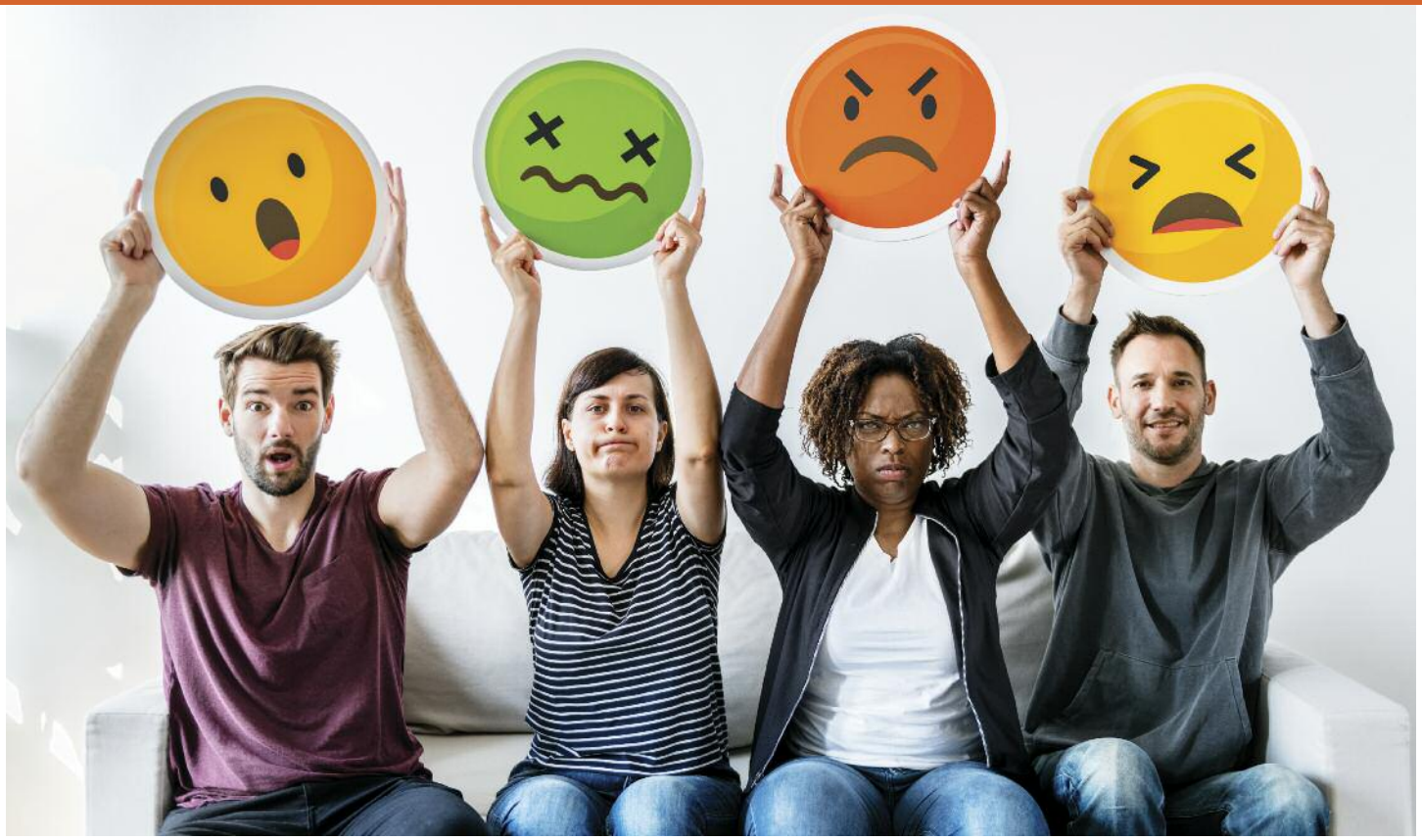

You Tweeted What?

Navigating First Amendment Concerns In the Public School Setting

By Christopher M. Pape and Zachary B. Roberson

Introduction

Maybe no other area of law better captures the unique combination of political intrigue, pedagogical concerns, and practical considerations common to the education bar than speech claims under the First Amendment. This article will rely on an extended hypothetical based on some of our prior cases to describe the legal considerations for student, employee, and community member speech. Although the student speech analysis is unique to education law, the employee and community member speech issues are applicable to other public agencies and public actors.

Setting the Stage

It's election season, and the incumbent mayor is seeking reelection. Her main campaign promise is to consolidate the town's two high schools. The plan is simple:

close the older, smaller school and transfer the students from that school into the newer, larger school.

Jenny Doe, a senior at the old high school, is the student editor of the school newspaper which is written and edited by students in the Journalism II class. Jenny drafted a scathing editorial which, while not vulgar, was highly critical of the mayor's proposal to close her school. She focused on the preservation of each school's identity and the friendly rivalry between schools. She ended her editorial by stating that "consolidating the schools would be like erasing half of our town's history."

Jenny shared the editorial with her teacher and newspaper sponsor, Mr. Smith. He felt that the editorial was too controversial for the school paper, and directed Jenny to publish something more positive about the school's history instead.

Jenny complied with Mr. Smith's directive not to publish her piece in the paper, but instead posted it on her social media. In her post, she explained that she felt compelled to share the editorial with her classmates via social media because Mr. Smith had not let her speak her mind in the school's newspaper. She explained that "as the editor of the newspaper," she would be doing her classmates a disservice by remaining quiet.

Jenny's editorial quickly circulated on social media, and when Mr. Smith saw it, he told her there would be consequences for her insubordination. Additionally, he posted a response on his own social media page arguing against Jenny's position, which he characterized as churlish and childish. He expressed his fears about the school system's dire financial straits and stated that consolidating the two schools is the only fiscally responsible way forward. He ended his post by stating that "we may be erasing half of the town's history, but if we don't, the whole school system will be history."

When word spread about Mr. Smith's post and his threat of disciplinary consequences, a community petition seeking Mr. Smith's immediate termination began to circulate. The "Mr. Smith MUST GO!" petition received more signatures than there are students in the school. To top it all off, many parents began seeking transfers from Mr. Smith's class for their students, explaining that they don't feel he creates a safe place for his students to express themselves.

Whether and to what extent school officials may regulate student speech depends on the nature of the student's expression.

Ms. Washington, the community member who started the petition, does not have children in the system, but she employs tutors under a contract with both high schools. The school principals can cancel the contract at any time with no penalty to the school. Mr. Hamilton, the principal of the newer school, is good friends with Mr. Smith. In an effort to help his friend, Mr. Hamilton asks Ms. Washington to take down the petition. When she refuses to do so, he sends her a letter terminating the tutoring contract. Furious at receiving the letter as it will cost her a considerable amount of revenue, Ms. Washington calls Mr. Hamilton demanding to know why he cancelled the agreement. He tells her that they can talk once the petition has been removed.

Feeling pressure from the community, Mr. Jones, the principal of the older school where Mr. Smith teaches, informs Mr. Smith that the social media post was unacceptable, and that Mr. Smith has lost the confidence of his parents. With the support of the superintendent, Mr. Smith is placed on administrative leave pending termination.

Student Speech

Students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Whether and to what extent school officials may regulate student speech depends on the nature of the student's expression. The U.S. Supreme Court has recognized three main categories of student speech: (1) pure student expression under *Tinker v. Des Moines Independent Community School District*;[2] (2) vulgar, lewd, offensive, or indecent speech under *Bethel School District No. 403 v. Fraser*;[3] and (3) school-sponsored speech under *Hazelwood School District v. Kuhlmeier*.[4]

Can Mr. Smith prohibit Jenny's editorial?

The Supreme Court has been careful to draw a distinction between the questions of whether a school board may *punish* a student for certain speech, as was the issue in *Tinker* and *Fraser*, or whether it may *avoid publicizing* certain student speech. Our first scenario falls within this second question. In that regard, the Supreme Court held in *Hazelwood* that a school board may exercise "editorial control over the style and content of student-speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[5] The Eleventh Circuit has clarified that this standard controls all student-speech that (1) bears the imprimatur of the school (*i.e.*, the school had a role in setting guidelines for and ultimately approving the speech such that a "reasonable observer" would believe it is school-sponsored)[6] and (2) occurs in a "curricular activity."[7] Although seemingly tied to classroom instruction, the phrase "curricular activity" is more broadly interpreted to include any expressive activity that is (a) "supervised by faculty members" and (b) "designed to impart particular knowledge or skills to student participants and audiences."[8] Noticeably, there is no consideration of whether the activity is graded or earns school credit, occurs during school hours or on school campus, or is part of the school's curriculum catalog.[9]

In our hypothetical, there is no question the school newspaper bore the imprimatur of the school and was part of a curricular activity. The newspaper was published as part of a classroom activity, was designated as the official newspaper of the school, and was supervised by a faculty member. Thus, under *Hazelwood*, the school board could prohibit Jenny from publishing her article in the newspaper. The only remaining question is whether the speech limitation was "reasonably related to legitimate pedagogical concerns."[10] Courts give great deference to school boards and have upheld restrictions based on concerns such as avoiding debate and remaining neutral on a political or religious topic.[11] Ultimately, a court is likely to uphold the decision to prohibit publishing Jenny's article based on *Hazelwood*.

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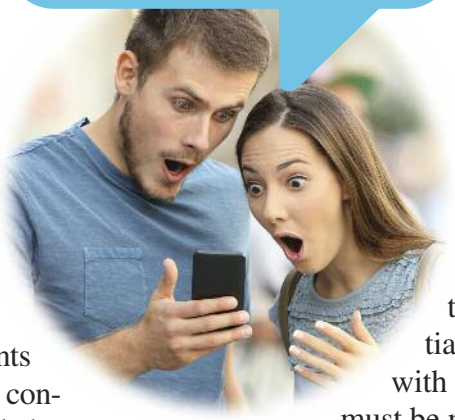

Can Jenny be disciplined for her social media post?

The question remains whether the school board could punish Jenny for publishing her editorial on social media as Mr. Smith threatened. In *Tinker*, the Supreme Court held that students cannot be punished for the mere expression of their personal views *on school grounds* unless the school board has reason to believe that such personal expression will cause a substantial interference with the work of the school or infringe on the rights of other students.[12] While *Tinker* requires a *substantial* interference or disturbance in order to regulate student expression, a school board need not wait until a disruption actually occurs.[13] Instead, the school board may regulate student expression if it can reasonably anticipate that the expression will cause substantial disruption or material interference with school activities.[14] This disruption must be more than a *de minimis* impact or theoretical possibility of discord.[15] For example, student expression may not be suppressed if it only gives rise to mild curiosity, discussion, comments, or even hostile remarks by some students.[16]

But what about off-campus student speech? Addressing this issue for the first time in *Doe v. Valencia College*, the Eleventh Circuit concluded that, "*Tinker* teaches that conduct by the student, in class or out of it that results in the invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[17] Although the Court

greatly limited its holding, stating only that, "*Tinker* does not foreclose a school from regulating all off-campus conduct[,]" it did not provide a detailed standard for punishment of such speech.[18]

Courts outside the Eleventh Circuit most commonly address punishment of off-campus speech by requiring the school system to first satisfy some threshold test, and if met, to then satisfy *Tinker*'s substantial interference standard. The threshold test used varies by jurisdiction, but the most common test analyzes whether there existed a "reasonably foreseeable risk" that the speech would reach the school or come to the attention of school officials.[19] Other tests focus on whether a sufficient nexus exists between the school's interests and the speech.[20] While several approaches are viable, the safest path in our Circuit is likely to follow the Ninth Circuit and consider both threshold tests: (1) whether there exists a sufficient nexus between the speech and the school, and (2) whether there exists a reasonably foreseeable risk that the speech would reach the school or school officials.[21] Then, if *both* threshold tests are met, apply the *Tinker* standard and analyze whether the speech "might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities."[22] Alternatively, if the speech interferes with another student's right to feel secure, the school may regulate the speech regardless of any threshold considerations.[23]

In our hypothetical, it seems likely that Jenny's editorial would satisfy any of the threshold tests. It is foreseeable–and Jenny's intention–that the editorial would reach the school or school officials, and there is a clear nexus between the editorial and her school. While the threshold test is met, facts are lacking that would meet the *Tinker* substantial disruption standard. Of course, the school did experience a disruption, but the facts in our hypothetical tend to show that Mr. Smith's post, not Jenny's, was the cause of the disruption. The school could attribute the disruption to Jenny or argue that her post would likely cause a future substantial disruption based on its controversial nature and relevance to the students.

However, forecasting a substantial disruption is always risky, and with weak evidence of a substantial

disruption or material interference with school activities, the school should avoid disciplining Jenny for the post until there are facts to prove substantial interference.

Attempting to circumvent the First Amendment framework by instead punishing Jenny for failing to follow Mr. Smith's directive is also risky. A school cannot prohibit a student from exercising a constitutional right by merely telling the student not to do so.[24] A school board cannot punish a student indirectly, through the guise of insubordination, for what it cannot punish directly.[25]

Employee Speech

Like student speech, government employee speech rights are limited. Despite this similarity–and the prohibition against retaliation–there is very little overlap between the considerations when responding to disruptive speech of an employee and a student.[26] The First Amendment rights of public employees, such as teachers, must be analyzed using the *Pickering-Connick* test.[27] This balancing test examines whether (1) the employee was speaking as a citizen on a matter of public concern; (2) the employee's speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in an adverse employment action. If the employee establishes these three prongs, the burden shifts to the employer to show that it would have made the adverse employment decision even in the absence of the protected speech.[28]

Was Mr. Smith speaking on a matter of public concern?

Addressing the first *Pickering-Connick* prong, in *Garcetti v. Ceballos*, the Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[29] Post-*Garcetti*, the Eleventh Circuit reformulated the first *Pickering-Connick* prong[30] into a two-step, legal inquiry that considers whether: (1) the speaker was speaking as an employee or citizen, and (2) the speech addressed the mission of the government or a matter of public concern.[31] This reformulated first step acts as a First Amendment "threshold layer" based on the role that the employee occupied when speaking and the content of the speech.[32]

To resolve the "citizen" component of the *Garcetti* threshold issue, courts examine whether the speech stems from the employee's official, professional duties.[33] Other relevant considerations may be whether the employee's speech advanced official duties or was made pursuant to them, or whether the employee used the employer's official authority or workplace resources as part of the speech.[34] Notably, a citizen's speech does not become "employee" speech merely because the individual's speech included information learned during the course of public employment.[35] Instead, the critical difference between speaking as a citizen and an employee is whether the speech fits within the scope of the individual's official duties.[36]

To evaluate the "matter of public concern" component, courts must determine whether the speech related to "any matter of political, social, or other concern to the community."[37] Both the content and context of the speech matter. For example, a criticism that would constitute a matter of public concern if made publicly may not rise to that level if made solely to the employee's supervisors.[38] Not all comments made outside of the workplace constitute speech as a citizen on a matter of public concern, but speech made to the general public weighs in favor of it being on a matter of public concern.[39] In contrast, workplace grievances are not matters of public concern.[40]

It is impossible to provide a comprehensive list of matters of public concern as any number of policy issues could qualify.[41] However, publicly speaking about "corruption in a public program and misuse of state funds . . . obviously involves a matter of significant public concern."[42] Similarly, the *Pickering* Court explained that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[43]

Under our fact pattern, Mr. Smith can make a strong argument that he was a citizen speaking on a matter of public concern. While his speech was motivated

primarily by information he learned as the newspaper sponsor, his response to Jenny did not use a school platform and was not within his official duties. Additionally, under *Pickering*, it is likely that Mr. Smith's comments are matters of public concern because they focus on how limited educational funds are spent.

Pickering-Connick Balancing

Next, we must balance the speech interests of the employee against the employer's interests. However, courts do not consider speech in a vacuum.[44] The context, circumstances, and impact, or potential impact, of the speech are relevant.[45] A governmental employer will have a difficult time establishing that non-disruptive expression–even if uncomfortable– sufficiently outweighs the speaker's rights.[46] In contrast, an employer's interest in disciplining an employee whose speech is vulgar and insubordinate may outweigh the speaker's right, even if the speech is otherwise protected.[47] At this step, context is critical because an employee's speech could be "protected had he confined his complaint to the proper time, place, and manner. . . . [but it may not be protected because he] chose to spend [employer] time broadcasting his rancor."[48]

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Most cases will fall between the two extremes. In those cases, the court will consider if the speech disrupts harmony in the workplace, damages critical relationships, or prevents the regular operation of the employer.[49] The relationship component is especially critical for an "employee serv[ing] in a sensitive capacity that requires extensive public contact."[50] Lastly, while the mere likelihood of a disruption can be sufficient, the existence of an actual disruption is persuasive evidence in favor of the employer's interest.[51]

The balancing test is where Mr. Smith's case will falter because there was actual disruption. Parents have requested mid-year transfers, and the administrative burden of handling those requests weighs in favor of the board. Additionally, Mr. Smith may have damaged sensitive relationships with students and parents that are critical to the school's success.

Community Member Speech

Ms. Washington's speech–the petition–poses another unique issue. To allege a successful First Amendment claim, she must show that she (1) engaged in constitutionally protected speech; (2) suffered a consequence that would objectively deter a person from engaging in such speech; and (3) her speech was causally related to the consequence.[52] Ms. Washington's speech, like Mr. Smith's, likely involves a matter of public concern. Speech "on matters of public concern. . . is at the heart of the First Amendment's protection[,] occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[53]

Assuming her speech is protected, we then consider whether she suffered a consequence that would deter a "person of ordinary firmness" from speaking.[54] This test is not onerous and has been shown through consequences such as retaliatory issuance of parking citations, a pattern of police harassment, or being denied the option to select one's preferred legal name on a driver's license.[55] Importantly, because this test is not subjective, it does not matter if Ms. Washington was actually deterred.[56] The loss of the contract likely establishes the second prong.

To show a causal connection, Ms. Washington must show that Mr. Hamilton was subjectively motivated to cancel her contract because of her exercise of free speech.[57] If she does that, the burden shifts to Mr. Hamilton to show that he would have canceled her contract even without her speech.[58] Clearly, Mr. Hamilton's actions were subjectively motivated by Ms. Washington's exercise of her speech. Barring additional facts, it is unlikely that Mr. Hamilton can defeat Ms. Washington's claim.

Conclusion

Social media creates new platforms for speakers, and a school board must consider a variety of legal frameworks as its stakeholders react to these platforms. As the barriers to publicly sharing one's thoughts continue to diminish, the legislature, courts, and school boards will struggle to keep up. ▲

Endnotes

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
2. 393 U.S. 503 (1969).
3. 478 U.S. 675 (1986).
4. 484 U.S. 260 (1988).
5. *Id.* at 273.
6. *Bannon v. School District of Palm Beach County*, 387 F. 3d 1208, 1214 (11th Cir. 2004).
7. *Id.* While *Hazelwood* appears to exist outside the traditional forum analysis used by courts for other non-school First Amendment free speech claims, the Eleventh Circuit has clarified that the *Hazelwood* test is the same as the standard for speech regulation in a non-public forum. Thus, under *Hazelwood*, like non-public forums, viewpoint discrimination is not allowed. *See Searcey v. Harris*, 888 F. 2d 1314, 1319 n.7 (11th Cir. 1989).
8. *Bannon*, 387 F. 3d at 1214.
9. *Id.* at 1215.
10. *Hazelwood*, 484 U.S. at 271-73.
11. *Corder v. Lewis Palmer School District*, 566 F. 3d 1219, 1228-29 (10th Cir. 2009); *Curry ex rel. Curry v. Hensiner*, 513 F. 3d 570, 579 (6th Cir. 2008); *Axson-Flynn v. Johnson*, 356 F. 3d 1277, 1290-93 (10th Cir. 2004); *Bannon*, 387 F. 3d at 1217.
12. *Tinker*, 393 U.S. at 509.
13. *Heinkel ex rel. Heinkel v. School Board of Lee County, Fla.*, 194 Fed. Appx. 604 (11th Cir. 2006).
14. *Id.* at 4.
15. *Holloman ex rel. Holloman v. Harland*, 370 F. 3d 1252, 1271-72 (11th Cir. 2004).
16. *Id.*
17. 903 F. 3d 1220, 1231 (11th Cir. 2018).
18. *Id*.
19. *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F. 3d 771, 777 (8th Cir. 2012); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F. 3d 754, 766 (8th Cir. 2011); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F. 3d 34, 38 (2nd Cir. 2007).
20. *Kowalski v. Berkeley Cty. Sch.*, 652 F. 3d 565, 576-77 (4th Cir. 2011); *see also Bell v. Itawamba Cty. Sch. Bd.*, 799 F. 3d 379, 396 (5th Cir. 2015).
21. *C.R. v. Eugene Sch. Dist. 4J*, 835 F. 3d 1142, 1145, 1150 (9th Cir. 2016).
22. *Tinker*, 393 U.S. at 506.
23. *Doe*, 903 F. 3d at 1231.
24. *Holloman*, 370 F. 3d at 1276.
25. *Id*.
26. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987).
27. *See Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).
28. *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F. 3d 1313, 1318 (11th Cir. 2005).
29. *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006).
30. *D'Angelo v. School Bd. of Polk County, Fla.*, 497 F. 3d 1203, 1209 (11th Cir. 2007).
31. *Boyce v. Andrew*, 510 F. 3d 1333, 1342 (11th Cir. 2007) (*citing D'Angelo*, 497 F. 3d at 1209).
32. *Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F. 3d 1149, 1160 (11th Cir. 2015).
33. *Alves*, 804 F. 3d at 1161-62 (*citing Moss v. City of Pembroke Pines*, 782 F. 3d 613, 618 (11th Cir. 2015); *Abdur-Rahman v. Walker*, 567 F. 3d 1278, 1283 (11th Cir. 2009); *Boyce*, 510 F. 3d at 1342)).
34. *Fernandez v. Sch. Bd. of Miami-Dade Cty., Fla.*, 898 F. 3d 1324, 1332 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1345 (2019).
35. *Lane v. Franks*, 573 U.S. 228, 240 (2014).
36. *Id*.
37. *Alves*, 804 F. 3d at 1162 (*quoting Connick*, 461 U.S at 146).
38. *McShea v. Sch. Bd. of Collier Cty.*, 58 F. Supp. 3d 1325, 1339 (M.D.Fla. 2014) (*citing Mpoy v. Rhee*, 758 F. 3d 285, 291-94 (D.C. Cir. 2014)).
39. *Leslie v. Hancock Cty. Sch. Dist.*, 994 F. Supp. 2d 1339, 1351 (M.D.Ga. 2014) (*citing Boyce*, 510 F. 3d at 1344-45).
40. *Garcetti*, 547 U.S. at 420 (*quoting Connick*, 461 U.S. at 154).
41. *See, e.g., Belyeu v. Coosa Cty. Bd. of Educ.*, 998 F. 2d 925, 927-28 (11th Cir. 1993) (agreeing with district court that an employee spoke on a matter of public concern when she advocated for Black History Month programming at a PTA meeting).
42. *Lane*, 573 U.S. at 241.
43. *Pickering*, 391 U.S. at 572.
44. *Rankin*, 483 U.S. at 388.
45. *Id.*
46. *See, e.g., Belyeu*, 998 F. 2d at 929-30.
47. *Morris v. Crow*, 117 F. 3d 449, 458 (11th Cir. 1997); *see also Jackson v. State of Alabama State Tenure Comm'n*, 405 F. 3d 1276, 1285-86 (11th Cir. 2005).
48. *Bryson v. City of Waycross*, 888 F. 2d 1562, 1567 (11th Cir. 1989).
49. *Rankin*, 483 U.S. at 388.
50. *Sims v. Metro. Dade Cty.*, 972 F. 2d 1230, 1237 (11th Cir. 1992).
51. *McCullars v. Maloy*, 369 F. Supp. 3d 1230, 1240 (M.D.Fla. 2019); *see also Cochran v. City of Atlanta, Georgia*, 289 F. Supp. 3d 1276, 1291 (N.D.Ga. 2017).
52. *Castle v. Appalachian Tech. Coll.*, 631 F. 3d 1194, 1197 (11th Cir. 2011) (*citing Bennett v. Hendrix*, 423 F. 3d 1247, 1250 (11th Cir. 2005)).
53. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (internal citations omitted).
54. *Bennett*, 423 F. 3d at 1254.
55. *Id.* at 1255 (*citing Garcia v. City of Trenton*, 348 F. 3d 726, 729 (8th Cir. 2003)); *Abella v. Simon*, 522 Fed. Appx. 872, 874 (11th Cir. 2013); *Wall-DeSousa v. Fla. Dep't of Highway Safety & Motor Vehicles*, 691 Fed. Appx. 584, 590-91 (11th Cir. 2017).
56. *Id.* at 590.
57. *Castle*, 631 F. 3d at 1197.
58. *Id*.

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