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"We have freedom of speech, but you got to watch what you say."[1] Depending on the parties, content, and context, only some forms of speech are protected under the First Amendment of the U.S. Constitution.[2] For instance, individuals are not entitled to speech that presents a clear and present danger to society.[3] The First Amendment protects a private individual's freedom of speech only when state action attempts to suppress it—not private actors or institutions.[4] But what happens to freedom of speech when both parties are state actors? This Case Comment explores this intricate and complex area of First Amendment rights.

In 2017, the Sixth Circuit Court of Appeals had to determine whether the speech of public employees Matthew Gillis and Fred Walraven was protected under the First Amendment of the U.S. Constitution.[5] The court applied the *Pickering* balancing test[6] and was faced with a matter of first impression—whether an employer, in order to prevail under the test, must present evidence illustrating that the employee's speech caused an actual disruption in the workplace.[7] This Case Comment contends that the *Gillis* court erred in its application of the *Pickering* balancing test because it failed to adhere to the doctrines of vertical and horizontal stare decisis.[8] First, the court erred by not addressing the threshold question of public concern before applying the *Pickering* balancing test. The court should have first determined whether the employees' speech was a matter of public concern[9] and if so, then applied the *Pickering*

1. Dave Itzkoff, *Tracy Morgan: 'You Got to Watch What You Say'*, N.Y. Times (Apr. 15, 2014), https://www.nytimes.com/2014/04/20/magazine/tracy-morgan-you-got-to-watch-what-you-say.html.

2. *See* Michael Gonchar, *Why Is Freedom of Speech an Important Right? When, if Ever, Can It Be Limited*, N.Y. Times (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/learning/why-is-freedom-of-speech-an-important-right-when-if-ever-can-it-be-limited.html (discussing the First Amendment and how "there are complex lines that can be drawn around what kinds of speech are protected and in what setting").

3. *Id. See also* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive perils that Congress has a right to prevent.").

4. *See* Elizabeth A. Riley, Note, *Waters v. Churchill: The Procedural Due Process Disguise of Public Employee Free Speech Rights*, 24 Cap. U. L. Rev. 893, 893 (1995).

5. Gillis v. Miller, 845 F.3d 677, 680–81 (6th Cir. 2017).

6. The *Pickering* balancing test requires the court to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

7. *Gillis*, 845 F.3d at 685 ("In fact, it appears that we have never squarely addressed whether employers must show evidence of actual disruption in order to prevail under the *Pickering* test.").

8. *Vertical stare decisis* is defined as "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Vertical stare decisis*, Black's Law Dictionary (11th ed. 2019). *Horizontal stare decisis* is defined as "the doctrine that a court, esp. an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *Horizontal stare decisis*, Black's Law Dictionary (11th ed. 2019).

9. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) (stating that "[t]he threshold question in applying [the *Pickering* balancing] test is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern'"); Connick v. Myers, 461 U.S. 138, 146–47 (1983)

balancing test that calls for balancing the interests of the employee and employer.[10] Second, the court incorrectly applied the precedent set out in *Waters v. Churchill* by failing to recognize that the material facts in *Waters* are distinguishable from those in *Gillis*. These two errors resulted in the *Gillis* court holding that in order for employers to prevail under the *Pickering* balancing test, they need not present actual evidence of disruption in the workplace resulting from the employees' speech.[11]

Matthew Gillis was already on the staff at the Bay County Jail in Bay City, Michigan, as a Correctional Facility Officer (CFO) when, in January 2014, he was elected to serve as the president of the Bay County Corrections Officer's Union.[12] Fred Walraven worked alongside Gillis at the Bay County Jail as a CFO and Sergeant.[13] In early 2014, Sheriff John Miller of the Bay County Sheriff's Department began an investigation into potential prescription drug trafficking within the jail after learning that one of his deputies had supplied an inmate with prescription mouthwash for periodontal disease.[14]

During the investigation, Gillis received numerous complaints from jail staff concerning the conduct of Bay County Jail's management.[15] In response, Gillis and Walraven wrote a memorandum informing the jail staff of their union rights as outlined in *National Labor Relations Board v. J. Weingarten Inc.*[16] On February 12,

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(outlining that because the employee's speech did not constitute a matter of public concern, the Court did not need to balance the interests between the employee and employer); Farhat v. Jopke, 370 F.3d 580, 588–89 (6th Cir. 2004) (citing *Connick*, 461 U.S. at 143; *Pickering*, 391 U.S. at 568–88). *See also* Whitney v. City of Milan, 677 F.3d 292, 298 (6th Cir. 2012). The court stated:

> First, we determine whether the affected speech involved a public employee's comments as a private citizen on a matter of public concern. Second, if the speech involves a matter of public concern, then we must balance the interests of the public employee, 'as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'

Id.

10. *See Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 146–47; *Whitney*, 677 F.3d at 298; *Farhat*, 370 F.3d at 588–89.

11. *Gillis*, 845 F.3d at 687 ("We therefore join those courts and the *Waters* plurality and hold that a public employer need not show actual disruption of the public agency in all cases in order to prevail under the *Pickering* balancing test.").

12. Gillis v. Miller, No. 14-cv-12518, 2016 WL 337454, at *1 (E.D. Mich. Jan. 28, 2016) *aff'd*, 845 F.3d 677 (6th Cir. 2017). Gillis continued to carry out his CFO duties when he was elected to serve as president of the Bay County Corrections Officer's Union. *Id.*

13. *Gillis*, 845 F.3d at 681.

14. *Id.*

15. *Id.* During the investigation, while management was trying to collect information from employees about the alleged trafficking, several employees complained about being interrogated or even threatened by management. *Id.*

16. *Id.* at 681 (citing Nat'l Labor Relations Bd. v. J. Weingarten, Inc., 420 U.S. 251, 266–68 (1975) (holding that unionized employees have a right, under the National Labor Relations Act, to have a union representative present during meetings with management that they reasonably believe will result in

2014, Gillis and Walraven posted this memorandum on an employee bulletin board inside the jail.[17]

On February 13, 2014, Miller summoned Gillis to the undersheriff's[18] office.[19] Upon Gillis entering the office, Miller tossed the memorandum across the table and demanded to know who wrote it, stating: "I will have you know I can have you prosecuted for interfering with an ongoing investigation for posting this memo."[20] Subsequently, on February 26, 2014, an investigation into Gillis' conduct commenced after a former inmate alleged that she had engaged in a sexual relationship with Gillis while in custody and during her court supervised release.[21] When confronted with these allegations one day later, Gillis initially denied the inmate's allegations, but ultimately admitted to them and resigned from his position as a CFO at Bay County Jail.[22]

On February 18, 2014, Walraven was placed on administrative leave following an investigation concerning alleged misconduct.[23] The investigation stemmed from an anonymous note passed to the undersheriff in January 2014 suggesting that management review security camera footage from shifts when Walraven had acted as supervisor.[24] A review of the footage revealed that the corrections officers under Walraven's supervision had engaged in various policy violating activities such as damaging jail property, conducting outside business while inside the jail, and permitting the use of cell phones inside the jail.[25] Walraven's employment was terminated on April 15, 2014.[26]

Plaintiffs Gillis and Walraven brought separate suits against Defendants Miller and the Bay County Sheriff's Department in the United States District Court for

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disciplinary action)). Gillis and Walraven's memorandum outlined the rights of the prison employees and instructed them:

> When you are summoned before a superior officer, I strongly suggest you state these words before you say anything else. 'If this discussion could in any way lead to me being disciplined or discharged, I request that my Union representative be present at the meeting. Without representation, I choose not to answer any questions.'

Gillis, 845 F.3d at 682.

17. *Id.* at 681–82.

18. According to the Merriam-Webster Dictionary, the term "undersheriff" means "a sheriff's deputy." *Undersheriff*, Merriam–Webster, https://www.merriam-webster.com/dictionary/undersheriff (last visited Nov. 13, 2018).

19. *Gillis*, 845 F.3d at 682.

20. *Id.*

21. *Id.* at 682–83.

22. Gillis v. Miller, No. 14-cv-12518, 2016 WL 337454, at *4–6 (E.D. Mich. Jan. 28, 2016).

23. *Gillis*, 845 F.3d at 682.

24. *Id.*

25. *Id.*

26. *Id.*

the Eastern District of Michigan.[27] Both Gillis and Walraven asserted claims under 42 U.S.C. § 1983, arguing they were discharged in retaliation for posting the memorandum, in violation of their First Amendment rights.[28] On January 28, 2016, the District Court granted the Defendants' summary judgment motion[29] in both cases, holding that the memorandum was not protected speech under the First Amendment.[30] The court reasoned that the memorandum did not touch on matters of public concern and even if it had, the Defendants' investigatory interests outweighed the Plaintiffs' speech interests.[31] Gillis and Walraven filed appeals to the Sixth Circuit Court of Appeals on the grounds that the district court erred in granting the Defendants' summary judgment motion.[32] The court combined the appeals and issued a decision on January 6, 2017.[33]

The first ten amendments to the U.S. Constitution, known as the Bill of Rights, protect the individual liberties of Americans.[34] The first of these ten amendments protects an individual's right to freedom of speech.[35] The Framers' desire to expand

27. *Id.* at 683.

28. *Id. See also* 42 U.S.C.S. § 1983 (West 1996).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

29. Fed. R. Civ. P. 56.

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Id.

30. *Gillis*, 845 F.3d at 683. Protected speech is speech that cannot be restricted by the government under the First Amendment of the Constitution. *See* Michael Kahn, *The Origination and Early Development of Free Speech in the United States*, 76 Fla. B.J. 71, 71 (2002).

31. *Gillis*, 845 F.3d at 683.

32. *See id.*

33. *See id.* at 681–83.

34. Bill of Rights Inst., https://billofrightsinstitute.org/founding-documents/bill-of-rights/ (last visited Nov. 7, 2018).

35. U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble and to petition the government for a redress of grievances." *Id.*

and protect this right stemmed from the longstanding suppression of speech throughout English history.[36] However, freedom of speech is not always guaranteed—it can only be protected when government action is taken against a private individual to suppress this right.[37]

Viewing First Amendment rights through the prism of employment related speech, it is understood that private employers cannot be found liable for violating the Constitution for terminating private employees[38] who engage in speech concerning the policies, practices, or operations of that employer.[39] For decades, public and private employees[40] were treated the same under the First Amendment, and it was understood that when a public employee is hired, she relinquishes certain constitutional rights.[41] It was not until 1967 that the Supreme Court addressed First Amendment speech rights of public employees by rejecting the premise that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[42]

In 1968, the Supreme Court passed down its landmark decision in the arena of public employee free speech.[43] In *Pickering v. Board of Education*, a teacher was dismissed from his position for sending a letter to the local newspaper, in connection to a recently proposed tax increase, criticizing the superintendent and Board of Education's past proposals to raise new revenue for schools.[44] The Court held that

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36. *See generally* Kahn, *supra* note 30, at 71–73 (explaining how the early origins of speech suppression in English history influenced the Framers of the Constitution).

37. *See* Riley, *supra* note 4, at 893.

38. *Id.* Private employees are individuals who work for a private employer (any employer that is not the federal, state, or local government). *Id.*

39. *Id.*

40. *Id.* Public employees are individuals who work for federal, state, or local governments. *Id.*

41. *Id.* (citing McAuliffe v. City of New Bedford, 29 N.E. 517, 520 (Mass. 1892)). Relinquishment of certain constitutional rights when public employees are hired is further outlined in *Keyishian v. Bd. of Regents of Univ. of N.Y.*:

> [A teacher] 'may work for the school system upon the reasonable terms laid down by the proper authorities of [the state]. If they do not choose to work on such terms, they are at liberty to retain their beliefs and go elsewhere.' Further, a teacher denied employment because of membership in a listed organization 'is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system may be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice.'

385 U.S. 589, 605–06 (1967).

42. *Id*. at 605.

43. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 567–68 (1968) (holding that teachers do not relinquish their First Amendment rights to comment on matters of public interest in connection with the operation of public schools in which they are employed); *see also* Richard Hiers, *Public Employees' Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. Fla. J.L. & Pub. Pol'y 169, 177 (1993).

44. *Pickering*, 391 U.S. at 564.

the teacher's First Amendment freedom of speech rights were violated,[45] adding that the challenge for a court is to "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[46] This analysis—balancing the interests of the employee commenting upon matters of public concern against the interests of the employer promoting the efficiency of its public services—is known as the *Pickering* balancing test.[47]

In 1983, the Court enhanced the *Pickering* balancing test through another landmark public employee free speech decision.[48] In *Connick v. Meyers*, the Court built on the *Pickering* balancing test, specifying that before the test can be applied, the court must first determine whether the speech can be characterized as a matter of public concern.[49] The Court then set forth a framework for determining whether a public employee's speech constitutes a matter of public concern.[50]

Both *Pickering* and *Connick* dealt with a public employee's speech that was written, with its contents undisputed.[51] In 1994, however, the Court in *Waters v. Churchill* was faced with the question of whether or not the *Pickering* balancing test applies when the employer is unsure as to the actual content of the employee's speech.[52] The Court dissected its previous *Pickering* and *Connick* analyses and held that the *Pickering* balancing test, inclusive of *Connick*'s initial threshold question refinement, can be applied to situations when the substance of the employee's speech is unwritten, and therefore, disputed.[53]

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45. *Id.* at 565. *See generally* Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 Duq. L. Rev. 133, 135 (2008); Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 Tex. Tech. L. Rev. 5, 16 (1999); Riley, *supra* note 4, at 986.

46. *Pickering,* 391 U.S. at 568.

47. Gillis v. Miller, 845 F.3d 677, 684 (6th Cir. 2017).

48. Riley, *supra* note 4, at 901; Schoen, *supra* note 45, at 16.

49. *See* Connick v. Meyers, 461 U.S. 138, 146–48 (1938) (outlining that "*Pickering*, its antecedents and progeny, lead us to conclude that if [the speech] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reason for her discharge").

50. *Id.* ("Whether an employee's 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.").

51. *See id.* at 141–42 (holding that the contents of the questionnaire the employee distributed were undisputed); *Pickering*, 391 U.S. at 564 (finding that the contents of the employee's letter were undisputed).

52. 511 U.S. 661, 664 (1994) (plurality opinion) ("In this case, we decide whether the [*Pickering*] test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said."). In *Waters,* the employee's speech was in question because it was part of a conversation that was overheard between employees; the speech was not written. *Id.*

53. *Id.* at 661 (holding that the *Pickering* balancing test should be applied to "what the government employer reasonably thought was said").

Today, the *Pickering* balancing test still stands as good law.[54] Although the Sixth Circuit Court of Appeals applied the *Pickering* balancing test in *Gillis* when determining whether the Plaintiffs' speech was constitutionally protected,[55] the court applied incorrect case law and ignored multiple precedents while applying this test, rendering future cases harder to adjudicate.

In *Gillis*, the Sixth Circuit affirmed the district court's grant of summary judgment, holding that the Plaintiffs did not have a valid First Amendment claim under 42 U.S.C. § 1983 because the Defendants' interests outweighed the Plaintiffs' interests under the *Pickering* balancing test.[56] The *Gillis* court reasoned that because the Defendants did not need to show evidence that the Plaintiffs' speech caused actual disruption to the workplace, the Defendants should prevail under the *Pickering* balancing test.[57] Further, the court held that because the Plaintiffs' claims failed under the *Pickering* balancing test, it "need not decide whether the . . . memorandum touched on matters of public concern."[58] The Plaintiffs argued that the Defendants were required to show evidence that the memorandum caused actual disruption to the jail's operations, and because the Defendants failed to do so, the Plaintiffs should prevail under the *Pickering* balancing test.[59] The Plaintiffs further contended that the memorandum touched on matters of public concern because its aims were to ensure the Defendants did not violate the *Weingarten* rights of other union employees and to expose the Defendants' alleged corruption.[60]

This case presented two specific issues before the Sixth Circuit in the application of the *Pickering* balancing test: first, whether the employees' speech constituted a matter of public concern and second, whether actual evidence of disruption in the workplace must be shown by the employer when weighing its interests in promoting efficiency.[61] The *Gillis* court erred in affirming the district court's grant of the Defendants' summary judgment motion because the court made two errors when applying the *Pickering* balancing test. First, the court failed to address the threshold question of public concern before applying the test. As per *Connick*, the speech must first be reviewed to determine whether it touches upon a matter of public concern, and only if so should the court then apply the *Pickering* balancing test.[62] Second, the court erred because it incorrectly applied the precedent set out in *Waters*. The court

54. 5 Emp. Coord. Employment Practices § 1:25.50 (Nov. 2019 update).

55. Gillis v. Miller, 845 F.3d 677, 683–85 (6th Cir. 2017).

56. *Id.* at 690.

57. *Id.* at 687–88.

58. *Id.* at 690.

59. *Id.* at 688–90.

60. *Id.* at 689–90.

61. *See generally id.* at 684–86.

62. Connick v. Myers, 461 U.S. 138, 147–48 (1983).

failed to recognize that the material facts in *Gillis* were distinguishable from those in *Waters*—the speech in *Waters* was disputed whereas the speech in *Gillis* was not.[63]

First, the *Gillis* court failed to address the threshold question of public concern before applying the *Pickering* balancing test. Adhering to the doctrines of vertical and horizontal stare decisis, the court should have first addressed the threshold question of whether the employees' speech is a matter of public concern, and only if so, then applied the *Pickering* balancing test.[64] In *Rankin*, relying on *Connick*, the Court explicitly stated that "the threshold question in applying [the *Pickering*] balancing test is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.'"[65] The Court upheld this threshold question requirement in *Waters*,[66] *Garcetti*,[67] and *Lane*[68]—all cases that called for application of the *Pickering* balancing test.[69] In *Whitney v. City of Milan*, a case that preceded *Gillis* by nearly five years, the Sixth Circuit properly adhered to the doctrine of vertical stare decisis because it held that first, a court should evaluate whether the employee's speech touches on a matter of public concern and, if so, to apply the *Pickering* balancing test.[70] Addressing the threshold question before applying the *Pickering* balancing test is crucial to the analysis because determining if the speech is

63. *See Gillis*, 845 F.3d at 688 (finding that the speech in question was a written memorandum).

64. *See* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action."); Waters v. Churchill, 511 U.S. 611, 668 (1994) (plurality opinion) (stating "[t]o be protected, the speech must be on a matter of public concern"); *Connick*, 461 U.S. at 147–48 ("Whether an employee's 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."); Farhat v. Jopke, 370 F.3d 580, 588–89 (6th Cir. 2004) (citing *Connick*, 461 U.S. at 143; Pickering v. Bd. of Educ., 391 U.S. 563, 568–88 (1968)).

65. Rankin v. McPherson, 483 U.S. 378, 384 (1987).

66. *See Waters*, 511 U.S. at 668 (plurality opinion) ("To be protected, the speech must be on a matter of public concern.").

67. *See Garcetti*, 547 U.S. at 418. Two inquiries must be made under the *Pickering* balancing test: "The first [inquiry] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action." *Id.*

68. *See* Lane v. Franks, 573 U.S. 228, 237 (2014) (discussing the two-step inquiry outlined in *Garcetti*).

69. *See Lane*, 573 U.S. at 235–37 (discussing how the *Pickering* balancing test provides the framework for analyzing the issue in question); *Garcetti*, 547 U.S. at 417–18 (outlining the *Pickering* balancing test and how it applies to the speech in question); *Waters*, 511 U.S. at 668 (plurality opinion) (stating that the dispute is over how to apply the *Pickering* balancing test).

70. 677 F.3d 292, 296 (6th Cir. 2012). The court stated:

> First, we determine whether the affected speech involved a public employee's comments as a private citizen on a matter of public concern. Second, if the speech involves a matter of public concern, then we must balance the interests of the public employee, 'as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'

Id. See also Farhat v. Jopke, 370 F.3d 580, 588–89 (6th Cir. 2004) (citing Connick v. Myers, 461 U.S. 138, 143 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568–88 (1968)).

a matter of public concern is the crux of whether the employee has a claim under the First Amendment.[71] Moreover, the language of the *Pickering* balancing test itself supports the Court's holding that the threshold question of public concern must first be addressed, stating that a court must "arrive at a balance between the interests of the [public employee], as a citizen, in commenting about matters of public concern."[72] The court can only conduct the balancing of interests once it has established that the employee's speech touched upon matters of public concern—which are balanced against the government's interests as an employer.[73]

The Sixth Circuit's decision in *Gillis*—to omit the analysis of the initial threshold question before applying the *Pickering* balancing test—flies squarely against the doctrines of vertical and horizontal stare decisis. The court blatantly deviated from not only Supreme Court precedent,[74] but also its own precedent[75] and thus, failed to adhere to the doctrines of vertical and horizontal stare decisis. Had the *Gillis* court properly adhered to the doctrines of vertical and horizontal stare decisis, it would have first answered the threshold question of whether the employees' speech was a matter of public concern and only then applied the *Pickering* balancing test. The Sixth Circuit's failure to adhere to vertical and horizontal stare decisis causes instability and unpredictability in the law.[76]

Second, the court erred in its administration of the *Pickering* balancing test by incorrectly applying the *Waters* precedent, thereby ignoring the correct and applicable precedent under vertical stare decisis. These errors caused the court to incorrectly hold that employers need not show evidence that the employee's speech caused actual disruption to the workplace to prevail under the *Pickering* balancing test. The requirement that employers produce evidence of actual disruption was a matter of first impression for the Sixth Circuit—a matter of first impression that the court

71. *See Lane*, 573 U.S. at 233 ("Speech by citizens of public concern lies at the heart of the First Amendment."); *Waters*, 511 U.S. at 668 (plurality opinion) (explaining that to be protected, "the speech must be on a matter of public concern"); *Connick*, 461 U.S. at 145 ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment Values,' and is entitled to special protection.").

72. *Pickering*, 391 U.S. at 568.

73. *Id.*

74. *See Lane*, 573 U.S. at 237 (citing *Garcetti*, 547 U.S. at 418); *Waters*, 511 U.S. at 668 (plurality opinion) (stating "[t]o be protected, the speech must be on a matter of public concern").

75. Whitney v. City of Milan, 677 F.3d 292, 297–98 (6th Cir. 2012) (outlining that the first step is to determine whether the speech involved a matter of public concern).

76. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 38–41 (1994) (explaining how individuals rely on legal rules when they are putting their affairs in order and the effects of instability and unpredictability in the law); Randy Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 418 (2010) ("When the Court settles a dispute in a certain way, it is natural that people and institutions affected by the dispute will rely on the Court's decision in shaping their understandings and behaviors."); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 792–93 (2012) (explaining how instability arises when courts fail to adhere to stare decisis since "[s]table law enables the public to know and understand what their civic rights and duties are").

incorrectly decided.[77] The court should have limited its application of *Waters* due to its unique utilization of the *Pickering* balancing test and adhered to the doctrine of vertical stare decisis that requires employers show evidence that the employee's speech caused actual disruption to the workplace.

In *Waters,* the content of the employee's speech was in dispute[78] and the Court's holding and analysis centered around this issue.[79] Cheryl Churchill, a nurse at a public hospital, had a conversation with one of her colleagues while on dinner break.[80] This conversation was overheard by three other hospital employees who notified Churchill's supervisor.[81] Churchill was terminated from her job because of alleged negative statements she made during the conversation, specifically, about her supervisor and department.[82] However, Churchill's recollection of the conversation was different—she denied saying some of the statements the hospital employees alleged she said.[83] The court noted that while there was no dispute as to a conversation taking place—the speech—there was a dispute as to what was actually said during the conversation—the content of the speech.[84]

Churchill argued she was terminated because of these statements and thus, her First Amendment rights were violated.[85] The issue the Court was faced with was how to apply the *Pickering* balancing test—whether to apply it to the speech as the government employer found it to be or to have a jury determine the facts of the

77. Gillis v. Miller, 845 F.3d 677, 685 (6th Cir. 2017).

78. *Waters*, 511 U.S. at 664 (plurality opinion). The speech that the *Pickering* balancing test was applied to in *Waters* differs from the speech in the actual *Pickering* case because the content of the defendant's speech in *Waters* was in dispute. *Compare id.* (acknowledging that there was a "dispute about what Churchill actually said"), *with Pickering*, 391 U.S. at 564 (finding that the employee sent a letter whose contents are undisputed).

79. *See Waters*, 511 U.S. at 668 (plurality opinion) (stating the dispute in the case is to determine how to apply the *Pickering* test when the speech is in question—whether the court should apply the test to the government's assessments of the content of the speech, or should ask the jury to determine the facts); *see also* Mark Strasser, *Pickering, Garcetti, & Academic Freedom*, 83 Brook. L. Rev. 579, 589–91 (2018) (explaining that the contents of Churchill's speech were in dispute and how the *Waters* Court applied the *Pickering* balancing test); Riley, *supra* note 4, at 905–06; Schoen, *supra* note 45, at 37–38 (explaining that in *Waters*, the Court was faced with applying the *Pickering* balancing test to a mistake of fact).

80. *Waters*, 511 U.S. at 664.

81. *Id.* at 665.

82. *Id.* at 661. Churchill allegedly made "disruptive statements critical of her department and supervisors." *Id.*

83. *Id.* at 665. During the conversation, Churchill allegedly was "knocking the [obstetrics] department" stating that it was a "bad place" to work. *Id.* According to Churchill, the conversation was about her concerns regarding the hospital's cross-training policy under which nurses from one department could work in another if their usual location was overstaffed. *Id.* Churchill admitted to having made negative statements during the conversation, but argued that those comments were all centered around her concerns that the cross-training policy threatened patient care. *Id.*

84. *See id.* at 664.

85. *Id.* at 668.

speech itself.[86] The Court held that the *Pickering* balancing test should be applied to what the government employer reasonably thought was said, finding that because the contents of the speech in question were disputed, greater deference should be given to a government employer's predictions of harm. Thus, employers need not present evidence of actual disruption to the workplace.[87] Relying on the Court's analysis in *Waters*, the Second,[88] Third,[89] Seventh,[90] Eighth,[91] Ninth,[92] and Eleventh[93] Circuits have held that employers need not present evidence of actual disruption to prevail under the *Pickering* balancing test.[94] Unlike in *Waters*, the speech in *Connick* and *Rankin*[95] was undisputed. Thus, the Supreme Court maintained that in order for the government to prevail under the *Pickering* balancing test, it must show evidence that the employee's speech impacted the actual operation of the government.[96] The Tenth Circuit followed suit in *Melton v. City of Oklahoma City*, *Schalk v. Gallemore*, and *Barker v. City of Del City*, holding that the government, as an employer, must introduce evidence of an actual disruption to its services resulting from the employee's speech.[97] In all three Tenth Circuit cases, as in *United States v. National Treasury*

86. *Id.*

87. *Id.* at 661, 673.

88. Lewis v. Cowen, 165 F.3d 154, 163 (2d Cir. 1999) ("The state need show only a 'likely interference' with its operations, and 'not an actual disruption.'").

89. Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 472 (3d Cir. 2015) ("The government need not show the existence of actual disruption if it established that disruption is likely to occur because of the speech.").

90. Wallace v. Benware, 67 F.3d 655, 661 n.8 (7th Cir. 1995) ("We do not agree, however, that an actual disruption of the affected department need to be shown[.]").

91. Tindle v. Caudell, 56 F.3d 966, 972 (8th Cir. 1995) ("A showing of actual disruption is not always required in the balancing process under *Pickering*.").

92. Brewster v. Bd. of Educ., 149 F.3d 971, 979 (9th Cir. 1998) ("[P]ublic employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient.").

93. Shahar v. Bowers, 114 F.3d 1097, 1108 (11th Cir. 1997) (en banc) (holding that "a particularized showing of interference with the provision of public services is not required" under *Waters*).

94. *Munroe*, 805 F.3d at 472; Lewis v. Cowen, 165 F.3d 154, 163 (2d Cir. 1999); *Brewster*, 149 F.3d at 979; *Shahar*, 114 F.3d at 1108; *Tindle*, 56 F.3d at 972; *Wallace*, 67 F.3d at 661 n.8. *See also* Gillis v. Miller, 845 F.3d 677, 687 (6th Cir. 2017) (acknowledging the *Waters* plurality and holding that a "public employer need not show actual disruption of the public agency in all cases in order to prevail under the *Pickering* balancing test.").

95. *See* Rankin v. McPherson, 483 U.S. 378, 381–82 (1987) (citing McPherson's testimony and uncontroverted evidence that she made the statement in question); Connick v. Myers, 461 U.S. 138, 141 (1983) (establishing Myers' creation and distribution of the questionnaire for which she was fired).

96. *See Rankin*, 483 U.S. at 388–89; *Connick*, 461 U.S. at 166.

97. *See* Barker v. City of Del City, 215 F.3d 1134, 1140 (10th Cir. 2000) ("No actual evidence indicates that the [employer] experienced any disruption."); Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (quoting Melton v. City of Okla. City, 879 F.2d 706, 715–16. (10th Cir. 1989) ("The government must produce evidence of an actual disruption of services which results from the employee's speech.")).

Employees Union, *Connick*, and *Rankin*, the speech in question was undisputed because it was written and could be referenced for analysis.[98]

The *Gillis* court based its decision on *Waters* stating: "We therefore join those courts and the *Waters* plurality and hold that a public employer need not show actual disruption of the public agency in all cases in order to prevail under the *Pickering* balancing test."[99] However, this holding is incorrect.[100] The *Gillis* court erred in its application of *Waters* because *Waters* applies the *Pickering* balancing test to a unique and distinguishable set of facts—situations when the speech in question is unwritten and thus disputed.[101] The Supreme Court departed from its own precedent when deciding *Waters* because it was faced with the application of the *Pickering* balancing test to a new and unusual set of facts.[102] The *Gillis* court directly quotes the *Waters* Court in its discussion of the deference given to government employers when predicting the disputed speech's harm on the efficiency of the workplace.[103] However, the Sixth Circuit applied this discussion to *Gillis* incorrectly because the deference the Court was referring to was for instances when the actual content of the employee's speech is disputed—situations in which the speech is not written and cannot be referenced for analysis.[104] This was not the case in *Gillis*, as the speech in question was a written memorandum. The *Gillis* court's failure to recognize the difference between these material facts resulted in an incorrect holding and thus, flawed precedent.[105]

The *Gillis* court should have adhered to vertical stare decisis from *National Treasury Employees Union*, *Connick*, and *Rankin*, and followed the Tenth Circuit because the material facts in these cases are analogous to *Gillis*—the speech at issue

98. *See e.g.*, United States v. Nat'l Treasury Emp. Union, 513 U.S. 454, 461–62 (1995) (explaining the speech in question was written); Rankin v. McPherson, 483 U.S. 378, 381–82 (1987) (citing McPherson's testimony and uncontroverted evidence that she made the statement in question); Connick v. Myers, 461 U.S. 138, 141 (1983) (establishing Myers' creation and distribution of a written questionnaire for which she was fired); *Barker*, 215 F.3d at 1137 (explaining that the speech in question was not in dispute); *Schalk*, 906 F.2d at 492 (outlining the speech in question was not disputed by the court because it was a written letter); *Melton*, 879 F.2d at 715–16 (outlining the speech between counsel and Melton was undisputed).

99. *Gillis*, 845 F.3d at 687.

100. *See* Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality opinion) (stating the dispute in the case is to determine how to apply the *Pickering* test when the speech is in question—whether the court should apply the test to the speech as the government found it to be or to ask a jury to determine the facts for itself).

101. *See id.*

102. *See* Riley, *supra* note 4, at 913.

103. *Gillis*, 845 F.3d at 687. *See also Waters*, 511 U.S. at 676 (plurality opinion) (discussing deference given to the alleged speech and reasoning that "employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility… [s]uch reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct").

104. *See Waters*, 511 U.S. at 676 (plurality opinion).

105. *See Gillis*, 845 F.3d at 681–82 (discussing the creation and posting of the memorandum titled "Weingarten Rights" in response to complaints received by Gillis and Walraven).

was undisputed.[106] Had the court applied this proper precedent, it would have held that employers must show actual evidence that the employee's speech caused disruption in the workplace.[107] Applying the correct precedent could have drastically changed the outcome for the Plaintiffs because had the Defendants been required to provide evidence that the memorandum disrupted the workplace and failed to do so, the court would likely have ruled in favor of the Plaintiffs.

Stare decisis mandates that "a court must follow earlier judicial decisions when the same points arise again in litigation."[108] The same points in *Waters* did not arise in *Gillis*—the speech was oral and disputed in the former, and written and undisputed in the latter.[109] Failure of courts to adhere to stare decisis causes instability and unpredictability in the law.[110] By applying incorrect precedent, the *Gillis* court caused unpredictability as to whether an employer is required to present evidence of disruption to the workplace in order to prevail under the *Pickering* balancing test. This unpredictability directly impacts employees' behavior, as well as whether they can assert First Amendment claims that call for the *Pickering* balancing test.[111]

The doctrines of vertical and horizontal stare decisis promote fairness, stability, predictability, efficiency, and thus, foster the public's confidence in the law.[112] Federal courts have been upholding the doctrine of stare decisis since the nation's founding in order to promote these factors.[113] Under the doctrine of stare decisis, a court must follow earlier judicial decisions from its own jurisdiction, or a higher one, when the

106. *See id.* at 681–83 (explaining the background and context to which the letter was written). *See also* United States v. Nat'l Treasury Emp. Union, 513 U.S. 454, 461–62 (1995) (explaining the speech in question was written by individuals within the class of employees alleging infringement of freedom of speech by honorarium ban); Rankin v. McPherson, 483 U.S. 378, 381–82 (1987) (citing McPherson's testimony and uncontroverted evidence that she made the statement in question); Connick v. Myers, 461 U.S. 138, 141 (1983) (establishing Myers' creation and distribution of the questionnaire for which she was fired).

107. *See, e.g., Rankin*, 483 U.S. at 379 (holding the employer did not meet its burden to demonstrate that its interest outweighed the employee's interest in commenting upon matters of public concern because no evidence was presented that such comments interfered with the efficient functioning of the office); Barker v. City of Del City, 215 F.3d 1134, 1134 (10th Cir. 2000) ("No actual evidence indicates that the [employer] experienced any disruption."); Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990) (quoting Melton v. City of Okla. City, 879 F.2d 706, 739 (10th Cir. 1989) ("[T]he government must produce evidence of an actual disruption of services which results from the employee's speech.")).

108. *Stare decisis*, Black's Law Dictionary (11th ed. 2019).

109. *Compare* Waters v. Churchill, 511 U.S. 661, 661 (1994) (plurality opinion) (stating "[w]hat Churchill actually said during the conversation is in dispute"), *with* Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968) (finding that the employee sent a letter whose contents are undisputed).

110. *See* Mead, *supra* note 76, at 792–93 (explaining how unpredictability and instability in the law arise when courts fail to adhere to stare decisis).

111. *See id.* at 793; Kozel, *supra* note 76, at 418.

112. *See* James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. Rev. 345, 347 (1986).

113. *See* Mead, *supra* note 76, at 792.

same issues arise in litigation.[114] When a court strays from stare decisis, fairness, stability, predictability, and efficiency are threatened because inconsistent application of the law violates the central premise of the U.S. legal system—that similar litigants be treated equally.[115] This premise ensures that legal decisions are grounded in objective principles, such as previous applications of the law, rather than subjective principles, like biases of individual judges.[116] Predictability is critical because it impacts human interactions on every level—it encourages individuals to engage in socially desirable conduct and abstain from undesirable conduct.[117] By knowing the rules in advance, individuals are able to adjust their behaviors and thus, laws are socially productive.[118] But in order for laws to be productive, predictability must be fostered through adherence to the doctrine of stare decisis.[119]

In summary, the *Gillis* court erred when applying the *Pickering* balancing test. First, it failed to address the threshold question of public concern and second, it held that employers need not present actual evidence of disruption to the workplace caused by the employee's speech. Each of these errors stemmed from the court's inadequate adherence to the doctrines of vertical and horizontal stare decisis. The court neglected both forms of stare decisis when applying the *Pickering* balancing test by failing to first determine whether the speech was a matter of public concern. Further, the court failed to apply proper vertical stare decisis by mistakenly analogizing *Waters*, in which the *Pickering* balancing test was applied to disputed speech, to *Gillis*, in which the speech was undisputed. The court's failure to adhere to proper precedent has promoted instability, inconsistency, and unpredictability, and thus, has muddied the waters for future cases that must apply the *Pickering* balancing test and for individuals making decisions in the employer-employee context.[120]

114. *Stare decisis*, Black's Law Dictionary (11th ed. 2019).

115. Mead, *supra* note 76, at 793.

116. Caminker, *supra* note 76, at 65.

117. *Id.* at 38. *See also* Mead, *supra* note 76, at 793.

118. Caminker, *supra* note 76, at 38.

119. *Id.*

120. *See* Caminker, *supra* note 76, at 38–41; Kozel, *supra* note 76, at 418; Mead, *supra* note 76, at 792–93.