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To: Office of the Whistleblower Ombuds
Attention: Shanna Devine

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Subject: **Legislative Whistleblowers and the First Amendment**

This memorandum responds to your request for an overview of the legal background regarding First Amendment protections for government employees, specifically relating to legislative branch employees reporting potential misconduct. In brief, government employees enjoy First Amendment protections when they speak as citizens on matters of public concern, but the government may be able to discipline employees, particularly policymaking employees, for speech that is particularly disruptive to the workplace.[1] Government employees, however, may be limited in their ability to seek relief for violations of their First Amendment rights. This memorandum begins by providing an overview of the scope of constitutional protections for public employee speech, including for legislative staffers, before addressing the potential limitations federal employees may encounter when seeking legal recourse for constitutional violations.[2]

Constitutional Protections for Public Employee Speech and Association

The Constitution's First Amendment prevents the government from "abridging the freedom of speech."[3] A series of Supreme Court cases has recognized that in certain circumstances, the Free Speech Clause may prohibit the government from retaliating against public employees because of their speech or political affiliation.[4] Specifically, under *Pickering v. Board of Education*, public employees are protected when they speak as citizens on matters of public concern, and when the employee's and the public's interest in that speech outweighs the government's interest as an employer.[5] Accordingly, *Pickering* may protect

[1] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 384, 390–91 (1987).

[2] Information in this memorandum is drawn from publicly available sources and is of general interest to Congress. As such, all or part of this information may be provided by CRS in memoranda or reports for general distribution to Congress. Your confidentiality as a requester will be preserved in any case.

[3] U.S. CONST. amend. I. While the First Amendment specifically prohibits "Congress" from abridging speech, the First Amendment was incorporated against the states by the Fourteenth Amendment. Near v. Minnesota, 283 U.S. 697, 707 (1931).

[4] *See, e.g.*, Branti v. Finkel, 445 U.S. 507, 515–17 (1980) (holding that the First Amendment generally prohibits the dismissal of a public employee based on his speech or beliefs).

[5] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). *See generally* Cong. Rsch. Serv., *Freedom of Speech and the Role of the Government: Government as Employer*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-8-2-

public employees against retaliation when they speak about government misconduct,[6] providing recourse for some whistleblowers.[7] The courts have been sensitive to context in this area, and decisions tend to be fact-specific. Relevant here, lower courts have recognized that special circumstances apply to political, confidential, or policymaking employees, which may include some legislative aides. Speech by those employees may be protected by the First Amendment,[8] but in some cases, the courts have been more willing to allow an employer to effectuate discipline.[9]

Pickering, Public Employee Speech, and Constitutional Whistleblower Protections

The Supreme Court has recognized that the government has an interest in regulating "employees' words and actions" as necessary to provide public services efficiently.[10] When employees speak in the course of their official duties, they are generally speaking on behalf of the government, and the government can accordingly control their speech.[11] However, in *Pickering v. Board of Education*, the Supreme Court emphasized that when public employees speak as citizens, they do not completely "relinquish the First Amendment rights they would otherwise enjoy" to discuss public issues, including matters related to the offices where they work.[12] The Court said in *Pickering* that to analyze the constitutionality of a restriction on an employee's speech, a reviewing court should balance the interests of the employee, "as a citizen, in commenting upon matters of public concern," against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[13]

Before applying the *Pickering* balancing test, a court must evaluate whether the employee spoke as a *citizen*, on a *matter of public concern*.[14] Employees speak as employees rather than as citizens if the speech is made "pursuant to their official duties."[15] Whether "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[16] If speech fails either of these two initial inquiries, and the employee instead spoke "as an employee upon matters only of personal interest," the *Pickering* balancing test does not apply, and the government may discipline its employee without violating the First Amendment.[17] Thus, although "[s]peech concerning potential illegal conduct by government officials" is likely to be considered "a

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[6] *See, e.g.*, Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1206 (10th Cir. 2007) ("Speech concerning potential illegal conduct by government officials is inherently a matter of public concern.").

[7] *See, e.g.*, Hufford v. McEnaney, 249 F.3d 1142, 1150 (9th Cir. 2001) ("[A]n employer who discharges an employee in retaliation for legitimate whistleblowing does so in violation of the employee's clearly established First Amendment rights.").

[8] *See* Davis v. Billington, 51 F. Supp. 3d 97, 122 (D.D.C. 2014) (analyzing free speech claims under *Pickering* and declining to dismiss); Tucker v. George, No. 08-cv-0024, 2009 U.S. Dist. LEXIS 43178, at *23 (W.D. Wis. May 21, 2009) (same).

[9] *E.g.*, Gordon v. Griffith, 88 F. Supp. 2d 38, 57–58 (E.D.N.Y. 2000).

[10] *E.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." (citation omitted)).

[11] *See id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

[12] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[13] *Id.* This balancing test also applies to independent contractors, although the fact that the worker is a contractor rather than an employee may be relevant in the application of the balancing test. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 678 (1996).

[14] Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).

[15] *Id.* at 421.

[16] Connick v. Myers, 461 U.S. 138, 147–48 (1983).

[17] *Id.* at 147.

matter of public concern,"[18] such speech will only be constitutionally protected so long as the employee was also speaking as a citizen.

Applying these threshold tests in the specific context of whistleblowers, First Amendment protection depends in part on whether they reported misconduct outside of their ordinary job duties, and whether overseeing others or investigating misconduct is part of their ordinary job responsibilities.[19] This is a "practical" inquiry, looking "to the duties an employee actually is expected to perform."[20] Accordingly, the Supreme Court has said an employee's formal job description may not be dispositive, and speech may be protected even if it was made at the office or involved the subject matter of employment.[21] Even if a generally applicable law requires public employees to report misconduct, such a law will not necessarily create a job duty unless it specifically imposes a reporting duty on the particular employee.[22] However, if employees are in "Internal Affairs" or "watchdog" positions,[23] or otherwise tasked with ensuring legal compliance, reporting government misconduct may be part of their job duties and unprotected by the First Amendment.[24] In addition, if employees report concerns up the chain of command rather than reporting to an outside party, they may be more likely to be speaking pursuant to their job duties.[25]

Accordingly, the Supreme Court held in one case that where a deputy district attorney wrote a memorandum outlining concerns with an affidavit in the course of his official duties, the First Amendment did "not insulate" the "communications from employer discipline."[26] The Court said that when the attorney "performed the tasks he was paid to perform," he "acted as a government employee" rather than as a citizen.[27] The Court recognized that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," but ruled that the First Amendment nonetheless did not protect the attorney when he was acting pursuant to his ordinary job duties.[28] By contrast, the

[18] Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1206 (10th Cir. 2007); *see also, e.g.*, *Connick*, 461 U.S. at 148 (suggesting "actual or potential wrongdoing or breach of public trust" would involve a matter of public concern); Dahlia v. Rodriguez, 735 F.3d 1060, 1067 (9th Cir. 2013) (en banc) ("Dahlia's speech—reporting police abuse and the attempts to suppress its disclosure—is quintessentially a matter of public concern."); Solomon v. Royal Oak Twp., 842 F.2d 862, 865 (6th Cir. 1988) ("[S]peech disclosing public corruption is a matter of public interest and therefore deserves constitutional protection."). *But see, e.g.*, Foster v. Ripley, 645 F.2d 1142, 1148–49 (D.C. Cir. 1981) (affirming a district court holding that an employee had not acted as a whistleblower by sharing information about an agency's reorganization, but was only "attempting to protect his personal interests" in "a mere power struggle" over administrative control of certain agency divisions).

[19] *See, e.g.*, *Dahlia*, 735 F.3d at 1077–78.

[20] *Garcetti*, 547 U.S. at 424–25.

[21] *Id.* at 420–21, 424.

[22] *See, e.g.*, Camp v. Corr. Med. Servs., 400 Fed. Appx. 519, 522 & n.2 (11th Cir. 2010); *Dahlia*, 735 F.3d at 1075; *see also* Trigillo v. Snyder, 547 F.3d 826, 829 (7th Cir. 2008) (holding that while a statute could "help determine the scope of an employee's duties to the extent that it creates responsibilities for that employee's specific job," a state statute requiring certain employees to report anticompetitive practices did not include the employee's position in the list, and a "broadly applicable legal duty" stemming from the fact that she was a state employee did not define her specific job duties).

[23] *Dahlia*, 735 F.3d at 1075.

[24] *See, e.g.*, *Trigillo*, 547 F.3d at 830 ("As the manager of procurement, it was Trigillo's job to ensure that the many transactions that went through the department were properly bid and otherwise met the requirements of the Illinois Procurement Code and other applicable laws. . . . Because the report was a means to fulfill Trigillo's obligation to oversee the department's procurement transactions, it is not protected by the First Amendment.").

[25] *See, e.g.*, *Dahlia*, 735 F.3d at 107; Davis v. McKinney, 518 F.3d 304, 313 (5th Cir. 2008); *see also, e.g.*, Foraker v. Chaffinch, 501 F.3d 231, 241 (3d Cir. 2007) ("[T]he controlling fact in the case at bar is that Price and Warren were expected, pursuant to their job duties, to report problems concerning the operations at the range up the chain of command.").

[26] *Garcetti*, 547 U.S. at 421.

[27] *Id.* at 422.

[28] *See id.* at 425–26.

Supreme Court held that a community college employee's testimony about government misconduct was protected speech, where the testimony was "outside the scope of his ordinary job duties."[29]

If employees are speaking as a citizen on a matter of public concern, and their speech is therefore protected, the court will then proceed to apply the *Pickering* balancing test to determine whether the government's action was justified by its needs as an employer in efficiently providing public services.[30]

In *Pickering*, a high school teacher had written a letter to the editor criticizing how local schools had previously handled bond proposals.[31] The school board fired the teacher after concluding that the accusations in the letter were false and that the letter breached his duty of loyalty to the school.[32] The Supreme Court specified that, if the teacher "were . . . a member of the general public," the First Amendment would protect his letter and the government would have very limited recourse against him.[33] The Court said that generally, "statements by public officials on matters of public concern must [also] be accorded First Amendment protection."[34] The Court concluded that the teacher was speaking on "a matter of legitimate public concern"—"whether a school system requires additional funds"—that should be subject to "free and open debate."[35] The Court further recognized "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[36] To determine whether the school's discipline was warranted in this instance, the Court considered a number of specific factors in the balancing inquiry.[37]

The Court held that the balance weighed in favor of the teacher, explaining that:

- His statements were not directed at people he worked with closely, so there was no risk of disrupting discipline or coworker harmony;
- His position did not entail "close working relationships" with leadership that required "personal loyalty and confidence";
- His statements did not impede the "proper performance of his daily duties in the classroom";
- His statements had not generated any negative "impact on the actual operation of the schools"; and
- His statements involved matters of public record that the school board could have easily rebutted where erroneous; the matters were not of the type where the teacher would be presumed to have greater access to the facts and exercise undue influence.[38]

The application of *Pickering*'s balancing test is fact-specific.[39] Lower courts have identified a variety of relevant circumstances for balancing the government's interests in discipline against employees' interests in speech. In a case involving "good-faith" whistleblower speech, one federal appeals court suggested that

[29] Lane v. Franks, 573 U.S. 228, 238 (2014).

[30] *Id.* at 242.

[31] Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1968).

[32] *Id.* at 568–69.

[33] *Id.* at 573.

[34] *Id.* at 574.

[35] *Id.* at 571–72.

[36] *Id.* at 568.

[37] *See id.* at 569.

[38] *Id.* at 569–73.

[39] *E.g.*, Gustafson v. Jones, 290 F.3d 895, 909 (7th Cir. 2002); Wulf v. City of Wichita, 883 F.2d 842, 865 (10th Cir. 1989).

the *Pickering* balancing test will more frequently weigh in favor of the employee because "[e]mployers cannot be said to have a legitimate interest in silencing reports of corruption or potential illegality."[40] Courts evaluating whistleblower claims have stressed the importance of such speech, weighing in favor of the employee[41] and making it difficult for government claims of disruption or confidentiality to outweigh the public interest in disclosure.[42] Silencing whistleblower speech may also be unlikely "to aid the government's interest in efficiency," given that exposing wrongful practices will likely "lead to more efficient provision of public services."[43]

Given the nature of the *Pickering* balance test, it is possible in cases presenting different factual circumstances for the government's interests to outweigh a whistleblower's speech interests. For example, a federal appeals court held in a nonprecedential opinion that the First Amendment did not prevent the government from firing a state lawyer who filed a lawsuit alleging mismanagement at his own agency.[44] The employee's suit claimed that agency officials had failed to investigate this mismanagement and had retaliated against him for raising his concerns internally.[45] He later alleged that the agency also fired him for filing that same suit.[46] Under the circumstances, the court said that the "extent of the disruption" caused by the lawsuit "tilt[ed] the *Pickering* balance in favor of" his state employer, outweighing the public's interest in his whistleblowing allegations.[47]

Elrod, Branti, and Confidential or Policymaking Positions

In a footnote in *Pickering*, the Supreme Court noted the possibility that some government positions may entail a "personal and intimate" relationship "between superior and subordinate," so that "certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship."[48] The Court suggested such a circumstance would present "significantly different considerations" from *Pickering* itself.[49] In a subsequent case, the Supreme Court said that employees in positions with more authority or public accountability must exercise greater "caution" in their speech than employees without any "confidential, policymaking, or public contact role."[50]

Based on this distinction, lower courts have concluded that employees in "high-level policy position[s]" are "'unlikely' to prevail under the *Pickering* balancing test," in part because their speech is more disruptive to the employer.[51] Some courts have gone further, drawing from a distinct line of Supreme

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[40] Hufford v. McEnaney, 249 F.3d 1142, 1149–50 (9th Cir. 2001); *cf.* Porter v. Califano, 592 F.2d 770, 773–74 (5th Cir. 1979) ("[I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. . . . [T]he balancing test articulated in Pickering is truly a balancing test, with office disruption or breached confidences being only weights on the scales.").

[41] *See, e.g.*, Akins v. Fulton County, 420 F.3d 1293, 1304 (11th Cir. 2005); O'Donnell v. Yanchulis, 875 F.2d 1059, 1062 (3d Cir. 1989); Marohnic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986).

[42] *See, e.g.*, *O'Donnell*, 875 F.2d at 1062; Solomon v. Royal Oak Township, 842 F.2d 862, 866–67 (6th Cir. 1988).

[43] *Akins*, 420 F.3d at 1304.

[44] Kimmett v. Corbett, 554 Fed. Appx. 106, 114 (3d Cir. 2014).

[45] *Id.* at 108–09.

[46] *Id.* at 110.

[47] *Id. See also, e.g.*, Swineford v. Snyder County, 15 F.3d 1258, 1272–73 (3d Cir. 1994) (ruling in favor of employer over whistleblower where her "activities disrupted office efficiency beyond the point where she should be protected," and her dispute with the city had become "solely a personal grievance").

[48] Pickering v. Bd. of Educ., 391 U.S. 563, 570 n.3 (1968).

[49] *Id.*

[50] Rankin v. McPherson, 483 U.S. 378, 390–91 (1987).

[51] McCullough v. Wyandanch Union Free Sch. Dist., 132 F. Supp. 2d 87, 90 (E.D.N.Y. 2001) (quoting McEvoy v. Spencer, 124 F.3d 92, 103 (2d Cir. 1997)).

Court precedent on political patronage to hold that if "a policymaking employee" speaks "in a manner that is critical of superiors or their stated policies," then the employee's speech will be considered unprotected without needing to engage in the *Pickering* balancing inquiry.[52]

The Supreme Court decisions that began this line of analysis identified a First Amendment *protection* for public employees, holding that a government employer generally may not fire nonpolitical public employees for their political beliefs.[53] In *Elrod v. Burns*, the Court ruled that "a nonpolicymaking, nonconfidential government employee" could not be fired "upon the sole ground of his political beliefs."[54] Four years later, in *Branti v. Finkel*, the Court expanded on this doctrine, holding that two assistant public defenders could not be fired solely because they were Republicans.[55] The *Branti* opinion acknowledged that "party affiliation may be an acceptable requirement for some types of government employment"—for example, "if an employee's private political beliefs would interfere with the discharge of his public duties."[56] However, the Court cautioned that party affiliation would not necessarily be "relevant to every policymaking or confidential position."[57]

Although the *Elrod-Branti* line of cases identifies a *protection* for public employees' political beliefs, based on the language in *Branti* and *Pickering* about limits on those protections for certain policymaking employees, lower courts have drawn the negative inference that employee speech is *unprotected* in certain circumstances.[58]

Notably, some courts have said that for certain categories of employees and speech, the government will be entitled to prevail as a matter of law without engaging in the *Pickering* balancing test.[59] Taking the broadest approach to this issue, the Ninth Circuit[60] has characterized *Elrod* and *Branti* as "an exception" to the *Pickering* balancing test and held that whenever "a public employee is a policymaker," any First Amendment retaliation "claim would fall under the rubric of *Elrod* and *Branti*."[61] Accordingly, the Ninth Circuit rejected a First Amendment claim brought by a former Assistant District Attorney after concluding

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[52] Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 971 (7th Cir. 2001); *cf.* Regan v. Boogertman, 984 F.2d 577, 581 (2d Cir. 1993) (holding that *Pickering* was "not applicable" to a case involving a policymaking employee who "was fired for partisan political reasons, namely her conduct in opposition to the reelection of the incumbent officeholders").

[53] Branti v. Finkel, 445 U.S. 507, 517–18 (1980).

[54] Elrod v. Burns, 427 U.S. 347, 375 (1976) (Stewart, J., concurring in the judgment). Justice Stewart believed the plurality opinion in *Elrod* to be too "wide-ranging." *Id.* at 374; *id.* at 373 (plurality opinion) ("[T]he practice of patronage dismissals is unconstitutional . . . ."). *See also* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when "no single rationale explaining the result [of a case] enjoys the assent of five Justices," the position representing the narrowest grounds for decision is the Court's holding).

[55] *Branti*, 445 U.S. at 520.

[56] *Id.* at 517. *See also Elrod*, 427 U.S. at 367 (plurality opinion) (suggesting patronage dismissals might be appropriate for policymaking positions, "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration").

[57] *Branti*, 445 U.S. at 518.

[58] *See, e.g.*, Hagan v. Quinn, 867 F.3d 816, 819–20 (7th Cir. 2017). *See also* Rose v. Stephens, 291 F.3d 917, 921 n.1 (6th Cir. 2002) (holding that *Pickering* applies where an employee speaks on political or policy-related issues, but that the balance favors the government as a matter of law in such cases). *But see, e.g.*, McEvoy v. Spencer, 124 F.3d 92, 101 (2d Cir. 1997) ("Where . . . the employer discharged a policymaker solely for speaking out on matters of public concern, and . . . the policymaker's political beliefs played no role in the employer's decision, *Elrod* is inapplicable and *Pickering* must be applied . . . .").

[59] *Rose*, 291 F.3d at 922.

[60] For brevity, references to a particular circuit in this memorandum (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Ninth Circuit).

[61] Fazio v. City and County of San Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997); *see also* Bellville v. Dunleavy, No. 3:19-cv-00036-JWS, 2021 U.S. Dist. LEXIS 194659, at *13 (D. Alaska Oct. 8, 2021) ("In the Ninth Circuit, 'an employee's status as a policymaking or confidential employee [is] dispositive of *any* First Amendment retaliation claim[,]' not just a claim based solely on political affiliation." (quoting Biggs v. Best, Best & Krieger, 189 F.3d 989, 994–95 (9th Cir. 1999)) (alterations in *Bellville*)).

that he "was a policymaker," without inquiring into the *Pickering* threshold questions or balancing factors.[62] Among other considerations suggesting his policymaker status, the court noted that he "handled high profile cases with a great degree of autonomy."[63]

A number of other courts have taken a narrower approach to the relationship between *Elrod*, *Branti*, and *Pickering*. The Sixth Circuit, for example, has held that *Pickering* applies unless a policymaking employee's speech "implicate[s] the employee's politics or substantive policy viewpoints" and is related to the employee's job duties.[64] It therefore held that a police commissioner, a policymaking employee, could not claim First Amendment protection against retaliation for writing a memorandum, in the course of his job duties, announcing his decision to terminate another employee.[65] In another case, the First Circuit concluded that a town council could decline to reappoint a recreation commissioner who opposed council plans for a community park project because one of the commissioner's primary job functions was to give the town council policymaking advice.[66] By contrast, in a different case, the Sixth Circuit concluded the *Elrod-Branti* exception to the *Pickering* balancing approach did not apply where a former school superintendent lost a position based on speech that did "not implicate either his political position or his substantive policy views."[67]

In a third approach to these interrelated doctrines, other courts have limited the *Elrod-Branti* approach to cases involving political association, rather than establishing an exception to First Amendment protections for employee speech.[68] These courts have continued to apply the *Pickering* balancing test to evaluate whether the speech of policymaking employees is protected.[69] However, the fact that an employee occupies a high-level confidential or policymaking position can weigh in favor of the government in the balancing inquiry.[70] One Second Circuit case brought by Connecticut's former Lottery Unit Chief provides an example.[71] The plaintiff "was fired by his supervisors for refusing to publicly support a change in the lottery."[72] The court acknowledged that his speech "implicate[d] a matter of public concern,"[73] but also noted that the plaintiff "was a senior policymaking employee" and that his criticism likely had a more significant effect on the agency's ability to run "an effective and efficient office."[74]

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[62] *Fazio*, 125 F.3d at 1334.

[63] *Id.*

[64] Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 973–74 (7th Cir. 2001); *see also, e.g.*, Foote v. Town of Bedford, 642 F.3d 80, 85 (1st Cir. 2011) ("The *Elrod*/*Branti* line of cases must inform the *Pickering* balance whenever a policymaking employee is dismissed for speech elucidating his views on job-related public policy."); *Rose*, 291 F.3d at 921 ("[W]here a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law."). The Circuits have adopted slightly different tests to determine whether an employee is appropriately characterized as a policymaking employee.

[65] *Rose*, 291 F.3d at 919.

[66] *Foote*, 642 F.3d at 86.

[67] Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 259 (6th Cir. 2006). The court believed his First Amendment claim should instead be analyzed under *Pickering*'s balancing test. *Id.* at 257.

[68] *See* Curinga v. City of Clairton, 357 F.3d 305, 311 (3d Cir. 2004); Lewis v. Cowen, 165 F.3d 154, 162 (2d Cir. 1999).

[69] *Curinga*, 357 F.3d at 312; *Lewis*, 165 F.3d at 162; *cf., e.g.*, Lawson v. Gault, 828 F.3d 239, 247 (4th Cir. 2016) (analyzing a claim involving termination based on speech under both the *Elrod-Branti* and *Pickering* lines of cases).

[70] *See* Rankin v. McPherson, 483 U.S. 378, 390–91 (1987).

[71] *Lewis*, 165 F.3d at 158.

[72] *Id.* at 157.

[73] *Id.* at 164. This decision was issued before the Supreme Court made clear that to be protected under *Pickering*, the speech must not only involve a matter of public concern, but must also be made as a citizen, outside the course of the employee's official duties, so the Second Circuit did not consider this as a threshold issue. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[74] *Lewis*, 165 F.3d at 165. *See also, e.g.*, Hall v. Ford, 856 F.2d 255, 264 (D.C. Cir. 1988) (rejecting the First Amendment claim of the former Athletic Director of the University of the District of Columbia after stating that the University "had a significant

First Amendment Protections for Legislative Staffers

There is relatively little caselaw considering the First Amendment rights of legislative employees, and most of those cases have involved state rather than federal employees, for reasons discussed in more detail below.[75] Existing precedent suggests that First Amendment retaliation claims brought by legislative employees would be analyzed under the constitutional standards that apply to other government employees—including the *Pickering* balancing test and the special considerations that apply in the case of policymaking or confidential employees.[76]

For example, in *Gordon v. Griffith*, a federal trial court rejected a state legislative aide's First Amendment claim after concluding that her position required a different analysis than the ordinary *Pickering* claim.[77] After reviewing the aide's duties, the court said that "[b]ecause positions as legislative assistants are inherently political, considerations of loyalty to the views and agenda of the elected legislator are relevant in staffing."[78] Accordingly, the court held that "*Elrod*'s categorical approach rather than *Pickering*'s balancing seems more appropriate to" analyze the claim.[79] Critically, the court believed that "legislative aides occupying positions in which their public speech may reasonably be associated with, or mistaken for, that of the legislator's may constitutionally be dismissed for their public speech."[80] Turning to the aide's specific position, the court concluded that her "job was one in which her public comments could reasonably be understood to reflect the views or, at a minimum, the sympathies of" the legislator.[81] Accordingly, in the court's view, the legislator could dismiss her for speaking out against the police at a protest and press conference.[82]

At the federal level, the most relevant precedent considering the free speech rights of legislative employees has not involved the same type of legislative aides. For example, one D.C. Circuit case rejected a First Amendment claim brought by a sergeant in the U.S. Capitol Police who alleged that she was improperly disciplined for leaking information to *Roll Call* about an unattended firearm left in a bathroom.[83] The appeals court concluded that the balance weighed in favor of the government's ability to discipline her, relying on the special circumstances surrounding law enforcement officers and the employee's role as a supervisor.[84]

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interest in ensuring that" the plaintiff, "a prominent policy level official," was "compatible with the President and the Board," and stating that his allegations of improprieties in the Athletic Department "directly interfered with this interest").

[75] *Infra* "*Bivens* and Qualified Immunity."

[76] *See, e.g.*, Davis v. Billington, 51 F. Supp. 3d 97, 115–16 (D.D.C. 2014). Accordingly, legislative employees must also demonstrate that they spoke as citizens on matters of public concern. *See* Payne v. Meeks, 200 F. Supp. 2d 200, 207 (E.D.N.Y. 2002) (dismissing retaliation claim brought by a case worker for a Member of the House of Representatives because her lawsuit did not involve a matter of public concern); Tucker v. George, No. 08-cv-0024-bbc, 2008 U.S. Dist. LEXIS 109287, at *8–9 (W.D. Wis. Mar. 13, 2008) (stating that legislative aide's retaliation claim against state senator would be barred if she spoke "pursuant to her official duties," but ruling that further factual development was required to decide whether she had).

[77] Gordon v. Griffith, 88 F. Supp. 2d 38, 57–58 (E.D.N.Y. 2000). *Cf., e.g.*, Burkhardt v. Lindsay, 811 F. Supp. 2d 632, 644 (E.D.N.Y. 2011) (dismissing political affiliation claim of aide to the Presiding Officer of the Suffolk County Legislature because the aide was a policymaker); Martinez v. Sanders, No. 02 Civ. 5624 (RCC), 2004 U.S. Dist. LEXIS 10060, at *16–17 (S.D.N.Y. June 2, 2004) (following *Gordon*'s mode of analysis but concluding factual issues prevented dismissal of free speech claims of staffer to state legislator).

[78] *Gordon*, 88 F. Supp. 2d at 45.

[79] *Id.* at 55.

[80] *Id.* at 57–58.

[81] *Id.* at 58.

[82] *Id.*

[83] Breiterman v. U.S. Capitol Police, No. 20-5295, 2021 U.S. App. LEXIS 30866, at *2–7 (D.C. Cir. Oct. 15, 2021).

[84] *Id.* at *19–20.

A federal trial court similarly considered an employee's supervisory responsibilities in rejecting the First Amendment claim of a former Assistant Director at the Congressional Research Service (CRS).[85] The employee was separated from CRS, which he alleged was because he published opinion pieces in newspapers without a disclaimer disassociating himself from the agency.[86] Following circuit precedent, the trial court concluded that there was a factual dispute "as to whether the plaintiff was a high-level employee" who "was obligated to exercise special caution in the exercise of his speech."[87] The court suggested that CRS, which "places a premium on the appearance of non-partisanship and objectivity," might be able to exercise greater control over employees with "broad responsibilities with respect to policy formulation, implementation, or enunciation."[88] The court further concluded that there were a number of other open factual issues related to factors on both sides of the *Pickering* balancing test.[89]

Ultimately, a court's analysis of any legislative staffer's First Amendment claims will depend on the specific factual circumstances of the claim, as well as the controlling precedent in that particular circuit.

Bivens and Qualified Immunity

Separate from the scope of public employees' constitutional speech rights is the question of how any given employee might be able to assert those rights. The answer depends greatly on whether the case involves a federal employee or a state or local employee, as well as the precise nature of the claim. Even if an employee's speech is protected under the First Amendment, the law may limit an employee's ability to seek redress for a violation of his or her rights.

Legal Remedies Available for State and Local Employees

In addition to any protections they may have under state laws,[90] state or local government employees have a unique cause of action under federal law that provides them an opportunity to seek damages for violations of their constitutional rights against state and local government actors. Under 42 U.S.C. § 1983 (Section 1983), any individual may institute a civil cause of action to recover money damages for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[91] Several of the cases discussed above involved claims under Section 1983, including *Gordon v. Griffith*.[92]

An important exception applies to claims under Section 1983. As discussed in more detail below, the courts may grant immunity to government defendants when their alleged conduct would not violate a constitutional right that had been sufficiently established before that conduct occurred.[93]

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[85] Davis v. Billington, 51 F. Supp. 3d 97, 116–18 (D.D.C. 2014).

[86] *Id.* at 105.

[87] *Id.* at 117–18.

[88] *Id.* at 117 (quoting Hall v. Ford, 856 F.2d 255, 264 (D.C. Cir. 1988)) (internal quotation marks omitted).

[89] *Id.* at 122.

[90] A review of state laws that might protect employee rights under the U.S. Constitution is beyond the scope of this memorandum.

[91] 42 U.S.C. § 1983.

[92] Gordon v. Griffith, 88 F. Supp. 2d 38, 39 (E.D.N.Y. 2000).

[93] *See, e.g.*, Bartlett v. Fisher, 972 F.2d 911, 916–17 (8th Cir. 1992) (noting that due to the fact-specific nature of the *Pickering* balancing test, constitutional rights "can rarely be considered 'clearly established'" under that test, so that government defendants will frequently be entitled to qualified immunity).

Legal Remedies Available for Federal Employees

Federal action is beyond the reach of Section 1983.[94] Other statutes, however, may protect federal employees in the exercise of some constitutional rights, including First Amendment rights.[95] For example, the Civil Service Reform Act (CSRA) provides a "comprehensive system for reviewing personnel action taken against federal employees."[96] Constitutional challenges to agency action taken against federal employees, such as First Amendment claims, "are fully cognizable within this system."[97] The CSRA provides "meaningful remedies" for example, for "employees who may have been unfairly disciplined for making critical comments about their agencies."[98] Employees who prevail in the administrative processes set forth by the CSRA may be entitled to remedies such as reinstatement, backpay, and attorney's fees.[99] While the CSRA does generally apply to the legislative branch,[100] the Congressional Accountability Act (CAA) extends additional labor and antidiscrimination protections to legislative branch employees.[101] The CAA provides statutory processes for aggrieved legislative branch employees and provides remedies for violations of the various provisions of the CAA.[102] However, some courts have highlighted that the CAA does not grant legislative branch employees the same remedies that are available for executive agency employees under the CSRA for review of adverse personnel actions taken in violation of their constitutional rights.[103]

Analyzing the precise scope of statutory protections is beyond the scope of this memo, which is focused on constitutional issues, at your request. On further request, CRS could examine statutory protections more closely.

Bivens Actions

An employee might also seek to raise a different kind of claim for money damages that is available in some circumstances when the federal government takes action that violates an individual's constitutional rights. The Supreme Court first recognized this type of claim in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[104] where it established that in limited circumstances, "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."[105] Where it applies, a *Bivens* claim

[94] District of Columbia v. Carter, 409 U.S. 418, 424 (1973).

[95] A comprehensive review of all statutes that may protect the free speech rights of federal employees is beyond the scope of this memo.

[96] United States v. Fausto, 484 U.S. 439, 455 (1988). For more information on the CSRA, see CRS Report R44803, *The Civil Service Reform Act: Due Process and Misconduct-Related Adverse Actions*, by Jared P. Cole.

[97] *See* Bush v. Lucas, 462 U.S. 367, 386 (1983).

[98] *Id.*

[99] *See* 5 U.S.C. § 1221(g) (providing examples of corrective action that may be taken by the Merit Systems Protection Board).

[100] *See* 5 U.S.C. § 2101 (defining "civil service" as "all appointive positions in the executive, judicial, and legislative branches). This definition, however, is an "initial categorization" of who counts as a federal employee, and particular provisions of the CSRA may not cover some federal workers. *See* CRS Report R44803, *The Civil Service Reform Act: Due Process and Misconduct-Related Adverse Actions*, by Jared P. Cole.

[101] *See* 2 U.S.C. § 1302.

[102] *See* 2 U.S.C. §§ 1401–07; *see, e.g.*, 2 U.S.C. § 1311 (providing that the remedy is the same as that awarded under 42 U.S.C. § 2000e-5(g)); 2 U.S.C. § 1361(c) (providing that "[n]o civil penalty or punitive damages may be awarded with respect to any claim under this chapter").

[103] *See* Payne v. Meeks, 200 F. Supp. 200, 205–06 (E.D.N.Y. 2002); *see also* 5 U.S.C. § 2302 (defining "prohibited personnel practice" as one applying to an "employee in . . . an agency").

[104] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[105] *See* Carlson v. Green, 446 U.S. 14, 18 (1980).

against a federal official is analogous to a Section 1983 claim against a state official and allows an aggrieved party to seek money damages against a federal actor for the violation of his or her constitutional rights.

In *Bivens*, the Court held that the plaintiff could pursue money damages for his Fourth Amendment claim against a group of federal narcotics agents.[106] The Court reasoned that when federally protected rights have been "invaded," a plaintiff is entitled to a remedy—whether that remedy is statutorily or judicially created.[107] Thus, the Court *implied* a private cause of action for individuals seeking money damages for Fourth Amendment violations. The Court implied a remedy for constitutional violations committed by federal actors in two other circumstances following *Bivens*. In a 1979 case, *Davis v. Passman*, the Court held that an administrative assistant who sued a Congressman for gender discrimination could pursue money damages for violating the equal protection principles embodied in the Fifth Amendment's Due Process Clause.[108] A year later in *Carlson v. Green,* the Court extended a *Bivens* remedy to a federal prisoner's estate seeking damages for failure to provide adequate medical treatment in violation of the Eighth Amendment.[109]

The Supreme Court, however, has not implied a new cause of action under *Bivens* in more than 30 years.[110] The Court continued its trend of limiting *Bivens* remedies in its 2017 decision *Ziglar v. Abassi*, noting that it had "adopted a far more cautious course" to judicially-created remedies in the decades since *Bivens*.[111] The Court now considers further expansion of the *Bivens* doctrine a "disfavored judicial activity."[112] Despite this, the Court has emphasized that *Bivens* itself is "well-settled law in its own context," and it continues to allow for claims against federal actors for money damages in the three limited contexts the Court has already recognized.[113]

For claims outside those three limited contexts, the *Abassi* Court provided a two-part test used to determine whether a *Bivens* remedy is available. First, the Court looks at whether the case presents a "new context"—that is, whether the case differs meaningfully from the three specific cases where a *Bivens* remedy was established.[114] Second, if the case does present a new context, the Court considers whether there are "special factors" counseling against creating a remedy.[115] The Court has not attempted to "'create an exhaustive list' of factors that may provide a reason not to extend *Bivens*," but has emphasized that "'central to [this] analysis' are 'separation-of-powers principles.'"[116] The Court has explained that it must consider the risk of "interfering with the authority of the other branches," including asking whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy."[117] The Court has generally made clear that "Congress, not the judicial branch, is in the best position to prescribe the scope of relief available for the violation of a constitutional right."[118] It has

[106] *Bivens*, 403 U.S. at 397.

[107] *Id.* at 392.

[108] Davis v. Passman, 442 U.S. 228, 248–49 (1979).

[109] *Green*, 446 U.S. at 17.

[110] Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

[111] *Id.* at 1855.

[112] *Id.* at 1857.

[113] *Id.* at 1848.

[114] *Id.* at 1857. As mentioned, these three cases are *Bivens v. Six Unknown Named Agent of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); and *Carlson v. Green*, 446 U.S. 14 (1980).

[115] *Abassi*, 137 S. Ct. at 1857.

[116] Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) (quoting *Abassi*, 137 S. Ct. at 1857).

[117] *Abassi*, 137 S. Ct. at 1858.

[118] Davis v. Billington, 681 F.3d 377, 381 (D.C. Cir. 2012).

declined to extend *Bivens* remedies, for example, in cases implicating issues more appropriate for the other branches, such as federal fiscal policy[119] or international relations.[120]

The Court has never recognized a *Bivens* remedy for claims against federal actors for First Amendment violations, nor has it categorically rejected such a claim. Therefore, the first part of the *Abassi* two-part test—whether the case presents a new context—can likely be answered in the affirmative. The second part of the two-part test—whether there are special factors counseling against creating a remedy—requires a more fact-intensive inquiry.

One important special factor that has appeared in several potential *Bivens* actions is whether Congress has either expressly created some alternative remedy, or else has deliberately declined to create one. In *Bush v. Lucas*, the Court held that a federal employee could not sue his agency, claiming that he was demoted after making public statements that were protected by the First Amendment.[121] Instead, the Court held that Congress had provided such employees with "comprehensive procedural and substantive provisions giving meaningful remedies against the United States," making it "inappropriate" for the Court "to supplement that regulatory scheme with a new nonstatutory damages remedy."[122] The reached a similar result, on the same reasoning, several years later in *Schweiker v. Chilicky*.[123]

The Eastern District of New York reached a similar result in a case by a former congressional staffer. While she had been employed by a Member of Congress, the staffer had made sexual assault allegations against a physical therapy business owned by a campaign supporter of the same Member.[124] The Member allegedly began to retaliate against the employee, and the employee filed a formal request with the congressional Office of Compliance pursuant to the CAA.[125] The Member fired the staffer, who then sued the Member under *Bivens* for violations of her First Amendment rights.[126] Relying on *Bush* and *Schweiker*, the court concluded that *Bivens* relief was unavailable for the staffer because Congress had enacted the CAA as a comprehensive remedial scheme for the resolution of employment disputes by legislative branch employees.[127] Importantly, as discussed more below, the court reasoned that the CAA did not entitle congressional employees to review of adverse personnel actions taken in violation of their constitutional rights, and "its withholding from congressional employees of a remedy for constitutional violations cannot have been inadvertent."[128]

Two courts of appeals have applied similar reasoning to preclude *Bivens* actions where Congress has *declined* to provide a statutory remedy for an alleged constitutional violation. In *Blankenship v. McDonald*, the Ninth Circuit held that a federal court reporter could not bring a *Bivens* action for the alleged violation of her First and Fifth Amendment rights.[129] The Ninth Circuit observed that the CSRA, which provides "a comprehensive system for reviewing personnel action taken against federal

[119] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[120] *Hernandez*, 140 S. Ct. at 744.

[121] Bush v. Lucas, 462 U.S. 367, 368 (1983).

[122] *Id.*

[123] Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (declining to extend *Bivens* to disability claimants under the Social Security Act in light of a comprehensive statutory scheme providing remedies for the alleged violation of their constitutional rights).

[124] Payne v. Meeks, 200 F. Supp. 2d 200, 201 (E.D.N.Y. 2002).

[125] *Id.* at 202.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 206.

[129] Blankenship v. McDonald, 176 F.3d 1192, 1194 (9th Cir. 1999).

employees,"[130] precluded a *Bivens* remedy for the federal court reporter because Congress had intentionally left out remedies for judicial employees under the CSRA.[131] The Ninth Circuit explained that while Congress had provided judicial employees with certain employment benefits and remedies, it had "withheld other benefits and remedies, such as review of adverse personnel decisions," which demonstrated "the lack of more complete remedies was not inadvertent."[132]

The D.C. Circuit followed similar reasoning when it declined to extend a *Bivens* remedy to a CRS employee who challenged his termination on First Amendment grounds. In *Davis v. Billington*, the court reiterated that Congress should prescribe the scope of relief available for constitutional violations, and that courts will not imply a *Bivens* remedy where "Congress has adopted a 'comprehensive remedial scheme.'"[133] The court concluded that the CSRA is a "scheme that reflects a considered congressional judgment about which remedies should be available for claims that fall within its ambit,"[134] and that this legislative judgment constituted "a special factor that precludes the creation of a *Bivens* remedy."[135] The court recognized that while the plaintiff lacked a remedy for his alleged constitutional injury under the CSRA, "Congress's choice to omit damages remedies for claimants in Davis's posture was a deliberate one."[136]

The CRSA and CAA do not apply to the public in general, and where Congress has not spoken, there may be an opportunity for courts to recognize a First Amendment *Bivens* claim. The Ninth Circuit recently held that a *Bivens* remedy was available for a bed and breakfast owner who alleged that a U.S. Border Patrol Agent had retaliated against him after he refused to cooperate with the Agent's investigation into a foreign national who was staying at the bed and breakfast.[137] The Ninth Circuit acknowledged that the Supreme Court had declined to recognize a First Amendment *Bivens* claim in *Bush v. Lucas*; however, the court emphasized that *Bush* arose out of an employment dispute that was governed by a comprehensive remedial scheme—a much different circumstance than a "vengeful officer" accused of retaliating against a private citizen.[138] The court analyzed potential statutory schemes that may provide relief for the plaintiff, including claims under the Federal Tort Claims Act, state tort laws, and injunctive relief, but concluded that none of the suggested remedies "defeats a *Bivens* action."[139] The Supreme Court recently granted a petition for certiorari in this case and will review the Ninth Circuit's decision to extend a *Bivens* remedy in this circumstance.[140]

These cases indicate that courts must undertake a fact-intensive analysis in each circumstance to determine whether special factors, including the existence (or advertent omission) of a statutory remedial scheme, preclude the recognition of a *Bivens* remedy. The most important factor for legislative branch

[130] United States v. Fausto, 484 U.S. 439, 455 (1988).

[131] *Blankenship*, 176 F.3d at 1195.

[132] *Id.*

[133] Davis v. Billington, 681 F.3d 377, 380 (D.C. Cir. 2012).

[134] *Id.* at 383.

[135] *Id.* at 383–84.

[136] *Id.* at 384.

[137] Boule v. Egbert, 998 F.3d 370, 375 (9th Cir. 2021).

[138] *Id.* at 390–91 (acknowledging that retaliation is a "well-established First Amendment claim").

[139] *Id.* at 391–92. The court concluded that injunctive relief or "protection against some future act" was not an adequate remedy because the plaintiff was seeking damages for the defendant's "completed actions." *Id.* at 392. In *Davis v. Billington*, the D.C. Circuit reasoned that although a *Bivens* remedy was not available, the plaintiff "can . . . file[] a claim for injunctive relief for the alleged constitutional violations." *See* 681 F.3d at 388 n.1.

[140] Egbert v. Boule, No. 21-147, 2021 WL 5148065 (U.S. Nov. 5, 2021).

employees is likely the scope of the CAA, as some courts have already found the CAA provides a "comprehensive remedial scheme" for employment disputes.[141]

Qualified Immunity

Even if a plaintiff may pursue a remedy for an alleged constitutional violation by a federal official, qualified immunity may shield that federal official from liability. Qualified immunity is a judicially created legal doctrine that shields government officials performing discretionary duties from being sued in their individual capacity.[142] Qualified immunity may be available in civil rights cases involving the deprivation of constitutional rights,[143] including both Section 1983 cases and *Bivens* actions.

Government officials are entitled to qualified immunity so long as their actions do not violate "clearly established" constitutional rights "of which a reasonable person would have known."[144] The immunity's broad protection is intended for "all but the plainly incompetent or those who knowingly violate the law,"[145] and to give government officials "breathing room" to make reasonable mistakes of fact and law.[146] According to the Supreme Court, the "driving force" behind qualified immunity is to ensure that "insubstantial claims" against government officials are resolved at the outset of the lawsuit.[147] Accordingly, qualified immunity, when applied, immunizes government officials not only from having to pay civil damages, but also from having to defend liability altogether.[148]

The Supreme Court granted qualified immunity in a *Bivens* case to two Secret Service agents who were sued for violating protestors' First Amendment rights.[149] In *Moss*, two groups assembled on opposite sides of the street on which President George W. Bush's motorcade was travelling.[150] One group supported the President and the other opposed him.[151] After the motorcade changed routes, the protestors moved locations, and the Secret Service agents directed state and local police to clear the block containing those assembled to protest the President.[152] The protestors sued the Secret Service agents for damages under *Bivens* for unconstitutional viewpoint discrimination in violation of their First Amendment rights.[153] The Court held that even if a *Bivens* remedy existed, the agents were entitled to qualified immunity because of the "overwhelming importance of safeguarding the President," and the fact that the law did not clearly establish that Secret Service agents have a First Amendment obligation "to make sure that groups with conflicting views are at all times in equivalent positions."[154]

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[141] *See, e.g.*, Payne v. Meeks, 200 F. Supp. 2d 200, 205 (E.D.N.Y. 2002); *Davis*, 681 F.3d at 380.

[142] *See* Kentucky v. Graham, 473 U.S. 159, 167–68 (1985) (defining "individual" or "personal" capacity suits as suits that "seek to impose personal liability upon a government official for actions he takes under color of state law").

[143] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[144] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[145] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[146] Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011).

[147] *Pearson*, 555 U.S. at 231.

[148] *Id.*

[149] *See* Wood v. Moss, 572 U.S. 744, 757 (2014).

[150] *Id.* at 747.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 754.

[154] *Id.* at 748, 746. Because of its holding in support of qualified immunity, the Court did not decide whether the agents had actually violated the First Amendment or whether a *Bivens* action was available under the First Amendment.

In evaluating whistleblower retaliation claims brought under Section 1983, federal courts have both denied and granted qualified immunity to state actors accused of First Amendment violations. For example, in *Anderson v. Valdez*, the Fifth Circuit held a state court justice was entitled to qualified immunity after a former court employee sued him for First Amendment retaliation.[155] The former court employee alleged that the justice had encouraged another judge not to rehire him after he reported judicial misconduct.[156] The court held that at the time of the incident, the law was unsettled as to whether the court employee was speaking as a citizen (which would entitle him to First Amendment protection) or as an employee as part of his job duties (which would not entitle him to First Amendment protection).[157] Therefore, because the law was not clearly established, the justice was entitled to qualified immunity.[158] In a case out of the Sixth Circuit, demonstrating an alternate outcome, the court held that a chief of police was not entitled to qualified immunity after a city police officer was disciplined for contacting the FBI to report police misconduct.[159] The court held that the police officer had engaged in clearly established constitutionally protected activity and that there were genuine issues of fact as to whether the police chief acted reasonably in disciplining the officer.[160] Like other qualified immunity cases, such cases will often turn on whether a prior precedent identified specific facts about government conduct that violates the Constitution.[161]

[155] Anderson v. Valdez, 913 F.3d 472, 476 (5th Cir. 2019).

[156] *Id.* at 474–75.

[157] *Id.* at 477.

[158] *Id.* at 476.

[159] See v. City of Elyria, 502 F.3d 484, 486–87 (6th Cir. 2007).

[160] *Id.* at 492–95.

[161] *See, e.g.*, Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (explaining that a clearly established right must be defined with "specificity," which requires identifying a case where the government actor was acting under "similar circumstances" when found to have violated the constitution).