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Take One Step Forward: Federal Courts Continue To Find That Volunteers Are Shielded From Retaliation Based On Protected Speech Under The First Amendment

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TAKE ONE STEP FORWARD: FEDERAL COURTS CONTINUE TO FIND THAT VOLUNTEERS ARE SHIELDED FROM RETALIATION BASED ON PROTECTED SPEECH UNDER THE FIRST AMENDMENT

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ABSTRACT

As an issue of first impression in the Fifth Circuit's jurisdiction, a United States district court in Texas considered whether it is impossible to state a claim for speech retaliation which involves the loss of a plaintiff's volunteer ministry rights and credentials. The court, in line with decisions from other federal courts and analogous Supreme Court cases, determined that being a volunteer is the type of governmental benefit or privilege the deprivation of which triggers First Amendment scrutiny, and it held that the volunteer chaplain stated a valid claim for retaliation. This article summarizes the law concerning retaliation against volunteers based on the exercise of their First Amendment rights, as well as analogous Supreme Court law. The article concludes that other federal courts that decide the issue, including the United States Supreme Court, will likely, and should, continue the pattern and decide that volunteers are protected from retaliation based on their exercise of First Amendment rights.

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INTRODUCTION

Brownsville, Texas, does not conjure up the image of a First Amendment bastion, but a recent decision in the United States District Court for the Southern District of Texas might change some people's

minds. On January 14, 2010, Judge Hilda G. Tagle ruled that the First Amendment prohibits government actors from retaliating against volunteers on the basis of protected free speech.[1] The decision came in a motion to dismiss filed by the defendants in *Hanson v. Cameron County*,[2] which involved a lawsuit brought by a former chaplain at the Cameron County Jail who alleged she was wrongfully discharged from her volunteer position in retaliation for exercising her right to free speech.[3]

The decision in Brownsville is the latest marker in a continuing pattern of federal courts holding that a volunteer is shielded from retaliation based on protected speech under the First Amendment.[4]

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1. *See* Hanson v. Cameron Cnty., No. B-09-202, 2010 WL 148723, at *6 (S.D. Tex. Jan. 14, 2010).

2. *Id.* at *1, *6.

3. The parties settled the case before trial. Compromise Settlement Agreement & General Release, *Hanson*, 2010 WL 148723 (No. B-09-202). Under the settlement agreement, Ms. Hanson, the volunteer chaplain, must give notice to the County and give it a reasonable time to correct the situation before she speaks out in a public forum or to the media about any jail conditions of concern to her. *Id.* at 3–4. The chaplain acknowledged in the agreement that this temporarily limits her state and federal free speech rights only during the reasonable time period provided by the County and Sheriff's Department. *Id.* at 4. Ms. Hanson also agreed to immediately report to a law enforcement agency any conduct—regardless of its source—that she believes is a criminal offense. *Id.* at 3. The settlement agreement also stipulates that entry into the jails is a revocable privilege. *Id.* at 2. In exchange, the Defendants agreed not to revoke or restrict the privilege if Ms. Hanson makes her concerns public—so long as she complies with the stipulation that she notify the Defendants first and gives them time to resolve the complaints. *Id.* at 4–5.

The settlement agreement also allows Ms. Hanson to resume her ministry at the jail, creates a policy for the jail to follow to deal fairly with chaplains, and requires a payment of $25,000 by the County to the attorneys working for Ms. Hanson. *Id.* at 2–5. Additionally, the agreement provides that the Defendants will instruct detention officers and jail administrative staff that Ms. Hanson is to be treated with the same courtesy and respect due all volunteer chaplains. *Id.* at 5.

4. *See, e.g.*, Mosely v. Bd. of Educ. of Chi., 434 F.3d 527, 534–35 (7th Cir. 2006) (holding that a volunteer stated a claim for retaliation based on protected speech); Cuffley v. Mickes, 208 F.3d 702, 709 (8th Cir. 2000) (reasoning that a person or organization's exercise of protected free speech rights cannot be the basis of preventing that person or organization from volunteering); Hyland v. Wonder, 972 F.2d 1129, 1136 (9th Cir. 1992) (holding that even though a volunteer had no right in the first instance to serve as a volunteer, and even though such a volunteer

Although this issue has not been decided by the Supreme Court, lower courts that have analyzed whether a volunteer is protected from retaliation based on First Amendment speech have unanimously held or indicated that the answer is "yes."[5]

The prior decisions relating to a volunteer's protection from retaliation based on protected speech under the First Amendment indicate the recent decision in the Southern District of Texas is not merely a trend, but is and will be, the rule in federal courts that address this issue.[6]

This article contains four parts. Part I examines the decision in *Hanson v. Cameron County*. Part II surveys federal authorities that have addressed the issue of whether a volunteer is protected from retaliation based on protected speech under the First Amendment. Part III compares those authorities to Supreme Court rulings in analogous cases. Part IV weighs the widely used arguments by both sides in these cases, and it includes discussion on the key issue of whether a volunteer position is a valuable government benefit.

I. *HANSON v. CAMERON COUNTY*

On September 1, 2009, Plaintiff Gail Hanson filed suit against Defendants Cameron County and Omar Lucio, who serves as Sheriff of Cameron County.[7] Ms. Hanson alleged that Defendants "retaliated against her after she publicly criticized Defendants' operation of the Cameron County Jail ("jail")."[8] Ms. Hanson alleged that, since 2000, she had "served as an official volunteer chaplain at the jail."[9]

As part of the application process for Ms. Hanson to become a volunteer chaplain, she submitted to a background check performed by Cameron County, completed an application, and submitted "a letter of

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could be terminated at will, the government could not terminate such a volunteer in retaliation for that volunteer's exercise of his First Amendment rights).

5. *See, e.g., Mosely*, 434 F.3d 527; *Cuffley*, 208 F.3d 702; *Hyland*, 972 F.2d 1129.

6. *See, Mosely*, 434 F.3d 527; *Cuffley*, 208 F.3d 702; *Hyland*, 972 F.2d 1129.

7. *Hanson*, 2010 WL 148723, at *1.

8. *Id.*

9. *Id.*

support from the pastor at her church."[10] After these tasks were completed, "Cameron County issued her an official volunteer chaplain's badge."[11] As a result, Ms. Hanson was allowed to "visit inmates without being placed on an individual prisoner's approved visitors list."[12] She was also allowed "contact" visits, while other visitors could only speak to inmates from behind a glass barrier.[13] Ms. Hanson was also "permitted to speak with several prisoners at a time and without the prior authorization of Defendants' staff."[14]

"In early 2009, [Ms.] Hanson spoke at a public political candidate forum regarding the conditions that she observed at the jail, which she alleged included women suffering miscarriages as the result of poor health services."[15] Ms. Hanson alleged that, shortly after the political forum, Defendant Lucio ordered that Ms. Hanson was banned from the jail.[16] Plaintiff sought injunctive relief to prevent "Defendants from banning her from the jail and declaratory relief allowing her to continue her volunteer ministry."[17]

Ms. Hanson's lawsuit centered on her claims that the Defendants stripped her of her position as a jail minister and banned her from the jail after she publically criticized Defendants' operation of the jail.[18] Defendants argued that, as a volunteer, Ms. Hanson had no right to be at the jail and no protectable interest in her service as a volunteer.[19]

Was the sheriff legally entitled to ban Ms. Hanson, a volunteer, for her speech at a political rally? The clear answer from Judge Tagle was "no."[20]

At the motion to dismiss stage, the court found that Ms. Hanson's service as a prison minister—even though it was done in a volunteer capacity—is the type of "governmental benefit or privilege the

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at *4.
19. *See id.* at *1, *4–5.
20. *Id.* at *6 (holding that the plaintiff had presented an actionable claim).

deprivation of which triggers First Amendment scrutiny."[21] Therefore, the court concluded that Ms. Hanson "stated an actionable claim for speech retaliation for revoking her volunteer minister credentials in retaliation for her public speech."[22]

Ms. Hanson prevailed at the motion to dismiss stage because her complaint was grounded in First Amendment jurisprudence that prohibits government actors from retaliating against volunteers on the basis of speech.[23] Indeed, Judge Tagle's decision helps solidify a pattern in the federal courts recognizing that volunteers are protected from retaliation based on First Amendment speech.[24]

In Ms. Hanson's case, Defendants attempted to characterize her complaint as claiming a "right to minister at the [Cameron County] jail."[25] But Ms. Hanson asserted no such "right," and her claims were not based on this purported "right."[26] Ms. Hanson's case was about the government's duty not to punish protected speech, not her "right" to a governmental benefit.[27] As one federal court maintained:

> For at least a quarter-century, th[e Supreme] Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

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21. *See id.* at *2.

22. *Id.* at *6.

23. *See generally id.* (citation omitted) ("[T]he Court's conclusion squares with the decisions of other courts who have considered speech retaliation issues in a volunteer and non-employment contexts.").

24. *Id.* at *2. *See* discussion *infra* Part II.

25. *Hanson*, 2010 WL 148723, at *1.

26. *See id.* at *2.

27. *See also* Kinney v. Weaver, 367 F.3d 337, 357 (5th Cir. 2004) (noting that the district court found sufficient evidence that the defendant police officials deprived the plaintiffs, instructors at a police academy, of the benefit of continued enrollment in their courses and at least some of the defendants sought to have the instructors removed from the academy altogether after the plaintiffs testified as experts against the police in an excessive force case). *See generally Hanson*, 2010 WL 148723 at *2 ("[Plaintiff] alleges a claim that Defendants retaliated against her by taking away her ability to be a volunteer at the jail, a governmental benefit or privilege the deprivation of which triggers First Amendment scrutiny.").

> It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.[28]

In *Perry v. Sindermann*,[29] for example, a non-tenured teacher alleged that the non-renewal of his one-year contract based on protected speech triggered First Amendment scrutiny.[30] The Supreme Court agreed.[31] The Court reasoned that, even though a plaintiff has no right to a valuable government benefit, that benefit cannot be taken away based on protected speech by the Plaintiff.[32] "Thus, the [non-tenured teacher's] lack of a contractual or tenure 'right' to re-employment" was "immaterial to his free speech claim."[33]

II. THE GREAT WEIGHT OF FEDERAL AUTHORITIES SUGGESTS THAT A VOLUNTEER IS PROTECTED FROM RETALIATION BASED ON PROTECTED SPEECH UNDER THE FIRST AMENDMENT

As an initial matter, the Supreme Court has not addressed the issue of whether a volunteer is protected from retaliation based on protected free speech under the First Amendment.[34] As discussed below, all federal appellate courts that have decided this issue, however, have held that a volunteer is afforded protection from retaliation under the First Amendment.[35]

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28. *See Kinney*, 367 F.3d at 357 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

29. 408 U.S. 593.

30. *Id.* at 595.

31. *See id.* at 597–98.

32. *Id.*

33. *Id.*

34. *See* Barton v. Clancy, 632 F.3d 9, 24, 26–27 (1st Cir. 2011) (holding that "as of April 2006, the law was not sufficiently clear to put . . . [the defendant] on notice that declining to reappoint . . . [the plaintiff] to the volunteer position of Parks Commissioner in retaliation for his First Amendment activities was unlawful" because the issue of "whether a volunteer position is a valuable government benefit the loss of which can form the basis of a First Amendment retaliation claim had not been decided").

35. *See infra* Part II.

Seventh Circuit

In *Mosely v. Board of Education of Chicago*,[36] a mother claimed the school board violated her First Amendment rights by retaliating against her for advocating in favor of her child's educational rights–the claim was rooted in the school board's dismissal of her as the chairperson of a school committee.[37] The district court dismissed Mosley's retaliation claim, brought under 42 U.S.C. § 1983, for failure to state a claim.[38] The Seventh Circuit reversed, stating that:

> [i]n the analogous context of public employees who allege that their employers retaliated against them based on assertions of First Amendment rights, we have observed that a "§ 1983 case does not require an adverse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964."[39]

The court found that Mosely effectively could not serve as chairperson of the school's Improving America's Schools Act ("IASA") committee due to retaliation.[40] In addition, the court cited a "direct allegation of action . . . designed to chill [Mosely's] free speech."[41]

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36. 434 F.3d 527 (7th Cir. 2006).

37. *See id.* at 529–30, 534.

38. *Id.* at 529. Section 1983 provides, in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the *Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2006) (emphasis added). Thus, First Amendment retaliation claims (i.e., Constitutional claims) can be brought under section 1983. *See* Hyland v. Wonder, 117 F.3d 405, 412 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998) (stating that the elements needed to be alleged for a First Amendment retaliation claim by volunteers, or individuals that are not technically employees, include the following: "(1) the loss of a valuable government benefit (2) in retaliation for their speech (3) on a matter of public concern").

39. *Id.* at 533 (quoting Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004)).

40. *Id.* at 534.

41. *Id.*

Namely, a teacher called the police to have Mosely removed from school while passing out flyers regarding an IASA meeting.[42]

The Seventh Circuit stated, "The fact that Mosely was a volunteer as opposed to a paid city employee is of little consequence to our analysis."[43] This position was based in the reality that Mosely did not bring a procedural due process claim, which would have required her to have a protected property interest in her position as IASA chairperson.[44] The First Amendment claim required only a determination that the school "unconstitutionally retaliated against" her for engaging in protected speech.[45] While Mosely did not have a "right" to the valuable government benefit of her volunteer position, her service as chairperson of the IASA committee precluded the government from denying that valuable benefit on a basis that violated constitutionally protected interests, especially freedom of speech.[46]

Eighth Circuit

In a case with facts very different from *Mosely*, the Eighth Circuit reaffirmed the right of volunteers not to be retaliated against for exercising their protected free speech rights.[47] In *Cuffley v. Mickes*,[48] the Missouri Highway and Transportation Commission denied the application of the Ku Klux Klan (KKK) to participate in the Adopt-A-Highway (AAH) program.[49] The state denied the KKK's application, in part, because Title VI of the Civil Rights Act of 1964 prevented the state from conferring a benefit on the KKK because of their discriminatory practices based on race, creed, color, and national origin.[50] The court held, "So long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI. The

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* (citing McGill v. Bd. of Educ. of Pekin Elementary Sch. Dist. No. 108, 602 F.2d 774, 780 (7th Cir. 1979)).
46. *Id.* at 534–35 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
47. Cuffley v. Mickes, 208 F.3d 702, 709 (8th Cir. 2000).
48. 208 F.3d 702 (8th Cir. 2000).
49. *Id.* at 704.
50. *Id.* at 705.

Klan, as one of many voluntary participants in the program, is free to determine its own membership."[51]

The Eighth Circuit concluded that the state denied the KKK's application based on the organization's beliefs and advocacy because it could provide no "convincing and constitutional reason for the denial."[52] As such, *Cuffley* provides two important insights in this line of cases. First, the Missouri Highway and Transportation Commission *assumed* that allowing volunteers to participate conferred a government benefit, and the court did not challenge that categorization.[53] Second, a person or organization's exercise of protected free speech rights cannot be the basis of preventing that person or organization from volunteering.[54] This is distinguishable from but analogous to *Mosely*, above, and *Hyland*, below, which prevent termination of someone in a volunteer position from exercising protected free speech rights.[55]

Ninth Circuit

Hyland v. Wonder[56] involved a volunteer with the San Francisco Juvenile Probation Department who wrote a memorandum to the judges supervising Juvenile Hall regarding problems there and failings of the Department's director.[57] His allegations against the director, Stephen La Plante, included a charge of incompetent administration, citing low staff morale, a decline in accountability, and lack of leadership in the department.[58] Immediately upon discovering that Hyland had written this memorandum, the chief probation officer of the Department told Hyland to leave and that he would never "be allowed into Juvenile Hall again."[59]

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51. *Id.* at 711.

52. *Id.* at 707.

53. *See id.* In fact, the Eighth Circuit noted that the Ninth and Tenth Circuits had already recognized that volunteer positions constituted a valuable government benefit. *Id.* at 707–08 n.5 (citing Andersen v. McCotter, 100 F.3d 723, 727 (10th Cir. 1996); Hyland v. Wonder, 972 F.2d 1129,1135 (9th Cir. 1992)).

54. *See Cuffley*, 208 F.3d at 709.

55. *See* Mosely v. Bd. of Educ. of Chi., 434 F.3d 527, 535 (7th Cir. 2006); *Hyland*, 972 F.2d at 1136.

56. 972 F.2d 1129.

57. *Id.* at 1133.

58. *Id.*

59. *Id.* (internal quotation marks omitted).

Hyland also alleged that other retaliatory incidents designed to prevent him from working in juvenile justice occurred or were threatened.[60]

Hyland filed suit, alleging that his termination came in violation of the First and Fourteenth Amendments because it was retaliation for his protected speech.[61] The district court dismissed Hyland's federal action for failure to state a claim.[62] The Ninth Circuit reversed and resoundingly affirmed that the opportunity to serve as a volunteer with the City Juvenile Probation Department was the type of governmental benefit or privilege that could not be denied on the basis of constitutionally protected speech.[63] The court held that even though a volunteer had no right in the first instance to serve as a volunteer, and even though such a volunteer could be terminated at will, the government could not terminate such a volunteer in retaliation for that volunteer's exercise of his First Amendment rights.[64] Even if the loss of a volunteer position perhaps is not as momentous as a salaried employee being terminated, the Ninth Circuit argued that "[r]etaliatory actions . . . are equally egregious in the eyes of the Constitution because a person is being punished for engaging in protected speech."[65]

The Ninth Circuit was detailed in its explication of why volunteering is a government benefit: "a person gains valuable experience and education in public administration and can make professional contacts . . . . The opportunity to serve as a volunteer is also important because it provides an individual the satisfaction of making a contribution, or giving something back, to society."[66] Furthermore, the Ninth Circuit supported the position that the Seventh Circuit would later assert—simply because Hyland had no right to be a volunteer and served in that position at-will does not diminish his First Amendment retaliation claim.[67]

60. *Id.*
61. *Id.*
62. *Id.* at 1133–34.
63. *Id.* at 1135, 1143.
64. *Id.* at 1136.
65. *Id.* at 1135.
66. *Id.* at 1135–36.
67. *Id.* at 1136.

Tenth Circuit

The Tenth Circuit, in *Andersen v. McCotter*,[68] reaffirmed the notion that just because an individual serves as a volunteer does not mean his or her rights to First Amendment protection are diminished.[69] In *Andersen*, a college student obtained an internship with the Utah Board of Pardons.[70] She was assigned to work "assisting in a therapy program for sex-offenders."[71] When the Utah Department of Corrections ("DOC") proposed changing its sex-offender treatment programs, Andersen gave a television interview criticizing the changes and warning they could result in sex offenders possibly being released too early.[72] The next day, the DOC fired Andersen from her internship, stating she had violated policy by saying "something negative about the Department."[73]

Andersen filed suit under § 1983, basing her claim on the position that her speech was "on a matter of public concern and was, therefore, protected by the First Amendment."[74] The district court dismissed the case, stating that Andersen's constitutional rights had not been violated.[75] On appeal, the Tenth Circuit declared Andersen was a government employee, based upon the facts that she was paid for twenty hours of work per week and received college credit for additional hours she worked.[76] The payment and credit both constituted valuable government benefits in the eyes of the court.[77] As a result, despite being an at-will employee, Andersen's First Amendment claim could not be diminished.[78]

The Tenth Circuit analysis, however, went even further. In applying the *Pickering* balancing test,[79] the court noted that "even if we

68. 100 F.3d 723 (10th Cir. 1996).
69. *Id.* at 727.
70. *Id.* at 725.
71. *Id.*
72. *Id.*
73. *Id.* (internal quotation marks omitted).
74. *Id.*
75. *Id.*
76. *Id.* at 726.
77. *Id.*
78. *Id.* at 726–27.
79. Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563, 568 (1968). The *Pickering* balancing test, discussed *infra* Parts II and III, involves a

accepted Defendants' arguments and considered Ms. Andersen a nonpaid volunteer, her claim would not be defeated. Defendants argue that volunteers are not entitled to First Amendment protection under *Pickering*. We disagree."[80] The Tenth Circuit noted that exercising free speech rights is not dependent upon earning a salary and that the Supreme Court has cited a variety of benefits outside the traditional scope of the employer-employee relationship that "cannot be denied solely because of the exercise of constitutional rights."[81] Once the court determined Andersen had a protectable interest, it applied the *Pickering* balancing test and declared that the district court erred in dismissing the case.[82]

Other federal appellate courts that have not actually decided the issue have affirmatively suggested that they would afford a volunteer protection from retaliation under the First Amendment, as detailed below.[83]

First Circuit

In *Lynch v. City of Boston*,[84] Heather Lynch sued the City and various city employees after she was both prohibited from working as a seasonal employee during Boston's "Can Share" food drive and removed from her volunteer position on the Mayor's Hunger Commission; positions she had held from 1986 and 1987 until 1993 and 1994.[85] In December 1993, Lynch received a flyer that had been distributed to all Boston employees by Thomas Menino, Boston's newly elected mayor, which "encouraged employees to provide suggestions to his office for the improvement of City services."[86] In response to the flyer, on January 12,

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balancing between the interests of the employee, 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.

80. *Andersen*, 100 F.3d at 727.

81. *Id.*

82. *Id.* at 728–29.

83. *See, e.g.*, Lynch v. City of Boston, 180 F.3d 1, 13 (1st Cir. 1999); *see also* Versarge v. Twp. of Clinton N.J., 984 F.2d 1359, 1364 (3d Cir. 1993); Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 25 (2d Cir. 1979).

84. 180 F.3d 1 (1st Cir. 1999).

85. *Id.*

86. *Id.* at 6.

1994, Lynch made what she intended to be an anonymous call to the Mayor's office, complaining about the lack of staffing at the Boston's Emergency Shelter Commission (ESC), which conducted the Can Share effort.[87] Coincidentally, Lynch spoke to John Greely at the Mayor's office, who was the husband of Kelley Cronin, Lynch's supervisor at the Can Share program and the Executive Director of the ESC.[88] Upon hearing about the call, Cronin told Lynch to "clear out your desk."[89] Cronin later told Lynch she would not be working on the 1994 Can Share drive, and informed her that she had been removed from her volunteer position on the Mayor's Hunger Commission.[90] Lynch claimed that Cronin's actions against her violated the First Amendment, § 1983, and Massachusetts law.[91] After the jury rendered a verdict, the District Court for the District of Massachusetts entered a judgment holding that Cronin was qualifiedly immune from the First Amendment claim, that the city was not liable, and that Lynch was entitled to $4,000 in damages for emotional distress.[92]

Although the court held that Cronin was entitled to qualified immunity because her actions against Lynch did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known,"[93] the court suggested that it otherwise would have afforded Lynch protection from retaliation under the First Amendment.[94] The court stated, using the *Hyland* language without citing the case itself, "We assume, without deciding, that the opportunity to serve as a volunteer could constitute the type of valuable governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny."[95]

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 7.
91. *Id.*
92. *Id.* at 7–9.
93. *Id.* at 13 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
94. *See id.* (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
95. *Id.*; *accord* Hyland v. Wonder, 972 F.2d 1129, 1135 (9th Cir. 1992).

Second Circuit

Robert Janusaitis, a volunteer fireman, submitted a report criticizing the management of the Fire Department.[96] In the report, he stated that training and morale at the Department were inadequate and that Department accounting practices were unacceptable.[97] After receiving no response, he drafted a letter to the IRS stating that the Department was "violating the Internal Revenue Code and generally accepted accounting principles."[98] He sent a draft to the Department's Executive Committee, threatening to also send it to the IRS if the Department did not change their accounting practices.[99] The Executive Committee and Department Chief suspended Janusaitis for thirty days.[100] After returning to active duty, Janusaitis wrote another letter to the Executive Committee stating that the suspension was politically motivated and demanding an apology.[101] Janusaitis later delivered a letter to the First Selectman of the Town, threatening to publicize an attached document that discussed how the Fire Department was trying to "cover up" the situation and explaining that he was planning to sue.[102] Finally, seven months after Janusaitis wrote his initial report, he participated in conversations with a reporter, who published a story titled, "Fireman Tells Story After Reinstatement."[103] After the article was published, the Department Chief and officers fired Janusaitis, and his dismissal was upheld by the Executive Committee.[104] Janusaitis sued under §§ 1983, 1985 and 1988 and for violations of his First Amendment rights.[105] The district court dismissed the action on the grounds that the Department's expulsion did not constitute state action, and that even assuming state action, the dismissal did not violate plaintiff's First Amendment rights.[106]

96. Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 18 (2d. Cir. 1979).

97. *See id.*

98. *See id.* at 19.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.*

104. *Id.* at 20.

105. *Id.* at 18.

106. *Id.* at 21.

Contrary to the district court, which held that Janusaitis's interview with the reporter was the only exercise of free speech,[107] the Second Circuit found that Janusaitis's letter to the IRS, the threatened lawsuit, the communication to the First Selectman, and the newspaper interview all came within the protection of the First Amendment.[108] The court never addressed Janusaitis's status as a "volunteer fireman," simply assuming that it was appropriate to apply the *Pickering* balancing test because the case involved "the various exercises of speech by appellant."[109] The court ultimately held that the successful functioning of the Fire Department outweighed Janusaitis's interests, especially because Janusaitis's actions were "more concerned with proving himself right and every one else wrong than with truly promoting the welfare and efficiency of the Department."[110]

Third Circuit

Paul Versarge was dismissed after working for a decade as a volunteer firefighter.[111] In his capacity as a private citizen, he requested that the Township of Clinton close a neighborhood street to traffic.[112] Versarge's boss, the fire chief, publicly opposed the closure because it would make it more difficult for emergency vehicles to respond to emergencies in the neighborhood.[113] Disagreement between Versarge and the fire chief escalated, culminating in Versarge writing a letter to the Mayor of Clinton stating that construction work had been done "at the firehouse without first obtaining the proper building or electrical permits."[114] Versarge wrote an additional letter to the Mayor.[115] Versarge was then fired.[116] After unsuccessfully trying to appeal his expulsion,

107. Janusaitis v. Middlebury Volunteer Fire Dep't, 464 F.Supp. 288, 296 (D. Conn. 1979).

108. *Janusaitis*, 607 F.2d at 25.

109. *See id.*

110. *Id.* at 26–27 (quoting *Janusaitis*, 464 F.Supp. at 296).

111. *See* Versarge v. Twp. of Clinton N.J., 984 F.2d 1359, 1361 (3d Cir. 1993).

112. *See id.*

113. *See id.*

114. *See id.* at 1362.

115. *Id.*

116. *Id.*

Versarge filed suit, alleging violations of the First and Fourteenth Amendments and seeking relief under § 1983.[117] The district court granted summary judgment in favor of the Defendants, and Versarge appealed.[118]

At the outset of its First Amendment analysis of the retaliatory expulsion claim,[119] the Third Circuit quoted *Perry*, stating that the government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.'"[120] It went on to state:

> At this juncture, we need not, and do not, conclude that plaintiff was an "employee" of the Hose Company or the Township. Rather, we assume, without deciding, that "the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny."[121]

Despite this position, the court applied the *Pickering* balancing test and cited to *Janusaitis*,[122] ultimately holding that the First Amendment did not protect the Plaintiff's speech because "the interests of the Hose Company outweigh the limited interests of plaintiff and the public in plaintiff's speech."[123]

Therefore, based upon the aforementioned survey of applicable case law, it appears that no federal appellate court has held that a volunteer, as a matter of law, should not be afforded protection from retaliation under the First Amendment.

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117. *Id.* at 1362–63.
118. *Id.* at 1361.
119. *Id.* at 1364.
120. *Id.* (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
121. *Id.* (quoting Hyland v. Wonder, 972 F.2d 1129, 1135 (9th Cir. 1992)).
122. *Id.* at 1367.
123. *Id.* at 1368.

III. THE DECISIONS IN THE FEDERAL CIRCUIT COURTS ARE CONSISTENT WITH ANALOGOUS SUPREME COURT CASES

As noted by the Seventh Circuit, the fact that a plaintiff is a volunteer as opposed to a paid city employee is of little consequence to the First Amendment retaliation analysis.[124] Although the Supreme Court has not addressed the narrow issue of volunteers, in an analogous case, the Supreme Court held that the government may not retaliate "against a contractor, ***or a regular provider of services***, for the exercise of rights" under the First Amendment.[125]

In *O'Hare Truck Service, Inc. v. City of Northlake*, a company had been providing towing services to the City of Northlake.[126] Such providers of services had been removed from the list of providers only for cause.[127] The owner of O'Hare Truck Services refused to contribute to the Northlake mayor's reelection campaign and, instead, supported his opponent.[128] Northlake then removed O'Hare from its list of service providers.[129] The company alleged that its removal was in retaliation for not supporting the mayor's reelection and resulted in substantial lost income.[130] The district court dismissed the complaint, holding that Seventh Circuit precedent that prevented government officials from

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124. *See* Mosely v. Bd. of Educ., 434 F.3d 527, 534 (7th Cir. 2006).

125. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 715, 720 (1996) (emphasis added); *see also* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 672–73 (1996) (holding that the First Amendment protects independent contractors from termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech); Rutan v. Republican Party, 497 U.S. 62, 65 (1990) (holding that even though low-level public employees had no legal entitlement to the promotions, transfers, and recalls, the government may not rely on a basis that infringes their First Amendment interests to deny them these valuable benefits); Branti v. Finkel, 445 U.S. 507, 517 (1980) (holding that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved); Elrod v. Burns, 427 U.S. 347, 373 (1976) (holding that the practice of patronage dismissals is unconstitutional under the First Amendment).

126. *O'Hare Truck Serv.*, 518 U.S. at 715.

127. *Id.*

128. *Id.*

129. *See id.*

130. *Id.* at 716.

discharging employees for refusing to support a political party or its candidates did not apply to independent contractors.[131] The Seventh Circuit affirmed.[132]

The Supreme Court rejected the notion that First Amendment protections for those outside the traditional employment context are trumped by the government's desire to advance a patronage system.[133] Drawing such a distinction between employees and independent contractors, the Court said, would make constitutional rights unacceptably dependent on the government's classification of someone as an employee or independent contractor.[134] Despite a long history in American law of treating employees and independent contractors differently, the Court said it was inappropriate for a constitutional claim to rise or fall based on a distinction that is "a creature of the common law of agency and torts."[135] In addition, such a rule would invite abuse, allowing the government to "avoid constitutional liability simply by attaching different labels to particular jobs."[136] Thus, the Court in *O'Hare* unequivocally recognized that retaliation claims now extend beyond traditional employer-employee relationships. Furthermore, nothing in *O'Hare* implies that a regular provider of services must be paid; it should be sufficient that the provider receives a valuable government benefit as a result of rendering services. Under the reasoning of *O'Hare*, volunteers should be protected from retaliation based on the exercise of First Amendment rights.

IV. THUS FAR, COURTS HAVE DISAGREED WITH OPPONENTS OF A VOLUNTEER RETALIATION CLAIM WHO ARGUE, AMONG OTHER THINGS, THAT BEING A VOLUNTEER IS NOT A PROTECTABLE INTEREST OR VALUABLE BENEFIT

Many courts have addressed—and dismissed—the arguments used by opponents of volunteer retaliation claims. For example, in

131. *See id.*

132. *Id.*

133. *Id.* at 720.

134. *Id.* at 721 (citing Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 721 (1996)).

135. *See id.* at 722

136. *Id.* (citing *Umbehr*, 518 U.S. at 679).

denying the KKK's Adopt-A-Highway application in *Cuffley*, the government asserted various state and federal statutes and regulations as the basis for justifying its actions.[137] The Eighth Circuit, however, rejected those assertions as after-the-fact, pretextual justifications.[138]

In *Hyland*, the state argued that because the information disclosed by Hyland was stale, conveyed only in an internal communication, and merely involved a personnel dispute there was no First Amendment infringement.[139] The Ninth Circuit disagreed.[140] First, limited circulation does not lessen the public concern analysis in a *Pickering* analysis.[141] Second, "general public awareness of an issue does not make all further investigation or in-depth discussion of the matter redundant, superfluous, or devoid of public interest."[142] Third, casting the issue as a personnel dispute did not free the court to simply ignore the public interest analysis.[143]

In *Andersen*, the state argued for a bright-line rule that an unpaid volunteer was unworthy of protection from retaliation.[144] The Tenth Circuit rejected that notion out of hand.[145]

The central issue facing the Third Circuit in *Versarge* was whether the plaintiff's conduct was a disruption so significant that it impaired the function and harmony of the entity, which, in that case, was a fire department.[146] The "mere existence of some disruption would not end our inquiry," the Third Circuit said.[147] "Disruption is simply a weight on the scales which must be balanced against the interests of plaintiff and the public in plaintiff's speech."[148] The context of the disruption is important, and in *Versarge* the court found that the plaintiff's statements impaired harmony in the volunteer fire department to such a degree that

137. *See* Cuffley v. Mickes, 208 F.3d 702, 708–11 (8th Cir. 2000).

138. *See id.* at 711.

139. *See* Hyland v. Wonder, 972 F.2d 1129, 1138 (9th Cir. 1992).

140. *See id.* at 1138–39.

141. *See id.* (quoting Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979)).

142. *Id.* at 1138 (citing *Givhan*, 439 U.S. at 415-16).

143. *See id.*

144. *See* Andersen v. McCotter, 100 F.3d 723, 727 (10th Cir. 1996).

145. *Id.*

146. *See* Versage v. Twp. of Clinton N.J., 984 F.2d 1359, 1366 (3d Cir. 1993).

147. *Id.*

148. *Id.* (citing O'Donnell v. Yanchulis, 875 F.2d 1059, 1062 (3d Cir. 1989)).

it detrimentally affected the close relationships required by the working environment.[149]

In *Lynch*, the First Circuit recognized that volunteers might be constitutionally protected from retaliation, but the government asserted a qualified immunity defense.[150] The court agreed that Lynch's supervisor was protected by qualified immunity in this instance but also noted that this defense is not absolute.[151] The court also found that the free speech rights of volunteers were not "clearly established" at the time of the supervisor's conduct.[152] Of course, a colorable argument now exists that volunteers in the First Circuit should be protected from retaliation because the court has now "clearly established" this right.

In *Janusaitis*, the state asserted that the plaintiff's speech impaired the performance of a government function.[153] While the Second Circuit agreed that Janusaitis' conduct had done so in this case, it noted that such an analysis must be conducted on a "case-by-case" basis.[154] The court ruled that the speech had undermined the government's authority and, more importantly, that the speech was primarily driven by Janusaitis's personal motivation and not the public good.[155]

The most common argument against a volunteer retaliation claim based on protected speech, however, is simply that the volunteer's status "does not qualify as a 'valuable government benefit,' the loss of which would trigger a speech retaliation claim analysis."[156] No Supreme Court precedent directly limits "valuable government benefits" to paid work or vendor contracts.[157] The Supreme Court, however, has stated that "[a]lthough the benefits withdrawn may be within the discretion of the government to award, the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—

149. *See id.* at 1367.

150. *See* Lynch v. City of Boston, 180 F.3d 1, 13 (1st Cir. 1999).

151. *Id.*

152. *Id.*

153. *See* Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 25 (2d Cir. 1979).

154. *See id.*

155. *See id.* at 26.

156. *See* Hanson v. Cameron Cnty, No. B-09-22, 2010 WL 148723, at *4–6 (S.D. Tex. Jan. 14, 2010).

157. *Id.* at *5.

especially, his interest in freedom of speech."[158] The Supreme Court has also recognized that protections have been extended beyond the government employee retaliation context to the termination of at-will employment contracts as well as the non-renewal of government vendor contracts.[159] Thus, courts addressing the issue of whether the loss of volunteer status is a valuable government benefit, the loss of which would trigger a speech retaliation claim, have found that it is such a benefit.[160]

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158. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

159. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 670–71; *Hanson*, 2010 WL 148723, at *6.

160. *See, e.g.*, Hyland v. Wonder, 972 F.2d at 1135–36; *Hanson*, 2010 WL 148723, at *6.

But cf. Barton v. Edward Clancy, Jr., 632 F.3d 9 (1st Cir. 2011) (involving a Parks Commissioner who claimed retaliation based on his First Amendment activity). In *Barton*, the First Circuit argued that "the Second, Seventh, and Ninth Circuits have found that volunteer positions are entitled to constitutional protection . . . [but those] cases relied in part, either directly or indirectly, on state statutes which mandate that such volunteers be treated as employees." *Id.* at 25. Specifically, the court in *Barton* claimed that the Ninth Circuit in *Hyland* relied on the Second Circuit case, Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979), the latter of which involved a Connecticut law that "specifically provided that volunteer firemen 'shall be construed to be employees of the municipality' for purposes of workmen's compensation." *Id.* at 24 (quoting CONN. GEN. STAT. § 7-314a (2011)). As an initial matter, the court in *Hyland* did not rely on any California statute, or mention any state statute, in its analysis to determine that a juvenile probation department volunteer is protected from retaliation based on protected speech. *See Hyland*, 972 F.2d at 1134–36. In fact, the Ninth Circuit stated that "whether Hyland is labelled [sic] a public employee or a volunteer is not determinative of whether Hyland stated a claim of First Amendment" retaliation–the critical question was "whether Hyland alleged the loss of a valuable government benefit or privilege in retaliation for his speech," which he had, based on the loss of his volunteer position. *Id.* at 1136, 1140–41 (referencing a California statute only with regard to the due process claim of Hyland, not his First Amendment retaliation claim, to conclude that Hyland had no property interest in the volunteer position and therefore could not maintain a due process claim, while he could maintain a First Amendment retaliation claim). Thus, the *Barton* Court's argument that the Ninth Circuit in *Hyland* "found that volunteer positions are entitled to constitutional protection . . . [by relying] on state statutes which mandate such volunteers be treated as employees" is belied by the *Hyland* decision itself, as the Ninth Circuit (1) did not rely on any California statute, or mention any state statute, in its analysis to determine whether the volunteer was protected from retaliation based on protected speech; (2) stated that it was irrelevant whether an individual was a public employee

or volunteer for purposes of a First Amendment retaliation claim; and (3) held that the loss of a volunteer position constituted the loss of a valuable government benefit or privilege that is afforded protection in a First Amendment retaliation claim. *See Barton*, 632 F.3d at 25; *Hyland*, 972 F.2d at 1134–36, 1140–41.

Similarly, the *Barton* Court claimed that the Seventh Circuit in Mosely v. Bd. of Educ., 434 F.3d 527 (7th Cir. 2006), relied upon another Seventh Circuit case, Brown v. Disciplinary Comm. of Edgerton Volunteer Fire Dep't, 97 F.3d 969 (7th Cir. 1996), the latter of which concluded that a volunteer firefighter could be protected by the First Amendment based in part on a Wisconsin state statute that treated volunteer firefighters as employees under the law for workmen's compensation. *See Barton*, 632 F.3d at 25; *Brown*, 434 F.3d at 973. The *Mosely* Court, however, did not rely on any Illinois statute, or mention any state statute, in its analysis to determine that a mother serving as a chairperson on a school committee (which the court described as a nominal position at best) is protected from retaliation based on protected speech. *See Mosely*, 434 F.3d at 530, 533–35. In fact, in accordance with the Ninth Circuit's analysis in *Hyland*, the Seventh Circuit stated that "[t]he fact that Mosely was a volunteer as opposed to a paid city employee is of little consequence to our analysis"—under a First Amendment retaliation claim, the issue is whether the defendants unconstitutionally retaliated against Mosely based on her protected speech. *Id.* at 534 (distinguishing a procedural due process claim, which requires a protected property interest, from a First Amendment retaliation claim, which does not require a protected property interest).

As for the Second Circuit case, *Janusaitis*, 607 F.2d 17, the *Barton* Court argued that it too relied on "state statute[s] that treated volunteer[s] . . . as employees under the law." *Barton*, 632 F.3d at 25 (citing *Janusaitis*). Specifically, the *Barton* Court claimed that the *Janusaitis* Court, "after concluding that the termination of the firefighter was 'state action' for purposes of a [42 U.S.C.] § 1983 claim , . . . simply treated the firefighter as a public employee for purposes of the *First Amendment* claim." *Id,* at 24 (emphasis added) (citing *Janusaitis*, 607 F.2d at 25). In fact, the *Janusaitis* Court did not state that it relied on the Connecticut statute treating firefighters as employees under the workmen's compensation statute to show that the plaintiff was entitled to protection as a volunteer, but instead used it to show that the actions of the defendant, Middlebury Volunteer Fire Department, constituted state action as required under 42 U.S.C. § 1983. *Janusaitis*, 607 F.2d at 21–22, 25. As set forth above in this article, the court never addressed Janusaitis's status as a "volunteer fireman" and simply assumed that it was appropriate to apply the *Pickering* balancing test because the case involved "the various exercises of speech by appellant." *Id.* at 25.

The *Barton* Court also attempted to rely on *Hoyt v. Andreucci* , 433 F.3d 320 (2d Cir. 2006), to argue that "*Janusaitis* does not appear to reflect the prevailing view of the Second Circuit." *Barton*, 632 F.3d at 24, n.13; *see Hoyt*, 433 F.3d 320. In *Hoyt*, the Second Circuit stated that it "had not yet addressed whether 'claims of termination from volunteer positions based on protected conduct are equivalent to, or should be analyzed different from, more traditional claims of termination from salaried government positions.'" *Hoyt*, 433 F.3d at 327 n.5 (quoting Gorman-Bakos

In short, while the *Pickering* analysis binds a court's ultimate decision, it is increasingly clear that volunteer status is a valuable governmental benefit, no less than potential business contracts or tax exemptions.[161] Official volunteer positions are often difficult to obtain, and volunteer positions can often open the door for many other opportunities for the individual volunteer.[162] The opportunity to serve as a volunteer is also an important governmental benefit "because it provides an individual the satisfaction of making a contribution to

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v. Cornell Coop. Extension of Schenectady Cnty., 252 F.3d 545, 552 n.2 (2d Cir. 2001)). This argument also appears misplaced. *Hoyt* involved an employee who was granted a leave of absence from his corrections officer job to fulfill his union leadership responsibilities. *Hoyt,* 433 F.3d at 322. Plaintiff Hoyt tried to analogize his situation during his leave to that of a volunteer, but his leave agreement made clear that "Hoyt would remain a public employee throughout his leave period." *Id.* at 327 n.5, 328. As a result, the court did not perform an analysis of plaintiff's status as a volunteer because the court found he was not a volunteer. *Id.* at 328.

The *Gorman* case, quoted by *Hoyt* for the proposition relied on by *Barton*, involved plaintiffs who filed suit under 42 U.S.C. § 1983, alleging, among other things, violation of their First Amendment free speech rights. *Gorman,* 252 F.3d at 551. In *Gorman*, plaintiffs alleged that the Cooperative, a subordinate government agency that ran programs such as the 4-H program, "retaliated against them by, among other things, terminating their volunteer status and enrollment in 4-H because . . . plaintiffs advocated policies contrary to those of defendants." *Id.* In a footnote, the Court stated that the trial court "presumed that plaintiffs had suffered an adverse employment action." *Id.* at 552 n.2. The court continued, "We do not address the question of whether plaintiffs' claims of termination from volunteer positions based on protected conduct are equivalent to, or should be analyzed differently from, more traditional claims of termination from salaried government positions." *Id. (*citing *Hyland,* 972 F.2d at 1135) (holding that serving as a volunteer constituted a government benefit or privilege and that "retaliatory actions with less momentous consequences [than loss of employment], such as loss of a volunteer position, are equally egregious in the eyes of the Constitution because a person is being punished for engaging in protected speech"). The *Gorman* Court remanded the case to the trial court for determinations relating to the *Pickering* balancing test and vacated the trial court's granting of defendants' summary judgment motion. *Id.* at 557–58. The court made no reference to a statute allowing the 4-H volunteers to be treated as employees, and the court allowed the volunteers' First Amendment Retaliation claim to proceed. *Id.* Thus, it appears that the Second Circuit allows volunteers to pursue First Amendment retaliation claims. *Id.*

Importantly, the *Barton* Court maintained that "no court has held that volunteers are not protected by the First Amendment." *Barton*, 632 F.3d at 25–26.

161. *See Hyland*, 972 F.2d at 1135–36.

162. *Id.*

society."[163] In addition, volunteers should be protected from retaliation because they often provide the public with a unique and independent view of government.[164]

CONCLUSION

Federal courts that have encountered the issue of whether a volunteer is shielded from retaliation based on protected speech under the First Amendment have consistently determined that the reach of a First Amendment retaliation claim extends to volunteers. In Gail Hanson's case, the federal court in Brownsville came to the same conclusion. The key inquiry is whether volunteer status is the type of governmental benefit or privilege the deprivation of which triggers First Amendment scrutiny. Despite arguments to the contrary, federal courts have answered the latter question in the affirmative. It is anticipated that other federal courts that decide the issue, including the United States Supreme Court, will likely, and should, continue the pattern and decide

163. *Id.*

164. Potential volunteer plaintiffs should be aware that government defendants may often have an interest in regulating the speech of its employees. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563, 568 (1968). In *Pickering*, the Supreme Court held that government employees may not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public institutions in which they work. *Id.* The Court also recognized, however, that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *Id.* Thus, the Court held that it is necessary to arrive at a balance between the interests of the employee, 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. *See id.* While the courts will not apply the *Pickering* balancing test at the motion to dismiss stage of the proceedings because the application of that test requires a weighing of facts, a potential volunteer plaintiff should be prepared to battle governmental defendants on these grounds. *See* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 283–287 (1977) (suggesting whether government would have terminated plaintiff in the absence of protected conduct is a question of fact for the jury to decide); *see also* Bonnell v. Lorenzo, 241 F.3d 800, 810 (6th Cir. 2001) ("The inquiry into whether Plaintiff's interests in speaking outweigh the [Defendants'] interests in regulating Plaintiff's speech is a factual determination conducted under the well known *Pickering* balancing test.").

that volunteers are protected from retaliation based on the exercise of their First Amendment rights.