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Say What?
Politics and the First Amendment Right to Free Speech in Schools

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I. CONSTITUTIONAL RIGHT TO FREE SPEECH

A. Generally.

1. Freedom of speech is essential to democracy, but it can be highly disruptive in public schools and in public employment.

2. The First Amendment of the U.S. Constitution protects the right to free speech, providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Minnesota Constitution likewise guarantees that "all persons may freely speak, write, and publish their sentiments on all subjects . . . ." Minn. Const. Art. I, Sec. 3.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2026 Ratwik, Roszak & Maloney, P.A.

3. The First Amendment's protection is broad and covers all forms of speech and expressive conduct, whether verbal or nonverbal, printed or digital, and will extend to other forms of protected expressive activity such as shirts, signs and banners, flyers, and music.

B. Types of Speech.

1. Images. Images on clothing, and other displayed images, usually will be considered expressive conduct, a form of protected speech, if:

   a. The actor dresses with the intent to convey a particularized message; and

   b. There is a strong likelihood that the message would be understood by its viewers.

   See Spence v. Washington, 418 U.S. 405, 410-11 (1974); *see also Baribeau v. City of Minneapolis*, 596 F.3d 465, 475 (8th Cir. 2010).

2. Written Words. Articles of clothing containing written words are almost always considered "speech" within the meaning of the First Amendment. *See, e.g.*, *Chambers v. Babbitt & Indep. Sch. Dist. No. 833*, 145 F.Supp.2d 1068 (D. Minn. 2001) (student's "straight pride" shirt was "speech").

3. Colors. Colored clothing may constitute protected speech if its purpose is to convey a particularized message pursuant to the test set forth above. *Bear v. Fleming*, 714 F.Supp.2d 972, 983 (D.S.D. 2010) ("Just as the students in *Tinker* chose to wear black armbands in protest of the Vietnam War, students may wear color patterns … with the intent to express a particular message."); *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F.Supp.2d 1359 (N.D. Fla. 2008) (student's rainbow colored belt was speech in support of gay students).

C. Government Restriction of Speech Generally.

The government may regulate speech to a certain extent despite First Amendment protections.

Some categories of speech have been deemed unworthy of the First Amendment's protection including: **fighting words, incitements to**

violence, true threats, and obscenity. The government can ban speech that falls into these categories in various situations.

Speech may also be subject to reasonable regulations, generally called time, place, and manner regulations, if these restrictions do not touch upon the content of the speech. The government can further restrict speech on public property if that property has not been designated as a forum for communication.

Key for Schools during Election Time: The government is prohibited in all instances, however, from excluding speech simply because it does not like the speech itself. It cannot engage in what is called "**viewpoint discrimination**" when regulating private speech.

II. STUDENT SPEECH

A. Student Speech Generally (the *Tinker* standard).

While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," their rights must be "applied in light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The school district has the authority to limit student speech—or discipline students for their speech—in four situations:

1. The school district may prohibit speech that is reasonably likely to lead to a **substantial disruption** or material interference with school activities or an invasion of the rights of others. *Tinker*, 393 U.S. 503.

2. The school district may prohibit speech that is **lewd, vulgar, or plainly offensive**. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

3. The school district may prohibit student speech that endorses or **promotes illegal drug use**. *Morse v. Frederick*, 551 U.S. 393 (2007).

4. The School District may exercise considerable control over "**school-sponsored speech,**" such as a school newspaper, yearbook, or other school publication. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

   But see Minn. Stat. § 121A.80, which provides significant free speech protections for student journalists preparing information for dissemination in school-sponsored media (which excludes "material

prepared solely for distribution or transmission in the classroom" and yearbooks).

B. Lessons Learned from *Tinker* and Subsequent Cases.

1. Mere fear of disruption is not enough. A public school must have specific facts from which it can reasonably forecast a substantial and material disruption.

2. The fact that speech might cause discomfort and unpleasantness is an insufficient ground for regulating the speech.

C. Common Student Speech Issues.

Student Attire with Political Messages. Schools may implement dress codes as long as they serve a proper purpose and are viewpoint neutral.

***N.J. by Jacob v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022).** A public high school student's First Amendment challenge to a dress code prohibiting inappropriate attire is governed by *Tinker*, not by the deferential standard for student speech in a nonpublic forum. The challenge arose after an associate principal told the student he could not wear a T-shirt depicting a handgun and expressing support for the right to bear arms. Nothing about the shirt suggested that the school had approved or sponsored it, and no reasonable observer would have viewed its message as school-sponsored or school-endorsed. On remand, the district court therefore had to consider whether the speech would materially and substantially disrupt the work and discipline of the school or invade the rights of others.

***Griggs ex rel. Griggs v. Fort Wayne Sch. Bd.*, 359 F.Supp.2d 731 (N.D. Ind. 2005).** A school dress code provision prohibiting "apparel depicting . . . symbols of violence" was facially constitutional. It was reasonably related to the school's legitimate pedagogical interest in preventing school violence and was not substantially overbroad. The provision was unconstitutional, however, as applied to a student's T-shirt expressing support for the United States Marine Corps, which reprinted part of the Marine Corps Rifleman's Creed and depicted an M16 rifle. Read in its military context, the shirt conveyed a patriotic message rather than a threat or endorsement of violence. Banning it therefore bore no reasonable relationship to the school's interest in preventing violence.

Pride/Rainbow Flags

We are not aware of any decisions directly addressing restrictions on student speech involving the Pride flag itself; however, such speech would most likely still be subject to *Tinker* framework.

A school district's ban of rainbows, pink triangles, and other speech supporting gay rights violated students' First Amendment rights. The court found that there was no evidence a student's rainbow belt and gay pride t-shirt caused substantial disruption in the school nor was there any evidence that disruption could occur. The court noted the "vast majority of episodes involving the speech at issue were indistinguishable from the typical background noise of high school." *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F.Supp.2d 1359, 1373 (N.D. Fla. 2008).

Politics/Social Justice

***Defending Education v. Olentangy Local Sch. Dist. Bd. of Educ.*, 158 F.4th 732 (6th Cir. 2025) (en banc).** A school district's anti-harassment policies prohibited students from intentionally referring to transgender and nonbinary classmates by pronouns matching their biological sex. Sitting en banc, the Sixth Circuit reversed the denial of a preliminary injunction by a 10–7 vote. Under *Tinker*, the court held, a school may not restrict students' personal speech on matters of public concern unless the speech would "materially and substantially disrupt" school activities or infringe the "rights of others." The district offered no evidence that using biological pronouns would disrupt school functions or amount to harassment under Ohio law. The court also held that the policy discriminated based on viewpoint, because it barred the pronoun usage reflecting one side of the debate while allowing the other.

***B.A. v. Tri Cnty. Area Sch.*, 156 F.4th 782 (6th Cir. 2025).** A school barred students from wearing apparel bearing the phrase "Let's Go Brandon," which is widely understood as a substitute for a profane insult directed at President Biden. The students argued that the phrase was protected political speech. The district court ruled for the school, finding that the school had shown it was reasonable to interpret the phrase as conveying a profane and vulgar message. The Sixth Circuit affirmed. Under *Fraser*, a school may prohibit vulgar or profane student speech, including coded or euphemistic stand-ins for profanity, as long as the school's interpretation of the message is reasonable. The speech's political character did not change that result.

***L.M. v. Town of Middleborough*, 103 F.4th 854 (1st Cir. 2024), *cert. denied*, 145 S.Ct. 1489 (2025).** A seventh grader wore a shirt reading "There Are Only Two Genders." He later wore the same shirt with "Only Two" covered by tape reading "CENSORED." The school barred both versions under its dress code's prohibition on hate speech, including speech targeting gender identity. The First Circuit affirmed the denial of a preliminary injunction, upholding the school's actions under *Tinker*'s substantial-disruption standard. The court reasoned that school officials could reasonably forecast that the message, by demeaning the gender identity of transgender and gender-nonconforming students, would disrupt the learning environment for those students. Because the taped version still plainly conveyed the same message, the school could bar it as well.

Off-Campus Speech

***Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021).** A high school student who failed to make the varsity cheerleading team posted a Snapchat image on a Saturday, away from school, criticizing the school and the cheer team in vulgar terms. The school suspended her from junior varsity cheerleading for a year. The Supreme Court held that the suspension violated the First Amendment.

While the Court recognized that schools may still have significant interests in some off-campus expression, such as serious bullying or harassment targeting particular individuals, threats against teachers or students, and breaches of school security, the Court identified three features that diminish a school's authority over off-campus speech:

1. Schools rarely stand in loco parentis when students speak off campus;

2. Regulating both on- and off-campus speech would reach everything a student says at all hours, so courts must be especially skeptical, particularly of political or religious speech; and

3. Schools themselves have an interest in protecting unpopular student expression.

Applying these principles, the Court found that the student's post was made outside school hours, from an off-campus location, to a private circle of friends, did not identify the school or target any member of the school community, and caused no substantial disruption. The Court declined to adopt a broad rule defining when schools may regulate off-campus speech, leaving that line to future cases.

D. Takeaways for Student Speech During Elections.

Political speech lies at the core of the First Amendment, and students do not lose that protection at school. A school may restrict student speech on political or social issues if:

1. School officials can point to specific facts that would reasonably lead them to forecast a material and substantial disruption of school operations; **or**

2. The speech would invade the rights of others; **or**

   NOTE: Courts disagree about the scope of this prong, and the Eighth Circuit has not resolved it, so districts should not rely on it without legal counsel.

3. The speech is vulgar, lewd, or profane, including coded stand-ins for profanity, even if it carries a political message. Speech that is merely offensive or "inappropriate" does not qualify.

Schools have broader authority over classroom discussions and school-sponsored activities, such as assemblies, and may limit political discussion in those settings for legitimate educational reasons. Schools have much less authority over speech students make off campus and outside school hours, except for threats, targeted harassment, and similar conduct.

NOTE: Rules must be enforced evenhandedly. A school may not treat speech differently depending on which candidate, party, or side of an issue it supports. Administrators should document the specific reasons for any restriction at the time it is imposed.

III. STAFF SPEECH.

A. Staff Speech Generally.

As an employer, the State "has interests . . . in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). A public employer may not discipline an employee for engaging in constitutionally protected speech. *See Connick v. Myers*, 461 U.S. 138 (1983).

Not all public employee speech, however, is constitutionally protected. In the Eighth Circuit, a public employee claiming First Amendment retaliation must show that her speech (1) was made as a citizen, rather than pursuant to official duties; (2) addressed a matter of public concern; and (3) was a substantial or motivating factor in an adverse employment action. *Thomas v. Marshall Pub. Schs.*, 152 F.4th 884, 889 (8th Cir. 2025) (citing *Davison v. City of Minneapolis*, 490 F.3d 648, 654–55 (8th Cir. 2007)). If the employee makes that showing, the employer may avoid liability by demonstrating that its interest in workplace efficiency outweighed the employee's speech rights, or that it would have taken the same action regardless of the speech. *Id.* (*citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284, 287 (1977)). Whether an employee spoke as a citizen on a matter of public concern is a question of law for the court. *McGee v. Pub. Water Supply, Dist. No. 2*, 471 F.3d 918, 920 (8th Cir. 2006).

1. Is the Speech Related to the Employee's Official Duties?

The U.S. Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Thus, speech made pursuant to an employee's official duties is not constitutionally protected and may be restricted.

The inquiry is a practical one. Speech is made pursuant to official duties if it "owes its existence" to the employee's professional responsibilities, and it may qualify even if it was neither required by the employee's job description nor requested by the employer. *Lyons v. Vaught*, 875 F.3d 1168, 1173–74 (8th Cir. 2017). The critical question is whether the speech is "ordinarily within the scope" of the employee's duties. *Lane v. Franks*, 573 U.S. 228, 240 (2014).

2. Does the Speech Touch on a Matter of Public or Private Concern?

If the speech does not address a matter of public concern, the inquiry ends, and courts will not review the reasons for the employer's action. *See Connick*, 461 U.S. at 146–47. In determining whether speech touches on a matter of public concern, courts consider the following:

a. Whether an employee's expressions relate to a matter of public concern must be considered in light of the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. The question is whether the employee's expressions can be "fairly characterized as relating to any matter of political, social, or other concern to the community . . ." *Id.* at 146. Where an employee speaks out in public or in private on matters that relate solely to the employee's parochial concerns as an employee, no First Amendment interests are at stake. *Id.*

b. The focus is on the role the employee has assumed in advancing the particular expression: that of a concerned public citizen, informing the public the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are relevant only to the employees of that institution. *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986).

c. When the speech addresses only internal practices that are relevant only to the employee, the speech does not touch on a matter of public concern and such speech is not protected. *Id.* Accordingly, the airing of personal grievances by an upset employee does not raise a free speech issue. *See Connick*, 461 U.S. at 147–48.

d. Off-duty speech on political and social issues, including on personal social media, will often address matters of public concern. *See Gustilo v. Hennepin Healthcare System, Inc.*, 122 F.4th 1012 (8th Cir. 2024).

3. Does the Employee's Right to Speak Outweigh the Interests of the Public School?

If the employee spoke as a private citizen on a matter of public concern, the school district must first make a threshold showing of disruption before any balancing occurs. "Defendants bear the burden of putting the *Pickering* balancing test into play by submitting evidence of disruption." *Mayfield v. Mo. House of Representatives*, 122 F.4th 1046, 1055 (8th Cir. 2024).

The district may rely on actual disruption or a reasonable prediction of disruption. *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 833–34 (8th Cir. 2015). Mere allegations of disruption, however, are insufficient. *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 2000). When there is no evidence of actual or reasonably predicted disruption, there are "no government interests in efficiency to weigh," and balancing is unnecessary. *Henry v. Johnson*, 950 F.3d 1005, 1011 (8th Cir. 2020).

If the district makes that showing, courts balance the employee's interest in commenting on matters of public concern against the district's interest in the efficient operation of its schools. Courts consider several factors drawn from *Pickering*, including:

a. The need for harmony in the office or workplace;

b. Whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate;

c. The time, manner, and place of the speech;

d. The context in which the dispute arose;

e. The degree of public interest in the speech; and

f. Whether the speech impeded the employee's ability to perform his or her duties.

Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310, 315 (8th Cir. 1986).

B. Staff Speech on School Property.

1. In the Classroom. Courts have generally held that teachers do not have a free speech right in the content of their classes because teaching is speech made on behalf of the school. *See, e.g., Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007). Because the role of the teacher is to conduct education to captive audiences based on the curriculum adopted by the school system, they are not entitled to express their own viewpoints. *Id.*

***Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007).** Mayer taught a current-events lesson during the duty day as part of her official job duties. During the lesson, she answered a student's question about whether she participated in political demonstrations by saying, when she passed a demonstration against this nation's military operations in Iraq and saw a placard reading "Honk for Peace", she honked her car's horn to show support for the demonstrators. Some parents complained, and the school's principal directed all teachers not to take sides in any political controversy. Mayer believed this incident led to her dismissal and challenged the nonrenewal alleging the school violated her free speech rights. The court held that, under *Garcetti*, Mayer did not have a First Amendment right to cover topics or introduce viewpoints that departed from the curriculum adopted by the school when conducting the education of a captive audience of students. The court further held that teachers do not have a constitutional right to introduce their own view on a subject; they must stick to the prescribed curriculum, which means not only the prescribed subject matter, but also the prescribed perspective on that subject matter.

2. Beyond the Classroom, but in the School. Courts have held that a school's authority to restrict staff speech does not end when staff are acting as teachers between classes, or when a conversation moves to non-curricular topics, so long as the speech occurs within the employee's ordinary job duties.

***Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).** A public high school assistant football coach was placed on leave, and his contract was not renewed, after he continued offering a brief, quiet personal prayer at the 50-yard line after games, despite the district's directive to stop. The Supreme Court held that the district violated the coach's rights under the Free Exercise and Free Speech Clauses. On the speech question, the Court held that the prayers were private speech, not government speech made pursuant to his official duties under *Garcetti*. When he prayed, the coach was not instructing players, discussing strategy, or engaging in any other speech the district paid him to produce. The prayers also took place during the postgame period, when coaches were free to attend briefly to personal matters such as checking messages or greeting friends. The Court rejected the district's argument that because coaches serve as role models and remain "on duty" at all times, everything they say or do at school belongs to the government, warning that such a broad reading of job duties would let schools treat all of an employee's

expression on school grounds as unprotected. The case establishes that staff speech on school property, even during school-sponsored events, is not automatically government speech. The question is whether the speech falls within the employee's ordinary job duties.

3. Outside School but Pursuant to Official Duties. When a staff member is speaking pursuant to his or her official duties, the staff member's speech is not constitutionally protected, and a public school may limit that speech. Even in those instances when the speech is not pursuant to the staff member's official duties, if the speech does not address a matter of public concern, it is not protected, and the district may generally act on it. If it does address a matter of public concern, the district must show disruption under *Pickering*.

C. Common Staff Speech Issues.

1. Political Clothing. Whether a district may restrict political clothing or accessories by staff depends on whether the restriction is a broad, prospective policy or discipline of an individual employee, and on whether courts view the attire as the employee's personal expression.

***Weingarten v. Bd. of Educ. of City Sch. Dist. of City of New York,* 680 F.Supp.2d 595 (S.D.N.Y. 2010).** A school district's ban on teachers wearing political buttons in schools was reasonably related to legitimate pedagogical concerns, including preventing political paraphernalia from improperly influencing students and maintaining the district's neutrality on controversial issues.

NOTE: *Weingarten* relied on a *Hazelwood*-style analysis that more recent decisions have rejected for teachers' personal expression. *See Dolce v. Connetquot Cent. Sch. Dist.*, --- F.4th ---, 2026 WL 2560338 (2d Cir. Aug. 31, 2026).

***Scott v. Meyers*, 191 F.3d 82 (2d Cir. 1999).** During a union contract ratification campaign, transit authority supervisors ordered employees to remove "Vote No" buttons from their uniforms under a longstanding rule prohibiting uniformed employees from wearing any buttons, badges, or insignia without the authority's permission. The Second Circuit affirmed an injunction against enforcement of the rule, holding it unconstitutionally overbroad. The court did not need to decide whether the "Vote No" buttons addressed a matter of public

concern, because the rule barred buttons on every subject, including plainly public issues.

***Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018).** Minnesota's statutory ban on wearing "political" badges, buttons, or insignia at polling places violated the First Amendment because the undefined term "political" was not capable of reasoned application.

NOTE: While *Mansky* is not a school case, and it involves neither students nor public employees, it remains relevant to schools because it addresses a problem that appears in many school dress codes and staff policies: restrictions on "political" expression that do not define what "political" means.

2. Political Bumper Stickers.

***Goodman v. City of Kansas City*, 906 F. Supp. 537 (W.D. Mo. 1995).** A federal district court struck down city regulations barring employees from displaying political buttons, bumper stickers, and signs supporting candidates in city elections, prohibiting vehicles with partisan bumper stickers from parking in city lots, and forbidding employees from attending political fundraisers and rallies, even off duty. Because the regulations were broad, prospective restrictions on many employees rather than discipline of an individual, the court applied the heightened *NTEU* standard, requiring the city to show that the harms it feared were real and that the restrictions would directly alleviate them. The city's asserted interests in appearing apolitical, preventing coercion of employees, and avoiding past political corruption were legitimate, but the city offered no evidence connecting employees' political expression to any actual harm. The case illustrates that blanket restrictions on public employees' political expression, including on personal vehicles, must be supported by evidence, not speculation.

***Williams v. McKee*, 655 F. App'x 677 (10th Cir. 2016) (unpublished).** A county detention officer parked his personal truck, which bore a bumper sticker reading "Still Voting Democrat? You're Stuck on Stupid," on the street in front of the jail's work release facility, in an area residents associated with sheriff's department employees. After a resident repeatedly complained to the sheriff and asked whether he shared the sticker's views, the sheriff directed the officer to park behind or beside the building, or to cover the sticker, while on duty. The officer refused and was fired for insubordination.

The Tenth Circuit affirmed dismissal of his First Amendment claim. For purposes of the motion, the defendants conceded the officer spoke as a citizen on a matter of public concern, so the case turned on *Pickering* balancing. The court acknowledged the officer's strong interest in political speech but concluded that the sheriff's interests in maintaining the appearance of impartiality and workplace efficiency outweighed it. Two factors drove the result. First, the sticker went beyond simply supporting or opposing a candidate. The insulting tone could easily spark conflict with coworkers and the public, and it had in fact led to citizen complaints and internal confrontation. Second, the restriction was narrow: the officer was not required to remove the sticker, only to avoid displaying it in front of the facility while on duty, and he remained free to display it anywhere else.

3. Political Flags/Posters.

***Cajune v. Independent School District 194*, 105 F.4th 1070 (8th Cir. 2024).** After George Floyd's death, teachers asked to display "Black Lives Matter" posters in their classrooms. The district initially took the position that the posters would violate its policy against conduct that could reasonably be perceived as political, but it later approved an "Inclusive Poster Series" that teachers could display at their discretion. A district resident then asked the district to allow "All Lives Matter" and "Blue Lives Matter" posters and shirts, and the district refused on the ground that those phrases were created specifically in opposition to "Black Lives Matter." The district court dismissed the resulting free speech claims, holding that the posters were government speech not subject to First Amendment scrutiny. The Eighth Circuit reversed and remanded. Taking the complaint's allegations as true, the court concluded that the posters could plausibly be private rather than government speech, because the district approved messages largely originating with teachers and community members and left their display to teachers' discretion, departing from its prior practice of barring political speech. By doing so, the district plausibly created a limited public forum, in which it could not discriminate based on viewpoint. Rejecting the opposing posters because they disagreed with "Black Lives Matter" was viewpoint discrimination. Because the case arose on a motion to dismiss, the court did not finally decide whether the posters were government or private speech; that question was left for remand.

NOTE: *Cajune* shows that a district's claim that classroom displays are government speech is weakened when it approves messages

originating with private parties and lets individual teachers decide whether to display them. Districts that want classroom displays treated as government speech should exercise clear, consistent control over what is displayed.

***Dolce v. Connetquot Cent. Sch. Dist.*, --- F.4th ---, 2026 WL 2560338 (2d Cir. Aug. 31, 2026).** A New York district ordered high school teachers to remove Pride flags from their classroom walls and Pride stickers from their doors under a "political activities" policy that permitted only the U.S. and New York flags. The Second Circuit affirmed dismissal of the teachers' First Amendment, equal protection, and Title VII claims. Deciding a question of first impression in that circuit, the court held that *Garcetti* applies to a K–12 teacher's curricular speech. Because teachers decorate their classrooms as part of their duty to create learning environments supporting the curriculum they are assigned to teach, the decorations are government speech, and the district may restrict them, even based on viewpoint, without implicating the First Amendment.

***Fraternal Ord. of Police Penn. Lodge v. Twp. of Springfield*, 2025 WL 314108 (3d Cir. Jan. 28, 2025) (unpublished).** Police officers challenged a township resolution specifically banning the display of the "Thin Blue Line" American flag by township employees on all township property as unconstitutional. The township conceded that the officers were speaking as private citizens, and the court held that the flag at issue touched on a matter of public concern. Because the resolution was a prior restraint on future speech rather than after-the-fact discipline, the township bore a heavier burden under *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995): it had to show real, not conjectural, harms and that the ban addressed them in a direct and material way. The court held the township could do neither.

Case to watch: *McIntyre v. Little Miami Sch. Dist.*, Case No. 26-cv-351 (S.D. Ohio). An Ohio high school social studies teacher has sued his district and its board president after the board ordered him to remove a classroom poster, which had hung in his classroom since August 2022, that read "Hate Has No Home Here" in rainbow letters with heart-shaped icons representing, among other things, the American flag, a peace sign, a rainbow Pride flag, and a transgender Pride flag.

D. Staff Speech and Conduct Away from Work.

Off-duty expression, including social media posts, letters to the editor, and participation in rallies or political events, is the area where staff have the strongest First Amendment protection. It is also where districts most often face pressure from parents and the community to take action. The analysis uses the same *Garcetti*/*Pickering* framework discussed above, but several features of off-duty speech change how that framework typically plays out.

1. Off-duty speech is usually private speech. Speech made outside work, on personal accounts, and not as part of an employee's job will rarely be considered speech made pursuant to official duties under *Garcetti*. *Pickering* itself involved a teacher's letter to a local newspaper criticizing the school board. As a result, the threshold question in most off-duty cases is not whether the employee spoke as a citizen, but whether the speech addressed a matter of public concern and, if so, how the *Pickering* balance comes out.

2. Political and social commentary is a matter of public concern; purely personal conduct may not be. Posts and comments on political or social issues will almost always involve matters of public concern.

   ***Gustilo v. Hennepin Healthcare System, Inc.*, 122 F.4th 1012 (8th Cir. 2024).** A Minnesota department chair's personal Facebook posts on presidential candidates, racism, police killings, COVID, and similar topics plainly addressed matters of public concern, and the Eighth Circuit remanded for the district court to apply *Pickering* balancing.

   By contrast, off-duty expression that does not inform the public about any matter of public concern, particularly where it trades on the employee's public position, may receive little or no protection. *See City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam) (police officer's sale of sexually explicit videos depicting himself in a police uniform was not speech on a matter of public concern).

3. The district must show actual or reasonably predicted disruption to its operations. In the Eighth Circuit, the employer must put the *Pickering* balance at issue by producing evidence of disruption, either actual disruption or a reasonable prediction of it. When there is no such evidence, there is no government interest to weigh and balancing is unnecessary.

***Melton v. City of Forrest City*, 147 F.4th 896 (8th Cir. 2025).** A firefighter was fired after posting a provocative image on his personal Facebook account, prompting complaints from residents who did not want him responding to their homes. The Eighth Circuit found the evidence of disruption thin, because there was no showing that the post had an impact on the fire department itself, and allowed his claim to proceed. This case illustrates the limits of community reaction as evidence.

***Crook v. Creston Cmty. Sch. Dist.*, 837 F.Supp.3d 958 (S.D. Iowa 2026).** On the evening of Charlie Kirk's assassination, a high school English teacher commented on a family member's Facebook post that Kirk was a terrible human being and that, while she did not wish death on anyone, his absence was a blessing. A local outlet reported the comment that night, and the superintendent placed her on administrative leave within hours. After a brief investigation focused exclusively on the post, the superintendent recommended terminating her continuing contract.

The court granted a preliminary injunction barring the district from taking adverse action against her based on the post. The district conceded the teacher spoke as a citizen on a matter of public concern, so the case turned on whether the district had produced enough evidence of disruption to trigger *Pickering* balancing. The court held the district did not meet its burden. The court counted only reactions from within the district and community, not from outsiders responding to a national news story. The district could not lay a foundation for its log of 111 emails, and only one of 104 voicemails appeared to come from a parent or student. Four to six parents threatening to move their children out of her class or the district, in a district of 1,300 students, was insufficient. Increased law enforcement presence did not count, because the superintendent requested it after the district had already determined that a rumored threat of violence was not credible.

NOTE: This decision involved a preliminary injunction and ultimately settled without a final decision on the merits.

4. Teachers' role may give districts greater weight in the balance, particularly where there is a documented disciplinary history. Courts recognize that teachers occupy positions of trust with students and families, and off-duty speech that undermines a teacher's ability to

work effectively with students or colleagues can tip the balance toward the district.

***Hedgepeth v. Britton*, 152 F.4th 789 (7th Cir. 2025), *cert. denied*, 146 S.Ct. 2641 (2026).** A high school teacher with two prior suspensions for profane classroom outbursts was fired after posting inflammatory comments about the George Floyd protests on her private Facebook account while on summer vacation. Most of her Facebook friends were former students. The posts drew complaints from current students, teachers, and parents, along with media coverage and contentious school board meetings. The Seventh Circuit affirmed summary judgment for the district, holding under *Pickering* that the district's interest in addressing actual and anticipated disruption outweighed the teacher's speech interests. The court relied on evidence of disruption within the school community, as well as the teacher's disciplinary history. It rejected her argument that the posts were private, since she had chosen an audience drawn largely from the school community, and her heckler's veto argument, reasoning that students and parents are participants in public education rather than outsiders. The court noted that teachers "occupy roles that entail an inordinate amount of trust and authority," which makes the government's interest "particularly compelling."

5. The district must be able to show the speech actually caused the adverse action. Even protected off-duty speech will not support a claim unless it motivated the district's decision. *See Thomas*, 152 F.4th at 889.

6. Non-expressive off-duty conduct is generally governed by other law. The First Amendment protects expression, not all off-duty conduct. Discipline for off-duty conduct that is not expressive, such as criminal conduct, is governed primarily by the teacher tenure statutes, collective bargaining agreements, licensure standards administered by the Professional Educator Licensing and Standards Board, antidiscrimination statutes, etc.

IV. FIRST AMENDMENT RETALIATION.

A. First Amendment Retaliation. "'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019).

B. *Thomas v. Marshall Pub. Sch.*, 152 F.4th 884 (8th Cir. 2025).

Facts. A middle school principal used district funds to create a flag display that included a Pride flag, directed custodial staff to hang the flags, confiscated a student petition seeking the flag's removal, distributed Pride stickers, and refused requests to display flags expressing other viewpoints. The principal also used district resources and official channels to help form a Gay-Straight Alliance and directed staff to promote it to students. After months of staff complaints about her leadership, an outside investigation found she had "created a negative, divided, and uncomfortable work environment." The district suspended her for a week, removed her as principal, and reassigned her to an administrative position.

Issue. Whether the district retaliated against the principal for her pro-LGBTQ+ speech in violation of the First Amendment.

Law. An employee must show that her speech (1) was made as a citizen rather than pursuant to official duties, (2) addressed a matter of public concern, and (3) was a substantial or motivating factor in an adverse employment action. The employer may still avoid liability by showing that its interest in workplace efficiency outweighed the employee's speech rights, or that it would have taken the same action regardless of the speech.

Holding. The Eighth Circuit affirmed summary judgment for the district on two grounds:

a. **Official duties.** The principal's speech was made pursuant to her official duties, not as a private citizen. Applying a "practical inquiry," the court concluded that she created the flag display, distributed stickers, and helped form the GSA "in her capacity as school principal," using district funds and authority. She also acknowledged that curating displays and facilitating student groups were part of her job.

b. **Causation.** To the extent any of her outside advocacy was private speech, she produced no evidence that it motivated the district's actions. The record showed that the district acted to address staff complaints and leadership concerns substantiated by an independent investigation.

V. SCHOOLS AS POLLING PLACES.

A. Generally.

1. Minnesota public school districts have no discretion to refuse use of their facilities for elections. Under Minn. Stat. § 204B.16, subd. 6, every school district shall make its facilities, including parking, available for the holding of city, county, school district, state, and federal elections, subject to the approval of the local election official.

2. A school district may charge a fee for use of the facility, but only in an amount that does not exceed the lowest amount charged to any public or private group. Minn. Stat. § 204B.16, subd. 6.

3. Polls are run and controlled by election judges, not school staff. Minn. Stat. § 204B.20.

4. The facilities provided shall be sufficient size to accommodate all election activities, and the space must be separated from other activities within the building.

B. People Allowed in and Around Polling Places.

Minn. Stat. § 204C.06 establishes rules for who may be present at and near polling places, which apply equally when the polling place is located inside a school.

1. 100-Foot Buffer Zone: Except for an election official, individuals waiting to register, to update their voter registration, or to vote, and individuals conducting exit polling, no person may stand within 100 feet of the building in which a polling place is located.

2. Inside the Polling Place: Only election judges, sergeants-at-arms, challengers, representatives of the Secretary of State's office, the county auditor's office, **and the municipal or school district clerk's office** may remain inside the polling place during voting hours, along with individuals who are voting, updating their voter registration, registering to vote, providing proof of residence for someone registering or updating registration, or assisting a voter.

3. Exception for Educational Activities: Minnesota law creates a specific accommodation for schools that serve as polling places.

Under Minn. Stat. § 204B.27, subd. 7, the Secretary of State may authorize educational activities related to voting and elections in the polling place on the day of a state, county, municipal, or school district election. Ballots used for such educational activities must be a different color than any ballot used at the election, and such educational activities must not interfere with the conduct of the election. Under Minn. Stat. § 204C.06, subd. 2(b), teachers and students participating in an educational activity authorized by the Secretary of State may be present at the polling place during voting hours.

C. Restrictions on Speech Near Polling Places.

Minnesota law places restrictions on political speech and campaign-related materials near polling places during voting hours. Minn. Stat. § 211B.11. During voting hours on the day of a primary or general election, a person may not:

1. Ask, solicit, or in any manner try to induce or persuade a voter to vote for or refrain from voting for a candidate or ballot question; or

2. Wear, display, or distribute any item that exhibits:

    - The name, likeness, logo, or slogan of a candidate who appears on the ballot;

    - The number, title, subject, slogan, or logo of a ballot question that appears on the ballot; or

    - The name, logo, or slogan of a political party represented by a candidate on the ballot.

On the day of a primary or general election, these restrictions apply during voting hours:

- Within a polling place;

- Within 100 feet of the building in which a polling place is situated and; and

- Anywhere on the public property on which a polling place is situated.