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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The opposition brief in this case is proof that the most experienced Supreme Court practitioners will distinguish away even the clearest of conflicts. But sometimes conflicts really are just as they appear.

Seven courts of appeals, including the Third Circuit below, have *expressly* acknowledged a deep circuit conflict on the question of whether (and how) the *Connick* framework applies to retaliation claims based on the First Amendment right to association. *See* Pet. App. 8a-9a; *Tang v. Rhode Island, Dep't of Elderly Affairs*, 163 F.3d 7, 11 n.4 (1st Cir. 1998); *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2003); *Boddie v. City of Columbus*, 989 F.2d 745, 748 (5th Cir. 1993); *Balton v. City of Milwaukee*, 133 F.3d 1036, 1040 (7th Cir. 1998); *Hudson v. Craven*, 403 F.3d 691, 698 (9th Cir. 2005); *Merrifield v. Board of Cty. Comm'rs*, 654 F.3d 1073, 1083 (10th Cir. 2011). And the conflict is most pronounced in the context of union affiliation claims, just like the claim at issue here. Pet. 10-20.

Yet, respondent bases his opposition on the astounding assertion that there is no conflict *at all*. In respondent's telling, each of these seven courts is "imagin[ing]" the conflict, and "every circuit to consider the question has held that the [*Connick*] test controls in determining whether a public employee's association is protected by the First Amendment." BIO 1-2, 8. That is simply incorrect. Indeed, recent precedent from both the Fifth and Eleventh Circuits holds—in language which could not be clearer—that *Connick*'s public-concern requirement does *not* apply to associational claims. *Infra* at 2-3. And, as the decisions of the district courts that actually have to

apply circuit precedent underscore, the conflict is especially pronounced in the union context.

In short, the conflict is real. And, as amici explain, the practical significance of that conflict for the nation's public employers, including police departments and schools, is real too. Respondent just ignores the impact of the decision below—and widespread circuit conflict—on those employers. But that is all the more reason to grant certiorari.

A. The Third Circuit's Decision Deepens A Multi-Faceted Conflict Of Authority

1. Respondent asserts (at 7) that the *Connick* framework has been applied to associational claims in "every circuit." But as seven circuits have themselves acknowledged (*supra* at 1), that is simply false. The Fifth and Eleventh Circuits have expressly held that *Connick*'s first prong does not apply to *any* associational claim. Pet. 15-17.

Respondent contends (at 20) that the Fifth Circuit has not rejected the public-concern requirement, but simply held that "plaintiffs need not make a case-by-case showing of public concern for certain types of association—such as union membership and political affiliation—that are inherently of public concern." But even that eliminates the public-concern requirement for broad classes of cases. And, in any event, the Fifth Circuit has expressly stated that any claim "predicated on free association . . . '*is not subject to the threshold public concern requirement*.'" *Breaux v. City of Garland*, 205 F.3d 150, 157 n.12 (5th Cir. 2000) (emphasis added) (citation omitted). Respondent dismisses this clear statement as "dicta," but district courts in the Fifth Circuit have uniformly declined to apply *Connick*'s first prong to *all*

associational claims. *See, e.g.*, *Saldivar v. City of Alton*, No. 7:12-CV-379, 2013 WL 12309519, at *3 (S.D. Tex. Apr. 17, 2013); *Hampshire v. Port Arthur Indep. Sch. Dist.*, No. 1:06-CV-442-TH, 2007 WL 9724758, at *5 (E.D. Tex. Dec. 21, 2007).

Respondent acknowledges (at 20 (quoting *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987)) that the Eleventh Circuit has held that "the public concern requirement 'is inapplicable to freedom of association claims.'" Thus, while standing on the rooftops to deny any conflict, even respondent ultimately admits that there *is* a circuit conflict on whether *Connick*'s public-concern prong applies to associational claims. Respondent suggests (at 20) *Hatcher* is outdated, but the Eleventh Circuit recently reaffirmed *Hatcher* in *D'Angelo v. School Board of Polk County*, 497 F.3d 1203, 1212 (11th Cir. 2007). And, as with the Fifth Circuit, district courts uniformly (and frequently) follow this settled precedent. *See, e.g.*, *Cochran v. City of Atlanta*, 289 F. Supp. 3d 1276, 1292 (N.D. Ga. 2017).

The existence of a circuit conflict over whether the public-concern requirement applies to associational claims—itself a matter of great significance, since this requirement is the touchstone for whether the First Amendment applies to an employment dispute—thus cannot plausibly be denied. And respondent does not (and cannot) dispute that resolving how *Connick* applies in the union context necessarily resolves the broader question of how *Connick* applies to associational claims more generally. Indeed, union affiliation is probably the most frequently recurring context in which associational claims are raised.

2. But there are several *additional* ways in which this case implicates—and provides an ideal vehicle to resolve—disarray in the courts of appeals.

First, as petitioners have explained, there is particular confusion regarding how the *Connick* framework applies to union affiliation claims. There are at least five separate tests governing such claims across the circuits. Pet. 10-20. Respondents do not contest that the Fourth, Sixth, and Seventh Circuits apply the *Connick* framework to claims of union association (in conflict with the Fifth and Eleventh Circuits), but speculate (at 13-16) that those three circuits would apply a different rule if presented with a claim where the alleged retaliation was premised exclusively on union "membership," rather than union "activity."

But that distinction is contrived. Claims alleging retaliation based on union "membership" virtually always arise in the context of the plaintiff's union "activity." Union membership and activity are both facets of *association*. It is absurd to think the circuits applying *Connick* to union "activity" would discard that entire framework when a plaintiff *removes* allegations of his union activity and rests on "membership" alone. Indeed, that would lead to the plainly incoherent result that a plaintiff who carefully pleads specific allegations relating to his particular union activities is subjected to a totally different—and more stringent—framework than a plaintiff with a threadbare complaint that omits such allegations.

Respondent's membership/activity dichotomy is simply manufactured for cert purposes.[1]

And this Court need not take petitioners' word for it. While respondent fails to identify a *single* district court that has adopted his membership/activity dichotomy, district courts in the circuits which apply *Connick* to union "activity" have applied the same framework to claims based on "membership" alone. *See, e.g.*, *Orick v. Banzinger*, 945 F. Supp. 1084, 1091 (S.D. Ohio 1996), *aff'd without op.*, 178 F.3d 1295 (6th Cir. 1999); *see also Cavanuagh v. McBride*, 33 F. Supp. 3d 840, 848 (E.D. Mich. 2014), *aff'd*, No. 14-1155 (6th Cir. Dec. 12, 2014). Likewise, district courts in the Third Circuit have already applied the reasoning from this "membership" case to cases where union activity is also alleged, further undercutting respondent's proposed distinction. *See infra* at 8.

Indeed, respondent cites only one case in any jurisdiction that even attempts to distinguish union membership and activity—the Sixth Circuit's decision in *Van Compernolle v. City of New Zeeland*,

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[1] Respondent's suggestion that the Seventh Circuit contemplated such a distinction in *Balton* is baseless, too. There, the court described itself as "firmly in the camp of those circuits that employ *Connick* to associational claims," and did not so much as hint at a distinction between claims based on "activity" or "membership" alone. 133 F.3d at 1040. Nor does the case's holding even implicate such a distinction. The court dismissed the claim because the plaintiff was not being retaliated against because of their membership *or* activities, but rather because their employer thought it "unprofessional" for them to have "stopped paying dues required of all members." *Id.* And respondent's reliance on Judge Cudahy's separate concurrence is likewise unavailing because Judge Cudahy expressly stated that he "d[id] not . . . agree" with the majority's reaffirmation of its precedent. *Id.* at 1041 (concurring in the judgment).

241 F. App'x 244 (6th Cir. 2007). That decision is unpublished, and thus, non-precedential. And, in any event, in *Van Compernolle*, the court concluded that a president of a police union *failed* to state a retaliation claim because his union activities—including representing union employees in their grievances and negotiating on behalf of the union for better pay—did *not* touch on matters of public concern. *Id.* at 250-51. Any language in the opinion that could be read to suggest that the result would have been different if the plaintiff included *fewer* allegations of union activity is dicta—which no doubt explains why it has not been adopted by any court, in the Sixth Circuit or elsewhere. *See id.* at 255-56 (Gilman, J. concurring) (noting the incoherence of such a distinction).

In short, it is undisputed that courts in the Fourth, Sixth, and Seventh Circuits apply *Connick* to union association claims.[2] Respondent's suggestion that these courts would suddenly apply an entirely different framework if only union membership, and not union activity, were at issue does not find support

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[2] Respondent seeks (at 14) to distinguish *Wilton v. Mayor & City Council of Baltimore*, 772 F.2d 88 (4th Cir. 1985), because that opinion purportedly "did not address the public-concern prong of [*Connick*]" or "use the words 'public concern.'" But even though *Wilton* did not use the exact words "public concern," it clearly applied the *Connick* framework. Pet. 11. And the fact that the opinion resolved the case on *Connick*'s second step does not mean that the court implicitly held that the first step does not apply to union membership claims. In any event, the Fourth Circuit has since expressly stated that *both* steps of the *Connick* test apply to all associational claims. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 249 (4th Cir. 1999).

in any published case and is refuted by how district courts *actually apply* their circuit's precedents.[3]

3. As explained, the Third Circuit's decision also creates a separate circuit conflict by rendering the *Connick* framework categorically inapplicable to union membership claims. Pet. 16-17. Respondent denies (at 17-19) this conflict as well, arguing that the Third Circuit simply held that the second prong was satisfied in this case because of a purported waiver by petitioners. But the court did not say *one word* about

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[3] Respondent's characterization of the Second and Tenth Circuits is inaccurate. As petitioners have explained (Pet. 14 n.6), the Second Circuit's position is internally inconsistent in light of *Lynch v. Ackley*, 811 F.3d 569 (2d Cir. 2016), which appeared to contradict its earlier holding in *State Employees Bargaining Agent Coalition v. Rowland,* 718 F.3d 126 (2d Cir. 2013). Respondent asserts (at 10 n.4) that *Lynch* is distinguishable because it did not "involve a claim of retaliation based on union association at all." But that is false. As the court expressly stated, "Lynch *also* claims unlawful retaliation for his associations," and these "claim[s] . . . [are] subject to the same analysis as set forth above for Lynch's First Amendment free-speech right." *Lynch*, 811 F.3d at 583 (emphasis added).

As to the Tenth Circuit, respondent argues that *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), held that *Connick*'s first prong does not apply to union association claims. But the reasoning of that case was expressly limited to contexts where a collective bargaining agreement had been signed. *Id.* at 1139. And *every* district court in the circuit to have considered the question has concluded that *Connick*'s "'public concern' requirement, . . . *not* the exception carved from *Shrum*, controls" when a CBA has not been signed. *Sinfuego v. Curry Cty. Bd. of Cty. Commissioners*, No. CR 15-0563 JB\GJF, 2018 WL 6815670, at *40 (D.N.M. Dec. 27, 2018) (emphasis added); *see Cardona v. Burbank*, Case No. 2:12-CV-608 TS-BCW, 2018 WL 2723882, at *9-11 (D. Utah June 6, 2018); *Hollenbach v. Burbank*, Case No. 2:16-cv-00918-DBP, 2017 WL 2242861, at *4-5 (D. Utah May 22, 2017).

waiver, gave no indication that the second prong (which it necessarily resolved against petitioners) applied to union membership claims, or gave petitioners an opportunity to raise the issue on remand despite the fact that petitioners had prevailed on an antecedent question below (and thus had no reason to separately raise the balancing prong).

And while respondent (at 18) insists that the Third Circuit has not jettisoned *Connick*'s balancing prong, that is *exactly* how district courts have read the decision below—holding that a plaintiff adequately alleges "constitutionally protected conduct" simply by asserting that their employer retaliated against them because of their union membership. *See Mattia v. Baker*, Civil Action No. 17-4298, 2018 WL 6621278, at *3 (E.D. Pa. Dec. 17, 2018); *Myers v. City of Wilkes-Barre*, No. 3:18-CV-42, 2019 WL 210938, at *10 (M.D. Pa. Jan. 15, 2019). In other words, in the real world, the Third Circuit's decision is just as categorical and far-reaching as the petition explains. Pet. 16-17.

That break from the established rule in every other court of appeals creates a separate circuit conflict warranting this Court's review. But it is just gravy. The conflict over whether the gateway public-concern requirement applies in this context is easily important enough to warrant review.

B. This Case Is An Excellent Vehicle

Beyond his implausible denial of any conflict, respondent offers essentially no reason to deny review. He briefly complains (at 24) that the case is "interlocutory." But it is well-settled that, "where the opinion of the [federal] court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or

finally resolve the ligation," the interlocutory status of the case is "*no impediment* to certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (10th ed. 2013) (emphasis added). That is the case here; the district court disposed of the case under a proper application of the *Connick* framework.

It is difficult to imagine a better vehicle to decide the question presented. Both the Third Circuit and district court squarely addressed the question. This case does not involve any complicating factors, such as a "hybrid speech" claim; instead, the Third Circuit stressed that this case involved a "pure associational claim," making the question presented as clean as it gets. Pet. App. 7a-8a; *see id.* at 14a. And the presence of experienced Supreme Court counsel on both sides ensures the issues will be fully vetted.

C. The Question Presented Is Exceptionally Important

Nor does respondent seriously question the importance of the question presented. The upshot of the decision below is to automatically constitutionalize employment grievances by union members and, thus, elevate union membership protection under the First Amendment beyond even core political expression, such as political party affiliation. This exception for union membership from the ordinary protections afforded to municipal employers is indefensible—and, tellingly, respondent barely even tries to defend the decision below.

Respondent asserts (at 1, 3) only that *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), "all but answered" petitioners' objection. But *Janus* addressed a completely different question (whether

the First Amendment bars the extraction of agency dues from nonconsenting employees). Indeed, *Janus* recognized that "the [*Connick*] framework was developed for use in a very different context" than the compelled subsidy dispute at issue there. 138 S. Ct. at 2472. At most, *Janus* supports the conclusion that public unions engage in First Amendment activity. But that settles nothing under *Connick*. The whole point of the *Connick* framework is to assess whether a public employee can state a retaliation claim based on *otherwise protected* speech (or association) when it happens in the public workplace. The Third Circuit went astray not by holding that union membership is protected under the First Amendment, but by holding that retaliation claims based on union membership automatically satisfy the *Connick* framework.

As explained in the petition (at 23-24), there is a great deal of difference between a claim that alleges an employee did not receive a promotion because his close relationship with the "rank and file" would make him a poor supervisor, and one based on the fact that his union took a particular position on a controversial issue. Notably, respondent just ignores this distinction and, like the Third Circuit, argues for a rule in which union membership *automatically* gives public employees an elevated status under the First Amendment when it comes to retaliation claims.[4]

Respondent's assertion (at 25) that union membership claims like the one at issue here "are quite uncommon" is belied by the multifaceted conflict on the question presented. And, in just the few

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[4] Respondent likewise just ignores the Third Circuit's elimination of the "public citizen requirement" for union-membership claims. *See* Pet. 24-25.

months since the decision below, there have been three cases in the Third Circuit alone addressing claims based on "union membership." *See supra* at 8; *see also Hampshire v. Philadelphia Hous. Admin.*, Civil Action No. 17-4423, 2019 WL 652481, at *13-14 (E.D. Pa. Feb. 14, 2019). That number is sure to grow in light of the Third Circuit's generous rule. And all of that does not even reflect the scores of cases that public employers are (or will be) forced to settle to avoid the cost of trial. By any reasonable measure, the question presented is frequently recurring and worthy of this Court's attention.

* * *

This Court adopted the *Connick* framework to ensure that the First Amendment did not "constitutionalize the [public] employee grievance." *Connick v. Meyers,* 461 U.S. 138, 154 (1983). But that is exactly what the decision below does—for every one of the millions of public employees who belongs to a union. Henceforth, they can constitutionalize *any* employee grievance simply by alleging that their employer acted based on their "union membership." As underscored by amici, the adverse practical consequences of such a rule for government employers at all levels alone merit this Court's intervention. But so does the very real, and very entrenched, conflict deepened by the decision below.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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