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## Turn Up the Volume: The Connick Pickering Test as a Remedy for Quiet Quitting and the COVID-19 Pandemic's Impact on Critical Private Employment Issues

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TURN UP THE VOLUME:  
THE *CONNICK PICKERING* TEST AS A REMEDY FOR QUIET  
QUITTING AND THE COVID-19 PANDEMIC'S IMPACT ON  
CRITICAL PRIVATE EMPLOYMENT ISSUES

*Megan E. Bowling\**

I. INTRODUCTION

In the twentieth century, a shift in American jurisprudence led to the formation of regulations and structures that benefit and protect the American workforce.<sup>1</sup> For those working in the public sector, a line of Supreme Court cases laid a foundation defining their speech protections.<sup>2</sup> Though these cases impacted private sector speech protections, they failed to do so in a consistent or predictable manner.<sup>3</sup> The resulting patchwork of legislative and judicial approaches, though difficult to navigate, can and must be refined and applied to the private sector in the wake of the Coronavirus pandemic (“COVID-19” or “the pandemic”), an event that severely disrupted nearly all aspects of the American workplace.<sup>4</sup>

Two of the pandemic’s significant impacts are the new ways in which American workers now relate to their vocations, and the fact that millions of people left their jobs in the pandemic’s wake.<sup>5</sup> These phenomena are so remarkable that they are described with new phrases such as “quiet quitting,”<sup>6</sup> and are exacerbated by widespread economic, physical health, mental health, and racial equity issues.<sup>7</sup> For the country’s more than 130

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1. SETH HARRIS ET AL., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* 4 (Carolina Academic Press 3d ed. 2021).

2. Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioner at 2, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (No. 21-418).

3. See *infra* Part II.C.

4. Tim Smart, *COVID-19 Did a Number on the Workforce – and the Workplace*, U.S. NEWS (Mar. 17, 2022), <https://www.usnews.com/news/economy/articles/2022-03-17/covid-19-did-a-number-on-the-workforce-and-the-workplace> [<https://perma.cc/576F-VFHE>].

5. See *id.*

6. Derek Thompson, *Quiet Quitting is a Fake Trend*, ATLANTIC (Sept. 16, 2022), <https://www.theatlantic.com/newsletters/archive/2022/09/quiet-quitting-trend-employee-disengagement/671436/> [<https://perma.cc/S2XR-KMBG>].

7. See *infra* Part II.E.2-5.

million private sector workers affected by these issues,<sup>8</sup> no federal judicial precedent exists to protect their rights to speak about these issues in their workplaces, even though such protections increase retention and would dramatically reduce quiet quitting and its ramifications.<sup>9</sup>

This Comment proposes that the best judicial remedy for the current economic, social, and political crises faced by the private employment sector is application of the public sector test created by the combined holdings of *Connick v. Myers*<sup>10</sup> and *Pickering v. Board of Education*<sup>11</sup> to the private sector. This Comment details why attorneys representing plaintiff-employees should utilize this combined test and why the Supreme Court should accept this application of the test as good law. Section II examines the caselaw supporting this proposal, and focuses on the public sector Supreme Court precedent of *Pickering*, *Connick*, *Rankin v. McPherson*,<sup>12</sup> *Snyder v. Phelps*,<sup>13</sup> *Abood v. Detroit Board of Education*,<sup>14</sup> and *Janus v. AFSCME*.<sup>15</sup> Next, Section II explains the private sector Supreme Court cases of *Marsh v. Alabama*<sup>16</sup> and *Board of County Commissioners v. Umbehr*.<sup>17</sup> Section II also contains an in-depth analysis of the employment landscape, the American economy, physical and mental health issues, and racial inequity. Section II finishes with an explanation of the quiet quitting crisis.

Section III discusses the benefits of applying the public sector test created by the combined holdings of *Connick*<sup>18</sup> and *Pickering*<sup>19</sup> to the private sector,<sup>20</sup> starting with how the proposal alleviates quiet quitting, protects private employees, and benefits private employers. Section III

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8. *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National): Series ID: CES9000000001*, U.S. BUREAU OF LAB. STAT., [hereinafter *CES9000000001*], <https://data.bls.gov/timeseries/CES9000000001>, [https://perma.cc/49HJ-UPZV] (last visited June 24, 2023); *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National): Series ID: CES0500000001*, U.S. BUREAU OF LAB. STAT., [hereinafter *CES0500000001*], <https://data.bls.gov/timeseries/CES0500000001> [https://perma.cc/ZWC9-FPUC] (last visited June 24, 2023).

9. See *infra* Part III.A.

10. *Connick v. Myers*, 461 U.S. 138, 148, 153-54 (1983).

11. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570-73 (1968).

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

13. *Snyder v. Phelps*, 562 U.S. 443, 454-60 (2011).

14. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239-41 (1977), *overruled by Janus v. Am. Fed'n of State Cnty., & Mun. Empls., Council 31*, 138 S. Ct. 2448 (2018).

15. *Janus v. Am. Fed'n of State Cnty., & Mun. Empls., Council 31*, 138 S. Ct. 2448, 2484-86 (2018).

16. *Marsh v. Alabama*, 326 U.S. 501 (1946).

17. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996).

18. *Connick v. Myers*, 461 U.S. 138, 148, 153-54 (1983).

19. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570-73 (1968).

20. The combined test derived from the holdings of *Connick*, 461 U.S. at 148, 153-54 and *Pickering*, 391 U.S. at 570-73 will be referred to as “*Connick Pickering*” in this Comment.

then explains why speech regarding the employment landscape, the American economy, physical and mental health issues, and racial inequity is protected under the combined *Connick Pickering* test and the *Snyder* test.<sup>21</sup> After that, Section III continues by explaining why the current jurisprudential landscape inadequately protects private employees. It then discusses the inherent similarities between public and private sector employees and the issues caused by the surge in remote work seen in the wake of the pandemic. Section III finishes by exploring the counterarguments against the Comment's proposal and the likely success of the proposal given the current state of the Supreme Court and the National Labor Relations Board ("NLRB").

## II. BACKGROUND

Before introducing the benefits and legal foundations of transferring the *Connick Pickering* test to the private employment sector, an overview of relevant law and the recent employment landscape is necessary. Part A of this Section presents a relevant history of employment legislation followed by Part B, which explores federal and state legislation affecting private employees' speech. Parts C and D then examine relevant fundamental caselaw impacting the speech rights of public and private sector employees, with a focus on the lineage of *Connick* and *Pickering*, and a synthesis of the *Connick Pickering* test. Parts E and F explore the state of employment in 2022, as well as the issues that extend from the employment landscape's transformation in the wake of COVID-19, with a focus on quiet quitting and several matters of public concern.

### A. *Employment Categories and Legislation*

Employers are often divided into two primary categories: those in the public sector and those in the private sector.<sup>22</sup> The public sector consists of employers who are extensions of the State and who fulfill public services, such as public school districts, police and fire departments, and government offices.<sup>23</sup> The private sector consists of all other employers, including businesses and non-profit organizations of virtually all kinds.<sup>24</sup> In June 2023, there were nearly twenty-three million public sector jobs

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21. *Snyder v. Phelps*, 562 U.S. 443, 454-60 (2011).

22. Christopher Raines, *Private Sector vs. Public Sector Employee Rights*, CHRON (Mar. 6, 2019), <https://smallbusiness.chron.com/private-sector-vs-public-sector-employee-rights-47957.html> [<https://perma.cc/29MB-C8QJ>].

23. *Id.*

24. *Id.*

and over 130 million private sector jobs in America.<sup>25</sup> Because they are extensions of the State, public employers are known as state actors and are covered by what is known as the “state action” doctrine, allowing their employees to be granted constitutional protections not given to private employees.<sup>26</sup> These rights include a qualified freedom of speech.<sup>27</sup> Conversely, private employers are not considered state actors, and many private employers utilize at-will employment.<sup>28</sup>

The traditional understanding that private employers are not required to extend First Amendment protections to their employees stems from the principle that public employers and their employees are extensions of the government, and thus, under the state action doctrine, are subject to the Constitution and the freedoms granted by the Bill of Rights.<sup>29</sup> Because they are not extensions of the State, private employers and employees are not subject to the mandates of the Constitution.<sup>30</sup> Thus, constitutional protections do not extend to individuals who work in the private sector.<sup>31</sup>

In the absence of such constitutional protections, legislation attempting to protect private employees’ speech developed in the last two-thirds of the twentieth century in lieu of robust common law.<sup>32</sup> These legislative efforts have led to an “age of statutes” for employment law.<sup>33</sup> Perhaps surprisingly, it is rare for statutory language changes to occur in private

25. CES900000001, *supra* note 8; CES050000001, *supra* note 8.

26. *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 523 (1982).

27. *Id.*

28. Raines, *supra* note 22. At-will employment is a concept under which an employer may fire an employee for any reason at any time, and conversely, the employee may quit for any reason at any time. *Id.* The concept became popular in the early 20th century as an effort to give employees power to leave work at the time of their choosing. *Id.* However, it also provides the employer immense power to discipline and create rules for employees. HARRIS ET AL., *supra* note 1, at 11.

29. See Stephen J. Shapiro, III, *Constitutional Protection of Individual Rights*, UNIV. OF BALT. SCH. OF L. (2001), [https://home.ubalt.edu/shapiro/rights\\_course/Chapter3text.htm](https://home.ubalt.edu/shapiro/rights_course/Chapter3text.htm) [<https://perma.cc/QH59-WBER>].

30. See Cong. Rsch. Serv., *Amdt14.2 State Action Doctrine*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-2/ALDE\\_00000810#ALDF\\_00011305](https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810#ALDF_00011305) [<https://perma.cc/3QAS-SD49>] (last visited Nov. 18, 2022); *Peterson v. Greenville*, 373 U.S. 244, 250 (1963) (Harlan, J., concurring) (“Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.”).

31. See Cong. Rsch. Serv., *supra* note 30. Interestingly, though private employees are not protected by the First Amendment, private corporations themselves have a right to protected speech. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 793 (1978).

32. HARRIS ET AL., *supra* note 1, at 4-5; STEVEN WILLBORN ET AL., *EMPLOYMENT LAW* 238 (Carolina Academic Press, 6th ed. 2017). Additionally, unions work to protect employee rights in both the public and private sectors, and the comprehensive work of unions is beyond the scope of this Comment. See HARRIS ET AL., *supra* note 1, at 48. It is notable that in the public sector, unions have more than five times the membership that private sector unions do. *Id.* For further discussion on unions in the public sector, see Austin J. Wishart, *The Connick/Garcetti Split: Is Public Employee Association a Matter of Public Concern?*, 91 U. CIN. L. REV. 280 (2022).

33. HARRIS ET AL., *supra* note 1, at 5.

sector employment law, despite statutory law's prominence within the employment sector.<sup>34</sup>

*B. Federal and State Legislation Protecting  
Private Employees' Speech*

The primary legislation protecting private employees' speech is the National Labor Relations Act ("NLRA"), which states that private employees have the right to engage in concerted activities if those activities are done for the purpose of collective bargaining or other mutual aid or protection.<sup>35</sup> The NLRA also established the NLRB, an agency that protects private sector employees' right to unionize and prevents and remedies unfair labor practices.<sup>36</sup> In theory, the NLRA can be applied to cases involving private employees who are not union members,<sup>37</sup> but in practice has been predominantly applied to litigation involving union activity.<sup>38</sup>

Many states also have statutes that protect private employees' speech,<sup>39</sup> and the number of states with such statutes increased over the twentieth century.<sup>40</sup> Beginning in 1974, New Hampshire, followed by nine other states, recognized a cause of action against an employer for the tort of wrongful discharge.<sup>41</sup> As of 2023, the vast majority of states recognize a private employer can be held liable for wrongful termination through

34. *Id.* The National Labor Relations Act ("NLRA"), for example, has not been majorly amended since 1959. *Id.*

35. 29 U.S.C. §§ 151-166. Notably, the NLRA does not cover multiple types of employers, such as certain religious institutions; certain Indian tribal enterprises; certain law firms; federal, state, and local government employers; employers who only have agricultural laborers; and employers subject to the Railway Labor Act. *Jurisdictional Standards*, NAT'L LAB. REL. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> [<https://perma.cc/9GXX-N76U>] (last visited Nov. 19, 2022). Additional federal legislation like Title I of the Americans with Disabilities Act, the Age Discrimination in Employment Act of 1967, the Genetic Information Nondiscrimination Act, and Title VII of the Civil Rights Act of 1964 impact private employees, though these statutes do not protect speech. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers> [<https://perma.cc/NB5J-DEUL>] (last visited Nov. 19, 2022).

36. 29 U.S.C. § 153.

37. Tom Spiggle, *Does the National Labor Relations Act Apply if My Employer is Not Unionized?*, THE SPIGGLE L. FIRM: SPLF EMP. BLOG (Jan. 26, 2017, 8:00 AM), [https://spigglelaw.com/national-labor-relations-act-apply-employer-not-unionized/#:~:text=Tom%20Spiggle-.Does%20the%20National%20Labor%20Relations%20Act,My%20Employer%20Is%20Not%20Unionized%3F&text=The%20National%20Labor%20Relations%20Act%20\(NLRA\)%20covers%20most%20employers%20whose,where%20neither%20is%20the%20case](https://spigglelaw.com/national-labor-relations-act-apply-employer-not-unionized/#:~:text=Tom%20Spiggle-.Does%20the%20National%20Labor%20Relations%20Act,My%20Employer%20Is%20Not%20Unionized%3F&text=The%20National%20Labor%20Relations%20Act%20(NLRA)%20covers%20most%20employers%20whose,where%20neither%20is%20the%20case) [<https://perma.cc/KQZ5-FCXA>].

38. *E.g.*, *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974).

39. *Free Speech, the Private Employee, and State Constitutions*, *supra* note 26, at 524.

40. *Id.* at 525.

41. *Id.* In 1982, those states, in addition to New Hampshire, were California, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Pennsylvania, Oregon, and West Virginia. *Id.*

either a tortious or contract violation,<sup>42</sup> but the protection is limited, and most states also require that the employer violate public policy in terminating the employee.<sup>43</sup>

Connecticut has what is arguably the most substantial state-level protection for private sector employees.<sup>44</sup> Enacted in 1983,<sup>45</sup> Connecticut General Statute § 31-51q<sup>46</sup> creates a cause of action against “any” employer on behalf of *any* employee terminated or discharged due to exercising rights granted by the First Amendment of the U.S. Constitution, as well as certain articles of the Connecticut Constitution related to the exercise of religious beliefs, expression, speech, and assembly.<sup>47</sup>

In *Cotto v. United Technologies Corporation*,<sup>48</sup> the Supreme Court of Connecticut applied this statute to a private sector case involving an employee who was terminated after refusing to display an American flag at his workstation.<sup>49</sup> The court noted that the statute’s inclusion of the word “any” was evidence that the statute applied to private employers.<sup>50</sup>

West Virginia took a very different approach in *Tiernan v. Charleston Area Medical Center, Incorporated*.<sup>51</sup> In *Tiernan*, the Supreme Court of Appeals of West Virginia held that the West Virginia Constitution’s Free Speech Clause did not protect a plaintiff-nurse who was terminated from her private employer after expressing her dissatisfaction with the hospital to members of the media.<sup>52</sup> The court emphasized that the Clause, though it did not state any areas of inapplicability, did not apply to the case at hand because the plaintiff was a private sector employee.<sup>53</sup>

42. Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. 3, 10 (Jan. 2001).

43. *Id.* at 4. Additionally, some states have penalties for employers who violate the federal National Labor Relations Act. Connecticut is one such state. See Richard R. Nelson, *State Labor Legislation Enacted in 1980*, MONTHLY LAB. REV. 21-22 (Jan. 1981).

44. See Conn. L. Trib. Ed. Bd., *Stupid Laws: CT Legislature ‘Unintentionally’ Guts the Protections of Connecticut’s Free Speech Statute*, LAW.COM (Aug. 3, 2022, 2:39 PM), <https://www.law.com/ctlawtribune/2022/08/03/stupid-laws-ct-legislature-unintentionally-guts-the-protections-of-connecticuts-free-speech-statute/?sreturn=20220903221423> [https://perma.cc/J4B9-93E9].

45. *First Amendment Employee Claims*, MADSEN, PRESTLEY & PARENTEAU LLC, <https://mppjustice.com/first-amendment-rights/> [https://perma.cc/C3T7-6YQ7] (last visited Nov. 19, 2022).

46. CONN. GEN. STAT. § 31-51q (2022).

47. CONN. GEN. STAT. § 31-51q(b) (2022); *Cotto v. United Techs. Corp.*, 251 Conn. 1, 6 (1999).

48. *Id.*

49. *Id.* at 2.

50. *Id.* at 7-8.

51. *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 137-51 (1998).

52. *Id.*

53. *Id.* at 137-38, 148.

*C. Foundational Supreme Court Caselaw  
Protecting Public Employees' Speech*

In addition to the piecemeal state-level jurisprudence affecting the speech rights of private employees across the U.S., a lineage of Supreme Court common law lays groundwork for public speech protections. Below, six relevant Supreme Court cases are explored.

1. *Pickering* and *Connick* Create the *Connick Pickering* Test

In 1968, Illinois public school teacher Marvin Pickering was terminated after sending a letter to a local paper criticizing how his employer handled previous attempts to raise school district funds.<sup>54</sup> In its decision, the Supreme Court noted that it is important for a public employee to have permission to speak about their concerns—even if those statements are not entirely correct due to a good-faith error—because such public school matters are typically decided through public elections and are of important interest to the public.<sup>55</sup> The Court concluded that Pickering was terminated unconstitutionally.<sup>56</sup> The Court focused its holding on a balance of interests: Pickering's interest as a U.S. citizen speaking about matters of public concern and the State's interest as an employer maintaining its effectiveness as a service provider.<sup>57</sup> In its conclusion, the Court created a balancing test weighing a public employer's efficiency in successfully providing services with a public employee's First Amendment right to speak freely about public issues.<sup>58</sup> It emphasized that when public employees speak about matters of public interest, they speak as citizens protected by the First Amendment, and this ability to have a "free and unhindered debate on matters of public importance . . . is so great that . . . a State cannot authorize the recovery of damages by a public official for defamatory statements . . . except when such statements are . . . made either with knowledge of their falsity or with reckless disregard for their truth or falsity."<sup>59</sup>

The Supreme Court, however, was not completely settled on the question of when a public employee's speech on public issues should be protected. The *Pickering* balancing test would not be used until two decades later in *Connick*, which further nuanced and defined "a matter of

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54. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564-65 (1968).

55. *Id.* at 571-72, 582.

56. *Id.* at 574-75.

57. *Id.* at 568.

58. *Id.*

59. *Id.* at 573.



public concern.”<sup>60</sup> *Pickering* and *Connick* have been closely associated since.<sup>61</sup>

In October 1980, a Louisiana Assistant District Attorney named Sheila Myers was told she would be transferred to a different criminal court, much to her disappointment.<sup>62</sup> After expressing her frustration, she told her supervisors that she would research whether others in her office held similar views.<sup>63</sup> After creating and sharing a questionnaire with her co-workers, one colleague, feeling it was creating a “mini-insurrection,”<sup>64</sup> informed the office supervisors.<sup>65</sup> Myers was promptly terminated for refusing to accept her transfer.<sup>66</sup> She quickly filed suit, arguing that creating and sharing the questionnaire was in fact related to a matter of public concern and thus, protected by the First Amendment’s guarantee to free speech.<sup>67</sup>

The Supreme Court concluded that Myers’s termination did not violate the First Amendment.<sup>68</sup> Instead, the Court found that the vast majority of her questions were related to her dissatisfaction with her transfer, and the supervisor was not required to “tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.”<sup>69</sup> The Court emphasized that 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.”<sup>70</sup> Myers’s questionnaire touched upon matters of public concern in only a “most limited”<sup>71</sup> way, and therefore, under the *Pickering* balancing test, her creating and sharing the questionnaire with her colleagues was not protected by the First Amendment.<sup>72</sup>

*Connick*’s conclusion that a public employee’s action must involve a matter of public concern as determined by the situation’s whole record to obtain constitutional protection has been combined with the *Pickering*

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60. See *Connick v. Myers*, 461 U.S. 138, 149-54 (1983).

61. E.g., *Boddie v. Columbus*, 989 F.2d 745, 749 (5th Cir. 1993). Coincidentally, *Connick* was decided the same year that Connecticut General Statute § 31-51q was enacted. *Connick*, 461 U.S. at 138.

62. *Connick*, 461 U.S. at 140.

63. *Id.* at 141.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 140-41.

68. *Id.* at 154.

69. *Id.*

70. *Id.* 147-48.

71. *Id.* at 154.

72. *Id.* at 148.

balancing test.<sup>73</sup> The resulting two-prong *Connick Pickering* test is used to determine whether public employers act constitutionally in discharging employees for their speech.<sup>74</sup> In its entirety, it “requires ‘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.’”<sup>75</sup> The test’s purpose is to protect both a public employer as it strives to efficiently provide services, complete projects, and manage a workforce; and to protect a public employee’s First Amendment right to speak freely about matters of public concern as the employee serves in a professional role.<sup>76</sup>

## 2. *Rankin* and the Application of *Connick Pickering* in the Public Sector

*Rankin* is a Supreme Court case heavily influenced by the *Connick Pickering* test.<sup>77</sup> In 1981, Ardith McPherson, a clerical worker at a Texas constable’s office learned about the attempted assassination of then-President Ronald Reagan.<sup>78</sup> She heard the news through a radio announcement while she was at work and began to discuss the event with a colleague.<sup>79</sup> McPherson, a Black woman,<sup>80</sup> shared her anger at the President’s policies restricting social services.<sup>81</sup> “If they go for him again, I hope they get him,” she said.<sup>82</sup> Unbeknownst to McPherson, her statement was heard by another co-worker.<sup>83</sup> This co-worker reported her speech to the constable, who terminated McPherson.<sup>84</sup> The Court’s 1987 decision favored McPherson in her suit against the constable, holding that her speech was protected by the *Connick Pickering* analysis.<sup>85</sup>

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

74. *Id.* at 381.

75. *Id.* at 384 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) and *Connick*, 461 U.S. at 140).

76. *See id.* at 384, 395.

77. *See id.* at 395; *see also* *Garcetti v. Ceballos*, 547 U.S. 410, 424-26 (2006) (applying *Connick Pickering* in a new way, as the Court held that a public employee’s actions are not constitutionally protected when those actions were performed as part of the employee’s official duties).

78. *Rankin v. McPherson*, 483 U.S. 378, 380-81 (1987).

79. *Id.* at 381.

80. McPherson testified that during her conversation at her workplace, her remarks about the assassination attempt were related to her views as a person of color. *Id.* at 381-82. She felt that the president’s restrictive welfare and Medicaid policies were heavily impacting the Black population, and thus her experiences with and views of these social issues affected her feelings toward the president’s policies and her choice of words exhibited in the conversation. *Id.*

81. *Id.* at 381.

82. *Id.*

83. *Id.* at 381-82.

84. *Id.* at 382.

85. *Id.* at 392.

The Court concluded that pursuant to *Connick*, McPherson's comment was made during a conversation addressing President Reagan's policies and was thus protectible because it was related to a matter of public concern.<sup>86</sup> The Court also concluded that her statement did not amount to a true threat, and noted that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."<sup>87</sup>

Under the *Pickering* prong, the Court found that the effectiveness of the constable's office as a workplace was not impacted by McPherson's comment, and that there was no evidence that McPherson's comment interfered with the office or its functions.<sup>88</sup> Thus, her interests in speaking about political policies outweighed her public employer's concerns about successfully performing its services.<sup>89</sup>

### 3. *Snyder* and the Definition of a Matter of Public Concern

*Pickering*, *Connick*, and *Rankin* force a reliable answer to the question: what is a matter of public concern?<sup>90</sup> *Snyder*, decided by the Court in 2011, provides the current definition.<sup>91</sup> In *Snyder*, the Court dealt with the actions of a religious group which took place close to a funeral.<sup>92</sup> The funeral was held for Marine Lance Corporal Matthew Snyder, who was killed while serving in the Marines in Iraq, and was picketed by members of the Westboro Baptist Church.<sup>93</sup>

Westboro members stood on public land approximately 1,000 feet from the funeral location, singing, reciting Bible verses, and holding signs with messages such as, "Thank God for Dead Soldiers," "God Hates You," and "Thank God for 9/11."<sup>94</sup> A fence blocked the picketers, but when the funeral procession drove from the funeral location to the cemetery, it came within 200 feet of the picketing.<sup>95</sup>

The church's leaders were sued by Snyder's father, but the Court held that Westboro's speech was protected, and relied on the logic of *Connick*, and *Rankin* in this conclusion.<sup>96</sup> It ruled that a statement's controversial

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86. *Id.* at 388.

87. *Id.* at 387.

88. *Id.* at 388-389.

89. *Id.* at 388.

90. *See, e.g., id.* at 383.

91. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

92. *Id.* at 447.

93. *Id.* at 448. Prior to this funeral, the church had picketed nearly 600 others and was well-known for such action. *Id.*

94. *Id.*

95. *Id.* at 449.

96. *Id.* at 453.

nature is immaterial to whether it deals with a matter of public concern,<sup>97</sup> and clarified that a matter of public concern is a topic related to any political, social, or other community concern, a subject of legitimate news interest, or a subject of value, concern, and general interest to the public.<sup>98</sup>

#### 4. *Abood*, *Janus*, and the Differences Between the Private and Public Sectors

The *Connick Pickering* test was also highlighted in a case that, despite being recently overturned, remains an important progeny of the test because it provides noteworthy context to employment caselaw in showing that public and private employees have inherent similarities.<sup>99</sup>

In 1977's *Abood*, the Supreme Court concluded that public employees who are not union members could be required to pay union fees, even if the employees disagreed with the programs or activities of the union or the union's values or beliefs.<sup>100</sup> This was already legal in the private sector,<sup>101</sup> and the Court reasoned that because public employees and their professional duties are not "basically different"<sup>102</sup> from private employees and their professional duties, the requirement should also be legal in the public sector.<sup>103</sup> The Court also maintained that "there can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities . . . may be properly termed political. But that characterization does not"<sup>104</sup> give public employees a weightier First Amendment interest than private employees—their First Amendment rights are equal.<sup>105</sup>

In 2018, *Janus* saw the Court overturn *Abood*'s conclusion.<sup>106</sup> In the *Janus* opinion, Justice Alito remarked that *Abood* was contrary to the conclusions of *Pickering* and *Connick*, and that *Abood* was rooted in

97. *Id.* See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

98. *Snyder*, 562 U.S. at 453.

99. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229 (1977), *overruled by Janus v. Am. Fed'n of State Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

100. *Abood*, 431 U.S. at 239-41.

101. *Id.* at 229.

102. *Id.*

103. *Id.* at 239-41. The Court instead found that the difference between the public and private sectors is determined by the employer's character. *Id.* at 229-30. For a full discussion of the difference between the character of public and private employees, see Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975) (explaining that the difference between the character of public and private employers is that government is uniquely a public employer, with public officials acting on its behalf and those officials being accountable to citizens and voters).

104. *Abood*, 431 U.S. at 231.

105. *Id.* at 229.

106. *Janus v. Am. Fed'n of State Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

neither case.<sup>107</sup> Instead, he wrote that a non-union public employee's speech cannot be forced to support matters of public concern (such as political issues) with which the employee disagrees,<sup>108</sup> as the employee's free speech rights "decisively" outweigh the employer's interest in union activities.<sup>109</sup> Importantly, Alito did not question *Pickering* or *Connick* in his opinion, rather, he used their precedents to provide a broader freedom of speech for public employees.<sup>110</sup>

Though Alito concluded that the *Abood* Court failed to sufficiently consider the differences between the impact of agency fees in public and private employment collective bargaining, Alito did not undermine the *Abood* Court's emphasis that public and private employees, as well as their duties, have fundamental similarities.<sup>111</sup> Similarly, though he wrote that the remark was applied incorrectly within the context of an agency fee case, he did not negate the *Abood* Court's determination that public and private employees possess equal First Amendment rights.<sup>112</sup>

#### *D. Supreme Court Caselaw Protecting Private Employees' Speech*

In addition to the state-level jurisprudence affecting private sector employees' speech and Supreme Court caselaw affecting public sector employees' speech, there are a small number of historic Supreme Court cases creating fragmented speech protections for the private sector.<sup>113</sup> Below, two twentieth-century cases relevant to the protection of private employees' speech in the wake of COVID-19 are addressed.

##### 1. *Marsh* and the Boundary Between Work and Life

In *Marsh*, twenty-two years before *Pickering* and thirty-seven before *Connick*, the Supreme Court faced a critical question in the context of the private employment sector: "Can those people who live in or come to [a

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107. *Id.* at 2472 (explaining that *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) is inappropriate for a case like *Abood* that involves speech made by a large organization because *Pickering* was developed to analyze the impact of only one employee's speech and cannot be used to force numerous public employees to support an opinion with which they do not agree); *Janus*, 183 S. Ct. at 2457 (explaining that dictum in *Connick v. Myers*, 461 U.S. 138 (1983) cannot be used to support a view that the First Amendment allows a public employer to force public employees to subsidize a private third party).

108. *Janus*, 183 S. Ct. at 2484-86.

109. *Id.* at 2477. Furthermore, Alito said that in such a situation the union is not the employer and thus the *Pickering* framework does not apply. *Id.* at 2474.

110. *See id.* at 2486.

111. *Id.* at 2480.

112. *See id.*

113. *See HARRIS ET AL.*, *supra* note 1, at 4-5.

company town] be denied freedom . . . simply because a single company has legal title to all the town?"<sup>114</sup>

The case revolved around Grace Marsh, a Jehovah's Witness who was arrested for handing out religious literature in an Alabama town owned by the Gulf Shipbuilding Corporation.<sup>115</sup> The Court concluded that an Alabama statute prohibiting entry on another's premises was unconstitutionally applied when used to prevent someone from exercising the First Amendment right to free speech.<sup>116</sup> Ownership, the Court noted, does not create absolute authority, and the fact that the boundaries between public and private use were vague in the case meant that the company's private control was limited.<sup>117</sup> This holding is relevant, even presently, not just to those residing in company towns, but to all those working in the private employment sector.<sup>118</sup>

## 2. *Umbehr* and *Connick Pickering* in the Private Sector

In 1996, the Supreme Court broke from its traditional refusal to apply *Connick Pickering* to the private sector.<sup>119</sup>

Keen Umbehr, an independent contractor hired as a Kansas county's exclusive garbage collection service provider, was terminated after six years of service.<sup>120</sup> The termination came after Umbehr consistently expressed his dissatisfaction with the County's Board of Commissioners and their policies.<sup>121</sup> Umbehr expressed his frustrations by speaking at Board meetings and writing letters to the editors of local news publications.<sup>122</sup> Umbehr sued the Board, alleging that he was terminated in retaliation for the criticism he expressed.<sup>123</sup>

The Court concluded that because Umbehr provided services to the public through his employment role, an adjusted *Connick Pickering* test was appropriate even though he was employed as a private contractor and not as a direct public employee.<sup>124</sup> Such a test, the Court said, would recognize "the variety of interests that may arise in independent

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114. *Marsh v. Alabama*, 326 U.S. 501, 505 (1946).

115. *Id.* at 502-03.

116. *Id.* at 508-09.

117. *See id.* at 506.

118. *See* Cong. Rsch. Serv., *Amdt1.7.2.4 State Action Doctrine and Free Speech*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE\\_00013541/\[https://perma.cc/A8XP-SU4L\]](https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE_00013541/[https://perma.cc/A8XP-SU4L]) (last visited Nov. 19, 2022); *see infra* Parts III.B., III.D.

119. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 675-76 (1996).

120. *Id.* at 670-71.

121. *Id.* at 671.

122. *Id.*

123. *Id.* at 671-72.

124. *Id.* at 678-79.

contractor cases,”<sup>125</sup> and be “superior to a bright-line rule distinguishing independent contractors from employees,”<sup>126</sup> which would provide free rein to terminate independent contractors.<sup>127</sup> The Court also noted that a nuanced approach would prevent First Amendment rights from being unduly dependent on whether state laws distinguish a government service provider’s contract as a contract of employment or a contract for services.<sup>128</sup>

The Court remanded the case so that Umbehr could argue under *Connick* that his termination was motivated by his speech on a matter of public concern (the matter being the Board’s policies) and under *Pickering* that his interests outweighed the Board’s.<sup>129</sup>

### E. COVID-19 and the Employment Landscape

The COVID-19 pandemic left an indelible mark on the employment landscape.<sup>130</sup> In addition to tremendous loss of life,<sup>131</sup> the virus led to extensive economic ramifications,<sup>132</sup> long-term physical and mental health crises,<sup>133</sup> and further exposed a disparity in racial equity.<sup>134</sup> Below, these impacts are introduced and explained. These impacts continue to heavily affect all employees across the U.S.,<sup>135</sup> and require a federal judicial precedent that creates jurisprudential structure for private employers and provides private employees with protections when they express concerns about matters of public concern.

125. *Id.* at 678.

126. *Id.*

127. *Id.* at 679-80.

128. *Id.* at 679.

129. *See id.* at 685.

130. Alison Auginbaugh & Donna S. Rothstein, *How Did Employment Change During the COVID-19 Pandemic? Evidence from a New BLS Survey Supplement*, 11 EMP. & UNEMP. (Jan. 4, 2022), <https://www.bls.gov/opub/btn/volume-11/how-did-employment-change-during-the-covid-19-pandemic.htm> [<https://perma.cc/N8PV-3PAX>].

131. Over 1.13 million individuals lost their lives to the virus as of July 1, 2023. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#maps\\_deaths-total](https://covid.cdc.gov/covid-data-tracker/#maps_deaths-total) [<https://perma.cc/5WSK-C349>] (last visited Nov. 23, 2022).

132. Auginbaugh & Rothstein, *supra* note 130.

133. *See* David Levine, *Long COVID Has Become the ‘Pandemic After the Pandemic’*, U.S. NEWS (Mar. 10, 2022), <https://www.usnews.com/news/health-news/articles/2022-03-10/long-covid-has-become-the-pandemic-after-the-pandemic#:~:text=Englund%20refers%20to%20long%20COVID,patient’s%20initial%20diagnosis%20of%20COVID> [<https://perma.cc/8TDU-VNGU>]; *Mental Health and COVID-19*, MENTAL HEALTH AM., <https://mhanational.org/mental-health-and-covid-19-two-years-after-pandemic> [<https://perma.cc/J5CP-GFC7>] (last visited Nov. 19, 2022).

134. *See* Valerie Wilson, *Inequities Exposed: How COVID-19 Widened Racial Inequities in Education, Health, and the Workforce*, ECON. POL’Y INST. (Jun. 22, 2020), <https://www.epi.org/publication/covid-19-inequities-wilson-testimony/> [<https://perma.cc/6FVN-KG3A>].

135. Auginbaugh & Rothstein, *supra* note 130.

### 1. An Overview of Employment in 2022

In December 2019, the COVID-19 virus's presence in humans was initially discovered in Wuhan, China.<sup>136</sup> Over the next six months, the virus spread across the world, and in 2020 approximately twenty-five million jobs were eliminated—loss on a scale not seen since the Great Depression.<sup>137</sup> In the spring of 2021, employment conditions improved, as nearly 60% of the jobs previously lost were restored.<sup>138</sup> Although thousands of new cases of the virus were still reported each month throughout 2022,<sup>139</sup> public and private employment numbers in the U.S. sat above pre-pandemic levels, and there were approximately 240,000 more jobs at the end of 2022 than in February 2020.<sup>140</sup> The professional and business services industry experienced the most growth, followed by transportation and warehousing industry roles.<sup>141</sup> Despite these seeming improvements, public and private employees remain far from unaffected by the virus and its negative ramifications.<sup>142</sup>

### 2. The U.S. Economy

In 2020, as the global economy wavered, fifty-one of the U.S.'s 100 largest low-wage employers changed their policies to provide large payouts for CEOs while their low-wage earners' salaries decreased.<sup>143</sup> CEOs at these fifty-one organizations saw average raises of 29% while their median workers' pay decreased by 2%.<sup>144</sup> These changes included

136. Scott LaFee, *Novel Coronavirus Circulated Undetected Months Before First COVID-19 Cases in Wuhan, China*, UC SAN DIEGO HEALTH (Mar. 18, 2021), <https://health.ucsd.edu/news/releases/Pages/2021-03-18-novel-coronavirus-circulated-undetected-months-before-first-covid-19-cases-in-wuhan-china.aspx> [https://perma.cc/2E3R-39U8].

137. Tim Henderson, *The US Has Reversed Pandemic Job Losses. Most Individual States Haven't*, STATELINE (Sept. 21, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/21/the-us-has-reversed-pandemic-job-losses-most-individual-states-havent> [https://perma.cc/GEA5-P7YT]; see also Joelle Gamble, *July Jobs Report: 2 New Milestones in our Economic Recovery*, U.S. DEP'T OF LAB. BLOG (Aug. 10, 2022), <https://blog.dol.gov/2022/08/10/july-jobs-report-2-new-milestones-in-our-economic-recovery#chart1> [https://perma.cc/66R9-C9JW]; Auginbaugh & Rothstein, *supra* note 130.

138. Auginbaugh & Rothstein, *supra* note 130.

139. *COVID Data Tracker*, *supra* note 131.

140. Alexandre Tanzi, *Employment in US Has Finally Exceeded its Pre-Pandemic Level*, BLOOMBERG (Sept. 2, 2022), <https://www.bloomberg.com/news/articles/2022-09-02/employment-in-us-has-finally-exceeded-its-pre-pandemic-level?leadSource=verify%20wall> [https://perma.cc/9VLH-9VBC].

141. *Id.*

142. *Id.*

143. SARAH ANDERSON & SAM PIZZIGATI, INSTITUTE FOR POLICY STUDIES 27TH ANNUAL EXECUTIVE EXCESS REPORT 1 (2021), <https://ips-dc.org/wp-content/uploads/2021/05/report-executive-excess-2021-PDF.pdf> [https://perma.cc/U8P7-ASSG].

144. *Id.* at 4.



awarding retention bonuses, lowering performance standards to allow chief executives to meet bonus goals, substituting time-based awards with performance-based awards, and ignoring poor second-quarter evaluation results.<sup>145</sup> These changes helped increase CEO pay, even in industries that were negatively impacted by the pandemic such as hospitality, retail, and foodservice.<sup>146</sup>

In a prominent example, Chipotle's CEO Brian R. Niccol saw a 136% salary increase between 2019 and 2020, which included an increase in base salary, option awards, and stock awards.<sup>147</sup> This 2020 salary was \$23.2 million more than the salary he was set to receive before the pandemic occurred,<sup>148</sup> and was his highest salary since being hired.<sup>149</sup> Chipotle's board of directors disregarded poor financial results and some COVID-19 related costs,<sup>150</sup> and increased Niccol's compensation in an effort to "fairly reward the leadership's team's extraordinary success in developing and executing the turnaround strategy that has benefited employees and guests, as well as shareholders."<sup>151</sup> Despite Niccol's pay raise, Chipotle's hourly employees saw no long-term pay increase during the pandemic.<sup>152</sup>

A study assessing the U.S.'s 300 publicly held corporations with the lowest median wages of 2020 discovered that in 2021 the wage gap

145. *Id.* at 5.

146. *Id.*

147. *Id.* at 9; Tom Kilgore, *Chipotle CEO's 2020 Pay More than Doubles, as COVID-Related PSU Modifications Provided a \$23 Million Boost*, MARKETWATCH (Apr. 5, 2021), <https://www.marketwatch.com/story/chipotle-ceos-2020-pay-more-than-doubles-as-covid-related-psu-modifications-provided-a-23-million-boost-2021-04-05> [<https://perma.cc/E73P-6BSG>].

148. Joanna Fantozzi, *Chipotle Mexican Grill CEO Brian Niccol Made \$38 Million in 2020: 2,898 Times More Than the Median Store-Level Employee*, NATION'S REST. NEWS (Apr. 6, 2021) <https://www.nrn.com/fast-casual/chipotle-mexican-grill-ceo-brian-niccol-made-38-million-2020-2898-times-more-median> [<https://perma.cc/C9E2-CERT>].

149. Heather Lalley, *Chipotle's CEO Made \$38M in 2020*, REST. BUS. (Apr. 5, 2021) <https://www.restaurantbusinessonline.com/financing/chipotles-ceo-made-38m-2020> [<https://perma.cc/X5ST-JAAW>].

150. ANDERSON & PIZZIGATI, *supra* note 143, at 9.

151. Ben Coley, *Chipotle CEO's Pay Increased 137 Percent to \$38 Million in 2020*, QSR (Apr. 5, 2021) <https://www.qsrmagazine.com/fast-casual/chipotle-ceos-pay-increased-137-percent-38-million-2020> [<https://perma.cc/C3KH-8QE2>].

152. ANDERSON & PIZZIGATI, *supra* note 143, at 9. Early in the pandemic, Chipotle's hourly employees were given a 10% base wage increase, but a few months later, the bonus was removed, leaving average pay at \$12 per hour as the virus raged. *Id.* Though some other corporations did offer paid leave and small pay increases to low-wage earners in 2020, typically at approximately \$2 per hour, most of these provisions were temporary just like Chipotle's. *Id.* Many of these corporations also spent large amounts on stock buybacks, falsely boosting their share prices and benefiting chief executives and investors. *Id.* The comprehensive set of rule changes made it easier for CEOs to receive large bonuses while low-wage earners' salaries shrank. *Id.*

between chief executives and median workers increased even more.<sup>153</sup> The actions these companies took in 2020 continued into 2021 and had ramifications on low-income workers that year.<sup>154</sup> Their CEOs made an average of \$10.6 million (as opposed to \$8.1 million in 2020), and their median workers made less than \$24,000, creating a gap with a ratio of 670:1.<sup>155</sup> Furthermore, 106 of the 300 studied corporations did not change their median workers' salaries to match inflation.<sup>156</sup>

Though low-wage earners were certainly the most negatively impacted, the economic impacts of the pandemic were not limited to them.<sup>157</sup> Higher wage earners also experienced job loss, with workers earning more than \$60,000 a year seeing a 10% drop in employment rates during the spring 2020.<sup>158</sup> In September 2020, 25% of all American adults reported that they or another in their household had lost their job or been laid off due to the pandemic.<sup>159</sup>

Multiple private employers including Philips, Gopuff, Warner Bros. Discovery, Microsoft, Meta, and Salesforce implemented layoffs for hundreds to thousands of employees in 2022.<sup>160</sup> Collectively, more than 32,000 people were laid off from the U.S. technology industry in 2022,

153. ANDERSON ET AL., INSTITUTE FOR POLICY STUDIES 28TH ANNUAL EXECUTIVE EXCESS REPORT 1 (2022), <https://ips-dc.org/wp-content/uploads/2022/06/report-executive-excess-2022.pdf> [<https://perma.cc/QGG8-6376>].

154. *Id.*

155. *Id.* at 4.

156. *Id.* Taxpayer dollars were found to contribute to these corporations by way of taxpayer-funded federal contracts as well. *Id.* at 8. Of the 300 corporations assessed in the 2021 study, 40% received federal contracts between October 2019 and May 1, 2022, and these contracts valued \$37.2 billion. *Id.* For example, Maximus, a company that manages Medicare call centers and federal student debts, received more federal contracts than any other of the 300 corporations. *Id.* at 1. Its CEO, Bruce Caswell, earned 208 times Maximus's median pay. *Id.* Twice in 2022, Maximus call center employees in Mississippi and Louisiana staged walkouts demanding better pay, paid sick leave, and other privileges. *Id.* at 10.

157. Elise Gould & Melat Kassa, *Low-Wage, Low-Hours Workers Were Hit Hardest in the COVID-19 Recession*, ECON. POL'Y INST. (May 20, 2021), <https://www.epi.org/publication/swa-2020-employment-report/> [<https://perma.cc/VVK4-CTNJ>].

158. *High-Wage Workers Have Recovered Most Lost Jobs, But Low-Wage Job Losses Persist*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/high-wage-workers-have-recovered-most-lost-jobs-but-low-wage-job-losses-persist> [<https://perma.cc/6XSC-HHTB>] (last visited Nov. 19, 2022).

159. Kim Parker et al., *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> [<https://perma.cc/M84S-TJF5>].

160. Brian Bushard & Carlie Porterfield, *HP Cuts More than 4,000 jobs – Here Are the Biggest U.S. Layoffs this Year*, FORBES (Nov. 22, 2022, 4:50 PM), <https://www.forbes.com/sites/brianbushard/2022/10/26/seagate-cuts-3000-employees-while-philips-slashes-4000-here-are-the-biggest-us-layoffs-this-year/?sh=247921ac54cb> [<https://perma.cc/KJG6-X33U>]; Avery Hartmans et al., *Amazon Will Reportedly Lay Off 10,000 Workers. Here are the Other Major US Companies that Have Made Cuts So Far, from Meta to Twitter*, BUS. INSIDER (Nov. 18, 2022, 4:08 PM), <https://www.businessinsider.com/layoffs-sweeping-the-us-these-are-the-companies-making-cuts-2022-5#juul-about-400-people-1> [<https://perma.cc/4D2H-S6TM>].

and only 9% of technology workers say they feel confident in their job security.<sup>161</sup> Many companies say that their workforce reductions are critical for refocusing their corporate plans and combatting overambitious growth.<sup>162</sup> Others, like Intel, place the blame on the state of the economy.<sup>163</sup>

The U.S. is also facing record-breaking inflation rates.<sup>164</sup> At the end of June 2022, consumer prices were 9.1% higher than the same time in 2021.<sup>165</sup> This is the largest year-to-year consumer price increase since November 1981.<sup>166</sup> Some of the most notable consumer price increases included food rising 10.4%, gasoline prices rising 59.9%, and new vehicles rising 11.4%.<sup>167</sup>

This upward trend has continued in 2023, and the causes of this significant inflation remain unclear, with some blaming stimulus payments and the fact that Americans spent excess money on products rather than services during the apex of the pandemic.<sup>168</sup> This, they say, strained the supply chain, which in turn increased demand.<sup>169</sup> Others say that corporations increased prices of their own volition, and that the global supply chain has issues stemming from pandemic shutdowns in factories and other workplaces.<sup>170</sup>

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161. Jennifer Liu, *Mass Layoff and Hiring Freezes: Tech Workers Report Huge Drops in Confidence in Job Security*, CNBC: MAKE IT (Aug. 3, 2022, 5:23 PM) <https://www.cnbc.com/2022/08/03/just-9percent-of-tech-workers-feel-secure-about-their-jobs-right-now.html> [<https://perma.cc/RE3K-PFGR>].

162. Bushard & Porterfield, *supra* note 160.

163. *Id.*

164. U.S. Bureau of Lab. Stat., *Consumer Prices Up 9.1 Percent Over the Year Ended June 2022, Largest Increase in 40 Years*, TED: THE ECONS. DAILY (Jul. 18, 2022) [hereinafter *Consumer Prices Up*], <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm#:~:text=Consumer%20prices%20up%209.1%20percent,U.S.%20Bureau%20of%20Labor%20Statistics> [<https://perma.cc/YN2W-N9WN>].

165. *Id.* Items within the consumer category include food, energy, clothing, vehicles, medical care, household furnishings and supplies, and recreation. *Id.*

166. *Id.*

167. *Id.* Gasoline prices saw their most significant twelve month increase since March 1980. *Id.*

168. U.S. Dep't of Agric., *Summary Findings: Food Price Outlook, 2023*, ECON. RSCH. SERV. (June 23, 2023), <https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/#:~:text=The%20all%20items%20Consumer%20Price,higher%20than%20in%20May%202022> [<https://perma.cc/S9DL-L7SE>]; Greg Iacurci, *Here's the Inflation Breakdown for May 2023, in One Chart*, NBC NEWS (June 13, 2023, 10:14 AM), <https://www.cnbc.com/2023/06/13/heres-the-inflation-breakdown-for-may-2023-in-one-chart.html> [<https://perma.cc/N5CD-ZYBG>]; Phil McCausland, *What is Causing Inflation? Economists Point Fingers at Different Culprits*, NBC NEWS (Feb. 16, 2022, 11:03 AM), <https://www.nbcnews.com/business/business-news/whats-causing-inflation-economists-point-fingers-different-culprits-rcna16156> [<https://perma.cc/87NS-YDU4>].

169. Iacurci, *supra* note 168.

170. *Id.*

### 3. Employees' Physical Health Concerns in the Wake of COVID-19

Concerns about employees' physical health remain in the public eye even though COVID-19 infection rates are no longer at peak levels.<sup>171</sup> The Centers for Disease Control and Prevention ("CDC") identified long COVID as a condition involving multiple symptoms including cardiovascular issues, exhaustion, migraines, and mental health challenges.<sup>172</sup> CDC data indicate that working age adults are more likely to contract long COVID than older adults.<sup>173</sup> Data show that two to four million workers are out of work due to suffering from long COVID.<sup>174</sup> If four million people are out of work due to long COVID, that encompasses nearly 2% of the entire U.S. workforce and means there are \$230 billion in lost earnings.<sup>175</sup>

Long COVID is characterized as the "next national health disaster,"<sup>176</sup> and "the pandemic after the pandemic."<sup>177</sup> Experts say that there is much to learn about the condition,<sup>178</sup> and that well-funded research, continued COVID-19 prevention, and a holistic hospital response is critical for prevention, for helping sufferers return to work, and for protecting those who develop the condition in the future.<sup>179</sup>

### 4. Mental Health Impacts on Employees in the Wake of COVID-19

The pandemic's impacts on the U.S.'s over 130 million private employees are not just economic, nor do they only include the effects of

171. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [https://perma.cc/H3A3-ETJL] (last visited Nov. 19, 2022). The highest numbers of new infections in the U.S. occurred in January 2022. *Id.*

172. Alice Burns, *What are the Implications of Long COVID for Employment and Health Coverage?*, KFF (Aug. 1, 2022) <https://www.kff.org/policy-watch/what-are-the-implications-of-long-covid-for-employment-and-health-coverage/> [https://perma.cc/V2KU-X2LH]. Long COVID occurs in individuals diagnosed with COVID-19, and its severity and specific symptoms vary, though one study found that 29% of long COVID sufferers had self-reported symptoms lasting more than one year. *Id.*

173. Nat'l Ctr. For Health Stat., *Nearly One in Five American Adults Who Have Had COVID-19 Still Have "Long COVID,"* CTRS. FOR DISEASE CONTROL & PREVENTION (Jun. 22, 2022), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2022/20220622.htm#:~:text=Nearly%20three%20times%20as%20many,5.5%25](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220622.htm#:~:text=Nearly%20three%20times%20as%20many,5.5%25) [https://perma.cc/E6UC-PW5R].

174. Katie Bach, *New Data Shows Long COVID is Keeping as Many as 4 Million People Out of Work*, BROOKINGS (Aug. 24, 2022), <https://www.brookings.edu/research/new-data-shows-long-covid-is-keeping-as-many-as-4-million-people-out-of-work/> [https://perma.cc/A58Z-CRCS].

175. *Id.*

176. Steven Phillips & Michelle A. Williams, *Confronting Our Next National Health Disaster—Long-Haul COVID*, NEW ENG. J. MED. (Jun. 30, 2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2109285> [https://perma.cc/MMH7-9KVK].

177. Levine, *supra* note 133.

178. *Id.*

179. Phillips & Williams, *supra* note 176. Another important issue impacting workers with long COVID is whether sufferers will be able to qualify for disability benefits. Burns, *supra* note 172.

long COVID.<sup>180</sup> A study conducted by the Bureau of Labor Statistics found that workplace suicides in the U.S., or suicides that occur at work, had increased by 39% from 2000 to 2020.<sup>181</sup>

Long-term mental health concerns are a top healthcare issue for employers in the U.S.<sup>182</sup> A study consisting of 135 large employers found that employers count long-term mental health issues as the leading health-related impact of the pandemic.<sup>183</sup> Eighty-five percent of the corporations surveyed plan to keep mental health care offerings in place for employees, and 24% of those corporations said that the affordability of employee mental health care is of high importance to them.<sup>184</sup>

In response to such data, the U.S. Surgeon General published a Framework<sup>185</sup> guide in October 2022 outlining how employers can serve as fundamental components of healthy communities.<sup>186</sup> The Framework highlighted the connection between employer support of mental health with employee well-being, and emphasized harm protection, community and connection, work-life harmony, mattering at work, and growth opportunities as the five essentials that organizations across the country must focus on in order to support employees' mental health.<sup>187</sup>

An additional mental health-related issue exacerbated by the pandemic is the boundary between work and life.<sup>188</sup> In 2020, in an effort to curb COVID-19 exposure and avoid infection, many workers who were not deemed essential or front-line employees began working remotely.<sup>189</sup>

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180. See *Cancer Now Top Driver of Employer Health Care Costs, Says Business Group's 2023 Health Care Strategy and Plan Design Survey*, BUS. GRP. ON HEALTH (Aug. 23, 2022) [hereinafter *Cancer Now Top Driver*], <https://www.businessgrouphealth.org/who-we-are/newsroom/press-releases/2023-lehcspsds> [https://perma.cc/ZL6A-MB2B].

181. Michael Sainato, 'It's All Preventable': Tackling America's Workplace Suicide Epidemic, GUARDIAN (May 27, 2022), <https://www.theguardian.com/us-news/2022/may/27/us-workplace-suicide-rates-pandemic> [https://perma.cc/HG22-S2U3].

182. *Cancer Now Top Driver*, *supra* note 180.

183. *Id.*

184. *Id.*

185. A Framework is a guide created to bring attention to a public health issue. *U.S. Surgeon General Released New Framework for Mental Health & Well-Being in the Workplace*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 20, 2022) [hereinafter *U.S. Surgeon General*], <https://www.hhs.gov/about/news/2022/10/20/us-surgeon-general-releases-new-framework-mental-health-well-being-workplace.html> [https://perma.cc/KBG6-9JZD].

186. *Id.*

187. *Id.*

188. *Survey: Remote Workers Struggle with Work-Life Boundaries, but is a Return to the Workplace the Answer?*, CISION PR NEWswire (Apr. 1, 2022, 12:00 PM) [hereinafter *Survey: Remote Workers Struggle*], <https://www.prnewswire.com/news-releases/survey-remote-workers-struggle-with-work-life-boundaries-but-is-a-return-to-the-workplace-the-answer-301515832.html> [https://perma.cc/YV4R-E9DK].

189. Kim Parker et al., *How the Coronavirus Outbreak Has—and Hasn't—Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/>

While the move allowed greater flexibility for these workers, many of whom rarely worked from home before the pandemic,<sup>190</sup> data in April 2022 showed that 47% of remote workers in the U.S. were concerned about the blurred boundaries between their personal lives and jobs.<sup>191</sup> Hybrid workers working both remotely and on-site shared those worries, with 41% reporting that they were concerned.<sup>192</sup> Of the individuals surveyed, 53% reported an increase in hours worked each week, 41% reported increased burnout, and 41% also reported that their mental health worsened.<sup>193</sup>

Additionally, data from the American Psychological Association show that employees both seek and value mental health support in the workplace.<sup>194</sup> Eighty-one percent of surveyed individuals say they will seek out employers that support mental health care when searching for future jobs.<sup>195</sup>

### 5. Racial Inequity and its Impact on Employees

Another public-facing issue that has increasingly impacted employees from 2020 to 2023 is racial inequity.<sup>196</sup> Tragically, a disproportionate number of people of color have lost their lives to COVID-19.<sup>197</sup> CDC age-adjusted crude mortality data show that Indigenous Americans, Pacific Islander Americans, and Black Americans experienced the worst casualties.<sup>198</sup> In October 2022, one in 211 Indigenous Americans, one in 276 Pacific Islander Americans, and one in 278 Black Americans had died of COVID-19; in 24 states, Black Americans had the highest COVID-19 mortality rate.<sup>199</sup>

The need for increased equity and justice initiatives came to the fore in 2020 in the wake of multiple murders of individuals including George

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[<https://perma.cc/QV92-577J>]. For a discussion on the ways in which remote work has benefited employees, particularly those with disabilities, see Baylee Kalmbach, *A COVID Silver Lining? How Telework May Be a Reasonable Accommodation After All*, 90 U. CIN. L. REV. (2022).

190. Parker et al., *supra* note 189.

191. *Survey: Remote Workers Struggle*, *supra* note 188.

192. *Id.*

193. *Id.*

194. *APA's 2022 Work and Well-Being Survey Results*, APA (Jul. 2022) [hereinafter *APA's 2022 Work and Well-Being*], <https://www.apa.org/pubs/reports/work-well-being/2022-mental-health-support> [<https://perma.cc/7KPD-7ALY>].

195. *Id.*

196. *Id.*

197. Elisabeth Gawthrop, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Nov. 22, 2022), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/XU63-HHEY>].

198. *Id.*

199. *Id.*

Floyd, Breonna Taylor, and Ahmaud Arbery.<sup>200</sup> These tragedies highlighted the need for reform within the American police and justice systems.<sup>201</sup> As of May 2022, Gallup data showed that half of Americans supported major changes to American policing, and 39% supported minor changes—totaling 89% of Americans who support at least some change to policing.<sup>202</sup>

Additionally, Asian Americans experienced increased levels of discrimination throughout the pandemic.<sup>203</sup> The Federal Bureau of Investigation found a 77% increase from 2019 to 2022 in hate crimes against Asian individuals living in the U.S.<sup>204</sup> Thirty-nine percent of Asian Americans reported personally experiencing racism either sometimes or often during the pandemic.<sup>205</sup>

American Psychological Association data show that the workplace is not immune to similar discrimination.<sup>206</sup> In 2022, Black workers, at 21%, were almost twice as likely as White workers, at 11%, to report that they experience discrimination while at work.<sup>207</sup>

#### F. Quiet Quitting

The phrase quiet quitting became popular in the summer of 2022 after being featured on various social media platforms.<sup>208</sup> Videos with millions of views feature the phrase, defining and redefining it, and there is not a clear consensus as to what it means.<sup>209</sup> Some say it means that you are

200. Richard Fausset, *Before Breonna Taylor and George Floyd, There was Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html> [<https://perma.cc/LH2B-FHW2>].

201. Emily Bazelon, *A Discussion About How to Reform Policing*, N.Y. TIMES (Jun. 16, 2020), <https://www.nytimes.com/interactive/2020/06/13/magazine/police-reform.html> [<https://perma.cc/H8ZH-E5BG>].

202. Justin McCarthy, *Americans Remain Steadfast on Policing Reform Needs in 2022*, GALLUP (May 27, 2022), <https://news.gallup.com/poll/393119/americans-remain-steadfast-policing-reform-needs-2022.aspx> [<https://perma.cc/4U85-7YCT>].

203. Mary Findling et al., *COVID-19 Has Driven Racism and Violence Against Asian Americans: Perspectives from 12 National Polls*, HEALTH AFFS. (Apr. 12, 2022), <https://www.healthaffairs.org/doi/10.1377/forefront.20220411.655787/> [<https://perma.cc/6ABS-QFU2>].

204. *Id.*

205. *Id.*

206. *APA's 2022 Work and Well-Being*, *supra* note 194.

207. *Id.* Other populations are also at risk of such discrimination, as 27% of disabled workers and 22% of LGBTQ+ workers have experienced workplace discrimination, as opposed to 8% of non-disabled workers and 12% of non-LGBTQ+ workers. *Id.* For an analysis of corporate racial equity policies, see Fitzhugh et al., *It's Time for a New Approach to Racial Equity*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Dec. 2, 2020), <https://www.mckinsey.com/bem/our-insights/its-time-for-a-new-approach-to-racial-equity> [<https://perma.cc/57N4-A8QT>].

208. Thompson, *supra* note 6.

209. Alyson Krueger, *Who is Quiet Quitting For?*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/2022/08/23/style/quiet-quitting-tiktok.html> [<https://perma.cc/6KQX-KX6G>].

“not outright quitting your job, but you’re quitting the idea of going above and beyond.”<sup>210</sup> Others, that you mentally disassociate from your work.<sup>211</sup> And others still say that it is about refusing additional work without receiving additional pay.<sup>212</sup> Regardless of its objective meaning, the phrase empowers workers experiencing an increase in burnout,<sup>213</sup> as well as others who feel they are selling “not just their time, but their selves”<sup>214</sup> to their employers.<sup>215</sup>

Some labor experts point to quiet quitting’s similarities with work-to-rule.<sup>216</sup> And while they wonder if quiet quitting is simply a new phrase to describe this practice, other labor experts use it to describe the issues of boredom, monotony, and pressure that nearly all workers face at some point.<sup>217</sup> Regardless, the phrase’s popularity indicates that cries for change in the workplace must be taken seriously.<sup>218</sup> Furthering this conclusion is that a record-breaking number of Americans voluntarily left their jobs in 2021, including more than four million each month from August to December of that year.<sup>219</sup> In November 2021, 4.5 million people left their jobs, the highest amount in a single month since the data was first collected in 2000.<sup>220</sup> Pew Center data from March 2022 reported that feeling disrespected at work was a primary reason.<sup>221</sup> Additionally,

210. *Id.*

211. *Id.*

212. *Id.*

213. *Survey: Remote Workers Struggle*, *supra* note 188.

214. Thompson, *supra* note 6.

215. *Id.*

216. GARETH MORGAN, *IMAGES OF ORGANIZATION: THE EXECUTIVE EDITION* 165 (Andrea Markowitz, ed., 1st ed. 1998). Work-to-rule is a historic method used by workers to combat unjust practices in the workplace by working in line with every minute workplace rule and regulation, which are often created “as part of a power play” and that can “never be applied if the system is to achieve any degree of operational effectiveness.” *Id.* Thus, when employees work-to-rule, it can result in the employer’s output and efficiency being heavily affected. *Id.*

217. Thompson, *supra* note 6.

218. *Id.*

219. Megan Leonhardt, *Over 4 Million Americans Have Quit Their Jobs for 6 Months in a Row as the Great Resignation Rages on*, *FORTUNE* (Feb. 1, 2022), <https://fortune.com/2022/02/01/great-resignation-over-4-million-americans-quit-jobs-six-consecutive-months/> [<https://perma.cc/2Y48-YVBQ>].

220. U.S. Bureau of Lab. Stat., *Number of Quits at All-Time High in November 2021*, *TED: THE ECONS. DAILY* (Jan. 6, 2022), <https://www.bls.gov/opub/ted/2022/number-of-quits-at-all-time-high-in-november-2021.htm> [<https://perma.cc/VWX3-4BY3>]. An additional phrase for the number of individuals who left work is the “Great Resignation.” Hannah Grabenstein, *Why a Third of American Workers Changed Jobs During the Great Resignation*, *PBS NEWS HOUR* (Sept. 22, 2022), <https://www.pbs.org/newshour/economy/1-in-3-americans-who-switched-jobs-during-the-great-resignation-say-they-did-it-for-better-pay> [<https://perma.cc/2XFA-NLWH>]. However, this term has also been considered a misnomer because workers are moving into new roles, not simply leaving employment altogether. *Id.*

221. Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, *PEW RSCH. CTR.* (Mar. 9, 2022),



38% of working adults said they changed jobs between 2020 and 2022, according to a poll published in September 2022.<sup>222</sup> These data sets indicate that American workers seek not just to leave their jobs, but to acquire new ones that meet their needs.<sup>223</sup>

### III. DISCUSSION

Considering the ways that the COVID-19 pandemic transformed the U.S.'s economy, the physical and mental health concerns of workers, and exacerbated racial inequity in the workplace, a consistent judicial precedent is necessary to grant private employees the ability to express their concerns and advocate for the betterment of themselves, their coworkers, and their workplaces.

The two-prong *Connick Pickering* test provides the best current precedent in light of its successful historic development and application.<sup>224</sup> The test remains strong precedent after forty years, and its progenies *Snyder*, *Rankin*, *Abood*, *Janus*, and *Umbehr* also present strong beneficial precedents for the private sector.

The wake of the pandemic continues to be a time of great vocational upheaval,<sup>225</sup> and offers the most appropriate time to apply the *Connick Pickering* test to the private sector and to the next private employment speech case that arises in the federal court system. Similarly to what is already used in the public sector, the language of the test could read that private employees' employment must be protected using "a balancing test between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the employer in promoting the efficiency of the services it performs through its employees."<sup>226</sup> By protecting speech related to matters of public concern, this proposal opens the door to increased communication and dialogue in private workplaces, which combats quiet quitting by increasing employee retention, improving workplace satisfaction, and creating healthy employer-employee relationships.<sup>227</sup> This proposal should be utilized by attorneys

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<https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/> [<https://perma.cc/HSL5-3U33>].

222. Grabenstein, *supra* note 220.

223. Krueger, *supra* note 209.

224. See *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

225. Helaine Olen, *How the Pandemic Ended America's Bad Romance with Work*, WASH. POST (Nov. 14, 2022, 8:58 AM), <https://www.washingtonpost.com/opinions/2022/11/14/covid-pandemic-work-resignation-quitting-unionization/> [<https://perma.cc/H26X-ZHF7>].

226. *Rankin*, 483 U.S. at 384 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983)).

227. *Quiet Quitting and What Employers Can Do About It*, THE NAT'L L. REV. (Sept. 18, 2022), <https://www.natlawreview.com/article/quiet-quitting-and-what-employers-can-do-about-it> [<https://perma.cc/K5LY-NPAM>].

representing plaintiff-employees and accepted by the Supreme Court as good law.

Part A of this Section discusses why this proposal alleviates the quiet quitting phenomenon, protects employees, and benefits private employers. Part B discusses why speech about the economy, physical health, mental health, and racial equity are matters of public concern under the *Snyder* holding. Part C analyzes the current jurisprudential landscape for private employees' speech and explains why the *Connick Pickering* test is the appropriate standard to use. Part D explains the inherent similarities of the public and private employment sectors as well as the reasons for applying *Marsh* to a workplace landscape riddled with unclear work-life boundaries. Lastly, Part E explores potential counterarguments to this proposal and the current state of the Supreme Court and the NLRB.

*A. This Proposal Alleviates Quiet Quitting,  
Protects Employees, and Benefits Employers*

Maintaining a respectful, communicative workplace is a top indicator that private employees will remain at an employer.<sup>228</sup> Because communication is critical to workplace retention, the current resignation crisis can be mitigated by protecting private employees' right to speak about the matters most affecting their lives—including the economy and COVID-19-related physical health, mental health, and racial inequities.<sup>229</sup> Additionally, because previously helpful remedies like vacation days, career development commitments, and increased salaries are no longer retaining employees,<sup>230</sup> increased communication is especially important.

Regardless of whether quiet quitting is a new crisis, a new iteration of work-to-rule, or a phrase that has simply taken off due to a social media platform's algorithm, the data show that millions of people have departed their jobs, and numerous issues affecting the workforce—including record-high inflation,<sup>231</sup> physical and mental health crises,<sup>232</sup> and high

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228. See Parker & Horowitz, *supra* note 221; see also Donald Sull, et al., *Toxic Culture Is Driving the Great Resignation*, MIT SLOAN MGMT. REV. (Jan. 11, 2022), <https://sloanreview.mit.edu/article/toxic-culture-is-driving-the-great-resignation/> [https://perma.cc/8LGU-5T9W].

229. See Ryan Pendell, *5 Ways Managers Can Stop Employee Turnover*, GALLUP (Nov. 10, 2021), <https://www.gallup.com/workplace/357104/ways-managers-stop-employee-turnover.aspx> [https://perma.cc/R7FU-5RW7].

230. *The Great Resignation: 'It's Killing Companies.'* KORN FERRY, <https://www.kornferry.com/insights/this-week-in-leadership/the-great-resignation-its-killing-companies> [https://perma.cc/YQ6N-V2BY] (last visited Nov. 19, 2022).

231. *Consumer Prices Up*, *supra* note 164.

232. Bach, *supra* note 174; *APA's 2022 Work and Well-Being*, *supra* note 194.

rates of racism—demonstrate that workers’ needs are not being met.<sup>233</sup> Applying *Connick Pickering* to the private employment sector would provide a national standard to ensure private employers are kept accountable while empowering private employees to speak about their concerns in the same way their public sector counterparts already can: when the concern is about a matter of public concern and outweighs an employer’s concerns, but does not disrupt the employer’s efficiencies as a service provider.<sup>234</sup>

Additionally, private employers would not be disrupted because the progeny of *Connick Pickering* aim to help employers maintain efficient workplaces while simultaneously protecting private employees when they speak about matters of public concern.<sup>235</sup> Thus, under this Comment’s proposal, private employers would not only benefit from increased retention, but remain efficient service providers. Because they would have a federal standard to adhere to, private employers would also benefit from this proposal because it would allow them to act confidently in employee communications involving speech and termination.

### *B. The Ramifications of COVID-19 are Matters of Public Concern*

The *Snyder* Court noted that a statement’s controversial nature is immaterial to whether it deals with a matter of public concern.<sup>236</sup> The *Snyder* Court also defined a matter of public concern as one related to any matter of political, social, or other community concern, a subject of legitimate news interest, or a subject of value, concern, and general interest to the public.<sup>237</sup> The pandemic is the “most significant global crisis of any of our lifetimes,”<sup>238</sup> clearly placing it within *Snyder*’s definition of a matter of public concern. Additionally, the pandemic’s ramifications are matters of public concern, and speech about them would be protected by the *Snyder* test when *Connick Pickering* is applied in the private sector.

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233. See *APA’s 2022 Work and Well-Being*, *supra* note 194.

234. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers* 461 U.S. 138, 140 (1983)).

235. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).

236. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). “Debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.*

237. *Snyder*, 562 U.S. at 453.

238. Scott L. Greer et al., *Coronavirus Politics: The Comparative Politics and Policy of COVID-19*, UNIV. OF MICH. PRESS, [https://www.press.umich.edu/11927713/coronavirus\\_politics](https://www.press.umich.edu/11927713/coronavirus_politics) [<https://perma.cc/R54E-RN9P>] (last visited Nov. 22, 2022).

### 1. Speech about the U.S. Economy is a Matter of Public Concern

The current state of the U.S. economy is a significant matter of public concern under *Snyder* because it is a subject of legitimate news interest, is impacting the vast majority of Americans, and is of general interest to the public.<sup>239</sup> The federal legislature can propose solutions to prevent future inflation and increases in pay gaps between chief executives and lower paid employees, meaning that the economy is also of political concern, further strengthening the conclusion that speech about it must be protected under *Snyder* if *Connick Pickering* is expanded to the private sector.<sup>240</sup> Even if economic solutions are implemented, employees like those in the hundreds of companies studied need an avenue to express concerns on these matters.

If private employees cannot speak out on prevalent issues like wage disparities, dramatic job loss and layoffs, supply chain issues and record-breaking inflation, then it is more difficult for the public to be aware of such issues and then elect representatives who can draft legislation addressing those problems. Such an avenue was needed by the plaintiff teacher in *Pickering*, and the Court ruled in his favor so that he and others like him could communicate about issues subject to elections.<sup>241</sup> For the same reason, private employees must have the right to speak about their employers' actions so that consumers can make informed purchases and interact with corporations in an educated manner.<sup>242</sup>

### 2. Employees' Physical Health Concerns in the Wake of COVID-19 are Matters of Public Concern

The physical health ramifications of COVID-19 are a prominent public topic, as evidenced by data surrounding long COVID, the "next national health disaster."<sup>243</sup> Private sector employees must be able to speak about their pandemic-related physical health issues with employers without fear of termination because such public health issues are an area of public concern deeply impacting them; therefore, they should be allowed to benefit from *Snyder*'s protection.<sup>244</sup> Protecting speech about pandemic-related physical health concerns would also provide private sector

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239. See *Snyder*, 562 U.S. at 453; see Henderson, *supra* note 137.

240. See *Snyder*, 562 U.S. at 453.

241. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573-74 (1968).

242. See *id.*; Tara Siegel Bernard, *Less Takeout, More Produce Swapping: How Inflation is Altering People's Behavior*, N.Y. TIMES (Jun. 28, 2022), <https://www.nytimes.com/2022/06/28/your-money/inflation-consumer-behavior.html> [<https://perma.cc/KF6M-98WQ>].

243. See Phillips & Williams, *supra* note 176.

244. See *Snyder*, 562 U.S. at 453.

employees with an avenue to speak about their health concerns, which is critical considering that upwards of 2% of the U.S.'s workforce, representing \$230 billion, may be impacted by long COVID.<sup>245</sup> Protecting the right to speak about such health concerns would help ensure that private sector employees have their questions and issues addressed, rather than feeling a need to leave their positions due to an unsafe or unhealthy workplace environment.<sup>246</sup>

Lastly, because the federal government has the power to address health crises, pandemic-related health matters are political concerns, further strengthening the conclusion that speech about such matters must be protected under *Snyder* if *Connick Pickering* is expanded to the private sector.<sup>247</sup>

### 3. Mental Health Impacts on Employees in the Wake of COVID-19 are Matters of Public Concern

The mental health conditions faced by those in the private workforce, catalyzed by the pandemic,<sup>248</sup> are also a matter of public concern under *Snyder* considering their prominence and interest to the public as well as health experts.<sup>249</sup>

The increase in workplace suicides from 2000 to 2020, as well as the increase in stress since before the pandemic, make it critical for private sector employees to have the right to express concerns about mental health resources, support, needs, and mental health-related criticisms to their employers.<sup>250</sup>

Furthermore, the emphasis that employers already place on mental health resources means that employers would not be impaired by a federal test that protects private employees' right to speak about mental health.<sup>251</sup> Instead, these employers' efforts would be supported by such a precedent, especially as employees seek out employers providing these resources, and as private employers seek to serve as participants in healthy communities.<sup>252</sup>

Lastly, *Marsh's* precedent holds that a company's ownership does not create absolute authority, and that vague boundaries between what a

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245. See Bach, *supra* note 174.

246. See *Quiet Quitting and What Employers Can Do About It*, *supra* note 227.

247. See *Snyder*, 562 U.S. at 453.

248. See *Cancer Now Top Driver*, *supra* note 180.

249. See *Stress in America 2022: Concerned for the Future, Beset by Inflation*, APA (Oct.2022) [hereinafter *Stress in America 2022*], <https://www.apa.org/news/press/releases/stress/2022/concerned-future-inflation> [<https://perma.cc/W3FK-X3U8>]; *U.S. Surgeon General*, *supra* note 185.

250. See Sainato, *supra* note 181; *Stress in America 2022*, *supra* note 249.

251. See *Cancer Now Top Driver*, *supra* note 180.

252. See *APA's 2022 Work and Well-Being*, *supra* note 194; *U.S. Surgeon General*, *supra* note 185.

private company owns and does not own mean that the private company's control is limited.<sup>253</sup> This precedent means that when there are ambiguous boundaries between work and life, as there are when remote work is prevalent,<sup>254</sup> private workers' speech must be protected, especially when work-life boundaries are of significant concern to employees.<sup>255</sup> This conclusion is further supported by the fact that 47% of remote workers in the U.S. are worried about the blurring between their jobs and lives, and 41% of hybrid workers share those concerns.<sup>256</sup>

#### 4. Racial Inequity and its Impact on Employees are Matters of Public Concern

The racial inequities that occurred and have come to the fore since 2020 are a matter of public concern under *Snyder* because they are a community concern, a legitimate news interest, and a subject of value and general interest to the public.<sup>257</sup> The growing awareness about the prevalence of racial inequity in the workplace means employees must be allowed to express concerns about resources, support, needs, and other equity related criticisms to their employers. The clear need to permit such concerns is further evidenced by the high mortality rates that Americans of color experience from COVID-19<sup>258</sup> and by the levels of racial discrimination occurring in and out of the workplace.<sup>259</sup> The progeny of *Connick Pickering* gives firm precedent for protecting such speech.<sup>260</sup>

#### *C. The Current Jurisprudential Landscape is Insufficient for Private Employees, and There are Multiple Advantages to Using Connick Pickering and its Lineage*

The current patchwork of legislation and judicial jurisprudence insufficiently protects the millions of private sector employees. This is a substantial problem because there are significantly more private than public employees in the U.S. and while the nation's public employees benefit from developed speech protections, their private sector counterparts have very little.

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253. See *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

254. *Kalmbach*, *supra* note 189.

255. *Survey: Remote Workers Struggle*, *supra* note 188.

256. *Id.*

257. See *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

258. See *Gawthrop*, *supra* note 197.

259. See *APA's 2022 Work and Well-Being*, *supra* note 194.

260. See, e.g., *Snyder*, 562 U.S. at 453.

Though federal laws protect private employees from discrimination based on classifications, disabilities, and medical conditions,<sup>261</sup> the NLRA only includes the rights to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,”<sup>262</sup> and fails to provide any standard for protecting speech that is not related to collective bargaining, mutual aid, or protection.<sup>263</sup> Additionally, there is a blatant lack of protection for any private employee not in a union, which is notable seeing that there are five times more members in public unions than in private unions,<sup>264</sup> even though there are nearly six times more private employees in the U.S. than public employees.<sup>265</sup> Moreover, membership in private sector unions is low,<sup>266</sup> and union membership should not be a mandatory prerequisite for speech protection.

Further evidencing the need for a consistent test is the reality that the private sector is resistant to revising statutory language, lacks significant common law precedents,<sup>267</sup> and that the NLRA is mostly used in union contexts.<sup>268</sup> The solution for speech protections is clearly not in a statute, but in judicial precedent.

Unique statutes for each state also mean that when state and federal courts are faced with a matter of speech protection in the private employment context, the statutes and tests they look to to determine the issues vary greatly.<sup>269</sup> This variability results in inconsistent rulings, as seen in *Cotto* and *Tiernan*,<sup>270</sup> leading to confusion for private employees and employers alike.

The Court in *Umbehr* even emphasized that using *Connick Pickering* for the case’s plaintiff-employee was important so that the First Amendment rights of private contractors employed by the government would not be unduly dependent on conflicting state laws.<sup>271</sup> Similarly, by extending *Connick Pickering* to all private employees, the Court would ensure that government-contracted private employees’ First Amendment rights are also protected.

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261. See U.S. Equal Emp. Opportunity Comm’n, *supra* note 35.

262. 29 U.S.C. § 157.

263. *Id.*

264. HARRIS ET AL., *supra* note 1, at 48.

265. CES9000000001, *supra* note 8; CES0500000001, *supra* note 8.

266. See HARRIS ET AL., *supra* note 1, at 48.

267. WILLBORN ET AL., *supra* note 32, at 238; HARRIS ET AL., *supra* note 1, at 5.

268. E.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974).

269. WILLBORN ET AL., *supra* note 32, at 238.

270. *Cotto v. United Techs. Corp.*, 251 Conn. 1, 7-8 (1999); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 151 (1998).

271. *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 679 (1996).

If *Connick Pickering* is accepted by the Supreme Court, then state courts would benefit from the test's strong precedent; the test could even be used in states that do not have their own statutes protecting private employees' speech. The use of *Connick Pickering* would create more consistent rulings and judicial analyses at all court levels regarding private employees' speech without requiring states to revise or adopt legislation. The *Connick Pickering* test and its progeny provide a simple solution by merely expanding an existing historic framework to the private sector rather than creating an entire new framework.

Moreover, the Court has already sanctioned expansion by previously extending the *Connick Pickering* framework.<sup>272</sup> In both *Rankin* and *Snyder*, the Court utilized the test in situations involving controversial language, and in *Umbehr*, the Court used the test in a case involving an independently contracted employee not directly employed by a public entity.<sup>273</sup> Given the unprecedented circumstances and ramifications of the COVID-19 pandemic, it is reasonable for the Court to extend the test once again, this time simply to the private sector.

*D. The Public and Private Sectors Have Inherent  
Similarities and There is Strong Legal Precedent  
for Protecting Work-Life Boundaries*

Importantly, the Court noted in *Abood* that neither public employees nor their professional duties are “basically different”<sup>274</sup> from private employees and their professional duties; instead, the difference between the public and private sectors is found in the character of the employer.<sup>275</sup> The Court also maintained that public and private sector employees have equal First Amendment rights, even though public unions' actions directly affect politics and thus may be deemed political.<sup>276</sup> The current Court can rely on the same logic that created the *Connick Pickering* test to extend *Connick Pickering* into the private sector because of these previously established similarities between the public and private sector.

*Janus*'s holding, though it overturned *Abood*'s,<sup>277</sup> can also be easily used to support the argument that because public and private sector employees are not basically different, the expansion of free speech rights seen in *Janus* should continue with an expansion of free speech

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272. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

273. *Id.*

274. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229 (1977), *overruled by Janus v. Am. Fed'n of State Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

275. *Id.* at 239-41.

276. *Id.* at 229, 231.

277. *Janus v. Am. Fed'n of State Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).



protections for private sector employees.<sup>278</sup> Alito's opinion did not invalidate the notion that public and private employees and their duties are similar, nor did it undermine that public and private employees possess equal First Amendment rights.<sup>279</sup>

The *Umbehr* Court further concluded *Connick Pickering* was an appropriate test even though the plaintiff did not work for a public employer because the plaintiff-employee provided services to the public through his work.<sup>280</sup> Data indicate that, as the world urbanizes, people are more reliant on the private sector than the public sector for a multitude of services.<sup>281</sup> According to legal scholarship, public sector employment principles are also extending into the private sector.<sup>282</sup> Thus, the logic of the *Umbehr* Court can easily be implemented to extend *Connick Pickering* to the whole of the private sector in light of the public services the private sector provides.

Just as *Marsh* analyzed the boundaries between actions that are and are not permissible in one's workplace,<sup>283</sup> *Marsh* can also be used to analyze employees' significant concerns around the modern prevalence of remote work<sup>284</sup> and the boundaries between work and life.<sup>285</sup> In *Marsh*, the Court held that in a private company town, the boundaries between public and private use were ambiguous.<sup>286</sup> When applied to the context of 2023, *Marsh's* holding indicates that many private companies' controls must be limited due to their use of remote work and lack of clearly established boundaries for employees. *Connick Pickering* would provide private employees the protection to speak about their work and life boundary concerns.

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278. *See id.* at 2480.

279. *See id.*

280. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 678-79 (1996).

281. Wallace, et al., *The Role of the Private Sector in the COVID-19 Pandemic: Experiences From Four Health Systems*, 10 FRONTIERS PUB. HEALTH 1, 1 (2022); *see also* Connick v. Myers, 461 US 138, 150-51 (1983) ("The federal workplace, like any place of employment, exists to accomplish the business of the employer.").

282. *See, e.g.*, Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 607, 616 (1990); *see also* "I am confident that the recognition of such protection for employees' exercise of their free-speech rights is the trend of our common law, however long this long-term trend may take to arrive at a majority position." Tiernan v. Charleston Area Med. Ctr., Inc., 203 W. Va. 135, 153-54 (1998) (Starcher, J., dissenting).

283. *Marsh v. Alabama*, 326 U.S. 501, 508-9 (1946).

284. Kalmbach, *supra* note 189.

285. *Survey: Remote Workers Struggle*, *supra* note 188.

286. *Id.*; *see Marsh*, 326 U.S. at 506.

*E. Counterarguments and the Current State  
of the Supreme Court and the NLRB*

One concern about this Comment's proposal may be that it would lead to more flagrant or violent speech in the workplace. However, as clearly established in *Snyder* and *Rankin*, it is not the law's job to legislate morality.<sup>287</sup> Such moralistic concerns must be addressed by non-legal solutions. A second concern may be that employers would be too anxious to take steps to discipline or terminate employees out of fear of litigation. However, the *Umbehr* Court stated, "The dissent's fears of excessive litigation . . . cannot justify a special exception to our unconstitutional conditions precedent to deprive independent government contractors of protection."<sup>288</sup> Additionally, the precedent of the public sector shows that employer discipline and termination do not result in more litigation and thus are unlikely to happen in the private sector.

To fully evaluate whether the *Connick Pickering* can be applied in the private sector at this time, the current Court's views on speech and employment must be considered. The current Supreme Court has a six to three conservative majority and views individual speech rights quite favorably, especially speech based on beliefs that the Court deems sincere.<sup>289</sup> The Court has also shown favor toward broad employee freedoms.<sup>290</sup> However, the Court has concluded that the federal government lacks power to impose sweeping requirements on workplaces,<sup>291</sup> and is known to be extremely business friendly.<sup>292</sup>

Because implementing *Connick Pickering* in the private sector creates a constitutional floor rather than a ceiling, these Court conclusions and attitudes should not impede the Court's adoption of *Connick Pickering*. Furthermore, considering the Court's favor toward free speech,<sup>293</sup> *Connick Pickering* would be an attractive avenue for the current Court to both benefit business and speech rights.<sup>294</sup>

287. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378, 380-81 (1987).

288. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 681 (1996).

289. Donald E. English, Jr. & Greg Riolo, *Looking Ahead: Upcoming U.S. Supreme Court Cases Employers Need to Know*, JACKSON LEWIS (Jul. 12, 2022), <https://www.jacksonlewis.com/publication/looking-ahead-upcoming-us-supreme-court-cases-employers-need-know> [https://perma.cc/Q7Y4-YETS]; *see also* *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

290. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. V. DOL, OSHA*, 142 S. Ct. 661, 665 (2022); *but see* *Glacier Northwest, Inc. v. Int'l Bhd. Of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1415-16 (2023).

291. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

292. Felix Salmon, *The Most Pro-Business Supreme Court Ever*, AXIOS (Aug. 4, 2022), <https://www.axios.com/2022/08/04/supreme-court-john-roberts-business> [https://perma.cc/6XZR-LZ82].

293. *See, e.g.*, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

294. Another factor that would likely affect this proposal's chance of success is the type of attorneys

Additionally, the state of the current NLRB sheds important light on the likelihood of the *Connick Pickering*'s application in the private sector. In multiple instances in 2022, the NLRB's General Counsel expressed a desire to broaden protections for private employees' speech, such as by expanding the understanding of concerted activity to include language on social media posts.<sup>295</sup> These instances indicate that the current NLRB could accept, and perhaps encourage, the adoption of the *Connick Pickering* test in the private sector.

#### IV. CONCLUSION

The COVID-19 pandemic radically transformed the employment landscape, and many aspects of the future of employment remain unknown.<sup>296</sup> One thing is certain, however—that change is necessary to better protect and provide for the U.S.'s private sector employees. Adoption of the *Connick Pickering* test in the private sector would provide that necessary change while remedying the phenomenon of quiet quitting and simultaneously improving multiple matters of public concern. Not only is this proposal rooted in historic jurisprudence, but it is supported by an abundance of data and legal scholarship. The aftermath of the COVID-19 pandemic presents the most opportune time to implement this proposal, which establishes the clearest and most appropriate standard of speech protection for private sector employees moving forward.

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hired by the parties. See Adrian Ma, *The Current Supreme Court Could Be the Most Pro-Business Yet*, NPR (Sept. 2, 2022) <https://www.npr.org/2022/09/02/1120692947/the-current-supreme-court-could-be-the-most-pro-business-yet#:~:text=Transcript->. The current Supreme Court led by Chief Justice John Roberts, according to a new study [<https://perma.cc/F2GN-JNXM>]. Today, 80% of businesses before the Court hire an attorney with past Supreme Court experience. *Id.* If the plaintiff employee also hired an attorney with previous Supreme Court experience, it would be more likely for the Court to rule in their favor and apply the *Connick Pickering* test in the private sector. See *id.*

295. E.g., Advice Memorandum from the NLRB Off. of the Gen. Couns. to Lisa Y. Henderson, Acting Reg'l Dir. of Region 10, Johns Creek Surgery Case, No. 10-CA-270348 at 5 (Aug. 24, 2021).

296. Smart, *supra* note 4.