No. 18-830

In The
Supreme Court of the United States

TOWNSHIP OF MILLBURN AND TIMOTHY P. GORDON,

Petitioners,

v.

MICHAEL J. PALARDY, JR.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF GRANTING CERTIORARI

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of more than 2,500 local governments, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission includes advancing the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National School Boards Association ("NSBA"), through its state associations of school boards, represents the nation's 90,000 school board members, who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students. NSBA's mission is to promote equity and excellence in public education through school board leadership.

In keeping with their longstanding commitment to support the provision of local

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[1] Pursuant to Supreme Court Rule 37.6, IMLA and NSBA affirm that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than IMLA, NSBA, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the intent to file this brief and have consented in writing to its filing.

governmental services and public education in an efficient and effective manner in compliance with federal and state requirements, IMLA and NSBA (collectively, "Amici") frequently engage in advocacy before this Court and other federal and state courts, legislatures, and agencies, and frequently participate in cases involving the application of federal law to public entities.

IMLA and NSBA have watched, with concern, as different circuits have embraced contradictory approaches to a basic question in suits enforcing the First Amendment's right of association in public workplaces, and as the circuit split has become more pronounced without this Court's active involvement. As explained in greater detail below, this circuit split has harmed the efforts of Amici to effectively educate and train their nationwide membership and to support their members' efforts to train public officials, and has made governing law difficult to predict for the thousands of members in circuits that have not directly addressed this question. The latest word on this question, from the Third Circuit in this case, threatens to increase the misuse of constitutional litigation to end-run dispute-resolution mechanisms under state law and governing collective bargaining agreements.

SUMMARY OF ARGUMENT

The decision below creates a path by which disappointed public employees who are associated with a union or similar group may bring First Amendment claims while avoiding the need to allege or satisfy three requirements that this Court has established. Specifically, public employees who allege retaliation for their association with such groups, the employees may avoid the need to show that their speech was on matters of public concern (and, at least in the Third Circuit, the employees may avoid the need to show that their interests outweigh legitimate governmental interests, and that their expressive conduct was as a private, not public, citizen).

If the decision stands, it will enable many ordinary employment disputes in the public workplace to avoid grievance arbitration and to reach, and remain in, federal court. That itself justifies this Court's attention.

Yet there is a second reason why this case qualifies for this Court's review. For at least one of the three sets of legal requirements that the decision below entitles public-sector employees to evade (the "matters of public concern" requirement), there is a deep and persistent circuit split. The Third Circuit is now the third of the United States Courts of Appeals to exempt freedom-of-association claims from the "matters of public concern" requirement. At least four circuits have refused to go along, holding that this requirement, like all other free-speech-claim requirements, applies equally to freedom-of-

association claims. In the five other circuits, there is no controlling decision on point, forcing public employers in those circuits to guess what standard would govern, based on dicta and district court decisions. The split is more than three decades old and has only deepened with the passage of time. A decision by this Court on the merits of the question is the only plausible way to resolve it.

ARGUMENT

A. The Third Circuit's categorical characterization of "mere membership in a public union" as something that is "always a matter of public concern" could have negative practical consequences for Amici's members.

The decision below appeared to hold "that mere membership in a public union is always a matter of public concern." *Palardy v. Twp. of Millburn,* 906 F.3d 76, 83 (3d Cir. 2018) ("By holding that mere membership in a public union is always a matter of public concern, the Fifth Circuit's approach avoids this problem. *Connick's* public-concern requirement thus stands as no obstacle to Palardy's associational claim." (citation omitted)).[2] Going even further, the Third Circuit did not see a need to balance the employee's interests against the government's interests in promoting workplace efficiency and avoiding disruption, as *Pickering*

[2] *See Connick v. Myers,* 461 U.S. 138, 146 (1983).

would also require.[3] The Third Circuit then expressly "decline[d] to apply *Garcetti's* private-citizen test to Palardy's freedom of association claim."[4] Although a thorough analysis of the wisdom of each possible path should await this Court's grant of certiorari, the practical consequences of the Third Circuit's categorical approach provide a compelling reason for this Court to grant review.

The tests in *Pickering, Connick,* and *Garcetti* serve an important function in keeping disappointed current or former employees from making a federal case of garden-variety employment grievances and run-of-the-mill workplace disputes. Through collective bargaining agreements negotiated by public employees and unions or other employee

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[3] *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968). The Third Circuit never explained why it saw no need to perform any balancing of interests under *Pickering*. Instead, after concluding that *Connick* and *Garcetti* do not bar Palardy's associational claim, the Third Circuit said nothing about *Pickering* but treated retaliatory motive and causation as the only remaining requirements. *See Palardy,* 906 F.3d at 83–84. This is particularly surprising because the Third Circuit was purporting to follow the Fifth Circuit's decision in *Boddie v. City of Columbus,* 989 F.2d 745 (5th Cir. 1993)—but *Boddie* treated *Pickering* balancing as part of the required analysis. *Boddie,* 989 F.3d at 750.

[4] *Palardy,* 906 F.3d at 83–84 (citing *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006)). The Third Circuit did not find *Garcetti* inapplicable because any court had so held, but because the Third Circuit believed "it does not make much sense to apply *Garcetti's* private-citizen requirement to pure associational claims based on union membership." *Id.* at 83.

associations, such disputes are often mandatory subjects of grievance procedures and (ultimately) arbitration. But if an employee can state a federal claim by including in his or her complaint an allegation that the retaliation was due to his or her association with the employee organization, without pleading any of the facts needed to satisfy *Pickering, Connick*, and *Garcetti,* it will increase the frequency with which ordinary employment disputes are constitutionalized and able to reach federal courts.

Moreover, under the Third Circuit's approach, garden-variety employment disputes arising against local public entities would not only reach federal court more often, but would remain there much longer. Once the automatic protection for association is recognized, the only two remaining issues of a valid claim involve motive and causation. *Palardy,* 906 F.3d at 80–81, 84 (describing the remaining elements as whether "the defendant engaged in 'retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights,'" and whether "'a causal link existed between the constitutionally protected conduct and the retaliatory action'" (quoting *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006))). "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El v. Britton*, 523 U.S. 574, 584–85, (1998) (quotation omitted). The same is frequently true of questions of causation. *See, e.g.*, *Tobey v. Jones*, 706 F.3d 379, 390–91 (4th Cir. 2013) ("Viewing all facts as alleged by Mr. Tobey as true,

which is the posture we must take when reviewing a 12(b)(6) motion, *we can infer causation based on the facts*, as Mr. Tobey alleges the arrest was *directly* precipitated by his constitutionally protected peaceful protest—Appellants did not take action until *after* he informed them that he wished to display his chest in order to express his views on the constitutionality of TSA screening measures." (first emphasis added)).

Grievance arbitration of ordinary workplace disputes is attractive to both public employers and public employees because of the cost savings achieved, and the speed with which decisions can be made, with finality, through such a process. Conversely, circuits that make it easy to turn an ordinary dispute into a cognizable federal cause of action can easily deprive the participants of those advantages. And the opportunity the Third Circuit's approach provides to public employees to threaten that kind of escalation can provide them with an upper hand in future negotiations, which would otherwise not be available to them.

In the decision below, the Third Circuit purported to follow the approaches of the Fifth Circuit and the Eleventh Circuit, which it construed as holding that "the public concern requirement does not apply to associational claims." *Palardy,* 906 F.3d at 82. It is important to recognize that the rule followed in the Fifth and Eleventh Circuits applies beyond the context of public employee unions. As the Fifth Circuit has recently explained, it has been applied to a First Amendment claim involving organizations that "are or were comprised of public

employees gathered to protect and promote their own interests," regardless of whether the public entity had an obligation to collectively bargain with that organization, as "First Amendment associational protection does not turn on whether a group meets the statutory technical definition of a labor union." *Mote v. Walthall*, 902 F.3d 500, 508–09 (5th Cir. 2018). The Fifth Circuit has extended employees' First Amendment right to freedom of association to include an association of college faculty members,[5] an association of supervisory firefighters,[6] and (in *Mote*) an association of police officers.[7]

B. A deep and persistent circuit split, regarding constitutional limitations on a very common function of government, warrants this Court's involvement.

First Amendment claims against a public employer based on the employee's union membership are exempt from the *Connick* test—if the case arises in a state along the Gulf of Mexico, or in the State of Georgia, or (since April 2018) in a state along the Delaware River.[8] That arbitrary difference frustrates

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[5] *Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cnty. Cmty. Coll. Dist.,* 730 F.2d 258, 262 (5th Cir. 1984).

[6] *Vicksburg Firefighters Ass'n, Local 1686 Int'l Ass'n of Firefighters, AFL-CIO, CLC v. City of Vicksburg*, 761 F.2d 1036, 1041–42 (5th Cir. 1985).

[7] *Mote,* 902 F.3d at 506–09.

[8] Indeed, for such cases that arise along the Delaware River, neither the *Pickering* balancing test nor the *Garcetti* private-citizen test would apply. *See* Section A, *supra*, at 4–5.

the ability of Amici and their members to effectively train public officials how to constitutionally perform a commonplace function of governing. It also makes it nearly impossible for the thousands of local governments and school boards located in a circuit that has not decided this issue to advise their clients on whether certain employment decisions are likely to be constitutionally challenged under the First Amendment merely based on an employee's union membership.

1. National associations like Amici need to help educate public officials and their attorneys, on a nationwide basis, about the scope of constitutional limits on their authority to hire, promote, and fire employees.

One of the tasks that Amici regularly perform is to help educate public officials and their attorneys about the legal limits on how they can perform their responsibilities. Because the membership of both IMLA and NSBA is national in scope, the educational and training work Amici perform extends into every federal circuit (and every state).

In helping to train public officials and their attorneys, one important topic is the constitutional limitations on the hiring, promotion, and firing of employees. In the public sector, the United States Constitution provides an important overlay to the state and federal statutes and regulations that govern such questions. Although local public officials and their attorneys may have a grasp of the

limitations that apply in the private sector, they need to learn, early in their public service, precisely how constitutional rights (such as those arising from the First Amendment) provide an additional degree of regulation on how they can perform their duties. Amici provide specialized training on this unique aspect of the employment relationship applicable only to public entities.

Decisions on hiring, promotion, and firing are pervasive in the public workplace. A school district or city's workforce is rarely static. Workforces grow (or sometimes shrink). Even when the number of positions remains the same, retirements and other circumstances make such employment decisions necessary.

First Amendment-protected activity among current and potential public employees is also pervasive, and appropriately so. Public employees often care deeply about matters of public concern because so much of what they do in the workplace involves matters of public concern. Public employees often associate with others for expressive purposes. Sometimes those expressive purposes are fully compatible with their positions of public employment, but not always.

In these circumstances, it is especially critical to the effectiveness of Amici and their members that constitutional limitations on public employment decisions be clear and teachable. If the elements of an employment decision that is violative of the First Amendment vary significantly depending on the particular federal circuit in which the school district,

city, or county is located, that geographic variation will interfere with the clarity of teaching and training—and thereby increase the likelihood that constitutional violations will unintentionally result. In circuits that have yet to definitively join either side of the split, the resulting uncertainty will also increase the likelihood of unintended constitutional violations.

2. The elements of a freedom-of-association claim arising in a public workplace vary significantly, and by circuit.

As explained above in Section A, the Third Circuit is the first circuit to squarely hold that union membership is categorically protected under the First Amendment's freedom-of-association element, notwithstanding *Pickering, Connick,* and *Garcetti.*[9] But even if the Third Circuit's decision is interpreted more narrowly, it embodies a deep and enduring split between two factions of circuit courts regarding whether such claims are exempt from the requirements of *Connick,* or *Pickering,* or both. Between those two factions are circuits that sometimes apply *Connick* and *Pickering* to a right-of-association claim, depending on the circumstances, and circuits without a definitive appellate decision on this question.

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[9] *See* Section A, *supra*, at 4–5 (describing *Palardy*).

a. Only three circuits follow the approach to *Connick* taken in this case.

In the Fifth Circuit, Eleventh Circuit, and now the Third Circuit, membership in a public union is always a matter of public concern. *See Palardy*, 906 F.3d at 84 (3d Cir. 2018); *Boddie*, 989 F. 2d at 749 (5th Cir. 1993); *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987). Federal courts in those three circuits do not apply the *Connick* requirement that the protected activity involve speech on matters of public concern.[10] *See, e.g.*, *Hatcher,* 809 F.2d at 1557 ("*Connick* is inapplicable to freedom of association claims").[11]

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[10] *See Connick,* 461 U.S. at 146.

[11] Indeed, in the Fifth Circuit, treating the ability of public employees to join unions and the right of their unions to engage in advocacy and to petition the government on their behalf, has risen to the level of "clearly established law." *Mote*, 902 F.3d at 507. As a result, a public official in that circuit who does not treat such conduct as protected *per se* by the First Amendment, is subject to individual liability under Section 1983. *Id.* at 509–10 (upholding denial of qualified immunity to police chief who allegedly fired the plaintiff in connection with his efforts to organize a non-union police association). In other circuits, the split has provided the foundation for courts to conclude that the right was not clearly established, and to grant qualified immunity on that basis. *See, e.g.*, *Rossiter v. City of Philadelphia,* 674 F. App'x 192, 198 (3d Cir. 2016) (inventorying the split in the circuits about whether activity must relate to a matter of public concern to trigger First Amendment associational rights, and holding that there is "no consensus of authority that leveraging a claim against a specific union member facing good faith disciplinary action in an effort to

Those two courts were joined by the Third Circuit upon the issuance of the decision below. *Palardy*, 906 F.3d at 82–84.

b. At least four circuits have held that the *Pickering* and *Connick* tests apply to freedom-of-association claims.

In the last quarter-century, nothing resembling a consensus formed behind the approach of the Fifth and Eleventh Circuits. In fact, the opposite has occurred, resulting in further doctrinal disarray.

The Second Circuit has refused to join the Fifth and Eleventh Circuits, explaining that "[t]o accept the plaintiffs' contention that their retaliation claim is exempt from *Connick*'s public concern requirement would be to elevate the *implicit* First Amendment right to freedom of association over other *explicit* First Amendment rights such as freedom of speech and the right to petition. We are unwilling to establish such a rule." *Cobb v. Pozzi,* 363 F.3d 89, 106 (2d Cir. 2004) (citations omitted). So too have the Fourth, Sixth, and Seventh Circuits. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 249 (4th Cir. 1999) ("[A]s in the public employee freedom of speech context, a public employee's corresponding right to freedom of association is not absolute.

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settle internal police affairs implicates a clearly established constitutional right").

Logically, the limitations on a public employee's right to associate are closely analogous to the limitations on his right to speak." (quotation omitted)); *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985) (holding that public-concern test applies to association claims); *see also Griffin v. Thomas*, 929 F.2d 1210, 1214 (7th Cir. 1991) (same).

c. In five other circuits, there is no *controlling* decision on this point.

In the First, Ninth, Tenth, Eighth and District of Columbia Circuits, there is no clear holding on this question from the appellate court for that circuit (or from this Court). As a result, public officials must guess which rule will ultimately apply, from dicta and district court rulings. This frustrates Amici's members in those circuits in trying to advise their clients.

The First Circuit has refused to categorically treat private speech to fellow employees regarding union activities as speech on matters of public concern. That court has noted that "certain categories of speech carry residual guarantees of their public qualities and are often interpreted, justifiably, to involve matters of inherent public concern," citing cases involving public voting and reports to supervisors of official misconduct or wrongdoing within public office. *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008). "Private speech to fellow employees regarding union activities is not necessarily imbued with those same public qualities." *Id.*

The Ninth Circuit has tended to see elements of speech and association in the same activities, and for that reason has applied *Connick* and *Pickering* to such claims. "Bearing in mind the Supreme Court's seminal public employee speech cases and their application in cases from the other circuits, we conclude that *Pickering* should be applied in this hybrid rights case. The speech and associational rights at issue here are so intertwined that we see no reason to distinguish this hybrid circumstance from a case involving only speech rights." *Hudson v. Craven,* 403 F.3d 691, 698 (9th Cir. 2005). In *Hudson*, the plaintiff claimed she was denied tenure because of her affiliation with students who attended a particular march and rally, "the very purpose" of which "was to speak out . . . , an exercise that implicates core speech rights." *Id.* at 696; *see also Godwin v. Rogue Valley Youth Corr. Facility,* 656 F. App'x 874, 875 (9th Cir. 2016) (applying *Connick* and *Pickering* in deciding whether a law-enforcement employee's "wearing of Vagos [motorcycle club] insignia ('colors') and association with Vagos is protected under the First Amendment" (footnote omitted)). But public officials must guess how that court would treat a claim of retaliation for mere association.

The Tenth Circuit has addressed the general subject several times without explicitly and fully agreeing with either faction. As Judge McConnell explained: "Neither this Court nor the Supreme Court has determined, as a general matter, whether *Pickering's* public concern requirement applies to freedom of association claims." *Shrum v. City of Coweta*, 449 F.3d 1132, 1138 (10th Cir. 2006)

(finding it unnecessary to "reach the broader question" that has divided the circuits, because "[i]n the specific context of public employee labor unions, this Court has rejected the requirement that a worker demonstrate that his association with the union be a matter of public concern"); *Schalk v. Gallemore*, 906 F.2d 491, 498 & n.6 (10th Cir. 1990) (applying public-concern test where the "association" was "nothing more nor less than an audience" for the employee's speech, but noting that the public-concern test "may be an inapt tool of analysis" in other "public employee/freedom of association" contexts); *see also* Pet. for Cert. 18–19. *But see Flanagan v. Munger,* 890 F.2d 1557, 1564 n.7 (10th Cir. 1989) ("[W]e express some doubt whether the *Pickering* test, particularly the public concern prong, applies in freedom of association cases.").

The Eighth Circuit has not decided this question in the context of unions or employee organizations. To fill that vacuum, officials in that circuit must either look to unpublished district court decisions,[12] or draw an analogy to cases involving

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[12] In cases involving union affiliation, district courts in the Eighth Circuit have sided with the Second Circuit's approach. As one such district court concluded, "[t]he reasoning in *Connick* is persuasive and its principles should apply to the freedom of association claim in this case. . . . while *Pickering* and *Connick* both involve free speech claims, the roots of their reasoning are derived from freedom of association cases." *Scripp v. St. Louis Cmty. Coll.,* No. 88-2517 C(2), 1991 WL 352888, at *5 (E.D. Mo. July 30, 1991) (citing *Boals*, 775 F.2d at 692), *aff'd*, 972 F.2d 354 (8th Cir. 1992); *see also Hale v. Robersone*, No. 96-1241-CV-W-6, 1998 WL 546623, at *4–5 (W.D. Mo. June 25, 1998) (applying *Connick* to a freedom-of-

political affiliation. In the political affiliation cases, the Eighth Circuit has attempted to harmonize "two lines of [Supreme Court] cases that assess how to balance the First Amendment rights of government employees with the need of government employers to operate efficiently." *Thompson v. Shock*, 852 F.3d 786, 791 (8th Cir. 2017). In the Eighth Circuit, "if an employee is discharged because of his or her expressive conduct, we apply the *Pickering–Connick* test. If an employee is discharged because of his or her political affiliation, we apply the *Elrod–Branti* test. And when a political-affiliation employee gets discharged for his or her expressive conduct, we apply *Pickering–Connick*." *Id.* at 792 (citations omitted).[13] But that approach is a third path, one that differs in substance from all the paths described above.

Finally, public officials in the District of Columbia must also guess about which approach a court might ultimately follow. As the District Court for the District of Columbia has noted, "[t]he D.C. Circuit has not decided, however, whether the *Connick* 'public concern' test also applies to First

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association claim and concluding that plaintiff "filed Union grievances and sought Union representation because of purely personal motives").

[13] As the Eighth Circuit interprets the test outlined in *Elrod v. Burns,* 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), "'in cases like *Elrod* and *Branti* involving pure patronage dismissals, the individual and government interests are essentially fixed, so that there is no need to perform a *Pickering* balance.'" *Thompson,* 852 F.3d at 792 (quoting *Hinshaw v. Smith,* 436 F.3d 997, 1005 (8th Cir. 2006)).

Amendment association claims." *Turner v. United States Capitol Police*, 34 F. Supp. 3d 124, 143 n.11 (D.D.C. 2014) (finding it "not necessary to decide that question here").

Training public officials and their attorneys on the line between protected and unprotected employee conduct is difficult enough when the employee's statements are evaluated, in part, under a balancing test. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011) ("Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (quoting *Pickering,* 391 U.S. at 568)). But when an employee's choice to associate receives *per se* constitutional protection in a significant minority of the federal circuits, and that split persists for more than one quarter of a century, it becomes even more difficult for national associations like Amici to provide guidance that prevents constitutional violations.

CONCLUSION

For the reasons set forth above, Amici Curiae International Municipal Lawyers Association and National School Boards Association respectfully request that the Court grant the petition for certiorari in this matter.

Respectfully submitted,

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