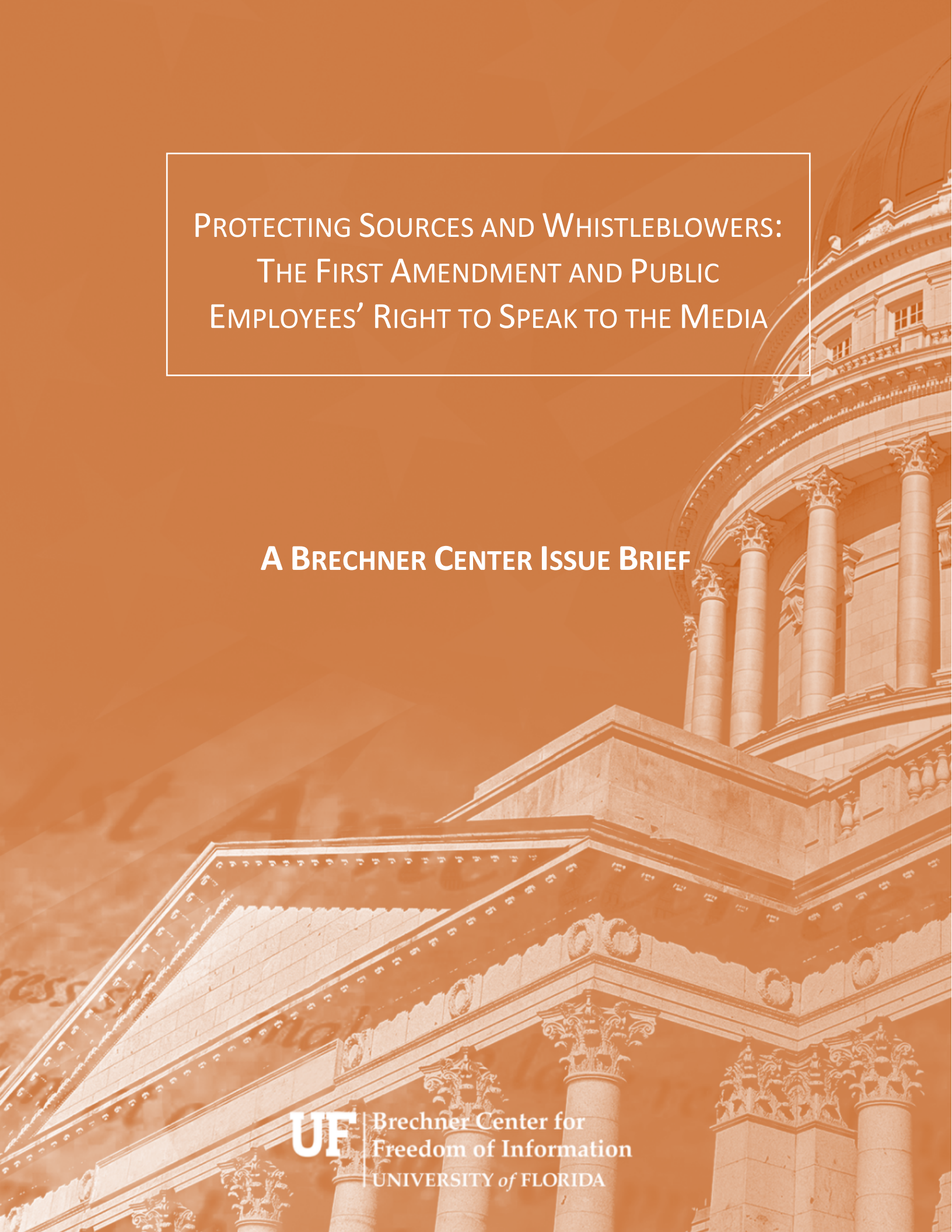
Protecting Sources and Whistleblowers: The First Amendment and Public Employees' Right to Speak to the Media

A Brechner Center Issue Brief



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Introduction and Summary

When *Serial* podcaster Sara Koenig sought to tell the story of how Cleveland police fatally shot a 12-year-old boy in a city park, mistakenly believing him to be armed, the only Cleveland Police Department source available to her was the head of the patrolman's union, Steve Loomis. Acknowledging that Loomis' perspective might not represent the views of rank-and-file officers, Koenig explained to listeners that "no other Cleveland officers were permitted to talk to us on the record."[1] That result is not just frustrating – it's almost certainly against the law.

Decades' worth of First Amendment caselaw establishes that public employees have a constitutionally protected right to speak about work-related matters without needing their employer's permission. Policies and regulations that require pre-approval before government employees can discuss their work with the news media are invariably struck down as unconstitutional when challenged.

Still, agencies persist in enforcing rules curtailing public employees' ability to share information with journalists. "Gag" policies similar to those declared unconstitutional in courts across the country remain on the books at all levels of government, from Cabinet-level federal agencies down to the tiniest local police department. Journalists regularly report encountering heavy-handed screening by government public-relations offices, delaying or outright denying access to news sources.

When journalists cannot have candid conversations with the subject-matter experts who work for federal, state or local agencies, the quality of news stories suffers. Audiences may be left with prepared statements from public-relations professionals who lack firsthand knowledge, or with stories heavily reliant on anonymous sources – both of which undercut the trustworthiness of news coverage.

This Issue Brief examines the free speech rights of government employees to speak to the public and press about their work, and how the courts have treated employers' policies forbidding or restricting speech. It explains what a public-sector employer may and may not require by way of a rule, policy or contract that limits what employees can say. It concludes with some strategies for news organizations and their attorneys to consider in challenging unduly restrictive policies that inhibit newsgathering.

[1] Serial, Season 3, Ep. 3, "Misdemeanor, Meet Mr. Lawsuit," *available at* https://serialpodcast.org/season-three/3/misdemeanor-meet-mr-lawsuit.

I. Free Speech in the Government Workplace

Gag rules restraining public employees from speaking to the news media are everywhere. They're on the books at the federal, state and local levels, unapologetically. The Georgia Department of Public Health instructs employees that they "should not respond to requests from the news media in any capacity" and must immediately transfer any journalist's call to the department's Media Relations Manager.[2] Southeastern Louisiana University directs its employees that, "to ensure that an appropriate image of the university is projected and maintained," they should send all interview requests to the institution's communications office.[3] In Honolulu, police officers are forbidden from giving interviews about "police-related issues" without signoff from a commander.[4] At Florida's Brevard Community College, campus police are told: "Refuse interviews or photograph requests, unless authorized to accept by Director of Security."[5] Through a combination of online searches and freedom-of-information requests, Brechner Center researchers have gathered dozens of examples of policies that either forbid government employees from speaking to journalists at all, or require that they obtain a supervisor's permission before doing so.

Nevertheless, a review of state and federal caselaw dating back to the 1940s finds nearly two dozen instances in which a court has struck down a blanket policy requiring public employees to get approval before speaking about their work. Courts across the country have invalidated the very same media restrictions that government agencies widely enforce today, finding that the restrictions are unconstitutionally broad. In a key 1998 case, a federal appeals court decided that a New York social-service agency overreached in requiring employees to contact the agency's public-relations office before releasing any information to the media "regarding any policies or activities of the Agency."[6] The court explained:

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[2] *See* Georgia Department of Public Health, Policy # CM-07002, "Media Relations Policy," Sec. 6.3.1, Sept. 2014, *available at* http://publichealthathens.com/wp/wp-content/uploads/2014/09/CM-07702-Media-Relations-19Sept2014.pdf.

[3] *See* Southeastern Louisiana University, "Media Inquiries, Advertising and Public Records Requests Policy," May 8, 2018, *available at* https://www.southeastern.edu/resources/policies/assets/media_inquiries.pdf.

[4] *See* Honolulu Police Department, Policy No. 5.06, "Media and Public Relations," Nov. 18, 2015, *available at* http://www.honolulupd.org/information/pdfs/MediaandPublicRelations-11-30-2015-14-11-09.pdf ("News media interviews with departmental personnel on police-related issues shall be conducted only upon approval of the individual's division-level commander; news media interviews with division-level commanders shall be conducted only upon approval of the commander's bureau or deputy chief.").

[5] *See* Brevard Community College Campus Security Manual, Sec. 700-4, "Security Officers' Work Standards," Oct. 2010, *available at* http://www.easternflorida.edu/our-campuses/campus-security/documents/campussecurityoperationsmanual.pdf.

[6] Harman v. City of New York, 140 F. 3d 111, 116 (2d Cir. 1998).

> The kind of approval procedure mandated by the City is generally disfavored under First Amendment law because it chills potential speech before it happens. ... The press policies allow the agencies to determine in advance what kind of speech will harm agency operations instead of punishing disruptive remarks after their effect has been felt. For this reason, the regulations run afoul of the general presumption against prior restraints on speech. … Employees who are critical of the agency will naturally hesitate to voice their concerns if they must first ask permission from the very people whose judgments they call into question. Only those who adhere to the party line would view such a requirement without trepidation.[7]

How does this apparent disconnect between what's legal and what's common practice persist? It helps to understand how First Amendment law has evolved in the workplace setting, and why government agencies (and their lawyers) might be unaware of the limits on their authority – or, if aware, might be willing to run the rather minimal risk of being sued.

A. Prior Restraints and the *Treasury Employees'* Case

The Supreme Court has said that "prior restraints" – regulations that forbid speech before it can even be heard – are the most noxious and disfavored of all government restrictions on speech. Courts regularly strike down attempts to restrain speech, unless the regulator can show an overwhelmingly compelling justification.[8] The Supreme Court recognized in its landmark 1931 decision, *Near v. Minnesota*, that there is a difference between imposing after-the-fact consequences on the harm caused by speech (such as money damages for libel) versus preventing speech from being published.[9] The burden on a government agency to justify restraining speech is much higher, the Court has said, because prior restraints are a direct attack on the marketplace of ideas.[10]

For decades, the courts have recognized that employees don't surrender all of their free-speech rights when they accept a government paycheck. The argument that a government job is a "privilege" that can be taken away for any reason was categorically rejected in the Supreme Court's *Keyishian v. Board of*

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[7] *Id.* at 119, 120.

[8] *See* Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); *see also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[9] 283 U.S. 697, 723 (1931).

[10] *See* Vance v. Universal Amusement Co., 445 U.S. 308, 315-16 (1980) ("the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication").

Regents decision, in which the justices struck down a law requiring state employees to sign an anti-Communist loyalty oath.[11]

As early as 1946, a New York state court struck down a city fire department rule that required firefighters to get written approval from their chief before appearing in a newspaper or magazine.[12] A federal court in Illinois found that a Chicago Fire Department regulation prohibiting[13] employees from talking to the media about anything "relating to Fire Department activities" was unconstitutionally vague and overbroad.[14] A state court judge in New York found that a city's policy that forbade firefighters from discussing "matters concerning the department" with the news media violated the employees' First Amendment rights.

In a key 1981 case, *Barrett v. Thomas*,[15] the Fifth Circuit struck down a Texas sheriff's policies restricting employees from making "unauthorized public statements" and forbidding comments to reporters on any topic "that is or could be of a controversial nature." The court readily found that the policies flunked the test of overbreadth, prohibiting more speech than necessary to achieve the sheriff's stated goals: "They explicitly forbid acts that departmental employees have a clear constitutional right to do. Although promoting loyalty, discipline, and efficiency in the department is a legitimate goal, these rules sweep beyond their intended ambit and impermissibly chill protected speech by the department's employees."[16]

The Supreme Court first dealt with a blanket restriction on government employee speech in 1995 in the case of *United States v. National Treasury Employees Union* (known as the "*NTEU*" case).[17] In the *NTEU* case, a labor union challenged a federal regulation prohibiting government employees from giving speeches in exchange for payment. Although the rule was not a complete ban on speaking, the Supreme Court viewed it as an unduly broad constraint on speech that could not be justified by the government's concern that employees might be influenced by bribes in the form of speaking fees.[18]

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[11] 385 U.S. 589 (1967).

[12] Kane v. Walsh, 295 N.Y. 196 (N.Y. 1946).

[13] Steenrod v. Board of Engineers, 87 Misc.2d 977 (N.Y. Sup. Ct. 1976).

[14] Grady v. Blair, 529 F.Supp. 370 (N.D. Ill. 1981).

[15] 649 F. 2d 1193 (5th Cir. 1981).

[16] *Id.* at 1199.

[17] 513 U.S. 454 (1995).

[18] *Id.* at 475 n.21.

The justices used the *NTEU* decision to clarify that "prior restraints" regulating broad categories of employees require even greater justification than after-the-fact penalties on individual speakers whose speech disrupts the workplace. With compelling rationale, the Court decided across-the-board prohibitions like the honorarium ban in *NTEU* are unconstitutional.[19]

The takeaway from the *NTEU* decision is that, to justify a categorial restraint on speech, the government must demonstrate that unrestrained speech will concretely produce serious harm and that the restraint "will in fact alleviate these harms in a direct and material way.'"[20] This standard has proven a difficult one for the government to meet.

Applying the *NTEU* ruling, judges have reliably sided with public employees who challenge workplace rules that forbid them from discussing their work with the public or press, or require them to get a supervisor's approval before they may speak. For example:

- In Michigan, a U.S. district court threw out an ordinance stating that only the fire chief could "release facts regarding fire department matters, fires or other emergencies to the news media" and requiring employees to refer all media inquiries to the chief.[21]
- In Connecticut, a federal judge struck down a highway patrol policy forbidding troopers from making "official comments relative to department policy" to members of the press or public without supervisory approval.[22]
- In Massachusetts, a fire department rule prohibiting employees from making "statements for publication concerning the plans, policies, or affairs of the administration of the fire department" without the chief's approval was invalidated.[23]

Most recently, the Ninth Circuit decided that the Nevada Highway Patrol infringed the First Amendment rights of a state trooper by punishing him for violating a policy against discussing the agency's K-9 program with outsiders.[24] In its opinion, the court stated:

> Although it could be true that police departments would operate more efficiently absent inquiry into their practices by the public and the legislature, efficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value. Avoiding

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[19] *Id.* at 468.

[20] 513 U.S. at 475 (quoting *Turner Broad. Sys., Inc. v. Federal Communications Comm'n,* 512 U.S. 622, 624 (1994) (plurality opinion)).

[21] Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp., 246 F.Supp.2d 734 (E.D. Mich. 2003).

[22] Lauretano v. Spada, 339 F. Supp. 2d 391 (D. Conn. 2004).

[23] Parow v. Kinnon, 300 F. Supp. 2d 256 (D. Mass. 2004).

[24] Moonin v. Tice, 868 F. 3d 853 (9th Cir. 2017).

> accountability by reason of persuasive speech to other governmental officials and the public is not an interest that can justify curtailing officers' speech as citizens on matters of public concern.[25]

Along with the Second, Fifth and Ninth Circuits, the federal Tenth Circuit has likewise invalidated broad restrictions on discussing work-related matters with outsiders.[26] Rulings from at least two other circuits (the Third and Seventh) strongly suggest that they, too, would strike down blanket prohibitions on employee speech to the public and press.[27] No federal court of appeals is on record taking a contrary position.

Restrictions on employee speech take many forms. Some are memorialized in employment contracts, some in employee handbooks, and some merely in memos circulated by government public-relations offices. Often, the policies are phrased in the form of instructions to journalists rather than to employees, making it uncertain whether the employer believes that granting an unauthorized interview is punishable misconduct by the employee.[28] For legal purposes, it seems to make no difference whether a

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[25] *Id.* at 866.

[26] *See* Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1185-87 (10th Cir. 2010) (finding that a school administrator violated clearly established First Amendment principles in telling school employee not to discuss "school matters" with anyone outside the agency, a prohibition beyond just safeguarding confidential student information). *See also* Luethje v. Peavine Sch. Dist., 872 F.2d 352 (10th Cir. 1989) (concluding that school board violated the First Amendment in enacting and enforcing a rule restricting lunchroom employees' speech, which read: "If you have any problems, consult [the principal]. Don't take any school problems other places, or discuss it with others.")

[27] *See* Swartzelder v. McNeilly, 297 F.3d 228 (3d Cir. 2002) (finding that a police department policy requiring the chief's written approval before testifying in court as an expert witness was an unconstitutional prior restraint on employee speech); Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) (striking down a state university's policy forbidding anyone "associated with" the university from communicating with student-athlete recruits without the athletic director's authorization). *See also* Alderman v. Phila. Hous. Auth., 496 F.2d 164, 174 (3d Cir. 1974) (holding that a housing authority's requirement that employees sign a confidentiality agreement forbidding discussion of tenant advisory-board elections violated the First Amendment, and observing that "precious little in the case law supports the imposition of a restraint on all the speech of public employees, even concerning a particularized topic"); Liverman v. City of St. Petersburg, 844 F.3d 400 (4th Cir. 2016) (voiding police department's policy that forbade "negative" comments about the agency on social media).

[28] A related constitutional issue, beyond the scope of this paper, is whether a government agency could retaliate against a journalist for defying a policy that requires clearing interviews with a media-relations spokesperson. While this exact issue appears to be untested, courts would probably base their determination on the nature of the reprisal. If, for instance, the consequence of noncompliance was merely a "cold shoulder" of disfavored treatment – exclusive interviews given to competitors, phone calls returned after every other reporter's – it seems improbable that a court would recognize a constitutional injury. *See, e.g.,* Baltimore Sun Co. v. Ehrlich, 437 F. 3d 410 (4th Cir. 2006) (finding no constitutional claim for journalists frozen out from interviews after Maryland governor deemed them to be untrustworthy). If, however, the consequences took the form of withdrawal of privileges generally made available to journalists, a court would be more likely to entertain a claim. *See, e.g.,* Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977)

restriction on speech is phrased as a contract, a regulation or a policy – all are equally unconstitutional if they unduly restrict the employee's ability to share information with journalists and others outside the agency.[29]

B. A shifting standard: The Supreme Court and discipline for workplace speech

If government agencies and their lawyers are confused about how much they can restrict employees from speaking to the media, it's probably because the First Amendment rights of public employees have been a moving target in the view of the federal courts. At one time, the Supreme Court treated a government job as a "privilege" that could be taken away for any reason, even if the motive was to punish the employee for speaking. As a New York judge wrote in 1949, rejecting a constitutional challenge to a (now-repealed) state law that disqualified members of "subversive" organizations from holding jobs in public schools: "A constitutional right of free speech may be abridged as a condition to the enjoyment of public employment. One does not have a constitutional right to be a public employee except upon compliance with reasonable conditions imposed upon all, or imposed under reasonable classifications."[30]

Since then, the U.S. Supreme Court has made it clear that public employees have free-speech rights that cannot be taken away lightly, especially not to prevent or punish speech about issues of public concern. In a pair of 1967 cases, the justices affirmed that people don't forfeit their constitutional rights, including the right of free expression, simply by accepting government employment.[31] The Court has recognized that government employees have unique expertise that ought to be shared, for the public's benefit as well as the speaker's.[32]

While *NTEU* was about the constitutionality of a blanket gag rule, different constitutional principles apply when an agency seeks to punish one particular speaker for saying or writing something that a supervisor finds disagreeable.

(recognizing a First Amendment claim for denial of a White House press credential, if the viewpoint of the publication is the basis for the denial).

[29] Although employers may argue that employees who accept contracts or handbooks containing broad speech restrictions have contractually waived their rights, the Supreme Court has ruled that agencies cannot condition the receipt of a benefit or privilege on a blanket surrender of First Amendment liberties. Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 570 U.S. 205 (2013).

[30] Lederman v. N.Y. Bd. of Educ., 276 A.D. 527, 529 (N.Y. App. Div. 1950).

[31] Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (discussing Fourth Amendment right against self-incrimination); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (discussing First Amendment rights to freedom of speech and freedom of association).

[32] *NTEU*, 513 U.S. at 470.

The starting point is the case of *Pickering v. Board of Education,*[33] brought by a fired Illinois teacher, Marvin Pickering. Pickering lost his job because of a letter-to-the-editor critical of the school district's spending priorities. In a 1967 opinion, the Supreme Court said that lower courts wrongly dismissed Pickering's First Amendment retaliation claim. Pickering's speech deserved First Amendment protection, the justices ruled, because it addressed matters of public concern. The employer could punish such speech only by showing that the government's interest in maintaining order and harmony in the workplace outweighed Pickering's interest in being heard.

The Court subsequently chipped away at *Pickering* to create more employer-friendly exceptions. For instance, if the employee's speech is regarded as primarily a personal grievance about working conditions, it receives diminished protection.[34] Most significantly, the Court decided in a 2006 case, *Garcetti v. Ceballos*,[35] that speech "pursuant to official duties" – such as writing an assigned memo – is not the employee's speech at all. Under the *Garcetti* analysis, when an employee speaks as part of a work assignment, that speech belongs to the employer, and the employee has no First Amendment claim if punished for performing the assignment in a way the employer finds unsatisfactory.

Constitutional lawyers have widely scorned the *Garcetti* case, finding it both unclear and unfair to employee whistleblowers. Scholar and author David Hudson of the Freedom Forum Institute called it the worst First Amendment opinion of Justice Anthony Kennedy's 30-year career.[36] Still, the case has nothing to do with policies that restrain or discourage speech, like the ban on speaking fees in *NTEU*.

To be clear, the *Pickering* and *Garcetti* cases are about the constitutionality of punishing an individual employee who has spoken in a way that the employer finds disruptive. But the *NTEU* case sets the standard for facial challenges to the constitutionality of policies that restrain entire categories of speakers from being heard. The government faces a much more demanding burden to justify a blanket restraint on speaking to the press than to justify punishing one particular speaker whose speech undermines the agency's effectiveness.

II. Agency Bans on Interviews Persist

The day after Jackson, Mississippi teacher Anthony Gunter gave an interview to a local TV news station expressing concern about how the school district was handling a case of tuberculosis, his principal called him into the office, reprimanded him for speaking to the media without approval, and told him his services were no longer required.[37] The principal cited a district-level policy that instructs employees:

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[33] 391 U.S. 563 (1968).

[34] Connick v. Myers, 461 U.S. 138 (1983).

[35] 547 U.S. 410 (2006).

[36] David L. Hudson Jr., *No Free Speech for You*, SLATE, Aug. 4, 2017.

[37] Alissa Zhu, *JPS fired Provine teacher who spoke to media about tuberculosis case, lawsuit claims*, MISSISSIPPI CLARION LEDGER, July 12, 2019.

"Make sure that you've talked to your supervisor and the Public and Media Relations Office before agreeing to do an interview. Remind the media representatives that you must have consent to grant an interview."[38] Gunter filed a federal lawsuit in July 2019, alleging that the policy is unconstitutionally overbroad because it makes no exception for speech, like his, that takes place off-campus on personal time.

The *Gunter* case echoes claims recently lodged by former schoolteachers in New Jersey and West Virginia, challenging their district's policies against speaking to the media without authorization. In New Jersey, a high school yearbook teacher, who was suspended after she spoke to the media to defend herself in a censorship scandal, filed suit asking a federal court to invalidate a district rule that forbids employees from giving interviews without the superintendent's permission.[39] In West Virginia, a high school teacher caught making racially offensive posts on Twitter alleges that she was unlawfully ordered not to answer questions from the news media, preventing her from defending her reputation.[40]

School districts everywhere publish and enforce no-interview policies, apparently oblivious that employees have constitutionally protected rights. The Denver school district's policy is typical of those in force throughout the country: "It is Denver Public Schools' policy that all news media inquiries regarding the district, departments or schools be referred to the Communications Team to ensure the most timely and accurate response."[41]

Research by journalism professor Carolyn S. Carlson for the Society of Professional Journalists shows that aggressive gatekeeping by public-information officers ("PIOs") is pervasive in public schools. In Carlson's 2014 survey of 190 journalists assigned to the education beat, 89 percent said that the institutions they cover require journalists to get interviews pre-approved by a public information officer some or all of the time.[42] More than 71 percent said that a public relations officer or administrative supervisor sits in on their interviews with school employees at least some of the time. One journalist told Carlson's research team:

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[38] *See* Jackson Public Schools, Public and Media Relations Communications Guide, at 12, *available at* https://www.jackson.k12.ms.us/cms/lib/MS01910533/Centricity/domain/68/documents_pdfs/pmr_handbook.pdf

[39] Adam Clark, *N.J. teacher behind infamous Trump yearbook censorship wants her bosses fired*, NJ.COM, June 7, 2019.

[40] Kyla Asbury, *Former teacher sues county board of education for free speech violations*, WEST VIRGINIA RECORD, Jan. 11, 2019.

[41] Denver Public Schools, Media Resources: Services and Programs, *available at* https://www.dpsk12.org/communications/mediarelations/.

[42] Carolyn S. Carlson and Megan Roy, *Mediated Access: Education Writers' Perceptions of Public Information Officers' Media Control Efforts*, Mar. 2014, at *2, *available at* https://www.spj.org/pdf/sunshineweek/ewa-survey-report-2014.pdf.

> "Going through public information officers, ironically, is not a good way to get an interview. All they do is delay things and make your job harder. I only use them when it is required and then I try to figure out how to circumvent them. They are typically a disruption rather than an aid."[43]

It's not just schools. During 2016, reporters in Wisconsin researched the media policies of all 20 state Cabinet-level executive agencies, and found that just two of them had "open door" policies allowing employees to speak to journalists without prior authorization.[44] Five others permitted a limited degree of communication – for instance, the state Department of Natural Resources authorized employees to answer "routine" questions, but refer "significant" ones to a public-affairs officer – while the remaining 13 agencies categorically required all interactions with journalists to be screened through a media-relations office.

A longtime Wisconsin environmental reporter said his job became more difficult when the state's Department of Natural Resources began requiring employees to get approval before discussing their area of scientific expertise with the media:

> It used to be that a reporter seeking official comment from the DNR could talk with a rank-and-file staff member with expertise in the issue at hand. ... But staffers at DNR and many other state agencies now must refer all media requests to their organization's spokespeople, who are or answer to political appointees. Depending on the circumstances, a spokesperson will often answer questions by email, or sit in on a conference call between a reporter and a staffer.[45]

Wisconsin is no outlier: Research by the Brechner Center shows that federal, state and local government agencies across the country commonly maintain "gag" policies similar to those declared unconstitutional by multiple federal courts. One of them – the state highway patrol in Nevada – continues enforcing a policy requiring advance approval for interviews[46] despite having lost a First Amendment case finding that a rule restricting officers' communications with the public was unconstitutional.[47]

Brechner Center researchers gathered media policies from federal, state and local agencies in three ways: (1) Using online keyword searches for common phrases and terms, such as "media relations policy," (2) searching news stories from the past five years for references to key phrases such as "permitted to

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[43] *Id.* at *6.

[44] Chris Hubbuch, *Special treatment or limited access?*, THE LACROSSE TRIBUNE, Mar. 13, 2016.

[45] Scott Gordon, *Volunteers Look To Inject More Science Into Wisconsin's Environmental Policymaking*, WISCONTEXT.COM, Sept. 5, 2017.

[46] Nev. Dept. of Pub. Safety, Policy No. 326, News Media Relations (2018), Sec. 326.2.1 ("Media Request") (obtained through FOIA request to agency).

[47] *See Moonin*, *supra* n. 24.

speak" and "not allowed to speak," and (3) by sending freedom-of-information requests to 50 state law enforcement agencies, because police agencies have been the most frequent source of litigation surrounding restrictive speech policies.

The research confirmed that agencies across the country have regulations on the books informing employees that they must get approval from their supervisors, and/or from a media-relations officer, before they may share information with journalists. Restrictive media policies are in force at agencies large and small, among them:

- Public universities, including the University of California system, where the president's office tells staff members: "If a reporter contacts you or someone in your department for an interview or information, please refer the reporter to Media Relations so we can coordinate a response."[48]
- Two-year colleges, such as those within the Kentucky Community and Technical College System, which instructs college employees: "If you are contacted by a member of the media, immediately refer the call" to the institution's Marketing and Communications Department without agreeing to an interview.[49]
- Police and sheriff's departments, such as Colorado's Steamboat Springs Police Department, which states in its employee policy manual: "At no time shall any employee of this department make any comment or release any official information to the media without prior approval from a supervisor or the designated Department media representative."[50]
- Criminal-justice agencies, including the Georgia Department of Juvenile Justice, where a regulation requires any employee contacted by the news media to refer the inquiry to the agency's Office of Communications and notify supervisors "through [the] chain of command."[51]

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[48] University of California System, Office of the President, Strategic Communications and Media Relations, "What We Do," *available at* https://www.ucop.edu/media-relations/what-we-do/index.html.

[49] Kentucky Community and Technical College System, Administrative Policies and Procedures, KCTCS Faculty/Staff Media Relations Policy, Sec. 4.21.2, Media Calls/Inquiries, *available at* https://publicsearch.kctcs.edu/policies/admin%20policies/4-21.pdf.

[50] Steamboat Springs Police Services, Policy Manual, Policy 321, Media Relations, *available at* https://steamboatsprings.net/DocumentCenter/View/17890/Steamboat_Springs_PD_Policy_Manual_022219?bidId=

[51] Georgia Department of Juvenile Justice, Policy #1.8, Public Information, Dec. 28, 2017, *available at* http://www.djj.state.ga.us/Policies/DJJPolicies/Chapter01/DJJ1.8PublicInformation.pdf.

Left unchallenged, these policies can have dangerous consequences for public employees. In New York, a Department of Transportation engineer said he was forced to retire after 29 years on the job after he was cited for insubordination for speaking, without authorization, to a local newspaper for an article about the DOT's hurricane response – even though the story portrayed the agency favorably.[52]

Not all agency policies are so restrictive. On their face, many comport with constitutional standards, offering a public-relations office as a resource rather than as a mandatory gatekeeper. For example, the U.S. Department of Health and Human Services media policy tells employees: "In keeping with the desire for a culture of openness, HHS employees may, consistent with this policy, speak to members of the press about their work."[53] The U.S. Fish and Wildlife Service authorizes employees to speak freely about their areas of expertise ("Employees should not be prohibited from speaking to the news media unless it would result in disclosure of information that is exempt from disclosure") while directing employees to seek approval before making any official comment on behalf of the agency,[54] which is a permissible distinction under First Amendment caselaw. But even where agencies' published policies are protective of employee speech rights, unofficial memos and directives can confuse employees about how protected they are.[55] When uncertain, most will refrain from speaking.

Public employees' inability to speak freely about their work became a matter of national prominence when the newly inaugurated Trump administration issued directives to federal health and environmental agencies cautioning scientists not to talk to the media without supervisory approval.[56] But constraints on government employee speech are not a creation of the Trump administration or the province of one party. News organizations complained repeatedly during the Obama administration about their inability to get unfiltered access to federal employees. In a December 2015 white paper sent to the Obama White House, media organizations reported:

> Requirements that no one in federal offices speak to reporters without notifying an authority, often a public information officer, have become more entrenched. We are similarly unable to obtain information from previously available experts within agencies,

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[52] Jon Alexander, *State clamps down on release of information*, THE (GLENS FALLS) POST STAR, Feb. 20, 2013.

[53] U.S. Department of Health and Human Services, Guidelines on the Provision of Information to the News Media, January 2017, *available at* https://www.hhs.gov/sites/default/files/media_policy.pdf.

[54] U.S. Fish and Wildlife Service, Official Public Communications – General Policy and Procedures, 115 FW 1, *available at* https://www.fws.gov/policy/115fw1.html.

[55] *See, e.g.*, Peter Sullivan, *CDC tells employees not to talk to the press: report*, THE HILL, Sept. 12, 2017 (reporting that a public-affairs officer emailed employees of the Centers for Disease Control telling them that "everything from formal interview requests to the most basic of data requests" would henceforth have to be cleared in advance with the media-relations office at CDC headquarters).

[56] Angela Chen, *Trump silences government scientists with gag orders*, THE VERGE, Jan. 24, 2017.

> who are often only allowed to speak when in the presence of a press office staff, which chills their speech, or are prohibited from speaking with the media at all.[57]

Restrictive speech policies are in force across all levels of government. A 2016 survey by Professor Carlson under the auspices of the SPJ found that more than 30 percent of news reporters assigned to the police beat in their communities said they "rarely" or "never" can get access to speak to the chief of police.[58] Fully 55 percent reported that they "rarely" or "never" are permitted to interview the lead detective at a crime scene.[59] More than 86 percent said that they must go through a public-information officer at least some of the time before they will be allowed to speak with a member of the police force.[60]

Some publicly available agency policies strike a legally defensible balance between the rights of employees and the authority of the employer. The Minnesota Department of Transportation, for instance, simply tells employees to consider a series of cautionary questions (such as "Do I have all the up-to-date information on this topic?" and "Am I the spokesperson or topic expert?") before deciding whether to grant an interview, as opposed to forbidding interviews or requiring pre-approval.[61] Similarly, Northwest Oklahoma State University tells employees who are approached by the news media:

> If you are unsure about commenting, you may politely decline to answer or refer the question to your supervisor. ... Employees choosing to make statements to the media should do so in a manner which does not imply, directly or indirectly, that the employee is speaking for the Regional University System of Oklahoma, the Board of Regents, or the University.[62]

Policies making advice available to employees who want it, but making clear that "permission" from a media-relations officer is not an enforceable requirement, are constitutionally permissible.

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[57] *See* Society of Professional Journalists et al., *Paper for President Obama On Restrictions on Press Freedom*, Dec. 15, 2015, at 2, *available at* https://www.spj.org/pdf/news/obama-restrictions-press-freedom-2015-12-15.pdf.

[58] Carolyn S. Carlson and Paymon Kashani, *Mediated Access: Crime Reporters' Perceptions of Public Information Officers' Media Control Efforts, Use of Social Media, Handling of Body Camera Footage and Public Records*, Mar. 2016, at *2, *available at* https://www.spj.org/pdf/sunshineweek/crime-reporters-survey-report.pdf.

[59] *Id.* at *4.

[60] *Id.* at *2.

[61] Minn. Dept. of Transportation, Policy HR007, Media Relations, *available at* https://www.dot.state.mn.us/policy/hr/hr007.html.

[62] Northwest Okla. State Univ., Employee Handbook, Sec. 7.5, "Media Relations," *available at* https://www.nwosu.edu/uploads//eehdbook.pdf.

III. Challenging Restrictive Media Policies: A Roadmap for Journalists

A. Establishing "standing" for a facial constitutional challenge

Though the law is overwhelmingly on the side of employees chafing against restrictive media policies, legal challenges are rare. That's unsurprising. An employee rarely will feel so strongly about the right to speak to the press as to be motivated to take legal action likely to sour workplace relationships. As a practical matter, the burden of obtaining a supervisor's sign-off for the occasional interaction with a journalist is far less than the burden of filing a lawsuit. Thus, the weight of restrictive workplace policies falls not on any particular employee, but on the journalists who have difficulty gaining access to the interviewees they need – and to the audiences that rely on their coverage.

When employees do sue, it's generally not to challenge a gag policy on its face, but to challenge a specific instance of discipline for speech that the employer dislikes.[63] Such a challenge muddies the constitutional issue because disciplinary action against an individual speaker is reviewed by the courts under the *Pickering* and *Garcetti* legal standards. To get the benefit of the more protective *NTEU* level of First Amendment scrutiny, a lawsuit must broadly challenge the constitutionality of the employer's policy apart from any particular speaker's message (*i.e.,* a "facial" challenge). The people in the best position to bring that challenge are the news organizations hampered by limited access to their sources.

Courts generally hesitate to entertain challenges to regulations brought by parties who aren't the ones being regulated. But there are exceptions, especially if the people directly suffering the burden of the regulation face impediments to suing on their own. For example, physicians and pro-choice groups can challenge laws restricting minors' access to contraceptives, because a teenager needing birth-control pills is unlikely to bring the case herself.[64] And federal courts take an especially broad view of the right to sue when restraints on First Amendment freedoms are at stake.[65]

There is already a roadmap for journalists to challenge government policies that restrain their sources for speaking in the context of judicially imposed gag orders on lawyers, parties, witnesses and other trial participants. News organizations have often succeeded in challenging judicially imposed gag orders. When an Ohio trial judge ordered everyone involved in wrongful-death lawsuits arising out of the shooting of anti-war protesters at Kent State University in 1970, a federal appeals court overturned the ban, saying: "The protected right to publish the news would be of little value in the absence of sources from which to

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[63] For instance, in *Salge v. Edna Indep. Sch. Dist.*, 411 F. 3d 178 (5th Cir. 2005), a school employee successfully challenged her firing for violating a district policy against sharing information with the media, but the focus of the case was on the substance of what she said rather than the legality of the policy.

[64] Carey v. Population Services Int'l, 431 U.S. 678 (1977).

[65] *See* Thornhill v. Alabama, 310 U.S. 88, 97 (1940) ("Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.").

obtain it."[66] The court treated the judge's order as a "prior restraint" on the distribution of news, even though the plaintiff, CBS News, was restrained only indirectly.

Similarly, the Tenth Circuit found that news organizations could challenge a district judge's order directing jurors not to grant interviews after serving in a high-profile civil rights lawsuit against police officers who were accused of framing an innocent man for murder.[67] Although the *Albuquerque Journal* was not party to the underlying litigation, the judges found that the newspaper had standing to intervene "because the court's order impeded its ability to gather news, and that impediment is within the zone of interest sought to be protected by the first amendment."[68]

Not every court agrees that a judge's order silencing trial participants should be considered a restraint on journalists. Several appellate courts have rejected that view and treated judicial gag orders with greater deference, rather than starting with the assumption that they're unconstitutional.[69] But even those courts have recognized news organizations are proper plaintiffs to raise the First Amendment issue, whether on their own behalf or on behalf of muzzled speakers. In other words, there is a strong legal consensus that news organizations must have the ability to sue to vindicate their own rights and/or the rights of muzzled speakers, who may fear retaliation or adverse publicity if they expose themselves as would-be whistle-blowers.

If restraints on public employee speech are not regarded as directly restraining journalists, news organizations may face the hurdle of proving that the order is actually preventing them from communicating with a willing source. Some judges will dismiss First Amendment cases brought by people claiming a right to receive information without proof of an identifiable speaker who has been prevented from speaking.[70] For example, a conservative organization in Pennsylvania ran into the "willing speaker" problem when trying to challenge a state regulation that forbids candidates for judgeships from taking positions on disputed political issues. Although the organization showed that many judicial candidates refused to respond to questionnaires about political ideology, a federal appeals court found there was

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[66] CBS, Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975).

[67] Journal Pub. Co. v. Mechem, 801 F. 2d 1233 (10th Cir. 1986).

[68] *Id.* at 1235.

[69] *See, e.g.,* In re Dow Jones & Co., 842 F.2d 603, 608-09 (2d Cir. 1988); Radio & Television News Ass'n v. United States Dist. Court for the Cent. Dist., 781 F.2d 1443, 1446 (9th Cir. 1986).

[70] *See, e.g.*, American Civil Liberties Union v. Holder, 673 F. 3d 245, 255 (4th Cir. 2011) (dismissing First Amendment challenge to federal law sealing access to files of False Claims Act cases, because there was no proof that any plaintiff would disclose the existence of a sealed case but-for the existence of the law); Stephens v. County of Albemarle, 524 F. 3d 485, 493 (4th Cir. 2008) (finding claim by widow of worker fatally injured in landfill explosion, who claimed that plaintiffs gagged by nondisclosure agreements in prior lawsuits involving the safety of the landfill might have given warning of the hazard, was too speculative to confer standing to challenge the NDAs as a First Amendment violation).

insufficient proof that the candidates would have answered if not for the state regulation -- so there was no free speech violation to be challenged.[71]

Based on the widespread use of unnamed sources who insist on anonymity because they are forbidden from speaking to the media, news organizations should have little difficulty documenting that willing speakers exist. During a 35-day federal shutdown that started just before Christmas 2018, sending some 800,000 federal workers home on unpaid leave, media outlets regularly met frustration when trying to gather information from furloughed employees. A husband-and-wife furloughed by the U.S. Department of Agriculture insisted on anonymity to discuss their financial hardship with NBC News, citing their agency's prohibition against interviews.[72] An IRS tax examiner told MSNBC that he could not talk on-the-record about the impact of going without pay for more than a month, "because he's not permitted to speak about his job with the media."[73] A California newspaper relied on second-hand accounts from a local congressman about how members of the Coast Guard -- going without pay because of the shutdown – were fearful of losing their homes and relying on charity to make ends meet, because "members of the Coast Guard are not permitted to speak to the media during the shutdown."[74] These examples show that there is no shortage of government employees are eager to share their observations and experiences – if they believe they can do so without jeopardizing their jobs.

The First Amendment issue will be even clearer still when agencies phrase their policies as requirements directed to journalists themselves. It is commonplace for agency rules to instruct journalists to present their interview requests exclusively to a public information officer and not to contact agency employees directly.

The Indiana Department of Administration, which oversees purchasing and other support services for state government agencies, tells journalists on its Media and Public Information web page: "All media requests for information or interviews must be requested through our Director of Communications and External Relations."[75] In Arizona, the state forestry agency instructs news organizations that "[a]ll media requests for interviews or other information must be handled through the Public Affairs Department of the

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[71] Pennsylvania Family Institute, Inc. v. Black, 489 F.3d 156 (3d Cir. 2007).

[72] Annie Nova, *Just get another job? For federal workers, it's not that simple*, NBCNEWS.COM, Jan. 18, 2019.

[73] Audrey McNamara, *Federal Workers Turn to GoFundMe as Government Shutdown Wears On*, THE DAILY BEAST, Jan. 6, 2019.

[74] Scott Middlecamp, *Rep. Salud Carbajal meets with Morro Bay Coast Guard members going without pay in shutdown*, THE (SAN LUIS OBISPO) TRIBUNE, Jan. 19, 2019.

[75] *See* Indiana Department of Administration, Media & Public Information, *available at* https://www.in.gov/idoa/2888.htm.

Department of Forestry and Fire Management."[76] School districts across the country use a cookie-cutter policy providing that "media requests to interview, videotape, or photograph ... staff, students, or board members" must go through a district media-relations coordinator.[77] The City of Wasilla, Alaska, famous for its former mayor, Sarah Palin, says on its website: "All media inquiries, including television, radio, newspaper or other media, must be submitted to the Mayor's Office for review and approval."[78] Similar city policies are on the books from Maryland[79] to Alabama.[80] None of these policies specifies any penalty that would be imposed on journalists who defy the directive, but all are phrased as mandatory. Policies that purport to forbid journalists from contacting public employees are even more clearly subject to challenge by media organizations whose newsgathering is constrained.

In short, media plaintiffs should be able to establish that their interests have been injured, whether directly or indirectly, to sustain a First Amendment challenge to government restraints on employees' speech to the media. The only question is whether the restraint will be treated as a presumptively unconstitutional prior restraint, or whether a less rigorous level of scrutiny will apply.

Strong practical considerations counsel in favor of recognizing standing for journalists to challenge employer policies that restrain employees from speaking to the media, whether in their own right or as stand-ins for the employees themselves. The Supreme Court has recognized that the case for third-party standing is especially compelling when the fear of harm from adverse publicity deters the most directly injured party from suing, which would apply most especially in the case of employees who – but-for the threat of punishment if discovered by their employers – would supply information to journalists

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[76] *See* Department of Forestry and Fire Management, Media & Public Requests, *available at* https://dffm.az.gov/newsroom/public-affairs.

[77] *See* Hazelwood (Mo.) School District, Reminder About Media Requests, *available at* https://www.hazelwoodschools.org/domain/2249; Sunnyvale (Calif.) School District, Reminder About Media Requests, *available at* https://www.sesd.org/domain/802; Ferguson-Florissant School District, Media Guidelines, *available at* https://www.fergflor.org/Page/81; Normandy (S.C.) Schools Collaborative, Media Guidelines, *available at* https://www.normandysc.org/Page/88; Oak Grove (Calif.) School District, Media Requests, *available at* https://www.ogsd.net/apps/pages/index.jsp?uREC_ID=586020&type=d&pREC_ID=1075753; Mason (Ohio) City Schools, Media & Public Info Requests, *available at* http://www.masonohioschools.com/departments/communication___connection/media___public_info_requests.

[78] *See* City of Wasilla, Media Request Policy, *available at* https://www.cityofwasilla.com/departments-divisions/mayor-s-office/media-requests.

[79] *See* City of Laurel, Communications, *available at* https://www.cityoflaurel.org/comm ("All media requests for information and interviews must be routed through the City's Communications Department").

[80] *See* City of Hoover, PIO/Media Requests, *available at* http://www.hooveral.org/FormCenter/Mayor– City-Council-7/PIO– Media-Requests-41.

anonymously as whistleblowers.[81] Employees are highly unlikely to be so motivated to speak to the media as to invest money and risk workplace relationships – exposing themselves as would-be whistleblowers – to initiate First Amendment litigation adversarial to their own employers. This "motivation" consideration has been recognized as a justification for conferring standing on news organizations in the context of gags on trial participants.[82] Moreover, an employee may lose incentive to pursue a case in midstream, either because the matter on which the employee wished to be heard becomes stale, or because the employee changes jobs. A news organization is likely to confront the same gag policy over and over again, while an employee might encounter it only once in a career.

B. Practical strategies for confronting gag policies

When a news organization is told that government employees are forbidden from speaking to the media, that should prompt a series of questions. First, a reporter should ask the "policy" exists in any formal, written format – and ask exactly what it says. Often, the "policy" turns out to be nothing more than "you'll-get-in-trouble" gossip handed down through watercooler chatter. Second, it should be asked who made the policy and whether the policy carries any binding force. If the policy is just a memo issued by a public-relations officer, then it's not a legally binding "regulation" carrying the authority of agency supervisors with hiring-and-firing authority. Third, a reporter should inquire whether employees are subject to disciplinary consequences for disobeying the policy. If not, then the "policy" is really just a request. And fourth, it should be asked whether a journalist who defies the policy and contacts agency employees directly without going through the specified public-relations channels be subject to any sanction. Ideally, the agency's responses to these questions should be documented – in writing, on camera, or in a (legally) recorded conversation. The more overtly that an agency purports to require journalists or employees to obtain clearance of their interviews under threat of concrete consequences, the more clearly the policy will be vulnerable to constitutional challenge.

If an agency acknowledges that the policy carries no punitive consequences, that acknowledgment should be documented and published to reassure employees that they are not subject to a prohibition on interviews. When employees claim to be bound by rules that forbid interviews, those claims should be investigated, and the findings publicized.

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[81] *See* Corey v. Population Serv. Int'l, 431 U.S. 678, 684 n.4 (1977) (recognizing that minors would not come forward to challenge a law forbidding them from purchasing contraceptives, because doing so would expose their private sexual practices, thus making a contraceptive vendor a suitable stand-in plaintiff).

[82] *See* Rene L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1192 (1990) ("Witnesses, for example, may have little at stake in the primary litigation at issue, and thus may have little motivation to spend time and effort challenging a restraint on their speech regarding that litigation. Likewise, litigants, who bear the cost of the primary litigation, may be unable to spare the resources necessary to challenge participant-directed gag orders.").

Conclusion: Best Practices and Recommendations

Although rules and policies requiring government employees to get approval before speaking with the news media are widely enforced, no such policy has ever survived a constitutional challenge.

Narrower confidentiality policies have been upheld as legal. It is legal for a government employer to forbid employees from falsely claiming to be speaking on behalf of the agency, and it is legal to require employees to refrain from sharing information the agency is obligated to keep confidential.[83] A narrowly drawn confidentiality policy should be all that an agency needs to protect its legitimate interests. Protecting the image or reputation of an agency is not a sufficiently compelling justification to override employees' First Amendment rights.

Government public relations offices have legitimate and legally permissible roles. They can offer coaching to employees uncomfortable with giving interviews, they can provide journalists with assistance in locating the right expert, and they can issue statements offering the agency's official perspective. What they cannot do is compel either employees or journalists to clear every conversation in advance.

[83] *See* Hanneman v. Breier, 528 F. 2d 750, 754 (7th Cir. 1976) (police department's policy forbidding officers from disclosing confidential information about internal investigations "is clearly valid on its face"); Zook v. Brown, 748 F.2d 1161, 1167 (7th Cir. 1984) (sheriff's department policy requiring pre-approval when speaking as an official representative of the department was not an overbroad restraint).

ACKNOWLEDGMENTS

This research builds on extensive research by Carolyn S. Carlson and Kathryn Foxhall for the Society of Professional Journalists and its "Censorship by PIO" awareness campaign. Brechner Center legal researchers Kelly Hayes, Rachael Jones and Linda Riedemann Norbut provided research and editing assistance with this paper, which was compiled by Professor Frank D. LoMonte, director of the Brechner Center. A more extensive version of this paper ("Putting the 'Public' Back Into Public Employment: The Civic Toll of Illegal Gag Rules Restraining Government Employee Speech") appears in a forthcoming edition of the *Kansas Law Review*.