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Concerning Behavior: Do a Public Employee's Free Association Claims Share the Public Concern Requirement of Free Speech Claims?

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CONCERNING BEHAVIOR: DO A PUBLIC EMPLOYEE'S FREE ASSOCIATION CLAIMS SHARE THE PUBLIC CONCERN REQUIREMENT OF FREE SPEECH CLAIMS?

Abstract: On September 28, 2018, the Third Circuit Court of Appeals held, in *Palardy v. Township of Millburn*, that it would not apply the public concern test from *Connick v. Myers* to public employees' First Amendment free association claims. The Circuits are split on whether to apply the public concern test: the Second, Fourth, Sixth, and Seventh Circuits apply the test; the Fifth and Eleventh Circuits do not apply it; and the Ninth and Tenth Circuits take hybrid approaches. This comment argues that the Third Circuit mischaracterized its holding, and its approach resembles the hybrid approach of the Tenth Circuit more than the Fifth Circuit it claimed to follow. This comment further argues that, although the Third Circuit's approach is an improvement on the circuit courts that apply the public concern test, a better approach would have the court adopt a strict scrutiny approach to resolving free association claims by public employees.

INTRODUCTION

The First Amendment to the United States Constitution, as incorporated against the states by the Fourteenth Amendment, protects freedom of association as well as freedom of speech.[1] When a state entity violates a person's constitutional rights, that person may seek redress through an action filed under 42 U.S.C. § 1983.[2]

These protections extend to public employees, who can sue their employer (the state) under § 1983 for disciplinary actions in the workplace that violate the employee's rights.[3] In 1983, in *Connick v. Myers*, the Supreme Court held

[1] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (holding that the liberty interest protected by the Due Process Clause of the Fourteenth Amendment included the liberty to associate with others to advance a particular belief). The Supreme Court has held that the Fourteenth Amendment extended First Amendment protections to actions taken by state governments, not just the federal government. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (holding that First Amendment prohibition on laws respecting establishment of religion applied to New Jersey's use of state funds to support religious schools). The First Amendment protects citizens' right to speak without government interference (free speech), but it also protects their right to associate with others (free association). *Patterson*, 357 U.S. at 460.

[2] 42 U.S.C. § 1983 (2018) (providing a cause of action for any person deprived of a constitutional right by a person acting on behalf of a state or territory).

[3] Connick v. Myers, 461 U.S. 138, 141 (1983). A public employee is any person employed in order to manage the affairs of government. *Public Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

that a public employer could not impose conditions on its employees that infringed on those employees' First Amendment rights.[4] Under the test applied in *Connick*, an employee's speech will only be protected if it is on a matter of public concern relating to matters that might concern the community.[5] In determining whether a given action infringes on the employee's free speech rights, a court must balance the employee's interest in discussing matters of public concern with the employer's interest in running an efficient office to provide public services.[6]

After *Connick*, the Supreme Court added another step in the test courts apply to public employee free speech claims.[7] Whether an instance of employee speech deals with a matter of public concern is a contextual and fact-sensitive inquiry that must be resolved before the claim can proceed.[8] In 2006, in *Garcetti v. Ceballos*, the Supreme Court held that a public employee only has a freedom of speech claim if the employee spoke in their capacity as a private citizen.[9] Therefore, speech produced by that employee in the course of

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[4] *Connick*, 461 U.S. at 147. In *Connick*, an assistant U.S. Attorney's (AUSA) supervisor transferred her to a different section of the court. *Id.* at 140. Unhappy with her transfer, she created a questionnaire for other AUSAs to give their opinion on the transfer policy, general morale within the office, the possibility of forming a committee to address grievances, and potential pressure within the department for AUSAs to engage in political work. *Id.* at 140–41. After she distributed her questionnaire, her supervisor fired her, purportedly for refusing to accept the transfer. *Id.* at 141. Her supervisor also characterized her production and distribution of the questionnaire as an act of insubordination. *Id.* The Supreme Court upheld her firing. *Id.* at 154.

[5] *Id.* at 146. The Court distinguished a public concern from a private complaint between employee and employer. *Id.* at 154. Although the Court held the political pressure question on her questionnaire did deal with a matter of public concern, the Court ultimately determined that her firing did not deprive her of her First Amendment right to freely express herself because of the disruption she caused within the office. *Id.* at 149, 154.

[6] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The Court has not rigorously defined the limits of public concern, but the Court has suggested that it could be a contextual determination, based on the form and content of any given speech. *See Connick*, 461 U.S. at 147–48 (holding that the question of whether a given instance of speech "addresses a matter of public concern" should be determined contextually). Courts have focused their inquiry on the content of the speech. *See, e.g.*, Ellins v. City of Sierra Madre, 710 F.3d 1049, 1058 (9th Cir. 2013) (holding that speech made in connection with a no-confidence vote in a police chief by union members was on a matter of public concern); Kristofek v. Vill. of Orland Hills, 712 F.3d 979, 985 (7th Cir. 2013) (stating that a police officer's speech about the wrongfulness of releasing a criminal due to political connections was a matter of public concern because of its content); Rodgers v. Banks, 344 F.3d 587, 600–01 (6th Cir. 2003) (holding that a memo criticizing a mental hospital's infringement on patient privacy spoke on a matter of public concern); Hellstrom v. U.S. Dep't of Veterans' Affairs, 46 F. App'x 651, 656 (2d Cir. 2002) (holding that a demoted manager's criticisms of his former director were employee grievances and not a matter of public concern).

[7] *See infra* notes 9–11 and accompanying text (discussing the creation of a private citizen requirement for public employee free speech claims).

[8] Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 897–98 (2005).

[9] 547 U.S. 410, 421–22 (2006).

their job duties does not receive First Amendment protection.[10] Currently, public employee free speech claims must satisfy both the public concern requirement from *Connick* and the private citizen requirement from *Garcetti* in order to proceed.[11] The circuits have split, however, on whether the public concern and private citizen requirements should also be applied to public employee free association claims.[12]

The Second, Fourth, Sixth, and Seventh Circuits apply the public concern requirement to public employee association claims.[13] The Fifth and Eleventh do not.[14] In a case of first impression, the Third Circuit Court of Appeals held in 2018, in *Palardy v. Township of Millburn*, that the public concern and private citizen requirements do not apply to a police officer's free association claim for discrimination based on union membership.[15] The court held that some union memberships might be a matter of public concern, but there existed no justiciable basis for determining which ones.[16] The court also noted that *Garcetti* explicitly described the private citizen requirement as applying only to speech claims.[17] Finally, the court held that union membership was not an official duty of an employee and therefore satisfied the private citizen requirement.[18]

Part I of this Comment describes the current state of the law regarding employee free association claims and the history of *Palardy*.[19] Part II examines and discusses the various approaches courts have taken to applying a public concern

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[10] *Id.* The Court did not provide a universal rule for determining when an employee spoke in their private capacity, but the Court differentiated such private capacity speech from speech made as part of an employee's professional responsibilities. *See id.* (holding that plaintiff's speech could be restricted when that speech took the form of a memo prepared in his official capacity as a deputy, not as a private citizen).

[11] Palardy v. Twp. of Millburn, 906 F.3d 76, 81 (3d Cir. 2018).

[12] *Id.* at 82.

[13] *See* Cobb v. Pozzi, 363 F.3d 89, 107 (2d Cir. 2004) (requiring plaintiffs to demonstrate that their association with a union was a "matter of public concern" before considering their constitutional free association claim); Edwards v. City of Goldsboro, 178 F.3d 231, 249–50 (4th Cir. 1999) (applying the public concern test to a suspended police officer's free association claim); Griffin v. Thomas, 929 F.2d 1210, 1212–13 (7th Cir. 1991) (applying the public concern test to a free association claim); Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985) (holding that *Connick*'s public concern requirement applies equally to speech and association claims).

[14] *See* Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991) (holding that a public employee dismissed for his political affiliation does not need to meet the public concern requirement governing free speech claims); Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1987) (noting that the public concern requirement, as applied to free association claims, would overturn precedent and damage first amendment rights).

[15] 906 F.3d at 82–83. A free association claim arises when an employee argues that they have been discriminated against or otherwise interfered with in a manner that restricts their right to associate with peers. *See Patterson*, 357 U.S. at 460 (holding that freedom to associate to advance a belief is protected by the Fourteenth Amendment's Due Process clause and its protection of freedom of speech).

[16] *Palardy*, 906 F.3d at 82–83.

[17] *Id.* at 83.

[18] *Id.* at 83–84.

[19] *See infra* notes 23–75 and accompanying text.

test to public employee free association claims.[20] Finally, Part III argues that the Third Circuit's approach, although reasonable, mischaracterizes the Fifth Circuit's precedent.[21] It presents an alternative approach for resolving the public concern and private citizen questions when dealing with free association claims.[22]

I. THE HISTORY OF PUBLIC EMPLOYEE FIRST AMENDMENT RIGHTS AND THE BACKGROUND AND PROCEDURAL POSTURE OF *PALARDY*

Over the course of the twentieth century, a series of decisions shaped the rights of public employees to speak and associate freely without facing retaliation from their employers.[23] *Palardy* is the latest decision in this series delineating the circumstances under which a public employee can be disciplined for his associations.[24] This Part discusses the legal standards governing the Third Circuit's decision in *Palardy* and the history of the case itself.[25] Section A begins with a description of the case law regarding public employee free association claims.[26] Section B then briefly describes the history of *Palardy*, from the events preceding filing to the Third Circuit's 2018 decision.[27]

A. History of Public Employee First Amendment Rights

For much of U.S. history, public employees had no grounds to challenge any conditions of their employment, even conditions that abridged a constitutional right.[28] Justice Oliver Wendell Holmes established the doctrine that public employees could not challenge conditions of their employment on constitutional grounds, writing that "[a] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[29] In other

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[20] *See infra* notes 76–107 and accompanying text.

[21] *See infra* notes 108–134 and accompanying text.

[22] *See infra* notes 135–155 and accompanying text.

[23] *Compare* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (allowing a state school system to restrict the free speech and association rights of its employees), *with Pickering*, 391 U.S. at 568 (preventing a state school system from attaching conditions to employment that unreasonably restricted employee free speech rights).

[24] *Palardy*, 906 F.3d at 84.

[25] *See infra* notes 28–75 and accompanying text.

[26] *See infra* notes 28–46 and accompanying text.

[27] *See infra* notes 47–75 and accompanying text.

[28] *See Connick*, 461 U.S. at 143–44 (reviewing past cases dismissing constitutional claims in similar circumstances); *see also Adler*, 342 U.S. at 492 (holding that employees of a state school system must follow terms of employment dictated by the state, even if they are restrictive of their free speech and association rights); Garner v. Bd. of Pub. Works, 341 U.S. 716, 720–21 (1951) (holding that a city can discharge employees for political affiliation).

[29] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). Justice Holmes wrote in his opinion that a city may require adherence to its rules as a condition of employment. *Id.* Although a rule against discussing politics may require a public employee to give up some free speech rights, that

words, public employees may have to accept restrictions on their constitutional rights or lose their jobs.[30] In the 1950s and 60s, however, a series of cases challenged Justice Holmes's doctrine.[31] In 1968, in *Pickering v. Board of Education*, the Supreme Court held that an employer could not offer employment with an unreasonable condition attached.[32] Following *Pickering*, the Court held in 1983, in *Connick*, that the First Amendment protects speech that is "on a matter of public concern."[33] To determine whether speech addresses a matter of public concern, a court must consider the totality of the speech, including its content and the circumstances of its delivery.[34] Courts consider the following factors to determine whether speech addresses a public concern: the space and time in which the employee spoke, the employee's motive in delivering the speech, the effect of the speech on the employee's relationships with peers and the employee's ability to do their own job, and the employee's employment responsibilities.[35] A court must balance a citizen's free speech interests with the state's interests in running effective public services.[36] This balancing test, emerging from the *Pickering* case, is known as the *Pickering* test.[37]

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did not pose a constitutional question because the Constitution did not guarantee public employment to anyone who wished for it. *Id.* at 517–18.

[30] *See id.* at 517–18 (holding that nothing prevents a mayor from conditioning a policeman's employment on adherence to a rule restricting speech).

[31] *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (holding that a state statute violated the right to due process guaranteed by the Fourteenth Amendment because it required public university employees to take a loyalty oath as a condition of employment). The Court held in *Wieman* that, although there is no general right to public employment, a public servant has constitutional protections was against being fired based on arbitrary or discriminatory grounds. *Id.*

[32] 391 U.S. at 568. Marvin Pickering, a teacher employed by the defendants' school district, wrote a letter to the editor of a local newspaper that was critical of the school district's attempts to increase revenue by raising taxes. *Id.* at 564. The school board fired Mr. Pickering after determining that his letter was disruptive to the district's schools. *Id.* The Court held that Mr. Pickering could not be fired because of his speech because he had the right to speak on important public issues. *Id.* at 574.

[33] 461 U.S. at 147.

[34] *Id.* at 147–48. The Court in *Connick* noted that whether a given instance of speech addressed a public concern is a legal, not a factual, question. *Id.* at 148 n.7. That meant that the Court had the responsibility to consider the content of the speech in question and determine for itself whether that speech addressed a public concern. *Id.* at 150 n.10. In *Rankin v. McPherson*, Ardith McPherson, an employee of a county constable's office, opined in a conversation that she hoped then-President Ronald Reagan would be assassinated. 483 U.S. 378, 381 (1987). When her supervisor heard about this speech, he terminated her employment. *Id.* at 381–82. The Supreme Court held that, as a statement about an ongoing news story commanding heavy publicity, McPherson's speech addressed a matter of public concern. *See id.* at 386.

[35] *See* Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 30 (1999) (describing factors considered by courts in evaluating whether employee speech addresses a matter of public concern).

[36] *Pickering*, 391 U.S. at 568.

[37] *Id.*; *see, e.g.*, Commc'n Workers of Am. v. Ector Cty. Hosp. Dist., 467 F.3d 427, 431 (5th Cir. 2006) (applying the *Pickering* test to a ban on pro-union buttons worn by public employees); Baldassare v. New Jersey, 250 F.3d 188, 201 (3d Cir. 2001) (analyzing a law enforcement investigator's

Subsequent developments added further requirements to public employee free speech claims.[38] In 2006, in *Garcetti*, the Supreme Court held that statements made pursuant to the employee's official duties, rather than as a private citizen, were not protected under *Connick*.[39] The Court's holding limited free speech protections for public employees to circumstances when they are speaking as private citizens, rather than in their official capacities.[40] Thus, to prevail on a free speech violation claim, a public employee must establish that they were speaking on a matter of public concern and that they spoke as a private citizen.[41]

The public concern and private citizen requirements have been applied inconsistently across circuits to public employee claims based on free association rights.[42] The Second, Fourth, Sixth, and Seventh Circuits apply the public

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retaliation claim using the *Pickering* test); Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 624 (2018) (describing factors considered by the *Pickering* test).

[38] *See Garcetti*, 547 U.S. at 421–22 (adding a new private citizen requirement to public employee free speech claims).

[39] *Id.* The Court held that an employer's interest in speech made pursuant to an employee's job responsibilities is greater than the employer's interest in that employee's private speech. *Id.* at 423. The employer's managerial duties may demand that they control speech made as part of the employee's official duties. *Id.*

[40] *Id.* at 425–26; *see* Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen?":* Garcetti v. Ceballos *and the "Citizenship" Prong to the* Pickering*/*Connick *Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 607–08 (2008) (defining speaking "as a citizen" as speech not made as part of an employee's official duties). It is a difficult task to draw the line between speech made as a private citizen and speech made in one's official capacity. *See* Jessica Reed, *From* Pickering *to* Ceballos*: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y.C. L. REV. 95, 124 (2007) (noting the difficulty in determining when a public employee at work is acting as a private citizen versus in their official capacity); *see, e.g.*, King v. Bd. of Cty. Comm'rs., 916 F.3d 1339, 1346 (11th Cir. 2019) (holding that a public employee's statements about mishandling a medical clearance process were made as an employee and thus were not entitled to First Amendment protection); Lyman v. NYS OASAS, 928 F. Supp. 2d 509, 526 (N.D.N.Y. 2013) (holding that a plaintiff's advocacy for victims of a church sex abuse scandal was speech made as a private citizen and that it was entitled to First Amendment protection).

[41] *See, e.g.*, *Garcetti*, 547 U.S. at 421–22 (establishing a private citizen requirement for public employee free speech claims); *Connick*, 461 U.S. at 147 (establishing a public concern requirement for public employee free speech claims); *Palardy*, 906 F.3d at 81 (discussing application of public concern and private citizen requirements).

[42] *See* Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393, 400 (3d Cir. 1992) (noting the split in circuits on application of *Connick* analysis to free association claims). Free association rights mean the right to participate in organized activity with fellow employees. *See id.* at 400 (describing free association rights as the right to organize fellow faculty against administration policies). In *Sanguigni v. Pittsburgh Board of Public Education* in 1992, a teacher complained that her principal harassed her and rated her poorly after she helped create a newsletter that called attention to harassment issues within the school. *Id.* at 395–96. She claimed that this retaliation violated her rights to free speech and free association. *Id.* at 396. In cases like *Sanguigni* and *Palardy*, a claim based on the right to free association refers to a petitioner's attempt to associate or organize with peers. *Palardy*, 906 F.3d at 81. In a free speech claim, typically an employer retaliated against an employee for a specific instance of speech. *Sanguigni*, 968 F.2d at 400.

concern requirement to free association claims by public employees.[43] Meanwhile, the Fifth and Eleventh Circuits have held that these claims have no public concern requirement.[44] The Ninth and Tenth Circuits each take mixed approaches.[45] At the time *Palardy* was first heard, the Third Circuit had not yet taken a position either way.[46]

B. The Background and Procedural Posture of Palardy

Palardy arose out of a disciplinary dispute between a Township of Millburn, New Jersey police officer and the town's business administrator.[47] Plaintiff Michael Palardy was a police officer for Millburn from 1988 to 2014.[48] He was also an active member of two police officers' unions, the Patrolmen's Benevolent Association (PBA) and the Superior Officers' Association (SOA).[49] He served as PBA sergeant-at-arms in 1991, union delegate from 1992–1995,[50]

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[43] *See, e.g.*, *Cobb*, 363 F.3d at 107 (holding that a public employee attempting to claim that their free association rights were violated must establish that the associational activity relates to a public concern); *Edwards*, 178 F.3d at 249 (analogizing limitations on a public employee's free association rights to similar limitations on their free speech rights); *Griffin*, 929 F.2d at 1212–13 (maintaining the public concern requirement for both free speech and free association claims); *Boals*, 775 F.2d at 692 (applying the *Connick* test to both free association and free speech claims).

[44] Boddie v. City of Columbus, 989 F.2d 745, 749 (5th Cir. 1993); *Hatcher*, 809 F.2d at 1558. In *Boddie*, a fireman sued the City of Columbus for firing him because of his association with union members. 989 F.2d at 747. The Fifth Circuit held that public employee freedom of association claims related to union activity did not need to meet the *Connick* public concern test. *Id.* at 749. In *Hatcher*, a teacher sued her school district, alleging that she was denied a promotion due to her association with parents who protested a school closing. 809 F.2d at 1557. The Eleventh Circuit held that *Connick*'s public concern requirements were inapplicable to free association claims. *Id.* at 1558.

[45] *See* Hudson v. Craven, 403 F.3d 691, 698 (9th Cir. 2005) (holding that free speech and free association rights are so similar that a case implicating both can be treated like a case implicating only free speech rights). The Ninth Circuit applies the public concern requirement in cases involving entwined free speech and free association claims. *Palardy*, 906 F.3d at 82. It has not decided how to approach free association claims with no speech component. *Id.* The Tenth Circuit generally applies the public concern requirement to free association cases, but does not apply it in the public-employee union context. *See* Shrum v. City of Coweta, 449 F.3d 1132, 1138 (10th Cir. 2006) (holding that, specifically when discussing labor union associations, the court will not impose a public concern requirement to free association claims). *But see* Merrifield v. Bd. of Cty. Comm'rs, 654 F.3d 1073, 1083 (10th Cir. 2011) (applying public concern requirement to free association claim arising out of public employee's retaining of an attorney).

[46] *Palardy*, 906 F.3d at 82.

[47] *Id.* at 78–80.

[48] *Id.* at 79. Palardy first served as a patrolman. *Id.* He was promoted to Sergeant in 1995, Lieutenant in 1998, and, in 2012, he became Captain.

[49] *Id.* The Patrolmen's Benevolent Association (PBA) is a labor union that represents patrol officers, and the Superior Officers' Association (SOA) represents officers of lieutenant rank. *See About NJSOA*, N.J. SUPERIOR OFFICERS' ASS'N, http://www.njsoa.org/about_welcome.html [https://perma.cc/AXD7-9TAQ]. The hierarchy of police ranks in Millburn goes from patrol officer, to lieutenant, to captain, and finally to chief. *Palardy*, 906 F.3d at 79.

[50] *Palardy*, 906 F.3d at 79. It is unclear from the opinion and filings for which union he served as delegate. *Id.*

SOA vice president in 2007 or 2008, and SOA president in 2009 or 2010.[51] Defendant Timothy Gordon was the business administrator for Millburn during the same time period.[52] This position gave him the authority to hire, fire, and promote police officers.[53]

In late 2010, Millburn had no chief of police, and Palardy hoped to assume that position.[54] At that point, Palardy had the most seniority among Millburn's lieutenants and thus expected to be promoted to captain and then chief.[55] Nevertheless, Gordon told Palardy that he wanted to bring in a chief from Livingston, New Jersey because he believed that none of the currently active lieutenants were ready to become chief.[56] Before Gordon could recruit a captain from another town, a Millburn captain returned from inactive duty and Gordon appointed this captain chief.[57] Meanwhile, Gordon promoted Palardy to "acting captain."[58] Palardy felt that Gordon disapproved of his union activity and this disapproval had harmed his chances at a promotion to chief or full captain.[59] As a result, Palardy resigned as union president because he believed that doing so would increase his chances of a full promotion.[60]

Despite Palardy's attempt to earn a promotion to chief, he realized that no promotion would be forthcoming no matter how long he waited.[61] In October 2011, a consultant recommended that Millburn fill all open positions in the captain rank.[62] In 2012, Gordon promoted Palardy to captain.[63] In 2013, the Township's Board of Education offered Palardy a Security Coordinator posi-

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[51] *Id.* The record does not clearly establish the precise dates for some of these positions; approximations are given in the original opinion. *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* Typically, during Palardy's tenure, the Township selected its chief of police from among its captains, who had previously been promoted from lieutenant. *Id.* Palardy noted that he could not have been promoted directly from lieutenant to chief pursuant to this policy. *Id.* He could, however, have been promoted to captain, then rapidly to chief, as he was the most senior lieutenant at this time. *Id.*

[56] *Id.* at 79–80. The Livingston Chief of Police would have then become chief of police for both towns simultaneously. *Id.* at 80.

[57] *Id.* at 80.

[58] *Id.* This position came with an increase in responsibilities but no increase in pay. *Id.*

[59] *See id.* (reporting that Gordon told another officer that Palardy would never become chief "because of his union affiliation and being a thorn in my side for all these years"). Gordon allegedly stated that Palardy's close relationship with the officers under his command made him a bad supervisor, and he had to learn to separate his work for the union from his work as a police officer. *Id.*

[60] *Id.* Palardy believed that resigning from union president would alter Gordon's perception that his involvement with the union would impede his success in a leadership role. *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* Palardy believed that this was "out of desperation" by Gordon. *Id.* It is unclear what might have caused this desperation, aside from a lack of suitable candidates for captain. *See id.* (summarizing Palardy's argument that his promotion was an act of desperation, but not providing any potential cause).

tion.[64] Effective February, 1, 2014, Palardy retired from the police force.[65] Subsequently he accepted the Board of Education's offer.[66]

After his retirement, Palardy filed a suit against Millburn and Gordon in the Superior Court of New Jersey.[67] His amended complaint asserted, inter alia, retaliation for exercise of free speech and free association rights and violation of free speech rights.[68] Defendants filed for removal to federal district court, which the District Court for the District of New Jersey granted in March 2015.[69]

The defendants filed a motion to dismiss all of the charges, and the N.J. District Court granted the motion with respect to several of the charges, leaving only the constitutional free speech and free association claims.[70] These claims asserted that Gordon violated Palardy's free speech and free association rights by retaliating against Palardy for his union organizing activity.[71] After discovery, the defendants moved for and were granted summary judgment on the outstanding claims.[72] The district court found that Palardy had not spoken on a matter of public concern, nor had he spoken as a private citizen.[73] The court therefore held that he had failed to meet the requirements of *Garcetti*.[74] Palardy appealed the grant of summary judgment to the Third Circuit.[75]

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[64] *Id.* At this point, Palardy recognized that he would not become chief, claiming that he "saw the writing on the wall," but the court did not elaborate beyond that in its opinion. *Id.*

[65] *Id.*

[66] *Id.*

[67] Notice of Removal at 1, Palardy v. Twp. of Millburn, 2017 WL 2968394 (D.N.J. July 11, 2017).

[68] Second Amended Complaint at 5–11, *Palardy*, 2017 WL 2968394 (2:15-cv-02089-SDW-SCM). Palardy asserted that Gordon's refusal to promote him was retaliation for Palardy's union organizing speech and activity. Id. at 5.

[69] Notice of Removal, *supra* note 67, at 1.

[70] *Palardy*, 906 F.3d at 80.

[71] Palardy v. Twp. of Millburn, No. 2:15-cv-02089-SDW-SCM, 2017 WL 2968394, at *2–3 (D.N.J. July 11, 2017). Palardy alleged that Gordon retaliated against him by commissioning a pair of studies meant to prevent Palardy from attaining the rank of captain, denying him a retroactive wage increase, considering other candidates for the position of Chief of the Millburn Police department, and declining to promote him to the chief position. *Id.*

[72] *Palardy*, 906 F.3d at 80. Courts grant summary judgment for one party when there is no disagreement by the parties on any fact material to the outcome of the case and the moving party is "entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986).

[73] *Palardy*, 906 F.3d at 80; *see Garcetti*, 547 U.S. at 421–22 (holding that the First Amendment does not protect employee speech made as part of that employee's job responsibilities).

[74] *Palardy*, 2017 WL 2968394, at *5–6. The district court did not apply a separate analysis to Palardy's free speech and free association claims. *Palardy*, 906 F.3d at 81. Instead, the district court analyzed Palardy's First Amendment claim as a whole and applied the *Garcetti* test to that claim. *Id.* at 80; *see Garcetti*, 547 U.S. at 420 (holding that First Amendment protections apply only to speech by "citizens on matters of public concern").

[75] *Palardy*, 906 F.3d at 77.

II. THE CIRCUIT COURTS' VARYING APPROACHES TO APPLYING THE PUBLIC CONCERN AND PRIVATE CITIZEN TESTS TO FREE ASSOCIATION CLAIMS

Prior to 2018, the Third Circuit had not ruled on whether the requirements of *Garcetti v. Ceballos* and *Connick v. Myers* apply to public employee free association claims, and the circuit courts are divided on this issue.[76] Section A of this Part describes how the other circuit courts apply *Garcetti* and *Connick* to public employee free association claims.[77] Section B of this Part describes the approach taken by the Third Circuit Court of Appeals in 2018 in *Palardy v. Township of Millburn*.[78]

A. How the Other Circuit Courts Apply the Public Concern and Private Citizen Tests to Free Association Claims

After *Pickering v. Board of Education* established the balancing test for public employee free speech claims and *Connick* added the public concern prong to that test, the circuits began to diverge on whether the *Connick* requirement applied equally to free association claims.[79]

A majority of circuit courts applied the public concern requirement to free speech and free association claims equally.[80] In 1985, in *Boals v. Grey*, the Sixth Circuit did not distinguish between free speech and free association claims.[81] The court applied the public concern test to both.[82] The Sixth Circuit read the Supreme Court's free speech opinion in *Pickering* to be based on an

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[76] Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006); Connick v. Myers, 461 U.S. 138, 141 (1983); *see* Palardy v. Twp. of Millburn, 906 F.3d 76, 82 (3d Cir. 2018) (noting divide among Circuits on the application of *Connick* and *Garcetti* to free association claims).

[77] *See infra* notes 79–97 and accompanying text.

[78] *See infra* notes 98–107 and accompanying text.

[79] *See Connick*, 461 U.S. at 147 (1983) (establishing public concern prong as part of the *Pickering* test); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (establishing a balancing test for public employee free speech claims); William A. Herbert, *The First Amendment and Public Sector Labor Relations*, 19 LAB. LAW. 325, 343–44 (2004) (noting the split in circuits regarding the suitability of the public concern requirement to free association claims). *Compare* Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985) (holding that the *Connick* public concern test applies equally to speech and association claims), *with* Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991) (holding that a public employee alleging dismissal for his political affiliation need not meet the public concern requirement governing free speech claims).

[80] *See, e.g.*, Cobb v. Pozzi, 363 F.3d 89, 104–05 (2d Cir. 2004) (applying the public concern requirement to free association claims); Edwards v. City of Goldboro, 178 F.3d 231, 249 (4th Cir. 1999) (same); Griffin v. Thomas, 929 F.2d 1210, 1212–13 (7th Cir. 1991) (same); *Boals*, 775 F.2d at 692 (same).

[81] *Boals*, 775 F.2d at 692.

[82] *Id.*

underlying free association theory.[83] The Seventh Circuit followed *Boals* in 1991 in *Griffin v. Thomas*, holding that there was no reason to treat speech and associational claims differently.[84] The Seventh Circuit noted that *Pickering* dealt with a case involving both speech and associational rights, and, further, that the Supreme Court had historically cautioned against establishing a hierarchy among First Amendment rights.[85] The Fourth Circuit also applied the public concern test to a public employee's free association claim in 1999, in *Edwards v. City of Goldboro*, on the basis of the similarity between an employee's First Amendment free association and free speech claims.[86] Finally, in 2004, in *Cobb v. Pozzi*, the Second Circuit held that free association claims should have to meet the public concern bar.[87] After a lengthy canvas of existing jurisprudence on the application of the public concern bar to free association claims, the Second Circuit decided that the test should apply, resting its decision on two pillars: first, that *Connick* should apply to all expressive activity by a public employee, not just speech.[88] The Second Circuit was also concerned that exempting free association claims from the public concern test would create a two-tiered system of first amendment rights.[89]

Not all Circuit Courts have applied the public concern test to free association claims.[90] The Eleventh Circuit in 1987, in *Hatcher v. Board of Public Education & Orphanage*, declined to apply the public concern test to free association claims, arguing that to do so would undermine established jurisprudence and first amendment liberties.[91] The Fifth Circuit followed suit in 1991

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[83] *Id.* Because *Pickering* and *Connick* were based on underlying free association claims, the Sixth Circuit reasoned, the public concern requirements they established should be applied to free association claims. *Id.*

[84] 929 F.2d at 1212–13.

[85] *Id.* at 1213–14 (quoting *McDonald v. Smith*, 472 U.S. 479, 485 (1985), to caution against establishing a tiered system of rights stating that "there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions").

[86] *See Edwards*, 178 F.3d at 249 (analogizing limitations on a public employee's free association rights to similar limitations on their free speech rights).

[87] 363 F.3d at 104–05.

[88] *Id.* at 102–03. The Second Circuit used the term "expressive activity" to refer to both speech and association and held that the requirements from *Connick* applied to all expressive activity. *Id.* at 104.

[89] *See id.* at 105 (holding that applying *Connick* to speech claims only would elevate free association rights above free speech rights).

[90] *See, e.g.*, *Coughlin*, 946 F.2d at 1158 (declining to extend public concern requirement to public employee free association claims); Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1987) (same).

[91] *See Hatcher*, 809 F.2d at 1558 (noting that the public concern requirement, as applied to free association claims, would overturn precedent and damage first amendment rights). The court held that *Connick* did not overturn *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958), which subjected any state action limiting free association rights to the "closest scrutiny." *Id.*

in *Coughlin v. Lee*, holding that a public employee's claim that his right to freely associate had been violated was not subject to the public concern bar.[92]

Two circuits have taken hybrid approaches.[93] The Ninth Circuit has not yet decided a case where the plaintiff's free association claim predominates over an intertwined free speech claim.[94] In 2005 in *Hudson v. Craven*, the Ninth Circuit held that when a claim alleges intertwined violations of free speech and free association rights (what the court calls a "hybrid" claim), the *Connick* public concern requirement should apply.[95] Meanwhile, the Tenth Circuit in 2006 in *Shrum v. City of Coweta* declined to apply the public concern requirement to free association claims based on a public employee's association with a union.[96] Until it decided *Palardy*, the Third Circuit had not taken a position on whether the public concern requirement applied to free association claims.[97]

B. The Third Circuit's Approach

In 2018 in *Palardy*, the Third Circuit stated that it would follow the Fifth Circuit's approach.[98] The court's opinion, however, made it clear that its decision turned on the unique circumstances of an association claim arising from union-related activity.[99] The court held that, inevitably, some union speech and

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[92] *See Coughlin*, 946 F.2d at 1158 (holding that a public employee alleging dismissal for his political affiliation need not meet the public concern requirement governing free speech claims). Although the ruling in *Coughlin* dealt specifically with free association for political affiliation, the Fifth Circuit later clarified in *Boddie v. City of Columbus* that it would not apply the public concern test to any public employee free association claims. 989 F.2d 745, 749 (5th Cir. 1993) (citing Prof'l Ass'n of Coll. Educators v. El Paso Cty. Comm. Coll. Dist., 730 F.2d 258, 262 (5th Cir. 1984) (holding that state action to prevent employees from associating with a union violates the First Amendment)).

[93] *See* Shrum v. City of Coweta, 449 F.3d 1132, 1138 (10th Cir. 2006) (holding that, when discussing labor union associations, the court will not impose a public concern requirement to free association claims); Hudson v. Craven, 403 F.3d 691, 698 (9th Cir. 2005) (holding that free speech and free association rights are so similar that a case implicating both can be treated similarly to a case implicating only free speech rights).

[94] *See Hudson*, 403 F.3d at 696 (noting that the court has not yet addressed a primarily free-association-based claim). In an intertwined claim, the plaintiff claims that their free speech and free association rights have both been violated in the same set of facts. *Id.*

[95] *See id.* at 698 (holding that when association involves a single event with a specific speech component, applying the *Connick* test is appropriate).

[96] *Shrum*, 449 F.3d at 1138. The Tenth Circuit noted that the *Pickering* test allowed a government to weigh its interest as an employer in controlling its employees' speech to provide efficient public service. *Id.* at 1139. Where, however, the state has signed a collective bargaining agreement with a union, it has acknowledged the union's right to represent its workers. *Id.* Therefore, in the specific realm of public employee union association, the public concern test is not appropriate. *Id.*

[97] *Palardy*, 906 F.3d at 82.

[98] *Id.*

[99] *See id.* (noting that even courts that still apply the public concern requirement to free association claims have recognized that union association sometimes is a public concern). The court noted that union membership is binary, whereby a given petitioner is either a union member or not, and unions often speak on a diverse set of concerns. *Id.* at 83. The court also held that determining which

activity would satisfy the public concern bar.[100] Because there was no basis for determining when that standard was met, the court held that applying the public concern bar to union-based free association claims would be inappropriate.[101] The Fifth Circuit noted that even courts that applied the public concern test to associational claims acknowledged that some union-related activity would meet the requirements of that test.[102] By analogy, then, some union membership might by itself be of public concern.[103] The Third Circuit followed the Fifth Circuit's approach in *Boddie v. City of Columbus*, stating that free association claims based on union membership need not meet the public concern requirement.[104] The court thereby sidestepped the problem of classifying any individual union membership as public concern related or not.[105] This ruling, in effect, creates a carve-out rule for unions.[106] Public employees in the Third Circuit do not have to meet the public concern and private citizen requirements for their free association claims—as long as those claims are based on the employee's union activity.[107]

III. The Third Circuit's Holding Is Narrower Than It Seems, and a Per Se Rule Would Work Better to Protect Public Employees' Rights

The Third Circuit's decision in *Palardy v. Township of Millburn* represented a step towards uniformity in public employee free association claims, but the rule it created is far from straightforward.[108] This Part analyzes the Third Circuit's decision and argues that the holding does not clearly establish its scope and does not go far enough to protect public employee associational rights.[109] It then evaluates one possible alternate approach to public employee free speech association claims.[110] Section A argues that the Third Circuit mischaracterizes the scope of its holding, and it resembles the Tenth Circuit's ap-

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union memberships reflected a public concern and thus deserved First Amendment protection was not a readily justiciable question due to the absence of applicable standards. *Id.*

[100] *Id.* at 82–83.

[101] *See id.* (noting the lack of standards for differentiating between public employee union membership that meets the public concern requirement).

[102] *Id.* at 82.

[103] *Id.*

[104] *See id.* at 83 (noting the difficulty of classifying union memberships as "public concern" related and holding that use of a per se rule declaring that they are avoids this problem).

[105] *Id.*

[106] *Id.* at 84.

[107] *Id.*

[108] *See* Palardy v. Twp. of Millburn, 906 F.3d 76, 82–83 (3d Cir. 2018) (claiming to follow the Fifth Circuit's approach to public employee free association claims, but characterizing that approach in two different ways).

[109] *See infra* notes 113–134 and accompanying text.

[110] *See infra* notes 135–155 and accompanying text.

proach more than the Fifth's.[111] Section B suggests an alternative approach that preserves worker rights without creating an unworkably specific rule.[112]

A. The Third Circuit's Ruling Resembles the Hybrid Approach of the Tenth Circuit More Than the "No Public Concern Requirement" Approach of the Fifth Circuit

The Third Circuit claimed to adopt the Fifth Circuit's position.[113] The court, however, framed that position in two different ways over the course of its opinion.[114] Relying on the Fifth Circuit's decision in *Boddie v. City. of Columbus*, the Third Circuit clarified that its holding was limited to the labor organization context as well.[115] The Third Circuit's reasoning largely focused on the unique characteristics of union organizing activity, and the opinion took a position only on associational claims in a union context.[116] It is also unclear whether union-related speech claims still have to meet the public concern requirement in the Third Circuit.[117]

When discussing the application of *Garcetti v. Ceballos*'s private-citizen requirement, the court held that it was inapplicable to union-activity-based claims.[118] The Third Circuit held that public employee union affiliation could not be considered one of an employee's job responsibilities, precluding the application of *Garcetti*.[119]

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[111] *See infra* notes 113–134 and accompanying text.

[112] *See infra* notes 135–155 and accompanying text.

[113] *Palardy*, 906 F.3d at 82 (citing Boddie v. City of Columbus, 989 F.2d 745, 749 (5th Cir. 1993)).

[114] *Id.* The Third Circuit claims that the Fifth Circuit has taken the view that the public concern requirement does not apply to claims based on freedom of association. *Id.* This is true, but the holding in *Boddie* states only that public concern need not be independently proven in the context of a claim stemming from union organization. *See Boddie*, 989 F.2d at 749 (holding that a freedom of association claim based on union association does not need to separately prove public concern); *see also* Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991) (holding that a public employee alleging dismissal for his political affiliation need not meet the public concern requirement governing free speech claims).

[115] *Palardy*, 906 F.3d at 82.

[116] *See id.* at 82–83 (choosing to follow the Fifth Circuit in the "specific context" of public employee union associational claims).

[117] *See id.* at 84 (dismissing Palardy's speech claim because it did not allege any conduct beyond that alleged in the association claim and was therefore duplicative). The Court held that membership in a union is always a matter of public concern, but did not elaborate on how this principle might affect union-related speech. *Id.* at 83.

[118] *Id.* at 83–84; *see* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (explaining that, for an instance of public employee speech to be constitutionally protected, it must be made outside of the employee's official duties).

[119] *Palardy*, 906 F.3d at 83–84; *see Garcetti*, 547 U.S. at 421 (holding that statements made pursuant to an employee's official duties are not protected under the First Amendment). The Third Circuit noted in its analysis the impact of the Supreme Court's 2018 decision *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, which exempted public employees from paying

Nevertheless, the breadth of the Third Circuit's ruling is unclear.[120] The court explicitly stated that it would not apply *Garcetti*'s private-citizen requirements to free association claims based on membership in a union.[121] In the next sentence, however, the court stated that the opinion in *Garcetti* made it clear that the private citizen requirement applied only to speech, not to associational claims.[122] Therefore, following *Palardy,* it is unclear whether courts in the Third Circuit should (1) not apply *Garcetti*'s private citizen requirement to any associational claims at all, or (2) simply hold that union associational activity is exempt from that rule.[123]

Thus, the position taken by the Third Circuit resembles more the hybrid approach of the Tenth Circuit than that of the Fifth.[124] It places the locus of its analysis on whether the underlying claim relates to union activity rather than constructing a broad rule applicable to all associational claims.[125] Although the court allowed Palardy's claim to proceed, the precedential effect of the Third Circuit's opinion will differ depending on how courts interpret this ruling.[126]

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agency fees even when they benefited from union representation. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps, Council 31, 138 S. Ct. 2448, 2474 (2018); *Palardy*, 906 F.3d at 83–84. *Janus* thus undermined the idea that union membership might be a job responsibility of a public employee. *Palardy*, 906 F.3d at 83–84; *see Janus*, 138 S. Ct. at 2460 (holding that nonunion public employees cannot be compelled to subsidize the union's bargaining efforts).

[120] *See Palardy*, 906 F.3d at 83 (declining to apply private citizen requirement to public employee free association claim). The Third Circuit stated that, by the "plain language" of the *Garcetti* opinion, the private citizen requirement applies only to speech. *Id.* But in the next paragraph, the Third Circuit held that union membership could never be considered one of a public employee's "official duties," and therefore a claim based on union membership would never fail the private citizen test. *Id.* at 83–84. It is unclear from the text of the opinion whether the court intended to hold that the private citizen test is categorically inapplicable to free association claims, or whether the unique traits of union association make that test inapplicable. *See id.* (holding that private citizen requirement applies only to speech claims and declining to apply the private citizen requirement to association claims, but failing to provide additional clarity on the rule).

[121] *Palardy*, 906 F.3d at 83.

[122] *Id.*; *see Garcetti*, 547 U.S. at 421 (holding that statements made pursuant to an employee's official duties are not protected under the First Amendment).

[123] *See Palardy*, 906 F.3d at 83–84 (declining to apply *Garcetti*'s private citizen requirement to a union association claim). The Third Circuit based its holding both on the fact that union activity is separate from an employee's normal job responsibilities and on the inapplicability of the private citizen test to associational activity in general. *Id.*

[124] *Compare Palardy*, 906 F.3d at 82 (restricting the holding to claims based on union affiliation), *and* Merrifield v. Bd. of Cty. Comm'rs, 654 F.3d 1073, 1084 (10th Cir. 2011) (rejecting the public-concern requirement in the "specific context" of public employee union association claims), *with Coughlin*, 946 F.2d at 1158 (holding that a public employee's free association claim need not pass the public concern test regardless of the claim's underlying facts).

[125] *Palardy*, 906 F.3d at 82.

[126] *Compare* Sinfuego v. Curry Cty. Bd. of Cty. Comm'rs, 360 F. Supp. 3d 1177, 1246 (D.N.M. 2018) (applying the public concern test to a public employee's free association claim based on union organizing activity where there was no collective-bargaining agreement in place), *with* Blangsted v. Snowmass-Wildcat Fire Prot. Dist., No. 04–cv–02260–WDM–KLM, 2008 WL 4411440, at *4 (D. Colo. Sept. 16, 2008) (declining to apply the public concern test in the case of a public employee's

Some district courts may apply the Fifth Circuit's rule from *Coughlin v. Lee*, exempting all associational claims from the public concern requirement.[127] Others may follow the Tenth Circuit's rule from *Merrifield v. Board of County Commissioners*, and exempt only associational claims that arise from union activity.[128] The Third Circuit's ruling meant to simplify public employee free association claims by removing the public concern requirement.[129] Paradoxically, though, the ruling in *Palardy* may end up complicating those claims and leading to a profusion of contradictory outcomes.[130] Furthermore, rules waiving the public concern requirement have been proposed for other types of public employee speech.[131] Excessive use of such rules threatens to honeycomb the public concern doctrine with exceptions, adding significant complication to ongoing litigation.[132] The Court in *Connick v. Meyers* used the public concern

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union organizing activity). *Sinfuego* and *Blangsted* were both decided in district courts in the Tenth Circuit after *Shrum v. City of Coweta*, where the Tenth Circuit held that the public concern test could not be applied to public employee free association claims based on union activity. *Sinfuego*, 360 F. Supp. 2d at 1246; *Blangsted*, 2008 WL 4411440 at *4; *see also Shrum v. City of Coweta*, 449 F.3d 1132, 1138 (10th Cir. 2006). These two courts came down on opposite sides on the question of whether the public concern requirement applied to all claims based on public employee union activity. *Sinfuego*, 360 F. Supp. 2d at 1246; *Blangsted*, 2008 WL 4411440, at *4. The disparity between these opinions, on two cases with very similar facts, demonstrates how such a carefully cabined holding can lead to unpredictable outcomes. *See Sinfuego*, 360 F. Supp. 3d at 1246 (choosing to apply the public concern test in a public employee union association case when the union does not have a collective bargaining agreement in place with its employer); *Blangsted*, 2008 WL 4411440, at *4 (declining to apply the public concern test on similar facts to *Sinfuego*); *see also Shrum*, 449 F.3d at 1138 (holding that the public concern test is not necessary for an associational claim arising from public employee union activity).

[127] *See Coughlin*, 946 F.2d at 1158 (declining to apply the public concern requirement to public employee free association claims).

[128] *See Merrifield*, 654 F.3d at 1083 (exempting only union-based associational claims from the public concern requirement).

[129] *See Palardy*, 906 F.3d at 83 (noting that the court's approach avoids the difficult analysis of whether a union membership is a matter of public concern).

[130] *See id.* (explaining that the court's approach avoids the application to associational claims of a test focused on the "content, form and context" of speech) (quoting Balton v. City of Milwaukee, 133 F.3d 1036, 1041 (7th Cir. 1998) (Cudahy, J., concurring)). The Third Circuit referred to the *Pickering*/*Connick* test as "cumbersome" when applied to associational claims, suggesting that one reason for the court's approach was to simplify the process of evaluating union-based free association claims. *Id.*; Connick v. Myers, 461 U.S. 138, 141 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). As noted above, however, even a carefully written exception may lead to unpredictable outcomes. *See supra* note 126 and accompanying text (describing contradictory outcomes following precedent of the Tenth Circuit's hybrid rule).

[131] *See* Rosalie B. Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N. U. L. REV. 17, 63–65 (1996) (suggesting the use of a rule waiving public concern requirement for public employee claims arising from whistleblowing speech, where a public employee raises the alert about an unlawful practice of his or her employer).

[132] *See* Edward B. Marks Music Corp. v. Colo. Magnetics, Inc., 497 F.2d 285, 288 (10th Cir. 1974) (holding that exceptions should be narrowly construed to avoid undermining the policy embodied by a rule).

requirement to avoid constitutionalizing employee grievances.[133] Adding too many exceptions to this requirement might allow through claims of the sort *Connick* hoped to prevent.[134]

B. A Strict Scrutiny Approach Avoids the Problems Inherent in the Third Circuit's Rule

There is another way for courts to determine which public employee free association claims to allow without needing any narrow or easily misinterpreted rules.[135] The Third Circuit articulated one advantage to a rule declaring that union activity would always meet the public concern and private citizen requirement: it would avoid the difficulty of implementing the *Connick* and *Garcetti* tests in cases where they do not cleanly apply.[136] Some scholars argue for the application of strict scrutiny to pure association claims without any speech component, rather than the public concern and private citizen tests and the *Pickering* balancing approach.[137] Such an approach would follow the standard the Supreme Court set in 1984 in *Roberts v. U.S. Jaycees*, where the Court held that a restriction on freedom of association, in order to be held constitutional, had to serve a compelling state interest that could not be achievable through less restrictive means.[138] This language has traditionally been used by the Court to define "strict scrutiny," the most exacting level of scrutiny that it will apply to evaluate whether a law is constitutional.[139]

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[133] *Connick*, 461 U.S. 154.

[134] *See id.* (declining to create a generally applicable rule to judge whether public employee statements touched a matter of public concern).

[135] *See* Nicole M. Rementer, *An Imbalanced Public Concern: The Case for Strict Scrutiny of Pure Freedom of Association Claims in Public Employment*, 19 COMMLAW CONSPECTUS 179, 205–09 (2010) (arguing for strict scrutiny of all pure association claims by public employees).

[136] *See Palard*y, 906 F.3d at 83 (noting the difficulty in finding a justiciable rule that can separate which union activity constitutes a public concern and the difficulty in applying the private citizen requirement to pure association claims with no speech component); *see also Garcetti*, 547 U.S. at 421–22 (establishing the private citizen test for public employee free speech claims); *Connick*, 461 U.S. at 147 (establishing the public concern test for public employee free speech claims).

[137] Rementer, *supra* note 135, at 201–05. One scholar argues that the rule determining whether to apply the public concern test, rather than the nature of the association under consideration, should be whether the claim under consideration is a pure association claim without a speech component. *Id.* at 202–04. If there is no speech component, then the public concern test should not apply. *Id.* at 205. The test could still be applied in some hybrid claims, mixing association and speech, which occur when an association claim contains an "essential speech component" and there is a "nexus" between that speech and the petitioner's employment at issue. *Id.*; *see, e.g.*, Melzer v. Bd. of Educ., 336 F.3d 185, 194 (2d Cir. 2003) (describing a hybrid claim where the claimant was a teacher fired for organizing with the North American Man-Boy Love Association to change the age of consent laws). In *Melzer*, the court held that the petitioner's claim arose from an act of association "of which speech was an essential component." 336 F.3d at 194.

[138] Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

[139] *See* Johnson v. California, 543 U.S. 499, 505 (2005) (defining a strict scrutiny standard as requiring "narrowly tailored measures that further compelling governmental interests"). The Court in *Roberts* used similar language as in *Johnson*, referencing a "compelling state interest" and requiring

In the past, the Supreme Court has applied strict scrutiny to some public employee free association claims, bypassing the test from *Pickering v. Board of Education* altogether.[140] This test has often been applied to patronage firing cases, where supporters of an outgoing administration are fired by a new administration when it moves in.[141] In cases since *Pickering*, however, the public concern test has predominated over the strict scrutiny standard for public employee free association claims, even as the strict scrutiny standard survives for free association claims outside the public employee context.[142]

The strict scrutiny approach would protect public employees while preserving their employer's ability to discipline them for disruptive conduct.[143] Public employees' non-speech conduct can and often does take place outside of work.[144] Such out-of-work conduct does not usually disrupt the workplace, and courts should require the employer to prove that a "compelling state interest" requires the public employee's free association rights to be curtailed.[145]

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that that interest could not be achieved through "means significantly less restrictive." *Roberts*, 468 U.S. at 623; *see Johnson*, 543 U.S. at 505 (defining strict scrutiny through reference to "narrowly tailored measures" and "compelling governmental interests").

[140] Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968); *see* Elrod v. Burns, 427 U.S. 347, 363 (1976) (applying strict scrutiny language in holding that employees of sheriff's office could not be discharged for their political affiliation). In 1976 in *Elrod*, decided after *Pickering*, the Supreme Court held that a requirement that public employees support a particular political party could not be constitutional unless it both served a "vital" purpose and was the "least restrictive" means of serving that purpose. *Elrod*, 427 U.S. at 363. The Court also held that the policy would be unconstitutional unless the advantage to the policy was greater than the loss of rights—language much more reminiscent of strict scrutiny than the *Pickering* test. *See id.* at 363 (describing standard that political-affiliation-based terminations must meet to be constitutional). *Compare Pickering*, 391 U.S. 563 at 568 (laying out the balancing test for establishing a violation of public employee free speech rights), *with Johnson*, 543 U.S. at 505 (describing narrow tailoring and compelling state interest requirements for a policy to survive strict scrutiny).

[141] *See* Craig D. Singer, Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. CHI. L. REV. 897, 901–04 (1992) (describing the use of strict scrutiny to evaluate patronage dismissal claims for employees not involved in policy making). One scholar contrasts the "heightened scrutiny" analysis applied in *Elrod* with the traditional *Pickering* test, and concludes that the latter test is best applied in cases of "overt expression" such as traditional free speech cases. *Id.* at 923. On the other hand, the "heightened scrutiny" *Elrod* approach is more appropriate for cases of dismissal based on an employee's beliefs and associations, even if they are "incidentally manifested." *See Elrod*, 427 U.S. at 362 (applying strict scrutiny test to public employee free association claims); Singer, *supra*, at 20 (describing the applicability of the *Elrod* test to varying fact patterns).

[142] *See* Shahar v. Bowers, 114 F.3d 1097, 1102–03 (11th Cir. 1997) (declining to apply strict scrutiny to a public employee free association claim and instead applying the *Pickering* test). *But see* Salvation Army v. Dep't of Comm. Affairs, 919 F.2d 183, 200 (3d Cir. 1990) (applying strict scrutiny to a religious charity's free association claim).

[143] *See* Rementer, *supra* note 135, at 205–09 (articulating the benefits of a strict scrutiny approach to public employee free association claims).

[144] *Id.* at 202.

[145] *See id.* at 205–06 (arguing that because these pure claims do not involve any actual speech by an employee there is less danger that third parties will impute the employee's views to the employer; thus, the appropriate focus is not on the state's role as employer, but on its role as government); *see*

The application of the strict scrutiny rule would also shift the burden of proof from employees to employers.[146] Under this scheme, an employee would not have to demonstrate that their act of association implicated a public concern.[147] Instead, employers would have to demonstrate that their restriction of their employee's rights served a compelling state interest.[148]

Such a rule would create more uniformity than the union association carve-out proposed by the Third Circuit.[149] It would remove any discretion by the court in determining whether the public concern bar should be applied in a specific case and, if so, whether the activity in question reaches that level.[150] A strict scrutiny approach would still allow for reasonable regulation of an employee's associations as long as this regulation is tailored to be the least restrictive means of accomplishing the desired end.[151]

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also Katherine Trucco, *Nothing to Gain, Nothing to Lose: How* Heffernan v. City of Patterson, N.J., *Creates Section 1983 Liability Absent a Deprived Right*, 49 LOY. U. CHI. L.J. 149, 160 (2017) (noting that association can derive from employee's personal beliefs without an overt speech component). In cases with no speech component, the state's power to control its employees' behavior is far more limited, and it is appropriate to lay on the employer the task of demonstrating that a given regulation is acceptable. Rementer, *supra* note 135, at 205–06; *see* Waters v. Churchill, 511 U.S. 661, 671 (1994) (holding that the government has more powers as an employer than it does as the state).

[146] Rementer, *supra* note 135, at 206.

[147] *Id.*

[148] *Id.*

[149] *See Sinfuego*, 360 F. Supp. 3d at 1246 (applying the public concern test to a public employee free association claim arising from union activity despite the controlling precedent of *Shrum*). As the New Mexico District Court's 2018 decision *Sinfuego* demonstrates, even seemingly minor factual differences can allow a lower court to circumvent circuit precedent in the absence of a strong, universally applicable rule. *See id.* (justifying application of the public concern test because there was no collective bargaining agreement in place). Tenth Circuit precedent required the district court to waive the public concern test for union-based association claims, but the district court did not do so and distinguished its case by noting that there was no collective bargaining agreement in place with the union. *Id.*; *see Shrum*, 449 F.3d at 1138.

[150] *See Sinfuego*, 360 F. Supp. 3d at 1246 (declining to follow Tenth Circuit precedent in evaluating public employee free association claim). The court in *Sinfuego* was able to distinguish its case from the controlling precedent due to a minor factual difference—an option that would not be available if the Tenth Circuit used a strict scrutiny approach. *See id.* (distinguishing from *Shrum* because of the lack of a collective bargaining agreement between the petitioner's union and her employer).

[151] *See* New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 76–77 (1928) (upholding a law that distinguished between labor unions and "benevolent orders" on the one hand and the Ku Klux Klan on the other). The Court accepted regulations that restricted some associations, such as those with the Ku Klux Klan, based on the Klan's violent actions and attempts to harm racial and religious minorities. *Id.* One scholar notes that, under a strict scrutiny standard, a public employer could bar its employees from membership in criminal gangs, as long as the objective of preventing criminal activity by state employees could not be achieved by less restrictive means. Rementer, *supra* note 135, at 206 (citing Piscottano v. Murphy, 511 F.3d 247, 276–77 (2d Cir. 2007) (holding that correctional officers could be terminated from employment due to their association with Outlaws Motorcycle Club, a criminal gang)). Although the Second Circuit, in *Piscottano* in 2007, applied the public concern test to a pure association claim, they could have reached the same result with a strict scrutiny test by holding that termination was necessary to achieve the goal of stopping correctional officers from breaking the law. *Id.*

If this framework were in place prior to the resolution of *Palardy*, the Third Circuit's task in evaluating Palardy's free association claim would be much simpler.[152] Because his claim—that he was denied a promotion because of his close association with his union—contains no speech component, the court would merely need to ask what interest the defendant was pursuing in firing him.[153] Even if that interest was compelling, such as preventing disruption of the workplace, the court would have to consider whether there existed any narrower, less restrictive means of achieving that end.[154] An answer in the affirmative would allow Palardy's claim to prevail, although an answer in the negative would at least reassure him, and other potential litigants, that the defendant took the narrowest possible approach to solving a compelling workplace dilemma.[155]

CONCLUSION

Although the Third Circuit's approach is an improvement over the public concern analysis applied by some circuits, it does not go far enough to create the desired uniformity of outcomes when analyzing public employee free association claims. The Third Circuit's approach, a rule declaring that union membership is always a public concern, still requires the application of judicial discretion to determine whether a novel case is sufficiently factually similar to the precedent for the rule to apply. The Third Circuit's rule preserves the structure of the *Pickering* test, forcing courts to evaluate whether an association claim meets the public concern requirement. This requirement, originally designed to evaluate employee speech, is ill-suited for evaluating associational claims.

In association cases, where the risk of imputing an employee's actions to their employer is reduced, forcing the employee to carry the burden of demonstrating that their association represents a public concern improperly shifts that burden from the government, who would carry it in most other First Amendment cases. A strict scrutiny approach in pure association cases moves this burden to where it should properly fall: on the employer. It ensures the protection of the right to freedom of association, a right belonging to all American citizens—even public employees.

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[152] *See Elrod*, 427 U.S. at 363 (laying out the applicability of strict scrutiny to public employee free association claims); *Palardy*, 906 F.3d at 82–84 (evaluating a public employee free association claim).

[153] *See Palardy*, 906 F.3d at 81 (analyzing an associational claim without considering speech); *Elrod*, 427 U.S. at 363–66 (evaluating potential reasons for dismissal of a public employee).

[154] *See Elrod*, 427 U.S. at 366 (noting the availability of less restrictive means to achieve the desired goal of government efficiency).

[155] *See id.* at 372–73 (holding that an employer restriction of free association did not satisfy strict scrutiny because less restrictive means were available to achieve the same end); *Palardy*, 906 F.3d at 84 (holding that Palardy's union activity was constitutionally protected).