Why the Private Sector’s Use of Social Media Need Not Be Legislated,” *Seton Hall Legislative Journal* 38, no. 1 (July 2013): 133, <http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1063&context=shlj>.

There is limited research on the impact of SMS on applicants' free-speech rights. Edward Appel mentions it as a concern and reviews a series of cases, but all the cases relate to incumbent employees.⁹⁷ Even in a law review article explicitly looking at the rights of public-sector employees in the context of social media, William Herbert does not address applicants' rights.⁹⁸ Moreover, in a full chapter on legal concerns about using social media in candidate selection, Schmidt and O'Connor review laws enforcing civil rights and privacy rights but make no mention of the right to free speech.⁹⁹ The lack of research on the free-speech rights of job applicants likely results from the "state action requirement," a rule that only government, not private, actors can violate most constitutional rights.¹⁰⁰ As most SMS research considers all employees, there is less focus on the subset of public employees—and even less on the sub-subset of homeland security employees.

This literature review reveals three themes about background checks. First, employers are expanding the use of background checks; for employers, more information is always better. Second, despite conflicting research on their effectiveness, employers continue to use background checks. Third, employers will expand their use of background checks, possibly infringing on applicants' rights until the law evolves to protect applicants. This lack of protection in the law deserves more research, which is the goal of this thesis.

E. CONCLUSION

Lacking legal guidance on the rights of applicants, homeland security employers may be unaware that they risk violating individuals' free-speech rights or chilling the speech of an entire group. This thesis seeks to determine the free speech rights of

⁹⁷ Appel, *Cybervetting*, 97–100.

⁹⁸ William Herbert, "Can't Escape from the Memory: Social Media and Public-Sector Labor Law," *Northern Kentucky Law Review* 40 (2013): 427, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219586.

⁹⁹ Gordon B. Schmidt and Kimberly W. O'Connor, "Legal Concerns When Considering Social Media Data in Selection" in *Social Media in Employee Selection and Recruitment*, ed. Richard Landers and Gordon Schmidt (Cham, Switzerland: Springer, 2016), 265–287.

¹⁰⁰ "State Action Requirement," Cornell Law School Legal Information Institute, accessed January 17, 2018, https://www.law.cornell.edu/wex/state_action_requirement.

applicants, raise awareness among homeland security employers about those rights, and provide guidance on how to protect them during pre-employment screening.

Chapter II provides the legal background on free speech as a First Amendment Right, with a specific focus on the more limited rights of public employees. Chapter III presents a content analysis of existing case law to show that there is no existing jurisprudence on the free-speech rights of homeland security job applicants. Chapters IV and V consider legal and social science arguments, respectively, that homeland security job applicants should be entitled to the full First Amendment protections of private citizens and not the limited rights of public employees. Chapter VI summarizes two public documents that offer policy and guidance on social media screening for homeland security job applicants and evaluates these documents for elements supporting or undermining the free-speech rights of applicants. Finally, Chapter VII offers recommendations for future research, possible legal action, and steps that homeland security employers can take to protect the rights of applicants for employment.

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II. BACKGROUND ON FREE SPEECH UNDER THE FIRST AMENDMENT

This chapter provides the background on Americans' right to free speech. First, this chapter describes general First Amendment analysis: the state action requirement and the two standards of review. Second, it reviews the free-speech rights of private citizens, using examples to illustrate when speech is and is not protected. Finally, this chapter reviews the free-speech rights of public employees and how it has evolved over the years.

A. FREE-SPEECH ANALYSIS IN GENERAL

Americans' right to free speech derives from the First Amendment of the Constitution: "Congress shall make no law . . . abridging the freedom of speech."¹⁰¹ Although the First Amendment refers only to Congress, the Supreme Court extended its application by interpreting the Fourteenth Amendment as applying the Bill of Rights to all levels of government.¹⁰² Therefore, the First Amendment restricts all agencies of federal, state, and local governments from violating individuals' right to free speech.

The First Amendment prohibits only the government's restriction of speech, which is known as the "state action" requirement. As Justice Joseph Bradley explains, "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment."¹⁰³ The Supreme Court has found state action in such varied activities as a shipbuilder coordinating a company town, a private sports organization established by state law, and a state pharmacy regulator prohibiting pharmacies from publishing prices.¹⁰⁴

¹⁰¹ U.S. Const. amend. I.

¹⁰² *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

¹⁰³ *United States v. Stanley*, 109 U.S. 3, 11 (1883).

¹⁰⁴ *Marsh v. Alabama*, 326 U.S. 501 (1946); *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

When the government restricts speech, courts evaluate the restriction's constitutionality under one of two tests. First, restrictions on time, place, and manner of speech are tested under the "rational basis" standard: Does any rational basis exist to justify the government's restriction on speech?¹⁰⁵ The rational basis test only allows the restriction if it (1) is content-neutral, (2) "narrowly tailored to serve a significant governmental interest," and (3) leaves open "ample alternative channels for communication."¹⁰⁶ For example, if a government restricts protests from occurring in the town square between the hours of 11:00 a.m. and 4:00 p.m., courts will test this restriction using the rational basis standard.

Second, restrictions on speech because of its content are tested under the "strict scrutiny" standard: Is the restriction "necessary, and narrowly drawn, to serve a compelling state interest?"¹⁰⁷ For example, if a government restricts a protest advocating for lower taxes or stricter gun control, courts will test this restriction using the strict scrutiny standard. The first step in free-speech analysis is determining the appropriate test, which often determines the issue because the strict scrutiny test is difficult to satisfy.¹⁰⁸

B. PRIVATE CITIZENS' FREE-SPEECH PROTECTIONS

Although private citizens have the broadest possible free-speech protections, they are not totally unencumbered. A few examples illustrate the protected and unprotected speech of private citizens. For protected speech, the chosen examples show how courts have had a broad conception of free speech, including speech critical of the government and made on the internet, which may eventually include online speech made by public job applicants. For unprotected speech, the chosen examples show where courts draw the line for acceptable speech, which may serve as a starting point for courts considering what speech is unacceptable for public job applicants.

¹⁰⁵ Laurence Tribe, *American Constitutional Law* (St. Paul, MN: Foundation Press, 2000), 791.

¹⁰⁶ *Ward v. Rock*, 491 U.S. 781, 789 (1989).

¹⁰⁷ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

¹⁰⁸ Tribe, *American Constitutional Law*, 791.

1. Examples of Protected Speech

The First Amendment protects almost all speech, as shown in three examples. One example shows the importance courts give the right to free speech by protecting even speech critical of the government, which is a common form of speech when government employees and job applicants complain about their employer. A second example shows the broad conception of the act of speaking, particularly the courts' consideration of whether online activities of public job applicants qualify as speech. A final example shows that courts consider online speech similar to in-person speech, which is important when considering how public employers may treat social media behavior.

One of the most vivid forms of speech critical of the government is the burning of the American flag in protest. In *Texas v. Johnson*, the Supreme Court confirmed that even such speech is protected.¹⁰⁹ Johnson burned an American flag at the 1984 Republican National Convention.¹¹⁰ Texas convicted him of violating a state statute prohibiting “desecration of a venerated object.”¹¹¹ Johnson appealed, citing his right to free speech.¹¹² Texas countered that it was justified in arresting Johnson to keep the peace and venerate a national symbol.¹¹³ The Supreme Court ruled for Johnson. On keeping the peace, the court found that facts did not indicate impending violence.¹¹⁴ On the importance of the flag as a national symbol, “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹¹⁵ Even for speech destroying the most important national symbol, the court upheld Johnson’s right to free speech.

The right to free speech also protects citizens from being forced to speak, which is shown in *West Virginia v. Barnett*.¹¹⁶ In 1942, West Virginia established a state law

¹⁰⁹ *Texas v. Johnson*, 491 U.S. 397 (1989).

¹¹⁰ *Johnson*, 491 U.S. 397 at 399.

¹¹¹ *Johnson*, 491 U.S. 397 at 399.

¹¹² *Johnson*, 491 U.S. 397 at 399.

¹¹³ *Johnson*, 491 U.S. 397 at 400.

¹¹⁴ *Johnson*, 491 U.S. 397 at 410.

¹¹⁵ *Johnson*, 491 U.S. 397 at 414.

¹¹⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

requiring schools to teach civics and the “principles and spirit of Americanism.”¹¹⁷ The state board of education interpreted this as allowing it to require the recitation of the Pledge of Allegiance to the American Flag.¹¹⁸ The religious teachings of Jehovah’s Witnesses prohibit them from worshiping “graven images”—things of this world.¹¹⁹ When a young Jehovah’s Witness refused to recite the pledge and was disciplined, his parents sued the state for violation of his free-speech rights.¹²⁰ The Supreme Court ruled for the Jehovah’s Witnesses, holding that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹²¹ Among various arguments, the majority emphasized that forced displays of national unity are more likely to hinder unity than to show citizens the principles of freedom enshrined in the Constitution are applied equally to all, including symbols of America itself.

When Congress attempted to regulate the internet, the Supreme Court supported a lower court ruling that restrictions on free speech on the internet must not be overbroad. The Child Online Protection Act (COPA) prohibited commercial websites from sharing “material harmful to minors,” which was to be judged by “contemporary community standards.”¹²² Among other issues, the Third Circuit found COPA to be overbroad because (1) publishers could never be sure whether their content was harmful to minors because COPA did not define minors, and (2) “contemporary community standards” was unclear because publishers could not know who made up a contemporary community in the context of an international internet with infinite storage.¹²³ When such a law lacks clear guidelines and is overbroad, it is unconstitutional because the government cannot ban “unprotected speech if a substantial amount of protected speech is prohibited or chilled in the

¹¹⁷ *Barnette*, 319 U.S. at 625.

¹¹⁸ *Barnette*, 319 U.S. at 625.

¹¹⁹ *Barnette*, 319 U.S. at 627.

¹²⁰ *Barnette*, 319 U.S. at 630.

¹²¹ *Barnette*, 319 U.S. at 641.

¹²² *ACLU v. Ashcroft*, 322 F.3d 240, 246 (2003).

¹²³ *Ashcroft*, 322 F.3d at 252.

process.”¹²⁴ Importantly, the court declined to establish a weakened right to free speech for internet speech.

Although many other examples exist, these three show the Supreme Court has upheld free speech in the face of pressure to support national symbols and pressure to protect children. The government can pursue goals of that importance, but it must do so in the least restrictive method possible. The next sub-section shows examples in which the government satisfied that test.

2. Examples of Unprotected Speech

Courts allow government restrictions on speech in certain cases, as shown in three examples. One example demonstrates that courts will allow restrictions when the speech endangers the government, an argument public employers may use for screening candidates. Another example shows that speech can be restricted when inciting violence, which is important for SMS as some online speech can quickly become inflamed. A final example considers obscene speech, which is important because the internet can be a significant source of obscenity, whereby possible job applicants may take on alternate personas.

One of the best-known axioms about free speech is that it does not protect one from “falsely shouting fire in a theatre.”¹²⁵ Although this quote is part of *Schenck v. United States*, the case did not involve falsely shouting “fire” but young men resisting the draft during World War I.¹²⁶ Schenck mailed thousands of fliers to draft-aged men urging them not to submit to the draft.¹²⁷ The federal government arrested him for violation of the Espionage Act of 1917, which prohibited obstruction of recruitment for the armed

¹²⁴ Although the Third Circuit carried the primary burden of ruling on the free speech issues in this case, the Supreme Court effectively endorsed its ruling by remanding the matter back to the district court level for fact-finding based on the Third Circuit’s analytical framework. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

¹²⁵ *Schenck v. United States*, 249 U.S. 47 (1919).

¹²⁶ *Schenck*, 249 U.S. at 49.

¹²⁷ *Schenck*, 249 U.S. at 49.

services.¹²⁸ The Supreme Court ruled that the government can restrict speech that “create[s] a clear and present danger that will bring about the substantive evils that Congress has a right to prevent.”¹²⁹ Because it was lawful for Congress to draft young men, it was, therefore, lawful for Congress to restrict the speech of those creating a “clear and present danger” undermining that effort.

In *Chaplinsky v. New Hampshire*, the Supreme Court determined that “fighting words” that incite violence are not protected.¹³⁰ When a town marshal responded to complaints about Chaplinsky disturbing the peace by preaching in the town square, Chaplinsky responded by berating the marshal and calling him a “God damned racketeer” and “a damned Fascist.”¹³¹ For this, Chaplinsky was arrested for violating a New Hampshire statute that prohibited directing any “offensive, derisive or annoying word to any other person who is lawfully in any street or other public place.”¹³² Chaplinsky appealed his conviction all the way to the Supreme Court, claiming the statute violated his freedom of speech.¹³³ The court rejected this argument and upheld the code, holding that the government can prohibit “fighting words” provided the law is “carefully drawn so as not unduly to impair liberty of expression.”¹³⁴

The Supreme Court allowed restrictions on obscene speech and refined the definition of “obscene” in *Roth v. United States*.¹³⁵ A federal court convicted Roth for publishing literary erotica and pornography in violation of a federal statute prohibiting the publication of “obscene, lewd, lascivious, or filthy” material.¹³⁶ The Supreme Court upheld the conviction, ruling that the government need not allow all speech but can restrict

¹²⁸ *Schenck*, 249 U.S. at 48.

¹²⁹ *Schenck*, 249 U.S. at 52.

¹³⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹³¹ *Chaplinsky*, 315 U.S. at 569.

¹³² *Chaplinsky*, 315 U.S. at 569.

¹³³ *Chaplinsky*, 315 U.S. at 570.

¹³⁴ *Chaplinsky*, 315 U.S. at 573.

¹³⁵ *Roth v. United States*, 354 U.S. 476 (1957).

¹³⁶ *Roth*, 354 U.S. at 486.

that which is “utterly without redeeming social importance.”¹³⁷ Over the years, the definition of obscene has evolved from the *Roth* definition to “I know it when I see it” to that which lacks in serious literary, artistic, political or scientific value.¹³⁸ Nevertheless, consistent through the years is the fundamental holding that not all speech is protected, and obscenity can be restricted.

Though there are more examples, these three cases show when the Supreme Court has allowed the government to restrict speech. In these cases, the court found that protecting against clear and present danger to national security, fighting words, and obscenity are all important government goals. Moreover, the court found that the government must use the least restrictive means possible to achieve those goals. Given this background on the free-speech right of private citizens, the next section considers free-speech restrictions on public employees.

C. FREE-SPEECH RESTRICTIONS ON PUBLIC EMPLOYEES

Public employees are a unique group for free-speech protections. On the one hand, they are citizens and are entitled to constitutional and civil rights. On the other, as public employees, their speech may be construed as representing the government or may interfere with effective government administration. Jurisprudence on the free-speech rights of public employees has evolved from a very restrictive rule before 1968 to a more accommodating balancing test thereafter. More recently, courts have applied public employee free-speech jurisprudence to a new venue: social media.

1. Pre-1968 Public Employee Free Speech

Before 1968, public employees had very limited free-speech rights, and governments could limit speech and terminate employees for almost any reason. The classic formulation of this idea came in 1892, in *McAuliffe v. Mayor of New Bedford*.¹³⁹

¹³⁷ *Roth*, 354 U.S. at 484.

¹³⁸ *Roth*, 354 U.S. 476; *Jacobellis v. Ohio*, 378 U.S. 184 (1964); and *Miller v. California*, 413 U.S. 15 (1973).

¹³⁹ *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (1892).

McAuliffe was a police officer and was terminated by the mayor for supporting a political party while off duty.¹⁴⁰ McAuliffe appealed the termination to the Massachusetts Court of Appeals, which upheld the termination.¹⁴¹ The court justified the termination with the famous construction “the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”¹⁴² In other words, the court upheld the right of public employers to restrict the speech of employees and observed that by accepting employment, employees also accept these restrictions.

Although *McAuliffe* was a state court decision, the Supreme Court embraced the view that government employment implied restricted free-speech rights in *United Public Workers v. Mitchell*.¹⁴³ In response to the political activities of public-sector unions, Congress passed the Hatch Act, which prohibited federal employees from taking “any active part in political management or in political campaigns.”¹⁴⁴ When a federal employee was terminated under the Hatch Act for serving as a ward executive for a political party, the employee sued, claiming that the Hatch Act violated his right to free speech.¹⁴⁵ The Supreme Court upheld his termination and the constitutionality of the Hatch Act, ruling that Congress’ power to ensure the nation’s stability was more important than the free-speech rights of federal employees. In the view of the court at this time, such employees’ free speech could be sufficiently voiced at the ballot box by voting.¹⁴⁶

2. Post-1968 Public Employee Free Speech

In 1968, the Supreme Court reversed years of precedent restraining public employee free speech and began balancing employees’ rights with the needs of government employers. In later cases, the court clarified this balancing test by requiring that employees

¹⁴⁰ *McAuliffe*, 155 Mass. at 220.

¹⁴¹ *McAuliffe*, 155 Mass. at 220.

¹⁴² *McAuliffe*, 155 Mass. at 220.

¹⁴³ *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

¹⁴⁴ *Mitchell*, 330 U.S. at 78.

¹⁴⁵ *Mitchell*, 330 U.S. at 82.

¹⁴⁶ *Mitchell*, 330 U.S. at 90.

must be speaking on matters of public concern and must be speaking as private citizens for speech to be protected.

The court established its balancing test in *Pickering v. Board of Education*. Pickering was a teacher who publicly criticized the financial management of his school district.¹⁴⁷ The school district had sought approval to increase funding via a bond issue and tax increase.¹⁴⁸ Pickering wrote a letter to the editor of a local newspaper in which he contended that the board was incompetent and was misallocating funds.¹⁴⁹ The board held an administrative hearing, determined that Pickering was undermining the goals of the district, and fired him.¹⁵⁰ The state court upheld the termination because Pickering's acceptance of the teaching position precluded him from speaking about the administration of the school board.¹⁵¹ At the time, the state court was properly applying the Supreme Court's precedent on free-speech rights of public employees. Pickering appealed to the Supreme Court, seeking a reversal of this rule.

In *Pickering*, the Supreme Court reversed its previous jurisprudence and recognized that public employees do not forego all free-speech rights when accepting public employment.¹⁵² The court indicated that the new rule should require a balancing test between two priorities.¹⁵³ First, any public employee has an interest "as a citizen, in commenting upon matters of public concern."¹⁵⁴ The court justified this interest in the need for an informed public opinion, the need for free debate, and the need for citizens to speak freely without fear of reprisal.¹⁵⁵ Second, the government has an interest "as an employer, in promoting the efficiency of the public services it performs through its

¹⁴⁷ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

¹⁴⁸ *Pickering*, 391 U.S. at 566.

¹⁴⁹ *Pickering*, 391 U.S. at 566.

¹⁵⁰ *Pickering*, 391 U.S. at 567.

¹⁵¹ *Pickering*, 391 U.S. at 567.

¹⁵² *Pickering*, 391 U.S. at 568.

¹⁵³ *Pickering*, 391 U.S. at 568.

¹⁵⁴ *Pickering*, 391 U.S. at 568.

¹⁵⁵ *Pickering*, 391 U.S. at 572.

employees.”¹⁵⁶ The court justified this interest as maintaining discipline and harmony among employees, establishing trust and loyalty between supervisors and subordinates, and enabling efficiency in providing public services.¹⁵⁷ These justifications are important because they serve as factors that future courts might consider when balancing the rights of employees against the interests of employers.

Later, in *Connick v. Meyers*, the Supreme Court clarified that for the balancing test to apply and protect an employee, the employee must be speaking on matters of public concern.¹⁵⁸ Connick was an assistant district attorney who was happy with her position.¹⁵⁹ The district attorney, Meyers, was happy with her work but sought to transfer her to another position.¹⁶⁰ Connick became upset and resisted the transfer.¹⁶¹ When Meyers finally ordered the transfer, Connick distributed a questionnaire to fellow assistant district attorneys inquiring about work conditions.¹⁶² When Meyers discovered this, he accused Connick of fomenting discontent among the workforce and fired her.¹⁶³

The Supreme Court upheld her termination without undertaking the *Pickering* balancing test because the court determined that Meyers was not speaking on a matter of public concern but about a private matter.¹⁶⁴ The court noted that the original formation of the *Pickering* test included the phrase “public concern” for a reason: employers need latitude when managing their offices.¹⁶⁵ Courts should use the *Pickering* test only after considering the threshold of whether the employee was speaking on a matter of “political,

¹⁵⁶ *Pickering*, 391 U.S. at 568.

¹⁵⁷ *Pickering*, 391 U.S. at 570.

¹⁵⁸ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

¹⁵⁹ *Connick*, 461 U.S. at 140.

¹⁶⁰ *Connick*, 461 U.S. at 140.

¹⁶¹ *Connick*, 461 U.S. at 141.

¹⁶² *Connick*, 461 U.S. at 141.

¹⁶³ *Connick*, 461 U.S. at 141.

¹⁶⁴ *Connick*, 461 U.S. at 148

¹⁶⁵ *Connick*, 461 U.S. at 146.

social, or other concern to the community” when considering the “content, form, and context” of the speech.¹⁶⁶

The Supreme Court continued to refine the *Pickering* test in *Garcetti v. Ceballos* by clarifying that for it to apply, the employee must be speaking as a private citizen and not as an employee.¹⁶⁷ Ceballos was an assistant deputy attorney in Los Angeles.¹⁶⁸ When Ceballos discovered inaccuracies in an affidavit, he investigated and developed the opinion that the affidavit was faulty and insufficient to justify prosecuting the case.¹⁶⁹ Ceballos presented these findings to his supervisors in an internal memo.¹⁷⁰ The supervisors dismissed his concerns and directed him to continue to prosecute the case.¹⁷¹ Ceballos did so.¹⁷² However, afterward, he felt he suffered adverse employment actions due to his resistance, such as involuntary transfers and a lack of promotion.¹⁷³ He initiated a grievance claiming his memo was a form of speech that should be protected.¹⁷⁴ The grievance was denied, and Ceballos appealed all the way to the Supreme Court.

The Supreme Court upheld the finding that Ceballos did not suffer adverse employment action and ruled that for the *Pickering* test to apply, an employee must be speaking in a private capacity. The court clarified *Pickering* by adding another threshold question: Was the employee speaking pursuant to one’s official duties?¹⁷⁵ If so, the *Pickering* test does not apply, even to possibly protect the employee.¹⁷⁶ The court reemphasized the need for government agencies to operate efficiently and not to

¹⁶⁶ *Connick*, 461 U.S. at 146.

¹⁶⁷ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁶⁸ *Garcetti*, 547 U.S. at 420.

¹⁶⁹ *Garcetti*, 547 U.S. at 413.

¹⁷⁰ *Garcetti*, 547 U.S. at 414.

¹⁷¹ *Garcetti*, 547 U.S. at 414.

¹⁷² *Garcetti*, 547 U.S. at 414.

¹⁷³ *Garcetti*, 547 U.S. at 415.

¹⁷⁴ *Garcetti*, 547 U.S. at 421.

¹⁷⁵ *Garcetti*, 547 U.S. at 421.

¹⁷⁶ *Garcetti*, 547 U.S. at 420.

“constitutionalize the employee grievance.”¹⁷⁷ Moreover, the court noted there is no private version of Ceballos’s speech; a letter to the editor can be written by either a private citizen or a public employee speaking as a private citizen, but an internal memo can be written only by an employee.¹⁷⁸

Synthesizing the line of Supreme Court cases after 1968 leads to a series of threshold questions and a balancing test. Was the person speaking as a private citizen? If so, was the content of the speech related to a matter of public concern? If so, does the interest of the speaker in exercising one’s right to free speech outweigh the interest of the public employer in efficient operations? Only when all three questions are answered in the affirmative is the speech protected by the First Amendment.

3. Public Employee Free Speech in the Age of Social Media

As the notion of speech has evolved to include speech conveyed on social media, courts have had to adapt free-speech jurisprudence to this new arena. These cases focus on two issues. First, does the particular form of social media activity even qualify as speech? Second, can public employers establish employee handbook policies specific to social media, and how should those policies be evaluated regarding free-speech rights?

When faced with questions about social media actions, such as posting photos or liking another’s social media post, courts have found these actions qualify as speech. The Supreme Court led the way on this issue by ruling that the federal government could not restrict indecent communications in internet chat rooms made from public libraries.¹⁷⁹ The government had sought to regulate the internet as if it were television broadcast airwaves, which are regulated by the Federal Communications Commission.¹⁸⁰ However, the court held that the internet was different and warranted full free-speech protections because any

¹⁷⁷ *Garcetti*, 547 U.S. at 420.

¹⁷⁸ *Garcetti*, 547 U.S. at 420.

¹⁷⁹ *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁸⁰ *Reno*, 521 U.S. at 860.

individual could “become a town crier with a voice that resonates farther than it could from any soapbox.”¹⁸¹

Following the Supreme Court’s lead, a federal district court ruled that posting photographs qualifies as speech.¹⁸² Two high-school students posted lewd photos to Myspace and Facebook.¹⁸³ When the school discovered the posts, it suspended the students from their athletic team.¹⁸⁴ The students complained that the school was violating their free-speech rights.¹⁸⁵ The district court ruled that the action of posting to the social media pages qualified as speech.¹⁸⁶ The court justified this decision with an analogy to the precedent finding that posting photos in a physical display unit in a history department qualified as speech.¹⁸⁷ Furthermore, the court cited to the Supreme Court’s ruling that “First Amendment protections for speech extend fully to communications made through the medium of the internet.”¹⁸⁸

Finally, even the briefest of all forms of social media speech—the like button on Facebook—qualifies as speech for purposes of First Amendment analysis.¹⁸⁹ After winning re-election, a sheriff fired employees who had supported his opponent, including one employee whose only form of support was to like a post of the opponent on Facebook.¹⁹⁰ When the employee asserted his speech was protected, the federal district court had to determine whether liking a post on Facebook qualified as speech. The court considered that the action of liking a post resulted in linking the opponent’s campaign Facebook page to the employee’s own page and that the linking included an endorsement

¹⁸¹ *Reno*, 521 U.S. at 870.

¹⁸² *T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767 (2011).

¹⁸³ *Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d at 772.

¹⁸⁴ *Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d at 772.

¹⁸⁵ *Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d at 773.

¹⁸⁶ *Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d at 776.

¹⁸⁷ *Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d at 777.

¹⁸⁸ *Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d at 777.

¹⁸⁹ *Bland v. Roberts*, 730 F.3d 368 (2013).

¹⁹⁰ *Bland*, 730 F.3d at 380.

that the user literally likes or endorses the content.¹⁹¹ Therefore, whatever the content may be, the like button serves as the digital equivalent of posting a sign on one’s lawn and qualifies as speech deserving of First Amendment protection.

Second, courts are willing to evaluate the constitutionality of social media policies in employee handbooks for public employees *before* any alleged infraction occurs. For example, in *Liverman v. City of Petersburg*, the police department issued a social media policy that stated “negative comments on the internal operations . . . are not protected by the First Amendment free speech clause, in accordance with established case law.”¹⁹² A federal district court noted that social media only appear to be a novel issue but in fact can be analyzed as any other speech policy: “What matters to the First Amendment analysis is not only the medium of the speech, but the scope and content of the restriction.”¹⁹³ Using this analysis, the court found the City of Petersburg’s policy to be unconstitutionally overbroad because the policy, if applied, would restrict free speech.¹⁹⁴

D. CONCLUSION

These cases show that courts have established a standard for the free-speech rights of public employees and have considered whether online activities qualify as speech. Combined, they provide clear jurisprudence for courts on the free-speech rights of public employees when the employees’ speech occurs online. However, these cases do not address the free-speech rights of *job applicants*. The next chapter seeks to determine whether courts have wrestled with the rights of public job applicants as distinct from incumbent public employees.

¹⁹¹ *Bland*, 730 F.3d 368.

¹⁹² *Liverman v. City of Petersburg*, 844 F.3d 400, 408 (2016).

¹⁹³ *Liverman*, 844 F.3d at 407.

¹⁹⁴ *Liverman*, 844 F.3d at 408.

III. EXISTING LAW ON THE FREE SPEECH RIGHTS OF HOMELAND SECURITY JOB APPLICANTS

Is there existing legal jurisprudence on the free-speech rights of homeland security job applicants? The question presents the challenge of proving a negative—that among the thousands of cases on free speech, none establish a rule on the free-speech rights of public job *applicants*. This chapter responds to this challenge by describing the LexisNexis database of case law, explaining the content analysis research method, and applying this method to the search results from the database.

A. THE LEXISNEXIS CASE LAW DATABASE

LexisNexis is an electronic database providing those in the legal field with access to statutes, case law, law review journals, and secondary sources. As of 2017, LexisNexis had digitized and categorized over 180 million federal and state court cases.¹⁹⁵ LexisNexis allows users to screen these cases using a “citor,” a depth of discussion filter, a jurisdiction filter, and a keyword search function.

LexisNexis offers a citator, which allows users to follow a major case and see how its rule was applied by later courts in slightly different circumstances.¹⁹⁶ LexisNexis has categorized cases into positive, negative, or neutral treatments of precedent cases—cases that have considered similar facts and issues and established the rule of law for future cases.¹⁹⁷ Subsequent courts may give the precedent case positive treatment and follow its rule, or subsequent cases may give the precedent case negative treatment and override its ruling. LexisNexis’s citator—under the brand name “Shepard’s citations”—allows users to screen subsequent cases by each type of treatment.¹⁹⁸

¹⁹⁵ LexisNexis, *Advancing Insight* (New York: LexisNexis, 2017), <https://www.lexisnexis.com/pdf/lexis-advance/la-overview-brochure.pdf>.

¹⁹⁶ “Legal Research: Citators,” Stonehill College, last modified August 20, 2018, <http://libguides.stonehill.edu/c.php?g=16657&p=92626>.

¹⁹⁷ LexisNexis, *Advancing Insight*.

¹⁹⁸ “What Is a Shepard’s Citation Search?,” LexisNexis, accessed August 28, 2018, https://help.lexisnexis.com/tabula-rasa/newlexis/shepards_cpt-concept?lbu=US&locale=en_US&audience=all,res,cb,lps,med,vsa,tax,lpa,icw,blink,bcheck,pub,urlapi.

Also, LexisNexis offers a “depth of discussion” search that allows users to screen subsequent cases by how much emphasis the court gave the precedent case.¹⁹⁹ LexisNexis divides discussion depth into four categories. First, the *analyzed* category indicates that a court “fully considered the cited reference.”²⁰⁰ Second, the *discussed* category indicates that a court “discusses the cited reference with some measure of analysis.”²⁰¹ Third, the *mentioned* category indicates that a court “mentions the cited reference but does so briefly.”²⁰² Fourth, the *cited* category indicates that a court “cites to the reference with minimal if any discussion.”²⁰³ When screening for cases citing a precedent, these depth-of-discussion indicators allow users to focus only on cases that significantly use the ruling in the underlying precedent case and screen out cases that reference the underlying precedent tangentially.

Finally, LexisNexis allows users to screen by jurisdiction and search by keyword. Users can screen results to see only federal courts such as the Supreme Court, federal circuit courts of appeal, and federal district courts.²⁰⁴ Also, users can search within search results for keywords.²⁰⁵ For example, users can search within the cases citing to *Roe v. Wade* for only those using the word “fetus.”²⁰⁶

¹⁹⁹ “What Is a Shepard’s Depth of Discussion Indicator?,” LexisNexis, accessed August 28, 2018, https://help.lexisnexis.com/tabula-rasa/newlexis/shepdepthofdiscussion_cpt-concept?lbu=US&locale=en_US&audience=all,res,cb,lps,med,vsa,tax,lpa,icw,blink,bcheck,pub,urlapi.

²⁰⁰ LexisNexis.

²⁰¹ LexisNexis.

²⁰² LexisNexis.

²⁰³ LexisNexis.

²⁰⁴ “How Do I Narrow or Filter My Shepard’s Report?,” LexisNexis, accessed August 28, 2018, https://help.lexisnexis.com/tabula-rasa/newlexis/narrowshp_hdi-task?lbu=US&locale=en_US&audience=all,res,cb,lps,med,vsa,tax,lpa,icw,blink,bcheck,pub,urlapi.

²⁰⁵ LexisNexis.

²⁰⁶ *Roe v. Wade*, 410 U.S. 113 (1973). *Roe v. Wade* is one of the most well-known Supreme Court cases, establishing women’s right to abortion.

B. CONTENT ANALYSIS RESEARCH METHOD

Content analysis is a research method whereby the researcher analyzes a body of human communications for patterns to answer a research question.²⁰⁷ Content analysis proceeds via four steps. First, the researcher establishes a question.²⁰⁸ Second, the researcher chooses a specific form of communication and body of material to study—limiting the body to a reasonable size if necessary.²⁰⁹ Third, the researcher identifies in advance the specific characteristic sought in the body of material.²¹⁰ Fourth, the researcher scrutinizes the material for the specific characteristic and marks each item in a binary fashion as including or not including the characteristic.²¹¹ Then, the researcher quantifies and summarizes the results to answer the established question.²¹²

For example, a researcher might evaluate the intensity of news coverage on Hurricane Katrina. First, the researcher would establish a question, such as “How many news stories during a specific time period were about Hurricane Katrina?” Second, the researcher would choose from news sources such as newspapers, radio, and television stories. If there are too many stories, the researcher might limit the material by the size of news outlet or medium. Third, the researcher specifies in advance that stories must have at least some percentage of the story dedicated to Hurricane Katrina. Fourth, the researcher reads, watches, and listens to the stories in the sample and evaluates each for pertinence to Hurricane Katrina. Finally, the researcher has a summary that indicates the percentage of stories that covered Hurricane Katrina.

²⁰⁷ Paul Leedy and Jeanne Ellis Ormrod, *Practical Research: Planning and Design* (New York: Pearson, 2016), 257.

²⁰⁸ Leedy and Ormrod, 257.

²⁰⁹ Leedy and Ormrod, 257.

²¹⁰ Leedy and Ormrod, 257.

²¹¹ Leedy and Ormrod, 257.

²¹² Leedy and Ormrod, 257.

C. CONTENT ANALYSIS RESULTS FOR THE SEMINAL *PICKERING* CASE IN THE LEXISNEXIS DATABASE

Combining the LexisNexis database and the content analysis research method indicates no existing jurisprudence on the free-speech rights of homeland security job applicants. Four steps were taken for this content analysis. First, the question was established: Is there existing legal jurisprudence on the free-speech rights of homeland security job applicants? Second, the LexisNexis screening functions were used to isolate an appropriate body of cases likely related to public job applicants. Third, a criterion was established in advance: Did a court use the *Pickering* rule or any other jurisprudence to evaluate the free-speech rights of a public job applicant. Fourth, the resulting cases were reviewed to determine whether they related to public job applicants.

1. Establishing the Question: Is There Legal Jurisprudence on the Free-Speech Rights of Public Job Applicants?

Content analysis seeks to answer this question: Is there jurisprudence on the free-speech rights of public job applicants? As discussed in Chapter I, the Supreme Court established the modern rule on the free-speech rights of public employees in *Pickering v. Board of Education*. Any subsequent case considering free-speech rights of public job applicants would cite to *Pickering* as the lead case.²¹³ Even courts that elected not to use the rule of *Pickering* and to establish a new rule would need to cite to *Pickering* when analyzing why it should be deviated from or disregarded.²¹⁴ LexisNexis allows a search within *Pickering*'s progeny for any cases that considered the free-speech rights of public job applicants.

²¹³ “The Process of Legal Research,” WestLaw, accessed August 28, 2018, <http://lscontent.westlaw.com/research/ppts/process%20of%20legal%20research%20complete%20show.ppt>.

²¹⁴ Mary Miles Prince, ed. *The Bluebook: A Uniform System of Citation* (Cambridge, MA: Harvard Law Review Association, 2018), 165.

2. Establishing the Body of Material: Screening LexisNexis for Appropriate Cases

Among state and federal courts, 5,877 have cited to *Pickering* since the Supreme Court’s ruling in 1968.²¹⁵ According to LexisNexis, 1,866 of the courts viewed the rule of *Pickering* positively and followed it.²¹⁶ Of these, 1,793 cases were tried in federal courts, which—because free speech is a federal right established in the Constitution—have the jurisdiction when a plaintiff sues to enforce that right.²¹⁷ Of these, LexisNexis deems that 491 courts gave *Pickering* serious depth of discussion, meaning they either “analyzed” or “discussed” the case.²¹⁸ Table 4 shows the progression of screening from all the cases citing *Pickering* to those most appropriate for content analysis.

Table 4. Screening of *Pickering* Cases for Content Analysis

<u>Category</u>	<u>Screening Constraint</u>	<u>Number of Cases</u>
Citation History	Citing <i>Pickering</i>	5,877
Analysis	Positive/Followed <i>Pickering</i>	1,866
Courts	Federal Courts Only	1,793
Depth of Discussion	Analyzed or Discussed <i>Pickering</i>	491

The 491 cases engaging in serious analysis of *Pickering* were the most likely cases to apply to a public job applicant. However, this pool was still too large for content analysis. Therefore, the LexisNexis keyword function was used to further narrow the pool.

For this search, two keywords were used: “applicant” and “candidate.” Single keywords were used to ensure the search was encompassing (e.g., “job applicant” would result in fewer results but may have missed pertinent cases). Additional keywords (e.g.,

²¹⁵ These numbers are based on a LexisNexis search by the author on August 20, 2018.

²¹⁶ These numbers are based on a LexisNexis search by the author on August 20, 2018.

²¹⁷ These numbers are based on a LexisNexis search by the author on August 20, 2018.

²¹⁸ These numbers are based on a LexisNexis search by the author on August 20, 2018.

“seeker”) were deemed unnecessary as they were less likely to produce pertinent results, and each additional keyword would have diminishing marginal returns in the search process. This keyword search resulted in 72 cases including the word “applicant” and 120 cases including the word “candidate.”²¹⁹ The combined 192 cases served as a manageable size for content analysis.

3. Establishing the Characteristic: Use of a Rule to Evaluate Public Job Applicant Rights

When reviewing these cases, the characteristic sought was whether the court used an established rule (*Pickering*) or created a rule to adjudicate a case involving the free-speech rights of public job applicants. Case law generally follows an established pattern: describes the facts and issue, states the rule of law, applies the rule to the facts, and determines the conclusion.²²⁰ Therefore, the cases were reviewed to determine whether they related to the free-speech rights of public job applicants and, if so, what rule the court used. Importantly, for this content analysis, it did not matter whether the court ruled for the plaintiff (the person bringing the lawsuit); it only mattered whether the court used *Pickering* or another rule, which would indicate established jurisprudence on the free-speech rights of public job applicants.

4. Reviewing the Body of Material for the Characteristic: Reading the Cases

The 192 cases were reviewed for their use of a rule regarding the free-speech rights of public job applicants. Only three cases had a possible relation to public job applicants. The vast majority of results were false positives—search results returning cases that extensively applied *Pickering* and included the word “applicant” or “candidate” but did not relate to a public job applicant for various reasons.

²¹⁹ These numbers are based on a LexisNexis search by the author on August 20, 2018.

²²⁰ “Organizing a Legal Discussion,” Columbia Law School Writing Center, accessed August 20, 2018, https://www.law.columbia.edu/sites/default/files/microsites/writing-center/files/organizing_a_legal_discussion.pdf.

The most common false-positive was the use of the word “candidate” to describe a candidate for political office, for which the employee’s support was the free speech at issue, but the courts had considered the actions of incumbent employees, not job candidates. Another common false-positive was the use of the word “applicant” to describe an applicant for promotion. In these cases, courts engaged in a *Pickering* analysis, but this had little implication on the free-speech rights of employees who should have known their rights via a union or employee handbook. Other examples of using “applicant” included explanations of incumbent employees’ job descriptions as evaluating applicants for licenses or government benefits; those courts had not considered job applicants. Finally, courts often used “applicant” when quoting from other unrelated cases and not analyzing job applicants. Appendix A and Appendix B provide lists of all 192 cases and a brief note on how each case relates to the free-speech rights of public job applicants.

The three cases that engaged in a *Pickering* analysis of public job applicants are reviewed here. One case relates to an applicant for a volunteer position, another relates to an applicant for a replacement job after losing an elected position, and the last relates to an applicant whose city conditionally hired him but then rescinded the job offer. In none of the cases did the court explicitly indicate job applicants were entitled to a *Pickering* analysis protecting their free-speech rights.

In *Morrison v. City of Reading*, the court engaged in a *Pickering* analysis for a plaintiff who criticized her city’s mayor and was denied a volunteer position with city government.²²¹ Morrison was a community civil-rights activist who, among other actions, publicly complained that the city’s administration was misusing federal housing funds.²²² Later, Morrison applied for a volunteer position with the city’s Human Relations Commission.²²³ The city denied her application, which Morrison believed was related to her public complaints, so Morrison sued the city.²²⁴ Before engaging in a *Pickering*

²²¹ *Morrison v. City of Reading*, No. 02-7788, 2007 U.S. Dist. LEXIS 16942, at *1 (E.D. Pa., Mar. 9, 2007).

²²² *Morrison*, 2007 U.S. Dist. LEXIS 16942, at *2.

²²³ *Morrison*, 2007 U.S. Dist. LEXIS 16942, at *2.

²²⁴ *Morrison*, 2007 U.S. Dist. LEXIS 16942, at *3.

analysis, the court summarily stated that “prospective government employees and applicants for volunteer positions as well as persons already employed in government positions enjoy First Amendment protection.”²²⁵ To support this assertion, the court cited to the Ninth Circuit Court of Appeals case of *Hyland v. Wonder*.²²⁶ However, *Hyland* dealt with an incumbent volunteer; none of its facts relate to an applicant for a volunteer or paid position.²²⁷ Although the *Morrison* court indicated that applicants might have free-speech protections, it engaged in no analysis on the question, and the authority it cites does not address applicants. Therefore, *Morrison* does not establish jurisprudence on the free-speech rights of public job applicants.

In *De La Garza v. Brumby*, the court engaged in a *Pickering* analysis for a plaintiff who applied to be a school safety officer after losing a reelection campaign for sheriff, but the court did not explicitly address the plaintiff as a job applicant.²²⁸ After Brumby ousted De La Garza in a campaign for county sheriff, De La Garza applied for a position as a school safety officer.²²⁹ Brumby rejected De La Garza’s application.²³⁰ De La Garza sued, claiming that Brumby had violated his right to free speech by taking adverse employment action against him by not hiring him because of his statements during the election, which should have been protected free speech.²³¹ The court reviewed these facts and evaluated De La Garza’s claim using a *Pickering* analysis.²³² However, the court did not explicitly address De La Garza’s rights as an applicant as distinct from an incumbent employee.²³³ The court seemed to treat De La Garza as an incumbent because of the transitory nature of

²²⁵ *Morrison*, 2007 U.S. Dist. LEXIS 16942, at *17.

²²⁶ *Morrison*, 2007 U.S. Dist. LEXIS 16942, at *17.

²²⁷ *Hyland v. Wonder*, 972 F.2d 1129 (1992).

²²⁸ *De La Garza v. Brumby*, No. 6:11-CV-37, 2013 U.S. Dist. LEXIS 26675 (S.D. Tex. Feb. 27, 2013).

²²⁹ *De La Garza*, 2013 U.S. Dist. LEXIS 26675, at *3.

²³⁰ *De La Garza*, 2013 U.S. Dist. LEXIS 26675, at *4.

²³¹ *De La Garza*, 2013 U.S. Dist. LEXIS 26675, at *5.

²³² *De La Garza*, 2013 U.S. Dist. LEXIS 26675, at *10.

²³³ *De La Garza*, 2013 U.S. Dist. LEXIS 26675, at *12–16.

the attempted shift in position from the sheriff to a school safety officer.²³⁴ Because of this implicit, rather than explicit, treatment and the transitory application, *De La Garza v. Brumby* does not clearly establish a rule for the free-speech rights of public employment job applicants.

In *Delia v. Benton County*, the court engaged in a *Pickering* analysis for a plaintiff whose employment offer was withdrawn.²³⁵ Delia contended that Benton County withdrew its employment offer because the county discovered he had sued his previous government employer.²³⁶ The court equivocated between the plaintiff's status as a dischargeable employee and an applicant.²³⁷ For example, the court described its duty as having to evaluate the county's "decision to discharge plaintiff or alternatively not to hire plaintiff."²³⁸ The court seemed to want to dispose of the dispute regardless of the plaintiff's employment status, stating there was "scant evidence of motivation" for Benton County to retaliate against Delia, regardless of his employment status.²³⁹ Although the court implicitly equated incumbents and applicants, it did not explicitly analyze the issue or endorse a view that applicants have free-speech protections.²⁴⁰

These three cases indicate that courts may rely on *Pickering* to resolve free-speech disputes for job applicants seeking public positions but have not explicitly stated so. In each case, the plaintiff was not a pure applicant for a new job but had transitioned from elected employment to appointed employment, had volunteered, or had been in limbo after receiving a job offer. Moreover, in each case, the court only implied that applicants should receive a *Pickering* analysis. Although the direction is positive, there is no clearly established jurisprudence on the free-speech rights of homeland security job applicants.

²³⁴ *De La Garza*, 2013 U.S. Dist. LEXIS 26675, at *12–16.

²³⁵ *Delia v. Benton Cty.*, No. 05-6123-HO, 2006 U.S. Dist. LEXIS 87435 (D. Or. Nov. 29, 2006).

²³⁶ *Delia*, 2006 U.S. Dist. LEXIS 87435, at *2.

²³⁷ *Delia*, 2006 U.S. Dist. LEXIS 87435, at *3.

²³⁸ *Delia*, 2006 U.S. Dist. LEXIS 87435, at *3.

²³⁹ *Delia*, 2006 U.S. Dist. LEXIS 87435, at *3.

²⁴⁰ *Delia*, 2006 U.S. Dist. LEXIS 87435, at *3–12.

D. CONCLUSION

For many years, the lack of clear jurisprudence on the free-speech rights of homeland security job applicants was not a problem. Employers have always engaged in background checks of applicants, but before the internet, employers rarely concerned themselves with what an applicant may have said in a public forum. Now, in the age of social media, employers have a trove of public speech to use when evaluating an applicant. Courts have not yet specifically established the free-speech rights of public job applicants. The next chapter considers arguments that applicants should be entitled to free-speech rights similar to the *Pickering* standard for employees.

IV. LEGAL ARGUMENTS ON THE FREE-SPEECH RIGHTS OF HOMELAND SECURITY JOB APPLICANTS

Legal research examines existing case law to extract broadly applicable rules for new but similar circumstances. As Richard Posner describes it, the process of legal research seeks to “rely on information that can be gleaned from previous cases and to emphasize the continuity between those cases and the new one.”²⁴¹ This thesis uses the legal research method to answer a novel question of law: When homeland security employers screen the social media of job applicants, what are the free-speech rights of those applicants? This chapter first considers case law containing arguments that can be adapted to show SMS violates the free-speech rights of homeland security job applicants. Then, it considers counter-arguments from case law that indicate SMS does not violate the free-speech rights of homeland security job applicants.

A. ARGUMENTS THAT SOCIAL MEDIA SCREENING INFRINGES ON THE FREE-SPEECH RIGHTS OF HOMELAND SECURITY JOB APPLICANTS

This chapter considers three types of arguments that SMS infringes on the free-speech rights of homeland security job applicants. First, it analyzes how the *Pickering* line of cases would apply to applicants. Second, it assesses how analogous cases—such as those considering loyalty oaths and the chilling effect of employee speech policies—would apply to applicants. Finally, it evaluates how various Supreme Court doctrines—syntheses of case law—would apply to the SMS of applicants.

1. Applying the *Pickering* Rule to Homeland Security Job Applicants

As discussed in Chapter I, the Supreme Court established the modern rule on the free-speech rights of public employees in *Pickering v. Board of Education*.²⁴² After *Pickering*, the court added two threshold questions—discussed in the subsequent

²⁴¹ Richard Posner, “Legal Reason: The Use of Analogy in Legal Argument,” *Cornell Law Review* 91 (2006): 761, <https://pdfs.semanticscholar.org/ebcc/e3cb38fff16beb5f664be2a9d8abdaed303f.pdf>.

²⁴² *Pickering* 391 U.S. 563.

paragraph—that must be satisfied before the *Pickering* balancing of interests is triggered, creating the *Pickering/Connick/Garcetti* test.²⁴³ An obvious starting point for considering the free-speech rights of homeland security job applicants is to consider how this jurisprudence would apply to homeland security job applicants in lieu of incumbent government employees.

The modern rule on the free-speech rights of public employees is a series of threshold questions and a balancing test. Per *Connick*, was the content of the speech related to a matter of public concern?²⁴⁴ Per *Garcetti*, was the person speaking as a private citizen?²⁴⁵ Finally, per *Pickering*, do the interests of speakers in exercising their right to free speech outweigh the interests of employers in efficient operations? The answers to the questions inform a balancing of the interests of a public employee “as a citizen, in commenting upon matters of public concern” against the interest of the government “as an employer, in promoting the efficiency of the public services it performs through its employees.”²⁴⁶ Only when all three questions are answered in the affirmative is the public employee’s speech protected by the First Amendment.

In *Connick*, the Supreme Court established the first threshold question: Was the employee speaking on a matter of “public concern” such as school funding or stringency of airport screening?²⁴⁷ If so, the matter should be considered for further analysis; if not, the speech is unprotected.²⁴⁸ The court recognized the importance of employees as citizens contributing to public discussions on matters of “political, social, or other concern to the community.”²⁴⁹ But the court did not want to obligate future courts to the role of managing

²⁴³ *Garcetti*, 547 U.S. 410; and *Connick* 461 U.S. 138.

²⁴⁴ *Garcetti*, 547 U.S. at 418.

²⁴⁵ *Connick*, 461 U.S. at 146.

²⁴⁶ *Pickering*, 391 U.S. 563 at 568.

²⁴⁷ *Connick*, 461 U.S. at 146.

²⁴⁸ *Connick*, 461 U.S. at 146.

²⁴⁹ *Connick*, 461 U.S. at 146.

disputes over employment matters such as work conditions or “ordinary dismissals from government service” because of employee performance.²⁵⁰

Applying the *Connick* threshold test to homeland security job applicants indicates that they satisfy this threshold because, as applicants, they do not yet have employment concerns and, therefore, speak only with personal knowledge about matters of public concern. Homeland security job applicants who express their opinions do not yet have a basis in knowledge about the work conditions of incumbent employees. Courts would not be forced to manage disputes between applicants and public employers unless the employers did not hire applicants because of their speech, which would be the proper role of the courts. A counter-example is possible: an applicant speaking before being hired about the conditions of her potential employment. But even this might be construed as a matter of public concern, as such potential employment conditions would apply to all other applicants and possibly affect the experience of the public when receiving services from these employees.

In *Garcetti*, the Supreme Court established a second threshold question: Was the employee speaking as a “private citizen”?²⁵¹ If so, the matter should be considered for further analysis; if not, the speech is unprotected.²⁵² In establishing this threshold question, the court contemplated two possible factors, rejected them, and finally settled on one determinative factor. The court considered whether the plaintiff’s speech was on the subject of his or her employment but determined this was inappropriate because employees have a personal basis in knowledge about government administration and should not be penalized for speaking about that basis.²⁵³ The court also considered whether the time and place of the speech are important but deemed they are not dispositive because citizens are equally likely to discuss issues at work as at home, and to disallow such speech would make public

²⁵⁰ *Connick*, 461 U.S. at 146.

²⁵¹ *Garcetti*, 547 U.S. at 421.

²⁵² *Garcetti*, 547 U.S. at 421.

²⁵³ *Garcetti*, 547 U.S. at 421.

workplaces speech-free zones.²⁵⁴ To establish its rule, the court decided that the “controlling factor” was whether the plaintiff’s speech was made pursuant to his or her employment duties.²⁵⁵ The Supreme Court justified this factor by noting that employers cannot control speech opportunities created by the Constitution—such as writing letters to the editor.²⁵⁶ Nevertheless, employers should be allowed to control speech opportunities created in the course of fulfilling a government objective—such as writing official memos.²⁵⁷

Applying the *Garcetti* threshold test to homeland security job applicants indicates that they meet the threshold of speaking as private citizens because, by definition, they do not yet have employment duties. The Supreme Court’s concern was that government employers must be able to retain control over their employees. Besides requesting that applicants follow application instructions, potential employers should exercise little control over applicants who, like private citizens, should be free to speak on any subject. Another concern of the court was that the public would confuse protected speech—such as a letter to the editor—with unprotected speech—such as an official memo. Applicants, however, could not make pronouncements that anyone would consider official government messages. Finally, the court was concerned that courts would be thrust into managing disputes between employers and employees over workplace communications. As applicants are not yet employees, they cannot engage in official communications with future peers or superiors.

In *Pickering*, the Supreme Court established a balancing test between the interests of public employees and public employers.²⁵⁸ The court recognized the interest of public employees in exercising their right to free speech, justifying this interest with the need for an informed public opinion, the need for free debate, and the need for citizens to speak

²⁵⁴ *Garcetti*, 547 U.S. at 420.

²⁵⁵ *Garcetti*, 547 U.S. at 421.

²⁵⁶ *Garcetti*, 547 U.S. at 422.

²⁵⁷ *Garcetti*, 547 U.S. at 422.

²⁵⁸ *Pickering*, 391 U.S. at 568.

freely without fear of reprisal.²⁵⁹ The court also recognized the interest of public employers in the smooth delivery of public services, justifying this interest with the importance of discipline and harmony among employees, the need to build trust and loyalty between supervisors and subordinates, and the need for effectiveness in serving the public.²⁶⁰

Applying the *Pickering* balancing test to homeland security job applicants in the abstract is challenging, but the justifications the court used serve as an analytical checklist. Regarding informed public opinion, applicants may be more informed than other citizens about certain issues because of due-diligence in their employment search. Regarding free debate, applicants should not have to forswear their right to debate various issues because they have applied for public employment. Regarding fear of reprisal, applicants should not have to fear adverse employment actions from the government after speaking. Regarding the employers' need for discipline and harmony, applicants who may become discipline problems should be screened out via traditional means such as criminal record checks and drug tests. Regarding establishing trust and loyalty, employers can achieve this after applicants become employees; limiting applicant speech before they become employees stretches the justification too far. Regarding the need for efficiency, employers have many levers to pull—restricting free-speech rights should be the last option.

Even if one analyzes the free-speech rights of homeland security job applicants as if they were already employees, the blended *Pickering/Connick/Garcetti* test indicates that those applicants should be entitled to the full free-speech rights of private citizens and not the more limited rights of incumbent employees. By definition, applicants do not yet have employment concerns, so their speech would be on a matter of public concern. Applicants are not yet employed, so they must be speaking as private citizens. Furthermore, the justifications for the *Pickering* balancing test argue that applicant speech should be protected. The government is not permitted to screen the social media of private citizens without probable cause because it would violate their free-speech rights. Applying the

²⁵⁹ *Pickering*, 391 U.S. at 569.

²⁶⁰ *Pickering*, 391 U.S. at 570.

Pickering/Connick/Garcetti test to homeland security job applicants indicates that applicants are sufficiently close to private citizens to deserve the same protection from SMS.

2. Analogizing from Pre-employment Loyalty Oaths to Social Media Screening of Homeland Security Job Applicants

During the Red Scare in the 1950s, citizens and politicians feared that communists were infiltrating all levels of the U.S. government.²⁶¹ In response, some states instituted loyalty oaths as an employment requirement for all government positions, not merely sworn employees such as police officers and firefighters.²⁶² These loyalty oaths required public job applicants to swear allegiance to the state employer and forswear allegiance to the Communist Party or other groups thought to be undermining the government.²⁶³ In *Elfbrandt v. Russell*, the Supreme Court ruled such loyalty oaths violated the right to free speech.²⁶⁴ Arizona had passed a law that allowed prosecution of state employees who violated the oath by joining groups seeking to undermine the United States.²⁶⁵ A job applicant challenged the oath as violative of his free-speech rights.²⁶⁶ The court agreed, allowing oaths that barred participation in groups that engaged in violent acts but disallowing oaths that barred participation in groups that merely engaged in political activity.²⁶⁷ The court noted that such oaths might dissuade strong job candidates: “Public employees of character and integrity may well forgo their calling rather than risk prosecution” under such laws.²⁶⁸

Social media screening of homeland security job applicants has the potential to be the loyalty oaths of today. Much as loyalty oaths threatened public job applicants with

²⁶¹ M. J. Heale, *McCarthy's Americans* (London: Palgrave, 1998), 29.

²⁶² Heale, 29.

²⁶³ Heale, 29.

²⁶⁴ *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

²⁶⁵ *Elfbrandt*, 384 U.S. at 12.

²⁶⁶ *Elfbrandt*, 384 U.S. at 12.

²⁶⁷ *Elfbrandt*, 384 U.S. at 17.

²⁶⁸ *Elfbrandt*, 384 U.S. at 18.

penalties for joining non-violent political groups, SMS threatens public job applicants with the denial of possible employment based on what they do or do not say on social media. For example, if an applicant for a law enforcement position feels strongly about the Black Lives Matter group and joins the group on Facebook, will a police department view that online participation as contrasting with loyalty to the police department? Because concerns such as this example might cause applicants to forego their calling, SMS violates their free-speech rights in the same way as loyalty oaths.

3. Considering the “Chilling Effect” That Social Media Screening Could Have on Homeland Security Job Applicants

Courts do not merely protect free-speech rights after specific plaintiffs have suffered a violation. Courts also proactively protect free-speech rights by striking down laws that may hinder speech before it is even made. In *United States v. National Treasury Employees Union*, the Supreme Court considered such a law and found it had a chilling effect on the potential speech of public employees.²⁶⁹ When Congress passed the Ethics Reform Act of 1989, it banned federal employees from receiving honorarium payments for speaking engagements or written articles.²⁷⁰ Before the rule went into effect, a group of employees sued to enforce their right to free speech.²⁷¹ In evaluating their free-speech rights, the court noted it was not engaging in “*post hoc* [after the fact] analysis of one employee’s speech” but evaluating a “wholesale deterrent to a broad category of expression by a massive number of potential speakers.”²⁷² The court used the *Pickering* framework for this evaluation but indicated that the government faced a heavy burden of proof that was greater for a “statutory restriction on expression” than it would be for “an isolated disciplinary action” because of the challenge in balancing as yet unspoken speech.²⁷³ The court recognized that the speech restriction would affect not only current employees but

²⁶⁹ *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454 (1995).

²⁷⁰ *Nat’l Treasury Employees Union*, 513 U.S. at 460.

²⁷¹ *Nat’l Treasury Employees Union*, 513 U.S. at 460.

²⁷² *Nat’l Treasury Employees Union*, 513 U.S. at 467.

²⁷³ *Nat’l Treasury Employees Union*, 513 U.S. at 468.

also a “vast group of present and future employees” by affecting their compensation, which would indirectly “induce them to curtail their expression.”²⁷⁴ For these reasons, the court overruled the honorarium ban because it would “chill potential speech before it happens.”²⁷⁵

Social media screening of homeland security job applicants has the potential to have the same speech-chilling effects that the Supreme Court ruled against in *National Treasury Employees Union*. Consistent with *Pickering*, the court considered the needs of employers and the value of employee and future-employee speech. But for wholesale regulations, the court tilted the scale by emphasizing the value of potential speech and deemphasizing the claimed needs of employer efficiency. SMS may be a deterrent to a massive number of potential speakers because job candidates who know or suspect that their potential employer will screen their social media may self-restrict their speech. Similar to the honorarium ban, SMS is broader than isolated disciplinary action against a certain employee’s speech; therefore, it should be evaluated against a higher burden of proof than isolated disciplinary actions. Also, the court recognized the importance of protecting the free-speech rights of job applicants when it noted the potential impact of laws that affected future employees. The court was concerned that the threat of a monetary fine would chill their speech; SMS has the potential to deny applicants an entire career.

4. Applying the Doctrine of Unconstitutional Conditions to Social Media Screening

The doctrine of unconstitutional conditions holds that “government may not grant [or withhold] a benefit on the condition that the beneficiary surrender a constitutional right.”²⁷⁶ The doctrine is wide-ranging and can apply to any constitutional right, not only free speech.²⁷⁷ In 2013, the Supreme Court cited approvingly to this doctrine and provided

²⁷⁴ *Nat’l Treasury Employees Union*, 513 U.S. at 468.

²⁷⁵ *Nat’l Treasury Employees Union*, 513 U.S. at 468.

²⁷⁶ Kathleen M. Sullivan, “Unconstitutional Conditions,” *Harvard Law Review* 102 (May 1989): 1415, <https://doi.org/10.2307/1341337>.

²⁷⁷ Sullivan, 1415.

a series of examples.²⁷⁸ First, the court noted counties could not condition government-provided medical care by requiring that patients live in the county for at least one year, foregoing their right to travel.²⁷⁹ Second, the court noted that municipalities could not condition land-zoning by requiring that owners grant rights-of-way to municipalities, foregoing their Fifth Amendment right to just compensation for government takings.²⁸⁰ Finally, the court noted that state universities could not condition professorships by requiring that instructors refrain from critiquing schools, foregoing their right to free speech.²⁸¹ In each case, the court noted that governments may not engage in *quid pro quo* bargaining with beneficiaries to pressure them to give up a constitutional right in exchange for a government benefit.

Social media screening violates the doctrine of unconstitutional conditions by pressuring homeland security job applicants to forego their free-speech rights in exchange for jobs. Government employment qualifies as a government benefit; courts have even ruled that applicants placed on eligibility lists have a property interest in the potential employment.²⁸² Free speech is a constitutional right.²⁸³ Although SMS is not an explicit *quid pro quo*, it implicitly pressures applicants to self-restrict their online speech. Applicants concerned about their potential employment may refrain from speaking on controversial topics or taking positions they anticipate their potential employer may not endorse.

5. Applying the Doctrine of Vagueness to Social Media Screening

The doctrine of vagueness holds that laws and regulations are unconstitutional when individuals cannot determine what they prohibit.²⁸⁴ A regulation governing speech

²⁷⁸ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

²⁷⁹ *Koontz*, 570 U.S. at 604.

²⁸⁰ *Koontz*, 570 U.S. at 604.

²⁸¹ *Koontz*, 570 U.S. at 604.

²⁸² *Stana v. Sch. Dist. of Pittsburgh*, 775 F.2d 122, 126 (1985).

²⁸³ U.S. Const. amend. I.

²⁸⁴ *Connally v. General Contractors Co.*, 269 U.S. 385, 391 (1926).

is vague when potential speakers cannot understand it, must “guess at its meaning,” and “differ as to its application.”²⁸⁵ The doctrine of vagueness is justified under two rationales. First, the doctrine invalidates laws that do not provide citizens with fair notice or warning about the laws’ application.²⁸⁶ For example, the Supreme Court invalidated a statute that criminalized “treating contemptuously the flag of the United States” when a man was charged for wearing the flag as a patch on the seat of his jeans.²⁸⁷ The court ruled the statute was too vague for people to anticipate whether their actions would violate it.²⁸⁸ Second, the doctrine invalidates vague laws because they may allow for “arbitrary and discriminatory enforcement.”²⁸⁹ In the example of one constitutional scholar, “police who look charitably on a postgame victory celebration in the streets of a college town may not feel the same way about an antiwar demonstration.”²⁹⁰

The doctrine of vagueness argues that SMS may violate the First Amendment rights of homeland security job applicants by leaving those applicants unsure of whether and how their speech is being evaluated. Regarding notice, even if agencies inform candidates they will be screening their social media, they may not give clear guidelines on what is and is not acceptable. In contrast to drug tests whereby candidates know the binary nature of the screening results, SMS guidelines would be ambiguous, if they exist at all. Regarding arbitrariness, social media present the possibility that the screeners prefer some social media activity to others. SMS is arbitrary in that one screener may look charitably on a candidate’s support for gun rights but may not feel the same way about another candidate’s support for abortion rights, or vice versa.

²⁸⁵ *Connally*, 269 U.S. at 391.

²⁸⁶ *Smith v. Goguen*, 415 U.S. 566, 572 (1974).

²⁸⁷ *Goguen*, 415 U.S. at 568.

²⁸⁸ *Goguen*, 415 U.S. at 576.

²⁸⁹ *Goguen*, 415 U.S. at 573.

²⁹⁰ Kenneth L. Karst, “Equality as a Central Principle in the First Amendment,” *Chicago University Law Review* 43, no. 20 (1975): 38, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3965&context=uclrev>.

6. Conclusion

These arguments show that homeland security job applicants should be treated as private citizens and, therefore, not be subject to SMS as it is a form of free-speech restriction. Existing jurisprudence—the *Pickering/Connick/Garcetti* test—defines the acceptable restrictions on incumbent public employees; applying that test to applicants indicates applicants should neither be restricted nor treated as if they were employees. When engaging with applicants as private citizens, the government cannot constitutionally demand loyalty, chill speech, engage in *quid pro quo* bargaining for benefits, or arbitrarily enforce free-speech standards. SMS can serve as a mechanism for all those unconstitutional actions and violate the free-speech rights of homeland security job applicants.

B. ARGUMENTS THAT SOCIAL MEDIA SCREENING DOES NOT INFRINGE ON FREE SPEECH

To fairly evaluate the idea that homeland security job applicants are entitled to the free-speech protections of private citizens, this section considers counter-arguments. First, it considers the precedent that found *Pickering* was not the appropriate analytical framework for a candidate for a public university training program, which is somewhat similar to government employment. Second, it considers the precedent that fear of one’s speech being chilled is not sufficient to create standing to sue to protect one’s free-speech rights.

1. *Pickering* Is Not an Appropriate Framework for Analyzing Non-employees

On at least one occasion, a plaintiff contended he was denied a job opportunity because of his speech and requested the court engage in a *Pickering* analysis, which the court deemed inapplicable. In *Oyama v. University of Hawaii*, a state school denied Oyama admission to a licensing program—and thus possible government employment.²⁹¹ When Oyama was simultaneously a student in one program and seeking admission to another that would enable him to work as a public school teacher, he made inflammatory statements

²⁹¹ *Oyama v. Univ. of Hawaii*, 813 F.3d 850, 854 (2015).

about students with disabilities and the acceptability of pedophilia.²⁹² Because of these statements, the school rejected his application to the licensing program.²⁹³ Oyama argued that the school violated his free-speech rights and urged the court to engage in a *Pickering* analysis.²⁹⁴ The Ninth Circuit Court of Appeals recognized Oyama as a hybrid, as he was simultaneously a student and an applicant.²⁹⁵ Regarding his status as an applicant, the court refused to apply *Pickering*, holding it was inappropriate to “extend this doctrine to those who do not yet work for the government but may wish to do so.”²⁹⁶ The court denied this extension because it would have had the effect of limiting Oyama’s speech as if he was an employee, denying him the “freedom to test his ideas, critique professional conventions, and develop into a more mature professional than he would as a government employee.”²⁹⁷ Instead, the court analyzed his claim using the certification doctrine, the concept that courts should grant “deference to certifying institutions” provided the institutions apply professional standards and not the personal preferences of their employees.²⁹⁸ The court endorsed the certification doctrine for narrow use with certifying entities, not adjudicating employers’ restrictions on applicant speech.²⁹⁹

Oyama does not endorse limiting free speech for applicants for public employment; it merely endorses the certification doctrine for how public institutions evaluate the speech of applicants for state certifications. Oyama argued that *Pickering* was an appropriate framework for analyzing the free-speech rights of public job applicants. Though the court rejected this idea, the rejection does not indicate public job applicants are not entitled to free-speech rights. On the contrary, recall that the *Pickering* was established as the framework by which governments could acceptably limit the free speech of their

²⁹² *Oyama*, 813 F.3d at 856.

²⁹³ *Oyama*, 813 F.3d at 856.

²⁹⁴ *Oyama*, 813 F.3d at 860.

²⁹⁵ *Oyama*, 813 F.3d at 860.

²⁹⁶ *Oyama*, 813 F.3d at 866.

²⁹⁷ *Oyama*, 813 F.3d at 866.

²⁹⁸ *Oyama*, 813 F.3d at 867.

²⁹⁹ *Oyama*, 813 F.3d at 868.

employees; it did *not* affect the expansive free-speech rights of non-employee citizens, including those applying for public employment. And the court’s own explanation of the certification doctrine reinforces the concerns of the vagueness doctrine—that it allows for selective arbitrary and discriminatory enforcement, such as in a separate incident wherein a public university expelled a student seeking certification as a counselor because the student referred a gay client to another counselor.³⁰⁰

2. Merely the Fear of Adverse Employment Action Is Insufficient for Standing to Sue

Though the Supreme Court shows great respect for the concern that state action may chill speech, it has limited the concern with the requirement that a plaintiff show standing—that the plaintiff suffered an injury traceable to government action that can be redressed by a court. In *Clapper v. Amnesty International*, the Supreme Court rejected the idea that the fear of restriction of a First Amendment right grants standing to sue.³⁰¹ After the passage of the Foreign Intelligence Surveillance Amendments Act in 2008, Amnesty International claimed that the potential of surveillance was so fearsome that it chilled its free speech.³⁰² The court rejected this claim, ruling that Amnesty had not fulfilled the requirement of standing.³⁰³ The court noted that Amnesty International’s fear was not “fairly traceable” because it required a long chain of events: (1) that the government would seek to surveil non-U.S. persons with whom Amnesty International was communicating, (2) that the government would seek Foreign Intelligence Surveillance Court authority, (3) that a judge would grant that authority, (4) that the government would succeed in intercepting communications, and (5) that Amnesty International would be on the particular call or e-mail with the targeted individual that the government intercepted.³⁰⁴ Because there were so many speculative links in this chain, the court ruled that an

³⁰⁰ *Oyama*, 813 F.3d at 867.

³⁰¹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013).

³⁰² *Amnesty Int’l USA*, 568 U.S. at 405.

³⁰³ *Amnesty Int’l USA*, 568 U.S. at 401.

³⁰⁴ *Amnesty Int’l USA*, 568 U.S. at 411.

individual could not show standing merely from the “fear that, armed with the fruits of [agency surveillance], the agency might in the future take some other and additional action detrimental to that individual.”³⁰⁵

Just because Amnesty International could not show standing does not mean that homeland security job applicants could not. *Clapper* is not an effective counter-argument because the chain of connection between homeland security job applicants and their employers is much shorter than in *Clapper*. Homeland security job applicants need not speculate about a series of possible events to fear that their speech may cause detrimental action. One study found that 80 percent of students anticipate SMS by potential employers.³⁰⁶ Moreover, applicants often communicate among themselves about application procedures, making their fear of possible consequences more legitimate than in *Clapper*. Through unofficial online chat boards, applicants spread rumors about the hiring practices of departments, including rumors of SMS. For example, on Officer.com, the New York regional sub-board of a law enforcement chat room, 29 of 50 posts were about law enforcement job opportunities and screening procedures, with interested applicants discussing concerns such as what prescription medications or psychological conditions might be disqualifying.³⁰⁷ These applicants are clearly fearful about failing screening procedures, so fearful that they are reaching out to strangers online for any information they can find.

C. CONCLUSION

Balancing the arguments for and against free-speech protections for homeland security job applicants indicates that applicants should be provided with the full protections of private citizens. Applying existing jurisprudence for incumbent public employees to homeland security job applicants suggests applicants should be treated as private citizens.

³⁰⁵ *Amnesty Int’l USA*, 568 U.S. at 417.

³⁰⁶ Teri Root and Sandra McKay, “Student Awareness of the Use of Social Media Screening by Prospective Employers,” *Journal of Education for Business* 89, no. 4 (2014): 202–206, <https://doi.org/10.1080/08832323.2013.848832>.

³⁰⁷ “New York: Police Forums and Law Enforcement Forums,” Officer, accessed September 27, 2018, <https://forum.officer.com/forum/local-discussion-groups/u-s-states/new-york>.

Analogous case law on free speech indicates that homeland security job applicants would suffer various forms of government pressure to self-restrict their speech. Furthermore, counter-arguments can be distinguished as not addressing the specific concerns of homeland security job applicants.

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V. SOCIAL SCIENCE ARGUMENTS ON THE FREE SPEECH RIGHTS OF HOMELAND SECURITY JOB APPLICANTS

When analyzing a novel question of law, legal research looks beyond existing case law for public policy justifications in areas such as ethics, economics, and sociology.³⁰⁸ Social science disciplines offer arguments opposing the SMS of homeland security job applicants because it may be unethical, inefficient, and ineffective. Ethical analyses of employee health screening provide analogous arguments for SMS that suffer from counter-arguments. Economic theories of market-wage and economic balancing indicate SMS may not recognize the costs thereof. Moreover, sociology offers explanations of how applicants engage in the management of their social media to make good impressions and how employers are attracted to applicants similar to themselves, risking groupthink. This chapter reviews arguments from social science disciplines and considers how they apply to the free-speech rights of homeland security job applicants.

A. ETHICAL FRAMEWORKS FOR EVALUATING SOCIAL MEDIA SCREENING

Public health experts wrestle with the ethics of screening applicants for unhealthy behaviors such as smoking and obesity. Ethical arguments justifying screening smokers and the obese can be divided into deontological (duty-based) and consequentialist (utility-based) ethical frameworks. This section reviews those arguments, adapts them to SMS for homeland security job applicants, and presents counter-arguments that demonstrate SMS is not justified.

1. Deontological (Duty-Based) Ethical Frameworks

Deontological (duty-based) ethics focuses on the duty of actors and examines whether actions are “right or wrong in themselves, not by consideration of their

³⁰⁸ Sanne Taekema and Wibren van der Burg, “The Incorporation Problem in Interdisciplinary Legal Research,” *Erasmus Law Review* 2, (2015): 39, https://www.elevenjournals.com/tijdschrift/ELR/2015/2/ELR-D-15-004_001.pdf.

consequences.”³⁰⁹ Ethicists, for example, propose a duty-based argument that screening for smokers and the obese is justified because employers have a duty to hire employees who can serve as role models. Schmidt, Voigt, and Emanuel studied the ethics of screening smokers and found health-care organizations, in particular, argue that “employees must serve as role models for patients and that only nonsmokers can do so.”³¹⁰ For example, the World Health Organization hires only non-smokers and defends the policy by “its commitment to tobacco control and the importance of ‘denormalizing’ tobacco use.”³¹¹ Similarly, for obesity, medical ethicist Cynthia Jones argues there is a “moral duty to address health disparities because the required basic respect for all persons is violated by the presence of significant differences in health.”³¹² This moral duty justifies paternalism and pressure as “both morally acceptable and morally laudable” because there is an obligation for “legitimate government intervention if a health problem affects a vulnerable population.”³¹³ In both cases, these justifications involve a duty-based argument: Screening for smokers and the obese is justified because employers must be role models for the public; the consequential suffering of the obese or smokers is not a consideration.

Analogizing from these justifications illustrates arguments for the SMS of homeland security job applicants under a duty-based ethical framework. Homeland security employers have an obligation to screen the social media of job applicants because those individuals will serve as role models and should not be engaging in social media behavior of which the employer does not approve. Social media screening is ethical because it “denormalizes” unapproved speech by homeland security job applicants that

³⁰⁹ *The Essentials of Philosophy and Ethics*, s.v. “deontology,” accessed October 24, 2018, <https://search-credoreference-com.libproxy.nps.edu/content/entry/hodderepe/deontology/0>.

³¹⁰ Harald Schmidt, Kristin Voigt, and Ezekiel J. Emanuel, “The Ethics of Not Hiring Smokers,” *New England Journal of Medicine* 368, no. 15 (April 2013): 1369–71, <https://www.nejm.org/doi/pdf/10.1056/NEJMp1301951>.

³¹¹ Schmidt, Voigt, and Emanuel, 1369.

³¹² Cynthia M. Jones, “The Moral Problem of Health Disparities,” *American Journal of Public Health* 100, no. S1 (April 2010): S48, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2837423/pdf/S47.pdf>.

³¹³ Jacquineau Azétsop and Tisha R. Joy, “Epistemological and Ethical Assessment of Obesity Bias in Industrialized Countries,” *Philosophy, Ethics, and Humanities in Medicine* 6, no. 16 (December 16, 2011): 11, <https://doi.org/10.1186/1747-5341-6-16>.

could eventually affect the employer's operations. Paternalism and pressure to suppress speech are morally acceptable because homeland security employers must hire only those candidates whose speech aligns with that of the employer to ensure the employer's mission is efficiently accomplished. This duty trumps any possible negative consequences for job applicants.

The duty-based framework supporting SMS is vulnerable to numerous counter-arguments. Homeland security employers mistake how they are viewed by their constituents if they argue in favor of SMS to screen for appropriate role models. Homeland security *agencies* are the role models, and implicitly pressuring applicants to self-restrict speech casts homeland security agencies as authoritarian. Homeland security employers also mistake their mission if they are seeking to “denormalize” certain speech—citizens look to agencies to provide homeland security, not to dictate an approved speech code. Paternalism and pressure to suppress speech elevate SMS to a core mission though homeland security agencies are not tasked with that duty. Finally, a duty-based framework does not absolve actors of evaluating the efficacy of the action they claim fulfills their duty.

2. Consequentialist (Utility-Based) Ethical Frameworks

Consequentialist (utility-based) ethics evaluates actions based on the results of the actions, typically seeking to maximize the greatest good for the greatest number of people.³¹⁴ Ethicists also consider a utility-based argument that employer screening for smokers and the obese is justified because smoking and obesity are personal choices that impose unjustified costs on a broader societal group. Health care ethicists focus on the costs of smoking and obesity: an increased health insurance expense, higher absenteeism, and lower productivity.³¹⁵ Regarding smoking, Schmidt, Voigt, and Emanuel explain that employers feel employees “must take personal responsibility for actions that impose financial or other burdens on employers or fellow employees.”³¹⁶ Similarly, regarding

³¹⁴ *The Essentials of Philosophy and Ethics*, s.v. “utilitarianism,” accessed October 24, 2018, <https://search-credoreference-com.libproxy.nps.edu/content/entry/hodderepe/utilitarianism/0>.

³¹⁵ Schmidt, Voigt, and Emanuel, “The Ethics of Not Hiring Smokers,” 1369.

³¹⁶ Schmidt, Voigt, and Emanuel, 1369.

obesity, employers believe “that, unlike race or gender, body weight is not an immutable characteristic.”³¹⁷ Once employers conclude that smoking and obesity are choices, they justify discriminating “against the overweight ‘as a matter of economics’” because of the perceived increased costs.³¹⁸ These justifications make a utility-based argument: Screening for smoking and obesity may impose burdens on some individuals, but those burdens are outweighed by the broader reduction in health insurance expenses, absenteeism, and lost productivity, which impact many others.

Analogizing from these arguments offers a defense for the SMS of homeland security job applicants under a utility-based ethical framework. Homeland security employers view controversial and inflammatory speech by applicants as costly because it may hurt the reputation of the agency. The private sector recognizes the cost of inflammatory social media by employees by offering insurance against it. *Risk and Insurance* magazine has published articles such as “How Disgruntled Employees Tarnish Your Social Media Branding and Reputation,” and attorneys have written articles such as “Social Media Users, R U Insurable?”³¹⁹ Homeland security agencies are increasingly aware of the need to use social media “to manage the reputation of the organization” and to “engage in community outreach,” but allowing the risk of inflammatory social media speech by job applicants runs counter to that effort.³²⁰ In a utilitarian ethical framework, although SMS may negatively affect the freedom of some applicants, the preservation of the reputation of homeland security agencies is more valuable.

³¹⁷ Mark V. Roehling, “Weight Discrimination in the American Workplace: Ethical Issues and Analysis,” *Journal of Business Ethics* 40, no. 2 (October 2002): 183, <https://doi.org/10.1023/a:1020347305736>.

³¹⁸ Roehling, 183.

³¹⁹ Michell Kerr, “How Disgruntled Employees Tarnish Your Social Media Branding and Reputation,” *Risk and Insurance*, August 13, 2018, <http://riskandinsurance.com/how-employees-tarnish-social-media-reputation/>; and Kendal K. Hayden, “Social Media Users, R U Insurable?,” *Texas Bar Journal* 74, no. 1 (2011): 96, https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=12227.

³²⁰ Chelsea Fray, “Narrative in Police Communication: The Art of Influence and Communication for the Modern Police Organization” (master’s thesis, Illinois State University, 2017): 28, <https://ir.library.illinoisstate.edu/cgi/viewcontent.cgi?article=1754&context=etd>; and “Social Media Fact Sheet,” International Association of Chiefs of Police, January, 2013, <http://www.iacpsocialmedia.org/wp-content/uploads/2017/01/Social-Media-Fact-Sheet-1.pdf>.

This utility-based argument for SMS is vulnerable to several counter-arguments. First, proponents of SMS compare a certain negative—the deprivation of applicants’ free-speech rights if employers decline to hire based on SMS—against a possible positive—preventing a social media scandal that may reflect poorly on a government agency. Second, although employers always want more information about job candidates, the effectiveness—and therefore utility—of SMS is still uncertain.³²¹ Thus far, researchers have shown a link only between negative online behavior and some personality traits; they have not shown a link to counter-productive work behavior.³²² Third, homeland security agencies that engage in SMS to protect their reputation are neglecting to recognize they may be harming their reputation in the process. For example, applicants told after SMS by a prospective employer viewed the employer less favorably and were more likely to sue the employer.³²³

B. ECONOMIC FRAMEWORKS FOR EVALUATING SOCIAL MEDIA SCREENING

Economic perspectives on free-speech rights of homeland security employees and job applicants focus on the trade-offs among the public, employers, and employees. First, the market-wage theory of employment considers the exchange between employers and employees of compensation for temporarily foregone rights. Second, an economic cost-benefit framework attempts to quantify the value of the components of speech and regulation.

1. The Market-Wage Theory of Employment

Market-wage theory is one way through which economists attempt to understand the negotiations between employers and potential employees. Market-wage theory holds that when an “employer and a worker agree on a job, a wage, and working conditions, the party giving up rights—typically the employee—is (in theory) compensated for rights

³²¹ Stoughton, Thompson, and Meade, “Big Five Personality Traits,” 803.

³²² Stoughton, Thompson, and Meade, 803.

³²³ Stoughton, Thompson, and Meade, “Examining Applicant Reactions,” 73.

foregone,” such as the right to speak freely.³²⁴ When completed, this agreement forms an implied contract.³²⁵ Obviously, applicants are not yet under contract. However, extending the market-wage theory to applicants suggests an argument supporting SMS: Although applicants have not yet received compensation in exchange for their forgone rights, they may place option-value on the possibility of a job and be willing to acquiesce to SMS in exchange.

Social media screening cannot be justified by market-wage theory because applicants have not agreed to forego rights. Relative to other types of contracts, employment is more accurately governed by norms captured in relational contracts—implied terms based on the parties’ relationship with each other—instead of written transactional contracts.³²⁶ A market-wage theory attempting to justify SMS fails because applicants have had little to no time to develop a relationship with a prospective employer. Without a relationship, there is no opportunity to develop the implied terms that cover relational contracts. Without these terms, the market-wage justification becomes one-sided: Employers have decided that the possibility of compensation justifies SMS, but applicants have had no opportunity to confirm.

2. The Economic Cost–Benefit of Regulating Free Speech

Richard Posner, widely considered one of the founders of the field of law and economics, developed an economic framework for evaluating free speech.³²⁷ Posner proposed a formula arguing that restricting speech is economically justified when the value of the suppressed speech is less than the cost of suppression:

³²⁴ Bruce Barry, *Speechless: The Erosion of Free Expression in the American Workplace* (San Francisco: Berrett-Koehler Publishers, 2007), 214, <http://ebookcentral.proquest.com/lib/ebook-nps/detail.action?docID=322124>.

³²⁵ Christine G. Cooper, “The Basics of Employment Contracts,” American Bar Association, May 2007, https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0705_litigation_employmentcontracts.html.

³²⁶ Robert C. Bird, “Employment as a Relational Contract,” *Journal of Business Law* 8, no. 1 (2005): 149, <https://www.law.upenn.edu/journals/jbl/articles/volume8/issue1/Bird8U.Pa.J.Lab.&Emp.L.149%282005%29.pdf>.

³²⁷ *Stanford Encyclopedia of Philosophy*, s.v. “The Economic Analysis of Law,” July 17, 2017, <https://plato.stanford.edu/entries/legal-econanalysis/>.

$$V + E < P \times L / (1+i)^n$$

- V = social value lost if the speech is restricted
- E = error: the legal costs of determining the social value of the speech
- P = probability that suppressing the speech will cause a social cost
- L = magnitude of the social cost if the speech is allowed
- i = interest rate
- n = number of years until the social cost occurs.³²⁸

Posner elaborates on each variable. V is an estimate of the value lost by society if the government restricts the speech, which is determined by the type and amount of the speech.³²⁹ Posner does not place numerical values on different types of speech but points out that society values some forms of speech—such as political speech—more than others—such as obscenities.³³⁰ E is an estimate of the legal costs necessary to “distinguish the information that society desires to suppress from valuable information.”³³¹ P recognizes that resultant social costs of allowed speech are not guaranteed but only possible.³³² L attempts to estimate the magnitude of the possible social cost if the speech is allowed.³³³ The variables i and n acknowledge that any possible social cost that occurs in the future must be discounted to the present value for a fair comparison.³³⁴

Posner uses several examples to illustrate his framework by indicating the relative magnitude of the variables. As an example of political speech, Posner considers the case of *National Socialist Party of America v. Village of Skokie*, wherein a group of Neo-Nazis

³²⁸ Richard Posner, “Free Speech in an Economic Perspective,” *Suffolk University Law Review* 20, no. 1 (1986): 8, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2897&context=journal_articles.

³²⁹ Posner, 10.

³³⁰ Posner, 10.

³³¹ Posner, 8.

³³² Posner, 8.

³³³ Posner, 8.

³³⁴ Posner, 8.

sought government permission to parade through a predominantly Jewish neighborhood.³³⁵ Here, V (social value) is low; even allowing for *some* value in the Nazis' political position, the communicative effects on a neighborhood of Jews would be low.³³⁶ Also, E (error cost) is low, concluding the value of V is uncomplicated.³³⁷ However, P (probability of social cost) is high; such a parade is likely to create tension.³³⁸ L (magnitude of social cost) is also high; such tension could cause violence and rioting.³³⁹ Finally, there is little discount for the future timeframe of the costs; unlike a written manifesto that might cause unrest in the distant future, such a parade could cause harm almost immediately.³⁴⁰ Because the present value is less than the possible future risk, Posner's formula indicates that restricting the parade is justified.

Posner also applies his formula to several special situations, including the free-speech rights of public employees. Posner theorizes that V (social value) is low because "very few of them either want to express themselves publicly on political questions or could attract any significant audience if they did."³⁴¹ However, he admits that V could also be high because public employees have a unique perspective on government operations.³⁴² He finds the balancing difficult as P (probability of social cost) and L (magnitude of social cost) are also high because of the difficulty in "formulating and executing coherent government policies" to manage employee speech.³⁴³ On balance, Posner seems to find employee speech worth protecting if it is "self-expressive."³⁴⁴

³³⁵ Posner, 30.

³³⁶ Posner, 30.

³³⁷ Posner, 30.

³³⁸ Posner, 30.

³³⁹ Posner, 30.

³⁴⁰ Posner, 30.

³⁴¹ Posner, 49.

³⁴² Posner, 49.

³⁴³ Posner, 49.

³⁴⁴ Posner, 49.

Applying the Posner framework to the SMS of homeland security job applicants indicates that such screening is costlier than the supposed benefits. Because homeland security job applicants have researched their chosen field, they have more information than the average citizen, increasing the measure of V (social value). In contrast to the time when Posner wrote that individuals could not attract “any significant audience,” applicants now have new media on which to attract millions of listeners: social media. The value for E (error cost) is high; homeland security employers would have to engage human-resource offices and possibly courts to evaluate questionable social media posts of applicants. P (probability of social cost) is low; few applicant social media posts are harmful to the public. For example, Facebook reports it discovered 2.4 million pieces of hate speech in the first quarter of 2018; among a base of 2.2 billion users, at most, 0.11 percent of users created hate speech.³⁴⁵ L (magnitude of social cost) is low; although there have been riots and violence over perceived racial injustice by police, such unrest was based on the actions of incumbent officers, not the speech of applicants. Finally, the discount for the future timeframe of possible social cost is high; even if a social media post could cause unrest, it would be *after* the applicant was hired and *after* it was discovered online.

C. SOCIOLOGICAL FRAMEWORKS FOR EVALUATING SOCIAL MEDIA SCREENING

Sociologists enjoy a rich mine of data for analysis in the internet and social media world. They have identified two issues related particularly to SMS and homeland security. First, applicants may be tempted to manage their social media to reflect the perceived preferences of potential employers. Second, SMS may lead to groupthink by homeland security agencies, which has been identified as particularly risky in this arena.

1. Applicants May Engage in Impression Management When Applying for Homeland Security Jobs

You never get a second chance to make a first impression. Job applicants know this and typically manage their social media profiles accordingly, engaging in what sociologists

³⁴⁵ “Community Standards Enforcement Preliminary Report,” Facebook, accessed October 23, 2018, <https://transparency.facebook.com/community-standards-enforcement#hate-speech>.

have termed “impression management.”³⁴⁶ Impression management occurs when “individuals attempt to control the impressions others form of them.”³⁴⁷ Researchers have known of this phenomenon since the 1980s, but the creation of online social media has changed the means and motivations by which people seek to manage the impressions of others. Previously, impressions were limited to word of mouth, resume padding, and the names of references. Now, candidates can design “idealized versions of themselves” by creating “highly socially desirable identities.”³⁴⁸

Social media users have three general tactics for impression management; each has implications for their free speech. First, applicants can omit information by “purposely not including information that could potentially hurt the impression.”³⁴⁹ For example, an applicant may choose to not include their race in a demography section. Second, applicants can “distance themselves from members of their network whose posts can damage their impression.”³⁵⁰ For example, an applicant may disengage from a political group about whom they are passionate out of concern that the group is too controversial for a potential employer. Third, applicants may use strict privacy settings to limit viewership, as social media users “believe they have a right to privacy with what they post online and take full advantage of privacy settings.”³⁵¹ However, this creates a catch-22 for users: they feel strongly about an issue and want to speak out about it, but setting stringent privacy settings ensures few people can hear them.

³⁴⁶ Mark Leary and Robin Kowalski, “Impression Management: A Literature Review and Two-Component Model,” *Psychological Bulletin* 107, no. 1 (January 1990): 39, <http://dx.doi.org/10.1037/0033-2909.107.1.34>.

³⁴⁷ Leary and Kowalski, 40.

³⁴⁸ Noelle B. Frantz et al., “Is John Smith Really John Smith? Misrepresentations and Misattributions of Candidates Using Social Media and Social Networking Sites,” in *Social Media in Employee Selection and Recruitment*, ed. Richard Landers and Gordon Schmidt (Cham, Switzerland: Springer, 2016), 315.

³⁴⁹ Nicolas Roulin and Julia Levashina, “Impression Management and Social Media Profiles” in *Social Media in Employee Selection and Recruitment*, ed. Richard Landers and Gordon Schmidt (Cham, Switzerland: Springer, 2016), 235.

³⁵⁰ Frantz et al., “Is John Smith Really John Smith?,” 317.

³⁵¹ Frantz et al., 317.

The temptation of impression management combines with the SMS of homeland security job applicants to create the risk of stifling speech. Applicants may refrain from speaking on an issue about which they are passionate because they are concerned about the impression their position may make on a potential employer, or applicants may endorse certain positions about which they are neutral or negative to engender positive feelings in their potential employer. This dynamic is compounded by people being “more likely to engage in impression management when they perceive their image to be public.”³⁵² Note that this dynamic occurs regardless of whether the employer is actually engaging in SMS; the specter of potential screening is enough to affect the speech of the applicant.

2. Homeland Security Employers May Subconsciously Select People Similar to Themselves, Risking Groupthink

Sociologists have studied the proclivity of individuals to favorably evaluate others similar to themselves, leading to positive selection bias and possible groupthink. Demographic similarity theory “draws upon the Similarity-Attraction paradigm (and Social Identity Theory), maintaining that managers observe key personal attributes and attitudes expressed by applicants and [ascribe] positive characteristics to individuals whom they view as similar to themselves.”³⁵³ Wade and Roth tested this theory by establishing fake social media accounts and posting about a political issue.³⁵⁴ Then, Wade and Roth gathered human-resource professionals, determined their positions on the political issue, and asked them to evaluate the fake profiles.³⁵⁵ Wade and Roth found a statistically significant relationship between (1) the similarity between the applicants and the human-resource professional on the political issue and (2) the evaluations that the human-resource

³⁵² Frantz et al., 315.

³⁵³ Julie Wade and Phil Roth, “Social Media and Personnel Selection: How Does New Technology Change an Old Game?,” in *Proceedings of the 36th International Conference on Information Systems: Exploring the Information Frontier*, ed. Traci Carte, Armin Heinzl, and Cathy Urquhart (Atlanta: Association for Information Systems, 2015), 2, <https://pdfs.semanticscholar.org/0cfa/0ec9c04baba52a70c98ba35c8931ef697537.pdf>.

³⁵⁴ Wade and Roth, 7.

³⁵⁵ Wade and Roth, 9.

professionals gave the applicants.³⁵⁶ This result indicates that demographic similarity theory is active in SMS.³⁵⁷

Demographic similarity theory indicates homeland security employers risk developing a culture of groupthink when using SMS. One of the most important conditions encouraging groupthink is “homogeneity of group members’ social backgrounds and ideology.”³⁵⁸ James Ricciuti studied groupthink during homeland security–related incidents, including the Waco Branch Davidian raid, the Boston Marathon bomber manhunt, and the Brown standoff wherein a family claimed that the federal income tax was illegal and challenged federal marshals who tried to remove them from their property.³⁵⁹ Ricciuti determined that groupthink in the homeland security enterprise risks several negatives: insulated leadership, belief in one’s own morality, closed-mindedness, and self-fulfilling pressure to conform.³⁶⁰

The risk of groupthink, when combined with a broader perspective on free speech, has implications for homeland security employers. Although it is common to conceive of free-speech rights protecting *speakers*, legal theory holds that the First Amendment also protects *listeners*.³⁶¹ For example, when Congress required that libraries establish stringent internet-blocking policies on their public computers, the Supreme Court considered the rights of the listeners under the First Amendment.³⁶² Justice Breyer, in his concurrence, noted the law imposes a burden on listeners—“library patrons seeking legitimate Internet materials”—because it “directly restricts the public’s receipt of information.”³⁶³ This

³⁵⁶ Wade and Roth, 12.

³⁵⁷ Wade and Roth, 12.

³⁵⁸ James E. Ricciuti, “Groupthink: A Significant Threat to the Homeland Security of the United States” (master’s thesis, Naval Postgraduate School, 2009), 40, <https://www.hsdl.org/?abstract&did=762428>.

³⁵⁹ Ricciuti, 59–93.

³⁶⁰ Ricciuti, 95–98.

³⁶¹ Leslie Kendrick, “Are Speech Rights for Speakers?,” *Virginia Law Review* 103, no. 8 (2017): 1767–1809, http://www.virginialawreview.org/sites/virginialawreview.org/files/Kendrick_Online_0.pdf.

³⁶² *United States v. Am. Library Ass’n*, 539 U.S. 194, 220 (2003).

³⁶³ *Am. Library Ass’n*, 539 U.S. at 220.

“right to receive information” is what constitutional law scholar Alexander Meiklejohn was describing when he stated, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”³⁶⁴ Although counter-intuitive, homeland security employers who engage in SMS risk violating the free-speech rights of *themselves* as well as listeners.

D. CONCLUSION

Social science disciplines such as ethics, economics, and sociology contribute helpful frameworks that can be adapted to consider the free-speech rights of homeland security job applicants. Ethical arguments for SMS are countered by the homeland security employers’ responsibility to serve as role models and to consider the efficiency of SMS in a larger context. Economic theories indicate the lack of an opportunity for applicants to develop a contractual employer–applicant relationship, and the factors in a cost–benefit formula argue against regulating applicant speech. Furthermore, sociological research indicates that applicants may alter their social media profiles to fulfill perceived employer desires and that homeland security employers risk groupthink by unconsciously selecting applicants whose social-media profiles match their views.

³⁶⁴ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Clark, NJ: Lawbook Exchange, 2004), 25.

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VI. ANALYSIS OF POLICY AND GUIDANCE ON SCREENING THE SOCIAL MEDIA OF HOMELAND SECURITY JOB APPLICANTS

Although many homeland security employers engage in SMS of applicants, few publish their policies. Published policies allow for analysis of how homeland security employers engage in SMS and what standards they use for acceptable speech. Research for this thesis uncovered two documents useful for such an analysis. The Washington, D.C., Metropolitan Police Department (MPD) published its SMS policy for applicants, and the International Association of Chiefs of Police (IACP) published guidance for police departments on how to appropriately engage in SMS.³⁶⁵ This chapter describes both documents and analyzes them for positive and negative implications for the free-speech rights of homeland security job applicants by linking these implications to the legal and social science arguments described in previous chapters.

A. WASHINGTON, D.C., METROPOLITAN POLICE DEPARTMENT SOCIAL MEDIA SCREENING POLICY

The MPD established its SMS policy for applicants in its 2016 Special Order “Social Media Checks for Background Investigations.”³⁶⁶ Although publicly available via internet search, the MPD policy is an internal directive instructing recruitment staff and is not part of the recruitment information package provided to applicants.³⁶⁷ Analysis of the policy reveals implications for protecting and weakening the free-speech rights of homeland security job applicants.

³⁶⁵ Metropolitan Police Department of the District of Columbia, *Social Media Checks for Background Investigations*, SO-16-06 (Washington, DC: Metropolitan Police Department, June 3, 2016), https://go.mpdonline.com/GO/SO_16_06.pdf; and Andrée Rose et al., *Developing a Cybervetting Policy for Law Enforcement* (Alexandria, VA: International Association of Chiefs of Police, December 2010), <http://www.iacpsocialmedia.org/wp-content/uploads/2017/02/CybervettingReport-2.pdf>.

³⁶⁶ Metropolitan Police Department of the District of Columbia, *Social Media Checks*, 1.

³⁶⁷ Metropolitan Police Department of the District of Columbia, 2.

1. Policy Description

The MPD emphasizes the goals of protecting the department, treating applicants fairly, and preventing discrimination against applicants. First, the policy notes the legal risks for employers who do and do not engage in SMS—those that risk discriminating against applicants and those that do not risk civil judgments for negligent hiring if unprofessional applicants are hired and engage in misconduct.³⁶⁸ The policy recognizes these risks and seeks to “mitigate these risks to the greatest degree possible.”³⁶⁹ Second, the policy seeks fairness for applicants by requiring that social media checks be “conducted in a consistent and equitable manner.”³⁷⁰ Finally, the policy aims to protect the legal rights of applicants and “ensure that the checks do not discriminate against applicants or violate their privacy.”³⁷¹ With these purposes in mind, the policy includes three practical sections on definitions, regulations, and procedures.³⁷²

First, the MPD defines what information can be screened, by whom, and for what purpose. Applicants subject to SMS include active members, reserve members, and civilians.³⁷³ Social media are defined as electronic communications in online communities where users “share information, ideas, personal messages, and other content.”³⁷⁴ Information is broadly defined as anything accessible to the general public.³⁷⁵ Derogatory information has its own definition: “Any information [that], if credited to a member of the MPD, would bring discredit upon the Department.”³⁷⁶ The policy later provides examples of derogatory information as “hate speech, derogatory postings and/or pictures.”³⁷⁷

³⁶⁸ Metropolitan Police Department of the District of Columbia, 1.

³⁶⁹ Metropolitan Police Department of the District of Columbia, 2.

³⁷⁰ Metropolitan Police Department of the District of Columbia, 2.

³⁷¹ Metropolitan Police Department of the District of Columbia, 1.

³⁷² Metropolitan Police Department of the District of Columbia, 2–5.

³⁷³ Metropolitan Police Department of the District of Columbia, 2.

³⁷⁴ Metropolitan Police Department of the District of Columbia, 2.

³⁷⁵ Metropolitan Police Department of the District of Columbia, 2.

³⁷⁶ Metropolitan Police Department of the District of Columbia, 2.

³⁷⁷ Metropolitan Police Department of the District of Columbia, 4.

Second, the MPD establishes regulations for its in-house background investigators. The policy requires that background investigators keep any discovered information confidential.³⁷⁸ The policy prohibits investigators from disqualifying an applicant based solely on the discovery of derogatory information.³⁷⁹ Moreover, the policy bars investigators from requesting passwords or requiring that applicants log in to accounts in their presence.³⁸⁰

Third, the MPD's procedures provide the steps and requirements for properly checking an applicant's social media. The policy requires the department to notify applicants of the SMS via recruiting materials and to obtain signed waivers acquiescing to the screening.³⁸¹ This waiver requires applicants to list their social media accounts, note any possibly derogatory material, and explain possibly derogatory material in advance.³⁸² The policy lists several specific social media sites that investigators should check and allows for additional internet searches, provided that all applicants are subjected to the same examination.³⁸³ If an investigator discovers any derogatory information, he must forward it to the applicant, who has an opportunity to explain it in writing.³⁸⁴

2. Policy Implications Protecting the Free-Speech Rights of Applicants

The MPD's policy has numerous positive implications for protecting the free-speech rights of homeland security job applicants. First, in general, homeland security job applicants are often uncertain whether and how homeland security employers are engaging in SMS. Although the MPD policy may still chill the speech of some applicants, at least they are made aware of the policy. Second, the MPD acknowledges that applicants have rights, including the right to privacy. Although the MPD does not explicitly note the right

³⁷⁸ Metropolitan Police Department of the District of Columbia, 3.

³⁷⁹ Metropolitan Police Department of the District of Columbia, 3.

³⁸⁰ Metropolitan Police Department of the District of Columbia, 3.

³⁸¹ Metropolitan Police Department of the District of Columbia, 3.

³⁸² Metropolitan Police Department of the District of Columbia, 3.

³⁸³ Metropolitan Police Department of the District of Columbia, 4.

³⁸⁴ Metropolitan Police Department of the District of Columbia, 4–5.

to free speech, free speech and the right to privacy arguably are intertwined in the concept of “privacy of thought”—that privacy is necessary to develop ideas before they can be voiced. The MPD’s recognition of the right to privacy of thought indicates it may be open to recognizing applicants’ right to free speech.³⁸⁵ Third, the MPD recognizes the importance of social media as a form of speech. The MPD does not dismiss social media as merely an avenue to post vacation photos and relationship statuses but notes that social media are used to share “ideas.” Fourth, the MPD offers applicants an opportunity to explain potentially disqualifying information. This is the employment application version of Justice Brandeis’s maxim that the solution to disfavored speech is “more speech, not enforced silence.”³⁸⁶

3. Policy Implications Infringing on the Free-Speech Rights of Applicants

The MPD’s policy also includes aspects that may infringe on the free-speech rights of homeland security job applicants. Although the policy allows applicants to note potentially derogatory information before the SMS, some applicants may choose to simply delete such information, engage in impression management as described in Chapter IV, or otherwise effectively limit their speech. By setting a list of social media sites that will be surveyed, the policy may lead applicants to wrongly believe that other sites are not surveyed for publicly available information even though internet searches of candidates are permitted. Finally, the MPD’s multiple efforts to inform applicants that their social media will be screened may serve to “send a message” to applicants that they should curtail their speech if they want to work in the MPD.

The MPD policy’s most negative implication for free speech is its guidance on what qualifies as derogatory. Its definition of derogatory as information that “would bring discredit upon the Department” is subjective, and its list of examples is circular, using derogatory to define derogatory. This lack of clarity may lead applicants to speculate as to

³⁸⁵ Ken Gormley, “One Hundred Years of Privacy,” *Wisconsin Law Review* 5 (January 1992): 1381, <https://cyber.harvard.edu/privacy/Gormley--100%20Years%20of%20Privacy.htm>.

³⁸⁶ *Whitney v. California*, 274 U.S. 357, 377 (1926).

what speech is acceptable to the MPD. As noted in the discussion of policies that may chill speech in Chapter III, homeland security job applicants exhibit fear of unknown screening procedures, casting about on internet chat boards for clarity on what behavior may disqualify them from employment. Also, the MPD's weak definition may violate the Supreme Court's doctrine of vagueness. The doctrine of vagueness holds that laws violate the First Amendment when citizens have to guess at their meaning. In the absence of clear guidelines from the MPD on what qualifies as disqualifying speech, applicants may simply self-restrict speech. Finally, the MPD's definition fails the challenge of the *Garcetti* test. *Garcetti* protects speech when employees speak as private citizens. The MPD's policy for applicants is concerned that derogatory information might be "credited to a member of the department," implicitly acknowledging that homeland security agencies are judging applicants as if they were already agency members. Until they are hired, applicants remain private citizens and should be entitled to unencumbered free-speech rights.

B. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE GUIDANCE ON DESIGNING SOCIAL MEDIA SCREENING POLICIES

The IACP created guidance for homeland security employers on SMS in its 2010 document *Developing a Cybervetting Strategy for Law Enforcement*.³⁸⁷ The IACP developed this guidance by reviewing existing literature and case law, interviewing subject-matter experts, and presenting proposals to 16 focus groups of law enforcement professionals for evaluation.³⁸⁸ The result was recommendations on SMS with a description of how each recommendation was developed. Aspects of these recommendations either protect or weaken the free-speech rights of homeland security job applicants.

³⁸⁷ Rose et al., *Developing a Cybervetting Policy*, 1.

³⁸⁸ Rose et al., 2.

1. Guidance Description

The IACP guidance establishes goals and practices to achieve them. The IACP indicates that SMS policies should be consistent in scope and application.³⁸⁹ Policies should be applied consistently, periodically reviewed by management, approved by legal counsel, and “made available to the public.”³⁹⁰ Policies should fulfill the purposes of evaluating trustworthiness, estimating future responsible behavior, and ensuring “the individual has behaved in a manner consistent with law enforcement mores.”³⁹¹ The IACP divides its guidance into three sections: notice, search practices, and adjudication.³⁹²

First, the IACP emphasizes the importance of providing notice to applicants that their social media may be screened and gaining consent from applicants prior to conducting SMS. Despite noting that law enforcement agencies “are not legally required to inform job applicants . . . about employment-related cybervetting unless those searches are performed by a third party,” the IACP strongly encourages agencies to provide notice to respect applicants’ privacy and “allow job applicants to make informed decisions.”³⁹³ The IACP advises that employers request written consent from candidates so they are aware that recruitment staff will survey their social media and related internet search results.³⁹⁴ Also, candidates should be afforded the chance to explain any potentially concerning information.³⁹⁵ The IACP suggests that employers “review online information about these individuals available on websites, where a subject’s password is required to view content.”³⁹⁶ Finally, employers should notify applicants that failure to provide consent may “impact their employment status.”³⁹⁷

³⁸⁹ Rose et al., 2.

³⁹⁰ Rose et al., 4.

³⁹¹ Rose et al., 1.

³⁹² Rose et al., 4.

³⁹³ Rose et al., 5.

³⁹⁴ Rose et al., 5.

³⁹⁵ Rose et al., 6.

³⁹⁶ Rose et al., 6.

³⁹⁷ Rose et al., 6.

Second, the IACP recognizes that internet searches of candidates are an obvious way to engage in a background investigation. The IACP cautions that investigators must be trained to seek relevant information, redact information that may lead departments to discriminate against certain kinds of applicants, and maintain confidentiality.³⁹⁸ The IACP has frowned on one agency using college interns because they were more familiar with the internet than upper management.³⁹⁹ The IACP recommends that agencies request e-mail addresses, screen-names, and blogs where applicants contribute.⁴⁰⁰ Although agencies should not ask for passwords, they can request that applicants log in to “password-protected websites so that the recruiter or background investigator can review their profiles, blogs, or other online forums.”⁴⁰¹ The IACP specifically expresses concern about free-speech rights, including a full review of the applicable case law, but only in the context of incumbent employees, not applicants.⁴⁰² The IACP endorses a policy of prohibiting employees from disseminating “any material that brings discredit . . . to the agency,” but again, this applies only to incumbent employees; the IACP does not offer model language for applicants.⁴⁰³

Third, the IACP issues recommendations for adjudication, including determining when a candidate should be eliminated from consideration. The IACP notes that any adjudication should be preceded by authentication—determining that the information is correctly associated with the applicant (e.g., the John Smith posting was made by the actual John Smith applying for the job).⁴⁰⁴ Once authenticated, the IACP reminds agencies that social media information should be used just like other background information for adjudication.⁴⁰⁵ Furthermore, the IACP notes that if agencies use a third-party firm to

³⁹⁸ Rose et al., 6.

³⁹⁹ Rose et al., 6–7.

⁴⁰⁰ Rose et al., 7.

⁴⁰¹ Rose et al., 8.

⁴⁰² Rose et al., 10–11.

⁴⁰³ Rose et al., 14.

⁴⁰⁴ Rose et al., 17.

⁴⁰⁵ Rose et al., 20.

engage in SMS, they are obligated by the federal Fair Credit Reporting Act to provide the applicant with any information that affects the hiring decision.⁴⁰⁶

2. Guidance Implications Protecting the Free-Speech Rights of Applicants

The IACP guidance ensures that applicants are aware of SMS and treated equally. By emphasizing the importance of notice, the IACP ensures that applicants are aware if agencies screen their social media. By recognizing the importance of applicants' privacy—and presumably the privacy necessary to speak among friends about important ideas—the IACP acknowledges that applicants have distinct rights from incumbent employees, but does little more. The IACP also appropriately notes the importance that SMS be conducted by officially trained staff to minimize the risk of infringement on applicants' rights. Although focusing on incumbents, the IACP acknowledges that SMS impacts the right to free speech. Finally, the IACP guidelines for authentication and adjudication ensure that applicants are not wrongly accused of policy violations and that applicants are treated equally based on established criteria.

3. Guidance Implications Infringing on the Free-Speech Rights of Applicants

The IACP's procedural guidance does little to assuage applicants of the fear that their speech may be used against them, leaving applicants to self-restrict speech. Regarding notice, the IACP makes a veiled threat by suggesting that applicants should make "informed decisions" about their social media, or it may "impact their employment status." The IACP's suggestion that agencies should be allowed to view applicants' password-protected social media accounts after the applicant has logged in implies that applicants should self-restrict speech even among a closed group of online friends. The IACP neglects to define what may "bring discredit" to an agency, allowing broad concern among applicants on what speech may disqualify them for employment and, therefore, encouraging applicants to self-restrict speech. Although noting that SMS should be done

⁴⁰⁶ Rose et al., 21.

according to “established criteria,” the IACP falls short of the obvious recommendation that such criteria be written and, therefore, dodges the question of whether such criteria should be published to applicants.

Besides the procedural aspects of the IACP guidance that may infringe on the free-speech rights of applicants, the spirit of the guidance is problematic. The IACP’s goal that screening should eliminate candidates who are not “consistent with law enforcement mores” implies that agencies should deny employment based on candidate speech that does not fit the norms of the law enforcement community. Such an implied requirement is reminiscent of the “loyalty oaths” described in Chapter III. The Supreme Court evaluated loyalty oaths and ruled they violate the First Amendment because they might dissuade quality applicants who fear retaliation for breaching such oaths. Similarly, the IACP’s goal of finding applicants who are consistent with law enforcement mores may dissuade those who have cultural or political views inconsistent with existing law enforcement culture, which sociologists have described as promoting an “us versus them” attitude, proving masculinity, and resisting change.⁴⁰⁷ Also, as discussed in Chapter IV, enforcing cultural homogeneity risks a groupthink environment and its associated negatives for the organization, such as insulated leadership and closed-mindedness. The IACP’s goal of maintaining existing law enforcement mores may stifle the free speech of candidates who could contribute original thoughts to counteract such groupthink.

C. CONCLUSION

The MPD policy and the IACP guidance provide insight into how some homeland security employers are or should be thinking about the SMS of job applicants. Both documents take some steps toward protecting free-speech rights for homeland security job applicants, such as making efforts at informing applicants of the SMS process, giving applicants opportunities to explain potentially problematic speech, and ensuring fair adjudication once information the agency deems problematic is found. However, many aspects of the documents increase the risks to applicant free speech: the documents are

⁴⁰⁷ Angela Workman-Stark, *Inclusive Policing from the Inside Out* (Cham, Switzerland: Springer, 2017), 20–23, <https://www.springer.com/us/book/9783319533087#>.

vague as to what types of speech are unacceptable, they encourage applicants to self-restrict speech, and they seek to perpetuate the existing law enforcement culture. On balance, even when attempting to carefully describe best practices for SMS, these documents imply diminished free- speech rights for homeland security job applicants.

VII. CONCLUSION

This thesis sought to determine the free-speech rights of homeland security job applicants when employers screen their social media and whether existing policies and guidance support or infringe on those free-speech rights. To answer these questions, it considered legal arguments on the free-speech rights of applicants, social science arguments on free-speech rights of applicants, and two public documents offering protocols and guidance for screening applicants' social media.

Legal arguments around the SMS of homeland security job applicants favor treating applicants as private citizens because justifications for diminished protections are nonsensical when applied to applicants. For example, employers may be justified in restricting the speech of employees because the public may confuse an employee's official speech representing the agency with an individual's private speech; no listener would mistake an applicant's speech as representing the government. Social science arguments lean toward treating applicants as private citizens because the frameworks that justify restricting employee speech are not compelling when applied to applicants. For example, an economic cost-benefit analysis favors allowing applicant speech as it would most likely have a value greater than the cost of restricting it. Finally, the publicly available policies and guidance indicate employers may be underestimating how their policies send a message to applicants that they should self-restrict speech to improve their chances of employment.

A. RECOMMENDATIONS

If one accepts that homeland security job applicants should be entitled to free-speech protections, what recommendations support such a goal? This thesis recommends (1) positive steps—actions homeland security employers can take to prevent infringing on applicants' rights—and (2) preventive steps—actions homeland security employers should avoid to prevent interference with applicants' rights.

1. Positive Steps

Homeland security employers can take affirmative steps to give job applicants a better understanding of the SMS process and put applicants at ease that their free-speech rights are not in jeopardy. First, in the style of the Washington, D.C., Metropolitan Police Department, homeland security employers should ensure applicants are notified of the screening process and openly publish their internal protocols for the SMS of applicants. Applicants already anticipate that employers may be screening their social media and may self-restrict speech for fear it may affect their employment prospects. Providing applicants with clear notice at least removes the fear of the unknown for the applicant. By publishing the internal protocols for applicants, homeland security employers show applicants they are distinct from incumbent employees and warrant their own policy, and publishing the policy will assuage the fears of applicants regarding disparate treatment and the breadth of the screening.

Second, homeland security employers should publish a database of social media speech they have used to disqualify applicants. Lacking clear guidance or examples, applicants are left unsure of what speech may be disqualifying. Such a database would be analogous to pre-employment drug-use policies published by certain homeland security employers, such as the Federal Bureau of Investigation's policy that specifies acceptable timeframes before employment for the use of marijuana versus other illegal drugs.⁴⁰⁸ By stripping the social media posts of personally identifying information, homeland security employers would protect the privacy of the disqualified applicants. But, by indicating what social media posts are unacceptable, homeland security employers would reassure applicants that most speech is protected. Social media employers could seed such a database with example posts based on news or experience and then add to the database as they find new examples during the actual screening of applicants. If an independent entity manages such a database, the experiences of many agencies could be centralized and the burden of maintaining it shared. For example, the Federal Law Enforcement Training

⁴⁰⁸ "Employment Eligibility," Federal Bureau of Investigation, accessed December 3, 2018, <https://www.fbijobs.gov/working-at-FBI/eligibility>.

Centers (FLETC) facilitate a “Lessons Learned Work Group” that consolidates experiences, anonymizes them, and disseminates them among the group for everyone’s benefit.⁴⁰⁹ Similarly, FLETC could anonymize social media posts that recruitment officers find disqualifying and share them with other agencies and applicants.

2. Preventative Steps

Homeland security employers can also take preventative steps to ensure that the free-speech rights of applicants are protected. These steps include carefully wording their recruitment materials to avoid implying SMS will serve as enforcement of a speech code and resisting the temptation to evaluate applicant social media activity as if it were incumbent employee social media activity.

Employers should avoid including language in their recruiting materials and notice of social media documents that implies applicants will be held to a speech code. Veiled threat language—such as that found in the International Association of Chiefs of Police guidance, suggesting applicants should make “informed decisions” about their social media—makes applicants more likely to self-restrict speech. Employers should reconsider language that implies applicants should adhere to the homeland security enterprise’s existing culture and assure applicants that SMS is done in the spirit of preserving free speech.

Employers should avoid evaluating applicant speech by the same standard used to evaluate the speech of incumbent employees. Employers may want to use their experience with employees’ social media policy breaches as guideposts for determining when applicant social media speech is disqualifying in an employment background check. However, employers should recognize that applicants are not yet employees and should not yet be held to the same standard.

⁴⁰⁹ “Lessons Learned Work Group,” Federal Law Enforcement Training Centers, accessed December 3, 2018, <https://www.fletc.gov/lessons-learned-work-group>.

B. SUGGESTIONS FOR FURTHER RESEARCH AND FUTURE LEGAL ACTION

The contours of applicant free-speech rights can be more fully determined by future research and legal action. Future research could consider other rights of applicants. For example, are applicants entitled to due-process rights in the same way as incumbent government employees? Future research could also explore the social construct of social media. For example, as social media continue to proliferate, do people view them as becoming more serious and due more protections or less serious and due fewer protections? Finally, if enough homeland security agencies publish their SMS policies for applicants, future research could review those policies to delineate speech that homeland security employers find disqualifying from speech they do not.

Future legal action can provide judicial resolution of the question of the level of speech protections to which applicants are entitled. Although individual applicants may find the legal costs associated with such a suit prohibitive, free-speech advocacy groups, such as the American Civil Liberties Union (ACLU), could take on the litigation costs as part of their mission. The ACLU already spends approximately 22 percent of its annual budget on legal expenses to fulfill its mission statement of “working tirelessly in courts, legislatures, and communities to defend and preserve the Constitution’s promise of liberty.”⁴¹⁰ If the ACLU or a similar group finds that an applicant was denied employment by a homeland security agency because the applicant took a political position on social media, the ACLU might sponsor that case to set a precedent for applicants across the country.

C. CONCLUSION

Homeland security employers must recruit the best talent to fulfill their missions, and social media screening provides additional and unique information when engaging in background investigations. However, unlike traditional background investigation techniques, social media screening includes the possibility that homeland security

⁴¹⁰ American Civil Liberties Union, *Annual Report* (New York, ACLU, 2017), 20, <https://www.aclu.org/other/aclu-annual-report-2017>.

employers will infringe on the free-speech rights of their applicants. Homeland security employers should recognize these rights, acknowledge the risk that social media screening may affect these rights, and take steps to minimize the impacts of social media screening on these rights.

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**APPENDIX A. CONTENT ANALYSIS OF CASES CITING TO *PICKERING V. BOARD OF EDUCATION*
AND INCLUDING THE KEYWORD “APPLICANT”**

	<u>Court / Case</u>	<u>Related to job applicants?</u>	<u>Comment</u>
U.S. Supreme Court			
1.	Harris v. Quinn, 134 S. Ct. 2618	No	Not free speech related. Petitioner attempting to force the state to collect union dues and made an argument analogizing to Pickering.
1st Circuit - U.S. District Courts			
2.	Perez v. Zayas, 396 F. Supp. 2d 90	No	"Applicant" refers to an applicant for government benefits.
2nd Circuit - Court of Appeals			
3.	Harman v. City of New York, 140 F.3d 111	No	"Applicant" used in a footnote referring to another case.
2nd Circuit - U.S. District Courts			
4.	<u>Murray v. Town of Stratford</u> , 996 F. Supp. 2d 90	No	"Applicant" referred to an applicant for promotion.

5.	<u>Spence v. Ellis</u> , 2010 U.S. Dist. LEXIS 146449	No	Incumbent employee denied an endorsement letters as an "applicant" for a firearms license.
6.	<u>Savoy of Newburgh, Inc. v. City of Newburgh</u> , 657 F. Supp. 2d 437	No	"Applicant" referred to an applicant seeking to renew a government contract, not employment.
7.	<u>Locurto v. Giuliani</u> , 269 F. Supp. 2d 368	No	"Applicant" referred to an applicant for a transfer from one agency to another.
8.	<u>Shelton Police Union v. Voccola</u> , 125 F. Supp. 2d 604	No	"Applicant" referred to an applicant for employment, but the plaintiff was attempting to publicize the nepotism of Chief trying to hire his own son. Pickering only applied to incumbent employees.
9.	<u>Belch v. Jefferson County</u> , 108 F. Supp. 2d 143	No	"Applicant" referred to an applicant for promotion.
10.	<u>Piesco v. New York, Dep't of Personnel</u> , 753 F. Supp. 468	No	"Applicant" does refer to applicants for police officer position, but incumbent testing employee/plaintiff was terminated for speaking out about the passing score for that job.
11.	<u>Haurilak v. Kelley</u> , 425 F. Supp. 626	No	"Applicant" referred to an applicant for promotion.
3rd Circuit - Court of Appeals			
12.	<u>Springer v. Henry</u> , 435 F.3d 268	No	"Applicant" referred to an employee reviewing an applicant for medical license.

3rd Circuit - U.S. District Courts

13.	<u>Mitchell v. Miller</u> , 884 F. Supp. 2d 334	No	"Applicant" was a PA State Trooper cadet in training and therefore already an employee.
14.	<u>Toth v. Cal. Univ. of Pa.</u> , 844 F. Supp. 2d 611	No	"Applicant" referred to an applicant for promotion.
15.	<u>Yu v. United States Dep't of Veterans Affairs</u> , 2011 U.S. Dist. LEXIS 71995	No	"Applicant" merely included in a quote from the employee handbook; case is about an incumbent employee.
16.	<u>Beckinger v. Twp. of Elizabeth</u> , 697 F. Supp. 2d 610	No	"Applicant" included in a quote from another case.
17.	<u>Schlarp v. Dern</u> , 610 F. Supp. 2d 450	No	"Applicant" referred to an applicant for promotion.
18.	<u>Miller v. Weinstein</u> , 2008 U.S. Dist. LEXIS 111949	No	"Applicant" used in a Free Exercise clause analysis.
19.	<u>Morrison v. City of Reading</u> , 2007 U.S. Dist. LEXIS 16942	Maybe	"Applicant" refers to an applicant for a volunteer position. Court does engage in a Pickering analysis.
20.	<u>Grigsby v. Kane</u> , 2005 U.S. Dist. LEXIS 2010	No	"Applicant" refers to an employee whose job it was to review applicants for a state license.
21.	<u>Aumiller v. University of Delaware</u> , 434 F. Supp. 1273	No	"Applicant" refers to an employee who applied to have his contract renewed.

4th Circuit - Court of Appeals		
22.	<u>Lawson v. Gault</u> , 828 F.3d 239	No "Applicant" used in summary of another case.
23.	<u>Love-Lane v. Martin</u> , 355 F.3d 766	No "Applicant" refers to an employee who applied to have his position renewed but was demoted.
24.	<u>Jurgensen v. Fairfax County</u> , 745 F.2d 868	No "Applicant" used when quoting the Whistleblower Protection Act.
4th Circuit - U.S. District Courts		
25.	<u>Durham v. Jones</u> , 2012 U.S. Dist. LEXIS 128360	No "Applicant" used when discussing applying for attorney's fees.
26.	<u>Howell v. Marion Sch. Dist. One</u> , 2009 U.S. Dist. LEXIS 22723	No "Applicant" used when discussing employment license applicants.
5th Circuit - Court of Appeals		
27.	<u>Anderson v. Valdez</u> , 845 F.3d 580	No "Applicant" used to describe an applicant for transfer to another position.
28.	<u>Kinney v. Weaver</u> , 367 F.3d 337	No "Applicant" used in quote from Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, which is a case about an incumbent contract employee.

29.	<u>Kinney v. Weaver</u> , 301 F.3d 253	No	"Applicant" used in quote from Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, which is a case about an incumbent contract employee.
30.	<u>Brady v. Fort Bend County</u> , 145 F.3d 691	No	"Applicant" used when discussing applying for attorney's fees.
31.	<u>Bickel v. Burkhardt</u> , 632 F.2d 1251	No	"Applicant" referred to an applicant for promotion.
5th Circuit - U.S. District Courts			
32.	<u>Oller v. Rousel</u> , 2014 U.S. Dist. LEXIS 117694	No	"Applicant" referred to an incumbent professor applying for a prestigious chair.
33.	<u>Jackson v. Tex. Southern Univ.</u> , 997 F. Supp. 2d 613	No	"Applicant" used in a quote from another case.
34.	<u>De La Garza v. Brumby</u> , 2013 U.S. Dist. LEXIS 26675	Maybe	"Applicant" was a sheriff ousted in an election who then applied to be a school safety officer. Court does engage in a Pickering analysis.
35.	<u>Childers v. Dallas Police Dep't</u> , 513 F. Supp. 134	No	"Applicant" referred to an applicant for promotion.
6th Circuit - Court of Appeals			
36.	<u>Miller v. City of Canton</u> , 319 Fed. Appx. 411	No	"Applicant" used in a quote from another case.
37.	<u>Scarborough v. Morgan County Bd. of Educ.</u> , 470 F.3d 250	No	"Applicant" was an applying to keep his job when the title changed from elected to appointed.

6th Circuit - U.S. District Courts			
38.	<u>Wolgast v. Tawas Area Sch. Dist. Bd. of Educ.</u> , 2015 U.S. Dist. LEXIS 127437	No	"Applicant" used in state law discussion.
39.	<u>Hadad v. Croucher</u> , 970 F. Supp. 1227	No	"Applicant" used in discussing improper application for traffic violation data.
7th Circuit - Court of Appeals			
40.	<u>Bonds v. Milwaukee County</u> , 207 F.3d 96	No	Plaintiff was an "applicant" early in the fact history. After was accepted for employment, he spoke after speaking out publicly and the employer rescinded the employment offer.
41.	<u>Egger v. Phillips</u> , 710 F.2d 292	No	Describing how incumbent employees interview "applicants."
7th Circuit - U.S. District Courts			
42.	<u>Fagbemi v. City of Chi.</u> , 2010 U.S. Dist. LEXIS 26347	No	"Applicant" referred to an applicant for promotion.
43.	<u>Iovinelli v. Pritchett</u> , 2008 U.S. Dist. LEXIS 52617	No	"Applicant" referred to an applicant for promotion.
44.	<u>Thompson v. Board of Education</u> , 711 F. Supp. 394	No	"Applicant" refers to an employee applying for a transfer.
45.	<u>Kukla v. Antioch</u> , 647 F. Supp. 799	No	"Applicant" used in a citation to another case.

8th Circuit - Court of Appeals		
46.	<u>Bailey v. Dep't of Elem. & Secondary Educ.</u> , 451 F.3d 514	No Plaintiff's job was to evaluate "applicants" for Social Security Disability.
47.	<u>Richardson v. Sugg</u> , 448 F.3d 1046	No Describing employers discriminating against "applicants" in violation of the Civil Rights Act, not Pickering.
8th Circuit - U.S. District Courts		
48.	<u>Hemminghaus v. Missouri</u> , 2013 U.S. Dist. LEXIS 19293	No Describing employers discriminating against "applicants" in violation of the FMLA, not Pickering.
49.	<u>Minten v. Weber</u> , 832 F. Supp. 2d 1007	No Plaintiff was terminated and denied as an "applicant" for a firearms license.
50.	<u>Campion, Barrow & Assocs. of Illinois, Inc. v. City of Minneapolis</u> , 652 F. Supp. 2d 986	No Subcontractor "applicant" for a new contract.
9th Circuit - Court of Appeals		
51.	<u>Ceballos v. Garcetti</u> , 361 F.3d 1168	No Police officers was an "applicant" for a search warrant.
52.	<u>Voigt v. Savell</u> , 70 F.3d 1552	No Plaintiff terminated for speaking about job "applicants," but he was not an applicant himself.

9th Circuit - U.S. District Courts			
53.	<u>Mitchell-Matthews v. California</u> , 2015 U.S. Dist. LEXIS 43900	No	Rehabilitation officer terminated for how she treated an "applicant" for service.
54.	<u>Dahlia v. City of Burbank</u> , 2010 U.S. Dist. LEXIS 145241	No	"Applicant" refers to another officer's duties to check on job applicants.
55.	<u>Delia v. Benton County</u> , 2006 U.S. Dist. LEXIS 87435	Maybe	Plaintiff conditionally hired and then offer was rescinded.
10th Circuit - Court of Appeals			
56.	<u>Glover v. Mabrey</u> , 384 Fed. Appx. 763	No	"Applicant" used in quote from Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, which is a case about an incumbent contract employee.
57.	<u>Maldonado v. City of Altus</u> , 433 F.3d 1294	No	Describing employers discriminating against "applicants" in violation of the Civil Rights Act, not Pickering.
58.	<u>Considine v. Board of County Comm'rs</u> , 910 F.2d 695	No	"Applicant" refers to another officer's duties to check on applicants.
59.	<u>Koch v. Hutchinson</u> , 847 F.2d 1436	No	"Applicant" used in quote from an unrelated case.
10th Circuit - U.S. District Courts			
60.	<u>Brammer-Hoelter v. Twin Peaks Charter Acad.</u> , 575 F. Supp. 2d 1219	No	"Applicant" referred to application for a school to classified a charter school.

61.	<u>Sanchez v. City of Altus</u> , 2004 U.S. Dist. LEXIS 3252	No	Employees were complaining about an English language policy that applied to "applicants."
62.	<u>Westbrook v. Teton County Sch. Dist. No. 1</u> , 918 F. Supp. 1475	No	Uses "applicant" when discussing the difference between "prior restraint" and "chilling speech" but not related to job applicants.
11th Circuit - Court of Appeals			
63.	<u>McCabe v. Sharrett</u> , 12 F.3d 1558	No	"Applicant" used in a citation to another case.
64.	<u>Kurtz v. Vickrey</u> , 855 F.2d 723	No	"Applicant" referred to an applicant for promotion.
11th Circuit - U.S. District Courts			
65.	<u>Langford v. Hale Cnty.</u> , 2015 U.S. Dist. LEXIS 115866	No	"Applicant" used in a quote from an employee handbook.
66.	<u>Long v. Ala. Dep't of Human Res.</u> , 2014 U.S. Dist. LEXIS 181465	No	Describing employers discriminating against "applicants" in violation of the Civil Rights Act, not Pickering.
67.	<u>McShea v. Sch. Bd. of Collier County</u> , 58 F. Supp. 3d 1325	No	"Applicant" referred to an applicant for transfer.
68.	<u>VanCamp v. McNesby</u> , 2008 U.S. Dist. LEXIS 121576	No	"Applicant" used in a citation to another case.
69.	<u>Local 491 v. Gwinnett County</u> , 510 F. Supp. 2d 1271	No	"Applicant" used in a citation to another case.

70.	<u>Bevill v. UAB Walker College</u> , 62 F. Supp. 2d 1259	No	Describing employers discriminating against "applicants" in violation of the Civil Rights Act, not Pickering.
D.C. Circuit - Court of Appeals			
71.	<u>Williams v. IRS</u> , 919 F.2d 745	No	"Applicant" used in a citation to another case.
D.C. Circuit - U.S. District Court			
72.	<u>Pearson v. District of Columbia</u> , 644 F. Supp. 2d 23	No	"Applicant" was applying for a renewed term as an ALJ.

**APPENDIX B. CONTENT ANALYSIS OF CASES CITING TO *PICKERING V. BOARD OF EDUCATION*
AND INCLUDING THE KEYWORD “CANDIDATE”**

<u>Court / Case</u>	<u>Related to job applicants?</u>	<u>Comment</u>
U.S. Supreme Court		
1. <u>Harris v. Quinn</u> , 134 S. Ct. 2618	Covered in Pickering Analysis	
1st Circuit - Court of Appeals		
2. <u>O'Connor v. Steeves</u> , 994 F.2d 905	No	"Candidate" appears in a footnote referencing an unrelated case.
1st Circuit - U.S. District Courts		
3. <u>Bruno v. Town of Framingham</u> , 2009 U.S. Dist. LEXIS 108729	No	Employee spoke as an employee, resigned, and then sought his old job back as a "candidate."
4. <u>Bennett v. City of Holyoke</u> , 230 F. Supp. 2d 207	No	"Candidate" referred to an applicant for promotion.

2nd Circuit - Court of Appeals		
5.	<u>Lynch v. Ackley</u> , 811 F.3d 569	No "Candidate" refers to a political candidate.
6.	<u>Castine v. Zurlo</u> , 756 F.3d 171	No "Candidate" refers to a political candidate.
7.	<u>Nagle v. Marron</u> , 663 F.3d 100	No Employee was a "candidate" for tenure.
8.	<u>McEvoy v. Spencer</u> , 124 F.3d 92	No "Candidate" refers to a political candidate.
2nd Circuit - U.S. District Courts		
9.	<u>Lynch v. Ackley</u> , 2014 U.S. Dist. LEXIS 134274	No "Candidate" refers to a political candidate.
10.	<u>Murray v. Town of Stratford</u> , 996 F. Supp. 2d 90	Coverd in Pickering Analysis
11.	<u>Pisano v. Mancone</u> , 2011 U.S. Dist. LEXIS 28864	No "Candidate" refers to a political candidate.
12.	<u>Kelly v. Huntington Union Free Sch. Dist.</u> , 675 F. Supp. 2d 283	No "Candidate" refers to a political candidate.
13.	<u>Savoy of Newburgh, Inc. v. City of Newburgh</u> , 657 F. Supp. 2d 437	Covered in Pickering Analysis

14.	<u>Sassi v. Lou-Gould</u> , 2007 U.S. Dist. LEXIS 13643	No	"Candidate" referred to an applicant for promotion.
15.	<u>Fillie-Faboe v. Voc. Educ. & Extension Bd.</u> , 2001 U.S. Dist. LEXIS 25381	No	"Candidate" used in a squib citation to another case.
16.	<u>Shelton Police Union v. Voccola</u> , 125 F. Supp. 2d 604	No	Incumbent employee voiced concerns about nepotism of a chief hiring his own son, who was a "candidate."
17.	<u>Belch v. Jefferson County</u> , 108 F. Supp. 2d 143	Covered in Pickering Analysis	
18.	<u>Harman v. City of New York</u> , 945 F. Supp. 750	Covered in Pickering Analysis	
19.	<u>Piesco v. New York, Dep't of Personnel</u> , 753 F. Supp. 468	Covered in Pickering Analysis	
3rd Circuit - Court of Appeals			
20.	<u>Lodge No. 5 of FOP v. City of Philadelphia</u> , 763 F.3d 358	No	"Candidate" refers to a political candidate.
21.	<u>Curinga v. City of Clairton</u> , 357 F.3d 305	No	"Candidate" refers to a political candidate.
22.	<u>Azzaro v. County of Allegheny</u> , 110 F.3d 968	No	"Candidate" appears in a footnote referencing an unrelated case.
23.	<u>Monsanto v. Quinn</u> , 674 F.2d 990	No	"Candidate" referred to an applicant for promotion.

3rd Circuit - U.S. District Courts

24.	<u>Brown v. Tucci</u> , 960 F. Supp. 2d 544	No	"Candidate" used in a squib citation to another case.
25.	<u>Kimmett v. Corbett</u> , 2013 U.S. Dist. LEXIS 57059	No	"Candidate" used in a squib citation to another case.
26.	<u>Mitchell v. Miller</u> , 884 F. Supp. 2d 334	Covered in Pickering Analysis	
27.	<u>Toth v. Cal. Univ. of Pa.</u> , 844 F. Supp. 2d 611	Covered in Pickering Analysis	
28.	<u>Kimmett v. Corbett</u> , 2011 U.S. Dist. LEXIS 157281	No	"Candidate" refers to a political candidate.
29.	<u>Moore v. Darlington Twp.</u> , 690 F. Supp. 2d 378	No	"Candidate" refers to a political candidate.
30.	<u>Schlarp v. Dern</u> , 610 F. Supp. 2d 450	Covered in Pickering Analysis	
31.	<u>Miller v. Weinstein</u> , 2008 U.S. Dist. LEXIS 111949	Covered in Pickering Analysis	
32.	<u>Baranowski v. Waters</u> , 2008 U.S. Dist. LEXIS 21301	No	"Candidate" used in a squib citation to another case.
33.	<u>Morrison v. City of Reading</u> , 2007 U.S. Dist. LEXIS 16942	Covered in Pickering Analysis	

34.	<u>Lees v. West Greene School Dist.</u> , 632 F. Supp. 1327	No	Employee was a "candidate" for tenure.
35.	<u>Gobla v. Crestwood School Dist.</u> , 609 F. Supp. 972	No	"Candidate" used in a squib citation to another case.
4th Circuit - Court of Appeals			
36.	<u>Lawson v. Gault</u> , 828 F.3d 239	No	"Candidate" used in a squib citation to another case.
37.	<u>Smith v. Gilchrist</u> , 749 F.3d 302	No	"Candidate" refers to a political candidate.
38.	<u>Lee v. York County Sch. Div.</u> , 484 F.3d 687	No	"Candidate" refers to a political candidate.
39.	<u>Kim v. Coppin State College</u> , 662 F.2d 1055	No	"Candidate" referred to an applicant for promotion.
4th Circuit - U.S. District Courts			
40.	<u>Liverman v. City of Petersburg</u> , 106 F. Supp. 3d 744	No	"Candidate" referred to an applicant for promotion.
41.	<u>Claridy v. Anderson</u> , 2015 U.S. Dist. LEXIS 28150	No	"Candidate" refers to a political candidate.
42.	<u>Bloom v. Bd. of Educ. of Monongalia County</u> , 2013 U.S. Dist. LEXIS 160195	No	"Candidate" refers to a political candidate.

43.	<u>Conley v. Town of Elkton</u> , 2005 U.S. Dist. LEXIS 2602	No	"Candidate" refers to a political candidate.
5th Circuit - Court of Appeals			
44.	<u>Communs. Workers of Am. v. Ector County Hosp. Dist.</u> , 467 F.3d 427	No	"Candidate" used in a squib citation to another case.
45.	<u>Branton v. City of Dallas</u> , 272 F.3d 730	No	"Candidate" used in a squib citation to another case.
46.	<u>Brady v. Fort Bend County</u> , 145 F.3d 691	No	"Candidate" refers to a political candidate.
47.	<u>Kinsey v. Salado Indep. Sch. Dist.</u> , 916 F.2d 273	No	"Candidate" refers to a political candidate.
48.	<u>Burris v. Willis Independent School Dist., Inc.</u> , 713 F.2d 1087	No	"Candidate" refers to a political candidate.
49.	<u>Bickel v. Burkhart</u> , 632 F.2d 1251	Covered in Pickering Analysis	
5th Circuit - U.S. District Courts			
50.	<u>Hays v. LaForge</u> , 113 F. Supp. 3d 883	No	"Candidate" referred to an applicant for promotion.
51.	<u>Papagolos v. Lafayette County Sch. Dist.</u> , 972 F. Supp. 2d 912	No	"Candidate" used in a squib citation to another case.

52.	<u>De La Garza v. Brumby</u> , 2013 U.S. Dist. LEXIS 26675	Covered in Pickering Analysis	
53.	<u>Ricci v. Cleveland Indep. Sch. Dist.</u> , 2012 U.S. Dist. LEXIS 98917	No	"Candidate" refers to a political candidate.
54.	<u>Childers v. Dallas Police Dep't</u> , 513 F. Supp. 134	Covered in Pickering Analysis	
55.	<u>Myers v. Connick</u> , 507 F. Supp. 752	Covered in Pickering Analysis	
56.	<u>Jordan v. Cagle</u> , 474 F. Supp. 1198	No	"Candidate" refers to a political candidate.
57.	<u>Barbre v. Garland Independent School Dist.</u> , 474 F. Supp. 687	No	"Candidate" used in a squib citation to another case.
6th Circuit - Court of Appeals			
58.	<u>Baar v. Jefferson County Bd. of Educ.</u> , 476 Fed. Appx. 621	No	"Candidate" used in an analysis of public employer liability for individual action; not Pickering related.
59.	<u>Scarborough v. Morgan County Bd. of Educ.</u> , 470 F.3d 250	Covered in Pickering Analysis	
60.	<u>Leary v. Daeschner</u> , 349 F.3d 888	No	"Candidate" was a candidate for transfer.

6th Circuit - U.S. District Courts		
61.	<u>Marsilio v. Vigluicci</u> , 924 F. Supp. 2d 837	No "Candidate" refers to a political candidate.
62.	<u>Marsilio v. Vigluicci</u> , 924 F. Supp. 2d 837	No "Candidate" refers to a political candidate.
63.	<u>Dye v. Office of Racing Comm'n</u> , 2011 U.S. Dist. LEXIS 57628	No "Candidate" refers to a political candidate.
64.	<u>Spencer v. City of Catlettsburg</u> , 2011 U.S. Dist. LEXIS 40857	No "Candidate" refers to a political candidate.
65.	<u>Hadad v. Croucher</u> , 970 F. Supp. 1227	Covered in Pickering Analysis
66.	<u>Simmons v. Stanton</u> , 502 F. Supp. 932	No "Candidate" refers to a political candidate.
7th Circuit - Court of Appeals		
67.	<u>Siefert v. Alexander</u> , 608 F.3d 974	No "Candidate" refers to a political candidate.
68.	<u>McGreal v. Ostrov</u> , 368 F.3d 657	No "Candidate" refers to a political candidate.
69.	<u>Bonds v. Milwaukee County</u> , 207 F.3d 969	Covered in Pickering Analysis

70.	<u>Hanneman v. Breier</u> , 528 F.2d 750	No	"Candidate" refers to a political candidate.
7th Circuit - U.S. District Courts			
71.	<u>Lalowski v. City of Des Plaines</u> , 2012 U.S. Dist. LEXIS 149565	No	"Candidate" refers to a political candidate.
72.	<u>Fagbemi v. City of Chi.</u> , 2010 U.S. Dist. LEXIS 26347	Covered in Pickering Analysis	
73.	<u>Iovinelli v. Pritchett</u> , 2008 U.S. Dist. LEXIS 52617	Covered in Pickering Analysis	
74.	<u>Hentea v. Trs. of Purdue Univ.</u> , 2006 U.S. Dist. LEXIS 25599	No	"Candidate" refers to a candidate for tenure.
75.	<u>Jobe v. Rager</u> , 2006 U.S. Dist. LEXIS 1620	No	"Candidate" refers to employees job interviewing candidates.
76.	<u>Thompson v. Board of Education</u> , 711 F. Supp. 394	Covered in Pickering Analysis	
77.	<u>Kukla v. Antioch</u> , 647 F. Supp. 799	Covered in Pickering Analysis	
8th Circuit - Court of Appeals			
78.	<u>Nord v. Walsh County</u> , 757 F.3d 734	No	"Candidate" refers to a political candidate.

79.	<u>Burnham v. Ianni</u> , 98 F.3d 1007	No	"Candidate" used in a squib citation to another case.
80.	<u>Patteson v. Johnson</u> , 721 F.2d 228	No	"Candidate" refers to a political candidate.
8th Circuit - U.S. District Courts			
81.	<u>Vincent v. Story County</u> , 2014 U.S. Dist. LEXIS 184287	No	"Candidate" used to describe an employee's job description in that she interviewed candidates.
82.	<u>Hemminghaus v. Missouri</u> , 2013 U.S. Dist. LEXIS 19293	Covered in Pickering Analysis	
83.	<u>Int'l Ass'n of Firefighters Local 2665 v. City of Ferguson</u> , 2001 U.S. Dist. LEXIS 23869	No	"Candidate" refers to a political candidate.
84.	<u>Day v. Board of Regents of the Univ. of Neb.</u> , 911 F. Supp. 1228	No	"Candidate" refers to a political candidate.
85.	<u>Goodman v. City of Kansas City</u> , 906 F. Supp. 537	No	"Candidate" refers to a political candidate.
86.	<u>Lewis v. Harrison Sch. Dist. No. 1</u> , 621 F. Supp. 1480	No	"Candidate" refers to candidates for a sports team.
9th Circuit - Court of Appeals			
87.	<u>Robinson v. York</u> , 566 F.3d 817	No	"Candidate" refers to candidates for promotion.

88.	<u>Roe v. City of San Diego</u> , 356 F.3d 1108	No	"Candidate" used in a squib citation to another case.
9th Circuit - U.S. District Courts			
89.	<u>Bardzik v. County of Orange</u> , 605 F. Supp. 2d 1076	No	"Candidate" refers to a political candidate.
90.	<u>Robinson v. County of Los Angeles</u> , 2007 U.S. Dist. LEXIS 98591	No	"Candidate" refers to candidates for promotion.
91.	<u>Delia v. Benton County</u> , 2006 U.S. Dist. LEXIS 87435	Covered in Pickering Analysis	
92.	<u>Fujiwara v. Clark</u> , 477 F. Supp. 822	No	"Candidate" refers to a political candidate.
10th Circuit - Court of Appeals			
93.	<u>Gardetto v. Mason</u> , 100 F.3d 803	No	"Candidate" refers to a political candidate.
94.	<u>Koch v. Hutchinson</u> , 847 F.2d 1436	Covered in Pickering Analysis	
10th Circuit - U.S. District Courts			
95.	<u>Eaton v. Harsha</u> , 505 F. Supp. 2d 948	No	"Candidate" does refer to a candidate for employment, but not related to the suit where incumbent employees were disciplined.

96.	<u>Lunsford v. Bd. of County Comm'rs</u> , 2006 U.S. Dist. LEXIS 67119	No	"Candidate" refers to a political candidate.
97.	<u>Sedillos v. Bd. of Educ. of Sch. Dist. No. 1</u> , 2005 U.S. Dist. LEXIS 36816	No	"Candidate" refers to a political candidate.
98.	<u>Busey v. Bd. of County Comm'rs of Shawnee</u> , 277 F. Supp. 2d 1095	No	"Candidate" refers to a political candidate.
99.	<u>Hogan v. City of Independence</u> , 2003 U.S. Dist. LEXIS 12325	No	"Candidate" refers to a political candidate.
100.	<u>Weaver v. Nebo Sch. Dist.</u> , 29 F. Supp. 2d 1279	No	"Candidate" was a candidate for renewing a contract to coach volleyball.
101.	<u>Andersen v. McCotter</u> , 3 F. Supp. 2d 1223	No	"Candidate" refers to a political candidate.
102.	<u>Ruff v. City of Leavenworth</u> , 854 F. Supp. 774	No	"Candidate" refers to a political candidate.
11th Circuit - Court of Appeals			
103.	<u>Alves v. Bd. of Regents of the Univ. Sys. of Ga.</u> , 804 F.3d 1149	No	"Candidate" refers to employee's job description in interviewing candidates.
104.	<u>Gresham v. City of Atlanta</u> , 542 Fed. Appx. 817	No	"Candidate" was a candidate for promotion.
105.	<u>Shahar v. Bowers</u> , 114 F.3d 1097	No	"Candidate" refers to a political candidate.

106.	<u>Stough v. Gallagher</u> , 967 F.2d 1523	No	"Candidate" refers to a political candidate.
107.	<u>Kurtz v. Vickrey</u> , 855 F.2d 723	Covered in Pickering Analysis	
11th Circuit - U.S. District Courts			
108.	<u>Langford v. Hale Cnty.</u> , 2015 U.S. Dist. LEXIS 115866	Covered in Pickering Analysis	
109.	<u>Slane v. City of Sanibel</u> , 2015 U.S. Dist. LEXIS 93157	No	"Candidate" refers to a political candidate.
110.	<u>VanCamp v. McNesby</u> , 2008 U.S. Dist. LEXIS 121576	Covered in Pickering Analysis	
111.	<u>Local 491 v. Gwinnett County</u> , 510 F. Supp. 2d 1271	Covered in Pickering Analysis	
112.	<u>Harvey v. City of Bradenton</u> , 2005 U.S. Dist. LEXIS 38095	No	"Candidate" refers to a political candidate.
113.	<u>Bevill v. UAB Walker College</u> , 62 F. Supp. 2d 1259	Covered in Pickering Analysis	
D.C. Circuit - Court of Appeals			
114.	<u>National Treasury Employees Union v. United States</u> , 990 F.2d 1271	No	"Candidate" refers to a political candidate.

115. American Postal Workers Union v. United States Postal Serv., 830 F.2d 294 No "Candidate" was a candidate for promotion.

D.C. Circuit - U.S. District Court

116. Davis v. Billington, 775 F. Supp. 2d 23 No "Candidate" used in a squib citation to another case.

117. Pearson v. District of Columbia, 644 F. Supp. 2d 23 Covered in Pickering Analysis

118. Dougherty v. Barry, 604 F. Supp. 1424 No "Candidate" was a candidate for promotion.

119. American Postal Workers Union v. United States Postal Service, 595 F. Supp. 1352 No "Candidate" refers to a political candidate.

Federal Circuit - Court of Appeals

120. Briggs v. MSPB, 331 F.3d 1307, 2003 U.S. App. LEXIS 11608 No "Candidate" refers to a political candidate.

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