No. _____

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

PETITION FOR A WRIT OF CERTIORARI

MARCUS CURTIS
LATHAM & WATKINS LLP
12670 High Bluff Drive
San Diego, CA 92127
(858) 509-8465

GREGORY G. GARRE
Counsel of Record
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

QUESTION PRESENTED

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court set out a two-step framework for addressing First Amendment retaliation claims by public employees. The first inquiry is whether the employee spoke "as a citizen on a matter of public concern"; and, if the answer to that question is yes, the second inquiry is whether the public employer had "an adequate justification for treating [the employee] differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). In the decision below, the Third Circuit joined the Fifth and Eleventh Circuits, in an acknowledged circuit conflict with the Fourth, Sixth, and Seventh Circuits, by holding that *Connick*'s first inquiry does not apply to a retaliation claim based on membership in a public sector union. Then the Third Circuit—in a decision that breaks with every other court of appeals to have considered the question—rendered *Connick*'s second inquiry inapplicable to union-association claims as well, making the entire *Connick* framework categorically inapplicable to retaliation claims based on union membership.

The question presented is whether, and how, this Court's two-step framework for evaluating First Amendment retaliation claims by public employees applies to a claim alleging retaliation based on an employee's association with a public sector union.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. Factual Background 3

B. Procedural History 6

REASONS FOR GRANTING THE WRIT 10

A. The Third Circuit's Decision Deepens A Multi-Faceted Conflict Of Authority 10

1. Three circuits apply Connick*'s public concern requirement to retaliation claims based on union association.* 10

2. Two circuits do not apply Connick*'s public concern requirement to association claims based on union affiliation.* 15

3. Two circuits apply the Connick *framework to union association only under certain circumstances.* 17

4. The utter disarray in the circuits necessitates this Court's intervention. .. 19

B. The Question Presented Is Exceptionally Important And Warrants Review 20

TABLE OF CONTENTS—Continued

Page

C. This Case Is An Excellent Vehicle To Address The Question Presented 26

CONCLUSION 29

APPENDIX TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Third Circuit, *Palardy v. Township of Millburn*, 906 F.3d 76 (3d Cir. 2018) 1a

Opinion of the United States District Court for the District of New Jersey Granting Defendants' Motion for Summary Judgment, *Palardy. v. Township of Millburn*, Civil Action No. 15–02089(SDW)(LDW), 2017 WL 2968394 (D.N.J. July 11, 2017).....15a

TABLE OF AUTHORITIES

Page(s)

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Akers v. McGinnis,
352 F.3d 1030 (6th Cir. 2003), *cert. denied*, 543 U.S. 1020 (2004).....11

Balton v. City of Milwaukee,
133 F.3d 1036 (7th Cir. 1998).....8, 13

Boals v. Gray,
775 F.2d 686 (6th Cir. 1985).....11, 12

Boddie v. City of Columbus,
989 F.2d 745 (5th Cir. 1993).....9, 15, 16

Breaux v. City of Garland,
205 F.3d 150 (5th Cir.), *cert. denied*,
531 U.S. 816 (2000).....15

Cardona v. Burbank,
No. 2:12-CV-608 TS-BCW, 2018 WL
2723882 (D. Utah June 6, 2018) 19

Cavanaugh v. McBride,
33 F. Supp. 3d 840 (E.D. Mich. 2014) 12

Cillo v. City of Greenwood Village,
739 F.3d 451 (10th Cir. 2013).....19

TABLE OF AUTHORITIES—Continued

Page(s)

Classroom Teachers of Dallas/Texas State Teachers Ass'n/National Education Ass'n v. Dallas Independent School District, 164 F. Supp. 2d 839 (N.D. Tex. Apr. 6, 2001) 16

Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004) 2, 8, 14

Conley v. Town of Elkton, 381 F. Supp. 2d 514 (W.D. Va. 2005), *aff'd*, 190 F. App'x 246 (4th Cir. 2006) 11

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Cook v. Gwinnett County School District, 414 F.3d 1313 (11th Cir. 2005) 9, 16

Crawford-El v. Britton, 523 U.S. 574 (1998) 21

Cunningham v. Village of Mount Prospect, No. 02 C 4196, 2002 WL 31628208 (N.D. Ill. Nov. 19, 2002) 14

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TABLE OF AUTHORITIES—Continued

Page(s)

Donovan v. Incorporated Village of Malverne,
547 F. Supp. 2d 210 (E.D.N.Y. 2008), *aff'd*, 344 F. App'x 625 (2009) 14

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999).....11

Garcetti v. Ceballos,
547 U.S. 410 (2006).....1, 7, 9

Garvey v. Barnegat Board of Education,
No. CIV. A. 07-6134 MLC, 2008 WL 2902617 (D.N.J. July 24, 2008) 25

Gregorich v. Lund,
54 F.3d 410 (7th Cir. 1995).....13

Griffin v. Thomas,
929 F.2d 1210 (7th Cir. 1991).....2, 12, 13

Hamilton County Education Ass'n v. Hamilton County Board of Education,
822 F.3d 831 (6th Cir. 2016).....12

Hatcher v. Board of Public Education & Orphanage,
809 F.2d 1546 (11th Cir. 1987).....16

Hollenbach v. Burbank,
No. 2:16-cv-00918-DBP, 2017 WL 2242861 (D. Utah May 22, 2017) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Hudson v. Craven,
403 F.3d 691 (9th Cir. 2005).....17, 18

Janus v. American Federation of State, County, & Municipal Employees, Council 31,
138 S. Ct. 2448 (2018).....25

Kasak v. Village of Bedford Park,
514 F. Supp. 2d 1071 (N.D. Ill. 2007).....14

Key v. Rutherford,
645 F.2d 880 (10th Cir. 1981).....22

Local 491, International Brotherhood of Police Officers v. Gwinnett County,
510 F. Supp. 2d 1271 (N.D. Ga. 2007).....17

Lynch v. Ackley,
811 F.3d 569 (2d Cir. 2016).....14

Maglietti v. Nicholson,
517 F. Supp. 2d 624 (D. Conn. 2007).....15

Merrifield v. Board of County Commissioners,
654 F.3d 1073 (10th Cir. 2011), *cert. denied*, 566 U.S. 962 (2012).....18

TABLE OF AUTHORITIES—Continued

Page(s)

Norbeck v. Davenport Community School District, 545 F.2d 63 (8th Cir. 1976), *cert. denied*, 431 U.S. 917 (1977).....23

Orick v. Banziger, 945 F. Supp. 1084 (S.D. Ohio 1996), *aff'd without op.*, 178 F.3d 1295 (6th Cir. 1999).....12

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968).....2, 7

Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007) 14

Rinella v. City of Chicago, No. 16-cv-04088, 2016 WL 7241185 (N.D. Ill. Dec. 14, 2016) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....24

Rutherford v. Katonah-Lewisboro School District, 670 F. Supp. 2d 230 (S.D.N.Y. 2009) 14

Schnabel v. Hualapai Valley First District, No. CV 07-150-PCT-JAT, 2009 WL 322948 (D. Ariz. Feb. 9, 2009).....18

TABLE OF AUTHORITIES—Continued

Page(s)

Sheaffer v. County of Chatham,
337 F. Supp. 2d 709 (M.D.N.C. 2004) 11, 25

Shrum v. City of Coweta,
449 F.3d 1132 (10th Cir. 2006).....2, 18

State Emp. Bargaining Agent Coalition. v. Rowland,
718 F.3d 126 (2d Cir. 2013), *cert. denied*, 571 U.S. 1170 (2014).....14

United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union v. Anderson,
No. SA-17-CV-1242-XR, 2018 WL 3017366 (W.D. Tex. June 15, 2018) 15

VanCamp v. McNesby,
No. 3:08cv166-RS-MD, 2008 WL 2557539 (N.D. Fla. June 20, 2008).....16

Vicksburg Firefighters Ass'n, Local 1686 International Ass'n of Firefighters v. City of Vicksburg,
761 F.2d 1036 (5th Cir. 1985).....22

Wilton v. Mayor & City Council of Baltimore,
772 F.2d 88 (4th Cir. 1985).....10, 11

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1254(1).....1

U.S. Const. amend. I.....1

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Julie Jennings & Jared Nagel, Congressional Research Serv. *Federal Workforce Statistics Sources: OPM and OMB* (updated Jan. 12, 2018), https://crsreports.congress.gov/product/pdf/R/R43590 21

U.S. Census Bureau, 2017 Government Employment and Payroll Tables (rev. Sept. 27, 2018), https://www.census.gov/data/tables/2017/econ/apes/ annual-apes.html (follow "State & Local Government Employment and Payroll Data" link) 21

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-14a) is reported at 906 F.3d 76. The district court's unpublished opinion (App. 15a-27a) is available at 2017 WL 2968394.

JURISDICTION

The court of appeals entered its opinion on September 28, 2018. App 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

This Court has long applied a special framework for evaluating First Amendment claims alleging retaliation based on a public employee's speech. *See Connick v. Myers*, 461 U.S. 138, 143 (1983). As the Court recently reiterated, under this framework, there are "two inquiries." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). The first inquiry is whether "the employee spoke as a citizen on a matter of public concern." *Id.* If the speech is not on a matter of public concern, that is the end of the First Amendment inquiry. But if an employee's speech does address a matter of public concern, then the analysis shifts to the second inquiry—whether the public employer has an "adequate justification" for its decision that outweighs any intrusion on protected First Amendment interests. *Id.* This latter "balancing" step, the Court has stressed, "requires full consideration of the government's interest in the

effective and efficient fulfillment of its responsibilities to the public." *Connick,* 461 U.S. at 150–51.[1]

The courts of appeals are deeply divided over whether, or how, this framework applies to freedom of association claims. Many court of appeals decisions, including the opinion below, expressly acknowledge the circuit conflict. *See, e.g.*, App. 8a ("The circuits are split on whether *Connick*'s public-concern requirement applies to associational claims . . . ."); *Shrum v. City of Coweta*, 449 F.3d 1132, 1138 n.3 (10th Cir. 2006) (noting that "[f]ive Circuits have adopted the public concern requirement for freedom of association claims and two have not"); *Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004) (the parties have taken "positions that mirror a split in the circuits"); *Griffin v. Thomas*, 929 F.2d 1210, 1212–13 (7th Cir. 1991) ("[T]he circuits are split over the issue of whether *Connick*'s public concern requirement applies to freedom of association claims.").

Two courts of appeals have held that, when a public employee alleges that he was retaliated against based on the exercise of his First Amendment right to freedom of association, the employee need not establish that the association relates to a matter of public concern; six other circuits, however, apply some form of the public concern requirement to such claims. Courts in the latter category, moreover, again divide: four circuits apply the public concern

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[1] This inquiry is sometimes referred to as the *"Connick"* test, and sometimes as the *"Pickering*" test, based on the cases from which it largely originated. *See Connick,* 461 U.S. at 143; *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). In this petition, we refer to this inquiry generally as the "*Connick*" or "public concern" inquiry.

requirement to practically all association claims, and two circuits apply the public concern requirement only under certain defined circumstances.

The disarray among the circuits is even more extreme when it comes to claims alleging retaliation based on membership in a public sector union—the context in which this issue arises here. At least *five separate* tests govern the availability of a cause of action for a public employee alleging retaliation based on union membership. In the decision below, the Third Circuit adopted one of the most extreme versions of those tests. It held "that mere membership in a public union is always a matter of public concern," App. 11a, and, further, that a public employee's right to associate with public sector unions is categorically exempt from the Court's *Connick* framework, such that a court need not engage in any balancing of interests at all, *id.* at 12a-13a.

The upshot is that the framework governing the First Amendment rights of over fifteen million public employees depends on where in the country the alleged retaliation occurs. And, in many circuits, including the Third Circuit, members of public sector unions effectively enjoy greater First Amendment protections against their employers than their fellow employees who elect against union membership. This Court's intervention is imperative to resolve the disarray in the lower courts regarding this frequently recurring and undeniably important issue.

A. Factual Background

Michael Palardy worked as a police officer for the Township of Millburn, New Jersey, from 1988 until his retirement in 2014. App. 2a. He was promoted three times during his tenure with the Township's

police department: to sergeant in 1995, to lieutenant in 1998, and to captain in 2012. *Id.*

During this time, Palardy was a member of two police officers' unions—the Patrolmen's Benevolent Association (PBA) and the Superior Officers' Association (SOA). *Id.* He was a sergeant-at-arms and union delegate for the PBA at various times in the early 1990s, and he served as vice president for the SOA in 2007 or 2008, and as its president in 2009 or 2010. *Id.* Both the PBA and SOA acted as collective bargaining agents for individuals in the police department. *Id.* at 17a. While serving in the PBA and SOA, Palardy estimates that he participated in four or five contract negotiations between the unions and the Township, and attended at least two disciplinary hearings for fellow officers. *Id.* at 2a.

Palardy asserts that petitioners displayed hostility toward his union membership and activity. Palardy testified that he was told by other officers that petitioner Timothy Gordon, the Township's business administrator, who had authority to hire, fire, and promote Township employees including policy officers, made "statements reflecting negatively on Palardy's union activity." *Id.* at 3a.

According to Palardy, Gordon reportedly told another Township police officer on one occasion that Palardy "wasn't a good supervisor . . . because [he] was too close to [his] men and [he] would have problems separating [his] union business with police department work and being a supervisor." *Id.* (alterations in original) (quoting record). On another occasion, Gordon reportedly told a former Township police chief that Palardy "ha[d] to learn how to separate [him]self from the rank and file." *Id.* (alterations in original) (quoting record).

In late 2010, the Township's chief of police position opened up. *Id.* The Township's custom at the time was to select its new chief from its roster of captains. *Id.* Because Palardy was a lieutenant, not a captain, he was ineligible to become chief. *Id.* Palardy testified that Gordon also told him that he did not believe any of the lieutenants, including Palardy, had enough experience to become chief. *Id.* at 4a. Instead, Gordon was considering having the chief of police from nearby Livingston, New Jersey, serve in a dual capacity as the chief of both towns. *Id.* The Township ultimately had no need to go this route, however, because Gregory Weber, a captain on the Township's police force who had been on inactive duty for health reasons, returned to active duty and was promoted to chief of police in September 2011. *Id.*

Around this time, Palardy stepped down as union president, allegedly because he knew Gordon "had a problem with [his] union affiliation" and he wanted "to get the stigma off . . . [himself] that [he] was only a union guy." *Id.* (alterations in original) (quoting record). A month later, the Township retained an outside consultant to study the police department's "rank structure and current vacancies." *Id.* (quoting record). The consultant recommended that the department retain the captain rank and fill the existing vacancies in that position. *Id.* To that end, Gordon promoted Palardy to captain in February 2012 (according to Palardy, a move made "out of desperation"). *Id.* (quoting record).

In the summer of 2013, almost two years *before* police chief Weber was scheduled to retire (in 2015), Palardy was offered a part-time position as Security Coordinator for the Township's Board of Education. *Id.* Palardy asserts that he "saw the writing on the

wall that he would never become chief," and thus decided to retire from the police department and accept the school board's job offer. *Id.* at 4a-5a (quoting record). Palardy was placed on terminal leave, and he retired from the police department effective February 1, 2014. *Id.* at 5a.

B. Procedural History

A few months after retiring, Palardy filed this § 1983 action against petitioners. As pertinent here, Palardy asserted that petitioners retaliated against him in violation of his First Amendment rights to free speech and association by not promoting him to chief of police on the basis of their opposition to Palardy's union membership and activity. *Id.* at 16a.

The district court granted summary judgment in favor of petitioners. *Id.* at 15a. At the outset, the court recognized that, under this Court's precedents, a public employee may state a First Amendment retaliation claim against a public employer only when (1) the employee's speech addresses a matter of public concern, and (2) the employer lacks an adequate justification for treating the employee differently for his speech. *Id.* at 23a. The court then found that Palardy's union-related activity and association—in particular, his representation of union members in disciplinary hearings and in contract negotiations with the Township—"related to personnel matters" rather than to matters of public concern, and so did not rise to the level of "constitutionally protected conduct." *Id.* at 25a. The court considered Palardy's "association" claim together with his "speech" claim, and subjected them both to the above framework. *Id.* at 23a n.3.

The Third Circuit reversed in relevant part. *Id.* at 2a. The court first noted that to prevail on a First Amendment retaliation claim, a plaintiff must first prove that "he engaged in 'constitutionally protected conduct.'" *Id.* at 6a (citation omitted). The court then explained that "the Supreme Court has long held that public employees only receive First Amendment protection from retaliation in the workplace when they speak out on a matter of public concern and their interest in speaking outweighs the government's interest in promoting workplace efficiency and avoiding disruption." *Id.* (citing *Connick*, 461 U.S. at 147, and *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). The court added that, under *Garcetti*, 547 U.S. at 418, public employees who make statements pursuant to their official duties are not speaking as citizens for First Amendment purposes. *Id.* at 6a-7a.

The court then observed that, while "*Pickering*, *Connick*, and *Garcetti* were cases about speech," "Palardy's case . . . is different" because he claims petitioners "retaliated against him simply because of his union membership, and not because of his advocacy on any particular issue." *Id.* at 7a; *see id.* at 7a-8a (Palardy alleges that Gordon's comments "evince hostility toward [him] solely because of his union membership"). Whether Palardy is able to state a claim, the court explained, thus "depends upon whether *Connick* and *Garcetti* apply to pure associational claims like Palardy's"—a question on which "[t]he circuits are split." *Id.* at 8a.

The court explained that "[t]he Second, Fourth, Sixth, and Seventh Circuits apply the public concern requirement to public employee association claims," *id.*, reasoning that "it would be anomalous to exempt

[association claims] from *Connick*'s public concern requirement and thereby accord [them] an elevated status among First Amendment freedoms." *Id.* at 8a-9a (quoting *Cobb v. Pozzi,* 363 F.3d 89, 105 (2d Cir. 2004)). "On the other side of the split," the court continued, "the Fifth and Eleventh Circuits hold the public concern requirement does not apply to associational claims." *Id.* at 9a.[2]

The court then held that, in the context of "an associational claim arising from a public employee's union affiliation," the "minority position . . . is the better one." *Id.* at 10a. The court reasoned that the public concern requirement—which ordinarily considers the "content, form, and context of a given statement" to gauge whether it relates to a matter of public concern—is "cumbersome" in the context of a pure association claim. *Id.* at 10a-11a (discussing and quoting *Balton v. City of Milwaukee,* 133 F.3d 1036, 1041 (7th Cir. 1998) (Cudahy, J., concurring)). Finding no "justiciable basis . . . to separate the wheat from the chaff," the court reasoned that the better approach was to simply "hold[] that mere membership in a public union is *always* a matter of public concern." *Id.* at 11a (emphasis added). Thus, the

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[2] The court added that the "[t]he Ninth and Tenth Circuits both take unique approaches." App. 9a. "The Ninth Circuit applies the public concern requirement to 'hybrid' free speech and association claims, but it has not decided the question for freestanding association claims." *Id.* And "[t]he Tenth Circuit generally requires the public concern requirement for freedom of association claims . . . but has rejected the requirement in 'the specific context of public-employee labor unions'" where there is a collective bargaining agreement covering the plaintiff's relationship with their employer. *Id.* at 9a-10a (citation omitted).

court concluded that "*Connick*'s public-concern requirement . . . stands as no obstacle to Palardy's associational claim." *Id.*[3]

The court reached this conclusion without applying *Connick*'s second step: whether the Township had "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. Accordingly, the decision below went further than either of the two circuits it purported to follow, both of which apply the second step of the *Connick* test to union affiliation claims. *See Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1320–21 (11th Cir. 2005); *Boddie v. City of Columbus*, 989 F.2d 745, 750-51 (5th Cir. 1993). Instead, under the decision below, union affiliation is categorically outside of the *Connick* framework, and thus an employee may state a claim for retaliation even if a public sector employer has a compelling justification for treating a union member differently from an ordinary employee.

Accordingly, the court of appeals concluded that the district court "erred by holding as a matter of law that Palardy did not establish the first element of his First Amendment retaliation claim—constitutionally-protected conduct," and remanded for further proceedings as to that claim. App. 13a.[4]

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[3] The court further "decline[d] to apply *Garcetti*'s private-citizen test to Palardy's freedom of association claim," reasoning that an employee's membership in a public union was unlikely to ever be one of his "official duties." App. 12a.

[4] On remand, the focus will turn to whether Palardy is entitled to summary judgment on the remaining two elements of Palardy's association retaliation claim—"whether Defendants engaged in 'retaliatory action sufficient to deter a person of

REASONS FOR GRANTING THE WRIT

This Court long ago adopted a two-step framework for evaluating claims that a public employer retaliated against one of its employees for exercising his First Amendment rights, which seeks to balance the interests in an effective public workplace and the interests safeguarded by the First Amendment itself. The circuits are deeply divided over whether, and how, that framework applies to First Amendment retaliation claims based on the exercise of association rights and, in particular, membership in a public union. The Third Circuit's decision in this case adopts the most extreme position among the circuits—that the entire framework is categorically inapplicable when a plaintiff alleges retaliation based on union membership. That decision grants members of public unions an elevated status under the First Amendment, deepens the existing circuit conflict on this issue, and warrants this Court's review.

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

1. *Three circuits apply* Connick*'s public concern requirement to retaliation claims based on union association.*

The Fourth, Sixth, and Seventh Circuits have expressly applied the public concern requirement to First Amendment claims based on union association.

a. In *Wilton v. Mayor & City Council of Baltimore*, the Fourth Circuit affirmed the dismissal of a claim

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ordinary fitness from exercising his constitutional rights' and whether 'a causal link [existed] between the constitutionally protected conduct and the retaliatory action.'" App. 13a (alteration in original) (citation omitted).

by a correctional officer who alleged that a municipality did not promote him based on his membership in a public sector union. 772 F.2d 88, 91 (4th Cir. 1985). In so doing, the court recognized a "limitation on [a] public employee's asserted constitutional right of association [that] is closely analogous to the recognized limitation on a public employee's First Amendment right to speak on matters of community concern." *Id.* (citing *Connick v. Myers*, 461 U.S. 138 (1983)).

The Fourth Circuit has since re-affirmed that *Connick*'s framework applies fully to all association claims. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 249 (4th Cir. 1999) (recognizing that "[l]ogically" the "limitations on [an employee's] . . . right to speak" apply to his "right to associate"). And district courts in the circuit consistently follow this rule. *See, e.g.*, *Conley v. Town of Elkton*, 381 F. Supp. 2d 514, 521–22 (W.D. Va. 2005), *aff'd*, 190 F. App'x 246 (4th Cir. 2006); *Sheaffer v. County of Chatham*, 337 F. Supp. 2d 709, 719 & n.2 (M.D.N.C. 2004).

b. The Sixth Circuit likewise applies the "same" *Connick* public concern requirement to all association claims, including those based on union affiliation. *See Akers v. McGinnis*, 352 F.3d 1030, 1036 (6th Cir. 2003) ("State employees' freedom of expressive association claims are analyzed under the same standard as state employees' freedom of speech claims."), *cert. denied*, 543 U.S. 1020 (2004).

Specifically, in *Boals v. Gray*, the court held that "the *Connick* 'public concern' test is applicable to" claims alleging retaliation based on association with a public sector union. 775 F.2d 686, 691-92 (6th Cir. 1985). The court further held that "union-related speech and association" do *not* "inherently touch[] on

a matter of public concern as a matter of law." *Id.*; *see also id.* at 693 ("We conclude that an employee's speech, activity or association, merely because it is union-related, does not touch on a matter of public concern as a matter of law."). And in *Hamilton County Education Ass'n v. Hamilton County Board of Education*, the Sixth Circuit reaffirmed the validity of *Boals* in the union context. 822 F.3d 831, 841 n.3 (6th Cir. 2016) ("Union-related association . . . does not inherently touch on a matter of public concern.").

District courts in the Sixth Circuit have thus applied the public concern test where employees allege retaliation based on union membership. *See, e.g.*, *Orick v. Banziger*, 945 F. Supp. 1084, 1091 (S.D. Ohio 1996) (explaining, in a case where plaintiffs alleged retaliation based on their union membership, that "[u]nion association is protected 'if it addresses a matter of public concern and the employer has no overriding state interest in efficient public service that would be undermined by the speech or association'" (citation omitted)), *aff'd without op.*, 178 F.3d 1295 (6th Cir. 1999); *see also Cavanaugh v. McBride*, 33 F. Supp. 3d 840, 848 (E.D. Mich. 2014) (applying public concern test where plaintiff alleged he was retaliated against "simply because he was a union member engaged in union activities").

c. The Seventh Circuit also has squarely held that the *Connick* framework applies to claims alleging retaliation based on union association. In *Griffin v. Thomas*, the court applied the *Connick* test to an assistant principal's claim that she was demoted and reassigned based on her association with her union. 929 F.2d 1210 (7th Cir. 1991). The court concluded that there was "no rational reason for discriminating . . . among the rights of speech, petition, and

association in applying *Connick* to first amendment claims," and thus the plaintiff's association claim was governed by *Connick*. *Id.* at 1214.

Similarly, in *Gregorich v. Lund*, the Seventh Circuit applied the *Connick* framework to a claim by a state-employed research attorney who alleged he had been terminated based on his union-organizing activity. 54 F.3d 410, 413-14 (7th Cir. 1995). The court unequivocally stated that, "[w]hen a public employee alleges that he was fired in violation of his constitutional right to associate freely with others, we analyze his claim under the approach announced by the Supreme Court in [*Pickering*] and reiterated in [*Connick*]." *Id.* at 414. And while the court recognized that union activity often "touches upon matters of public concern," it held that this "'does not automatically' render [association] protected." *Id.* at 415 (citation omitted). Instead, when a plaintiff alleges retaliation based on association with a union, a court "must probe the record to determine the 'precise content, form, and context' of [the plaintiff's] associational activity." *Id.* at 415-16 (citation omitted). The Seventh Circuit is thus "firmly in the camp of those circuits that employ *Connick* to associational claims." *Balton v. City of Milwaukee*, 133 F.3d 1036, 1040 (7th Cir. 1998).[5]

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[5] The Third Circuit below pointed (App. 10a–11a) to Judge Cudahy's separate opinion in *Balton*. Judge Cudahy disagreed with the majority's conclusion that the *Connick* public concern test applies to association claims. In his view, "*Pickering* and *Connick* do not supply a relevant test for purely associational claims because such cases generally do not involve interference with the work relationship." 133 F.3d at 1041. But Judge Cudahy ultimately concurred in the judgment in *Balton* on the ground that the city was entitled to immunity. *Id.* at 1042.

District courts in the Seventh Circuit thus routinely apply both steps of the *Connick* framework in evaluating union-association retaliation claims. *See, e.g.*, *Rinella v. City of Chicago*, No. 16-cv-04088, 2016 WL 7241185, at *3 (N.D. Ill. Dec. 14, 2016); *Kasak v. Village of Bedford Park*, 514 F. Supp. 2d 1071, 1076–77 (N.D. Ill. 2007); *Cunningham v. Village of Mount Prospect*, No. 02 C 4196, 2002 WL 31628208, at *3–5 (N.D. Ill. Nov. 19, 2002).[6]

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[6] The Second Circuit appears to follow the same position, but its case law is less clear. In *Cobb v. Pozzi*, the court held that "a public employee bringing a freedom of association claim must demonstrate that the association or associational activity at issue touches on a matter of public concern." 363 F.3d 89, 107 (2d Cir. 2004); *see also Piscottano v. Murphy*, 511 F.3d 247, 273 (2d Cir. 2007). But the court reserved the question whether the *Connick* framework applies to claims based on association with a union. *Id.* at 273–74. And in *State Emp. Bargaining Agent Coalition v. Rowland*, the Second Circuit stated "that *Rutan*'s heightened scrutiny requirement," which governs retaliation based on political party affiliation, "applies to employment decisions based on union membership." 718 F.3d 126, 134 (2d Cir. 2013), *cert. denied*, 571 U.S. 1170 (2014). Since *Rowland,* however, the Second Circuit has stated—consistent with *Cobb*—that a "claim based on [plaintiff's] First Amendment association rights [with a public sector union] is subject to the same analysis as set forth above for [plaintiff's] First Amendment free-speech right based on the same incident." *Lynch v. Ackley*, 811 F.3d 569, 583 (2d Cir. 2016).

District courts in the Second Circuit, meanwhile, are themselves in disarray on the question presented. *See, e.g.*, *Rutherford v. Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 251 (S.D.N.Y. 2009) ("[I]t is far from clear that union membership by itself touches on a matter of public concern."); *id.* at 243 (consultation with a union representative not of public concern); *Donovan v. Incorporated Vill. of Malverne*, 547 F. Supp. 2d 210, 218 (E.D.N.Y. 2008) ("[T]he plaintiff's union membership, in and of itself, is enough to satisfy the public

2. Two circuits do not apply Connick*'s public concern requirement to association claims based on union affiliation.*

In express and acknowledged disagreement with the Fourth, Sixth, and Seventh Circuits, the Fifth and Eleventh Circuits have held that a public employee plaintiff need *not* show that his association with a union involved a matter of public concern in order to state a valid First Amendment retaliation claim.

a. In *Boddie v. City of Columbus*, the Fifth Circuit held that "no independent proof of public concern is required in a freedom of association claim arising from union organization activity." 989 F.2d 745, 749 (5th Cir. 1993); *see Breaux v. City of Garland*, 205 F.3d 150, 157 n.12 (5th Cir.) (a retaliation claim "predicated on free association" generally "'is not subject to the threshold public concern requirement'" (citation omitted)), *cert. denied*, 531 U.S. 816 (2000). But the Fifth Circuit still requires that the second step of *Connick*'s framework be satisfied—*i.e.*, that a court must still balance the employee's right to associate and the government's interest in promoting workplace efficiency. *See Boddie*, 989 F.2d at 749-50.

District courts in the Fifth Circuit have thus applied the second—but not first—step of the *Connick* test to union association claims. *See, e.g.*, *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Anderson*, No. SA-17-CV-1242-XR, 2018 WL 3017366, at *13–14 (W.D. Tex. June 15, 2018) (applying *Pickering*

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concern element."), *aff'd*, 344 F. App'x 625 (2009); *Maglietti v. Nicholson*, 517 F. Supp. 2d 624, 635 (D. Conn. 2007) (union membership "can be an associational activity that touches on a [matter of] public concern").

balancing test to retaliation claim based on union association even while not applying the threshold public concern requirement); *see also Classroom Teachers of Dallas/Tex. State Teachers Ass'n/Nat'l Educ. Ass'n v. Dallas Indep. Sch. Dist.*, 164 F. Supp. 2d 839, 853–54 (N.D. Tex. Apr. 6, 2001) (explaining that although there is no public concern requirement for association rights, "the balancing test is still appropriate" (citing *Boddie*, 989 F.2d at 750)).

b. The Eleventh Circuit likewise holds that "*Connick* is inapplicable to freedom of association claims." *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987). And the Eleventh Circuit recently reaffirmed this position in *D'Angelo v. School Board of Polk County*, 497 F.3d 1203, 1212 (11th Cir. 2007), explaining that "unlike speech or petitions by public employees, associational activity by public employees need not be on matters of public concern to be protected under the First Amendment." *See also Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005).

Like the Fifth Circuit, the Eleventh Circuit also has made clear that courts still must apply *Connick*'s second step, balancing the employee's right to associate against the employer's interest in workplace efficiency. *Cook*, 414 F.3d at 1320–21. District courts in the Eleventh Circuit apply the balancing analysis accordingly. *See, e.g.*, *VanCamp v. McNesby*, No. 3:08cv166-RS-MD, 2008 WL 2557539, at *7 (N.D. Fla. June 20, 2008) ("Although a public employee's associations need not relate to a matter of public concern to be constitutionally protected, the employee's interest in engaging in the associational activity must still be balanced with the state's interest as an employer in promoting its efficient

operations." (citation omitted)); *Local 491, Int'l Bhd. of Police Officers v. Gwinnett County*, 510 F. Supp. 2d 1271, 1288, 1290–91 (N.D. Ga. 2007) (noting that under circuit precedent the public concern portion of the *Pickering* analysis is inapplicable to association claims, but weighing the state's interest in "loyalty and discipline within the ranks of law enforcement" against Plaintiffs' First Amendment interests).

Thus, although the Third Circuit below purported to align itself with the Fifth and Eleventh Circuit's side of the circuit conflict, the decision below actually goes further than either of those courts. Whereas the Fifth and Eleventh Circuits exempt union association claims from only *Connick*'s first step, the decision below renders the entire *Connick* framework categorically inapplicable to such claims by holding that Palardy had engaged in constitutionally protected conduct without considering whether the Township had an adequate justification for its action—*i.e.,* without balancing the Township's interests in an effective workplace. App. 12a-13a.

3. Two circuits apply the Connick *framework to union association only under certain circumstances.*

The Ninth and Tenth Circuits follow their own unique approaches—with the Ninth applying the *Connick* framework only to "hybrid" claims in which the asserted association is "inseparable" from speech, and the Tenth holding that union association claims are exempt from the *Connick* framework, but only if there is a collective bargaining agreement.

a. In *Hudson v. Craven*, the Ninth Circuit applied the *Connick* framework in analyzing a claim involving "intertwined" speech and association rights, finding

there was "no reason to distinguish th[e] hybrid circumstance from a case involving only speech rights." 403 F.3d 691, 698 (9th Cir. 2005). The court indicated, however, that the same analysis might not apply outside of the "hybrid" context, where the alleged expressive "activity was ongoing membership in an organization." *Id.* District courts in the Ninth Circuit have applied *Connick* to various claims involving union association, deeming them to be "hybrid" claims. *See, e.g.*, *Schnabel v. Hualapai Valley First Dist.*, No. CV 07-150-PCT-JAT, 2009 WL 322948, at *8-10 (D. Ariz. Feb. 9, 2009).

b. The Tenth Circuit generally applies the public concern requirement to "claim[s] that a government employer retaliated against an employee for exercising the instrumental right of freedom of association for the purpose of engaging in speech, assembly, or petitioning for redress of grievances." *Merrifield v. Board of Cty. Comm'rs*, 654 F.3d 1073, 1081–82 (10th Cir. 2011), *cert. denied*, 566 U.S. 962 (2012). In *Shrum v. City of Coweta*, however, the Tenth Circuit specifically exempted claims of union association from the *Connick* framework, at least where there is a collective bargaining agreement. 449 F.3d 1132, 1138–39 (10th Cir. 2006). In this context, the court further held, a retaliation claim is exempt from *both* steps of the *Connick* framework. *Id.* at 1139 (noting that there is no need to "engage in judicial balancing of the government's interest in efficient operations against the [employee's] interest in union association" because the government "already balanced those interests" by signing the agreement).

Since *Shrum*, the Tenth Circuit has reserved the question whether the public concern requirement applies to retaliation claims involving union

association where there is *not* a collective bargaining agreement in place, *see Cillo v. City of Greenwood Village*, 739 F.3d 451, 461 n.17 (10th Cir. 2013), though district courts in the circuit have concluded that *Connick does* in fact apply to such claims. *See Cardona v. Burbank*, No. 2:12-CV-608 TS-BCW, 2018 WL 2723882, at *10 (D. Utah June 6, 2018) ("[T]he Court concludes that the public concern factor does apply to association claims involving public sector unions where, as here, there is no agreement between the employer and the union."); *Hollenbach v. Burbank*, No. 2:16-cv-00918-DBP, 2017 WL 2242861, at *4 (D. Utah May 22, 2017) ("After reviewing Tenth Circuit precedent, the court finds the public-concern element applies to freedom-of-association claims involving unions with which a municipality has not entered a collective-bargaining agreement.").

4. The utter disarray in the circuits necessitates this Court's intervention.

As the foregoing survey demonstrates, not only is there is a deep, acknowledged circuit conflict regarding how *Connick* applies to association claims, but also the courts of appeals are in particular disarray regarding how to treat retaliation claims based on association with a public sector union.

To summarize, the current status of First Amendment union-retaliation claims is as follows:

(1) In the Third Circuit, an allegation of retaliation based on union membership is categorically outside of the two-step *Connick* framework;

(2) In the Fifth and Eleventh Circuits, union-affiliation claims are subject to the second, but not first, inquiry of the *Connick* framework;

(3) In the Fourth, Sixth, and Seventh Circuits, both inquiries of the *Connick* framework are fully applicable to union-association claims;

(4) In the Tenth Circuit, the *Connick* framework is categorically inapplicable to union-association claims, but only when the employer has signed a collective bargaining agreement; and

(5) In the Ninth Circuit, the *Connick* framework applies to union association claims, but only if it is a "hybrid" claim.

Accordingly, there are now at least *five separate doctrinal frameworks* in place across the country for analyzing a First Amendment claim for retaliation based on union association. It is difficult to imagine an important area of constitutional law that is more confused, in geographic disarray among the circuits, and in need of this Court's intervention.

B. The Question Presented Is Exceptionally Important And Warrants Review

The deep and sustained division among the circuits regarding how *Connick* applies to union association claims is reason enough to grant certiorari. But the exceptional importance of the question presented underscores the need for review.

First Amendment retaliation claims against public employers are very frequently litigated. A Westlaw review of the federal judicial opinions applying *Connick*'s public concern test since 2000 reveals hundreds such claims, including more than two hundred that have involved freedom of association in particular. That number is not surprising given that there are approximately 20 million full-time government employees at the

federal, state, and local level.[7] The result of the circuit conflict regarding the question presented is that the First Amendment rights of millions of public employees—and the related protections afforded to countless public employers—depend on pure geographic happenstance. That intolerable situation alone necessitates this Court's review.

The question presented also has significant implications for the ability of municipalities and local governments to fulfil their core functions. Municipalities often spend hundreds of thousands of dollars a year litigating claims arising from workplaces grievances. As this Court has recognized, First Amendment retaliation claims are especially burdensome because they are "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998). That is particularly so for union membership claims, where a plaintiff need not allege any protected activity other than possession of a union card, and (due to the inherently adversarial nature of employer-union relations) there is typically at least some circumstantial basis to allege anti-union animus. Without the essential safeguards provided by the *Connick* framework, even meritless claims are thus rarely "amenable to summary disposition." *Id.*

By effectively abolishing the *Connick* framework in the context of retaliation claims based on union

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[7] *See* Julie Jennings & Jared Nagel, Congressional Research Serv. *Federal Workforce Statistics Sources: OPM and OMB* 6 (updated Jan. 12, 2018), https://crsreports.congress.gov/product/pdf/R/R43590 (federal employees); U.S. Census Bureau, 2017 Government Employment and Payroll Tables (rev. Sept. 27, 2018), https://www.census.gov/data/tables/2017/econ/apes/annual-apes.html (follow "State & Local Government Employment and Payroll Data" link) (state and local employees).

membership, the Third Circuit's decision will inevitably invite litigation by disgruntled union members seeking to avail themselves of the circuit's generous rule—a result that could have pervasive effects on the administration of public services, especially in the many municipalities currently facing a revenue crisis. *See* Aurelia Chaudhury, et al., *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities*, 107 Cal. L. Rev. (forthcoming 2019) (manuscript at 8) (discussing the "extremely heavy debt burdens" and potential "insolvency crises" facing many local governments).

The Third Circuit's rule is especially consequential where, as here, an employee does not challenge a termination or disciplinary action, but instead a *failure to promote*. Government employers—like all employers—require latitude in balancing the numerous context-specific factors that determine which employee is best suited for a particular position, especially high-ranking and supervisory roles like the one at issue here. Concerns about litigation costs created by a watered down or non-existent *Connick* test may make public employers reticent to promote more qualified non-union members at the expense of less qualified union members, leading to a public workforce whose selection is no longer governed by merit.

Furthermore, as courts have long recognized, there are a variety of circumstances where union membership may indeed be a legitimate consideration in an employment decision. *See, e.g., Key v. Rutherford*, 645 F.2d 880, 885 (10th Cir. 1981) (holding that the state may have a substantial and legitimate interest in barring union membership by supervisory personnel); *Vicksburg Firefighters Ass'n,*

Local 1686 Int'l Ass'n of Firefighters v. City of Vicksburg, 761 F.2d 1036, 1040 (5th Cir. 1985) ("[P]rohibiting firefighters properly characterized as supervisors from belonging to labor organizations composed of the rank and file serves a legitimate and substantial government interest in maintaining efficient and dependable firefighting services."); *Norbeck v. Davenport Cmty. Sch. Dist.*, 545 F.2d 63, 67–68 (8th Cir. 1976) (upholding the prohibition of a school principal from joining the teachers' union), *cert. denied*, 431 U.S. 917 (1977).

Here, for example, Palardy alleges that petitioners did not promote him to the role of chief of police because he was "too close to [his] men" and couldn't "separate [him]self from the rank and file." App. 3a (alterations in original) (quoting record). Even if those allegations were true, they reflect legitimate considerations a city should be able to take into account when deciding an appointment to the highest position in the municipal police force. Indeed, these are just the sort of "practical realities" about running a government office that *Connick* factors *into* the analysis. *Connick*, 461 U.S. at 154. Yet, under the Third Circuit's rule, a court may not *even consider* such justifications in deciding whether the employee has stated a First Amendment violation. Rather, a public employer's consideration of an employee's union membership as a factor in a promotion decision automatically establishes that the employer has intruded on a constitutionally protected area.

The decision below also may create or exacerbate resentment based on union membership and thereby disrupt the workplace. Under the decision below, union members effectively enjoy an elevated status under the First Amendment compared to other public

employees when it comes to retaliation claims. To the extent that government employees believe that their employers are shying away from making merits-based decisions, or even favoring union members on personnel matters, because of concerns over retaliation litigation, this will disrupt the workplace and exacerbate tensions among employees who opt to join unions and those who do not.

The need for this Court's intervention is heightened by the fact that the Third Circuit's decision in this case adopts the most extreme view among the circuits on the application of *Connick*'s two-step inquiry to retaliation claims based on union membership. The Third Circuit erred in holding that retaliation claims based on union membership are categorically exempt from *Connick*'s public concern step based on the notion that there is no "justiciable basis . . . to separate the wheat from the chaff." App. 11a. Just as is true for speech, a court can determine whether an employer's consideration of an employee's union association is based on a matter of public concern (say, an employer's hostility to a particular position taken by a union in collective bargaining or a union's support for a particular candidate in a recent election) or not (say, an employer's concern that an employee seeking a supervisory position may have too close a relationship with the rank and file).

Likewise, the mere fact that unions (like many organizations) *sometimes* lobby on issues of political or social importance does not mean that union membership is inherently or categorically a matter of public concern—and "no [other] First Amendment interest stands in the way of a State's rational regulation of . . . a commercial association." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 638 (1984) (O'Connor,

J. concurring in part and concurring in the judgment). Moreover, even when an employee's union membership touches on matters such as collective bargaining on wages or disciplinary proceedings, it does not follow that this association is undertaken by the employee "as a citizen," *Connick,* 461 U.S. at 143, rather than as a public employee, in furtherance of public employment. *See* App. 25a ("'Membership in a union "negotiating team" does not constitute conduct protected by the First Amendment. Further, statements made by a public employee carrying out official duties, including negotiating terms of employment, are not entitled to First Amendment protection.'" (quoting *Garvey v. Barnegat Bd. of Educ.*, No. CIV. A. 07-6134 MLC, 2008 WL 2902617, at *6 (D.N.J. July 24, 2008)). The Third Circuit therefore also erred in categorically eliminating the "private-citizen requirement" for claims based on union affiliation. App. 12a.[8]

In any event, whatever is true of the first step of the *Connick* test, there is no basis for eliminating the

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[8] In *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, this Court observed that some "union speech in collective bargaining, including speech about wages and benefits," may constitute a matter of "public concern." 138 S. Ct. 2448, 2474 (2018) (citation omitted). The Court did not, however, consider the separate question of whether an employee's mere membership in a public union is a matter of public concern, much less hold that the *Connick* public concern-inquiry is inapplicable to First Amendment retaliation claims based on union membership—the question here. To the contrary, in *Janus*, the Court recognized that "the *Pickering* framework was developed for use in a very different context" than the compelled subsidy issue in *Janus*. *Id.* at 2472. Nothing in *Janus* supports the Third Circuit's evisceration of the *Connick* framework for the type of claim at issue in this case.

balancing inquiry that is the hallmark of the second step of the inquiry. That balancing is critical to preserving the effective administration of public services. It is imperative that this Court make clear that courts must balance an employee's First Amendment rights with a public employer's interest in workplace efficiency, regardless of whether a retaliation claim is based on an employee's speech or association (such as union membership). As this Court has observed, "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." *Connick,* 461 U.S. at 151 (citation omitted). The elimination of *Connick*'s second step, and the *Connick* framework generally, for association claims based on union membership will strip government employers of this discretion and "constitutionalize the employee grievance." *Id*. at 154.

C. This Case Is An Excellent Vehicle To Address The Question Presented

This case, in which the Third Circuit, to its credit, issued a lengthy published decision squarely addressing the question presented, provides an excellent vehicle to resolve the question presented.

The facts of this case clearly implicate both steps of the *Connick* public concern framework. Union affiliation implicates *Connick*'s first step because, while union membership is primarily an economic association, unions also engage in political advocacy. That fact is crucial to the reasoning of the minority position in the Third and Fifth Circuits, which hold that the *Connick* framework cannot apply to association claims because there is no way to

"determine which union association is worthy of First Amendment protection and which is not." App. 11a.

The claims in this case also squarely implicate the second step of the *Connick* framework, because petitioners had more than "adequate justification" for (allegedly) considering Palardy's union affiliation in deciding whether he should be made chief of police. As noted above, Palardy asserts that petitioners believed he was "too close to [his] men" and would have difficulty separating "union business" from his role as a supervisor. App. 3a (alteration in original) (quoting record). Under the Third Circuit's reasoning, it is categorically improper for a public employer to consider such factors, even though they directly implicate the government's interest in running an efficient workplace and thus may be sufficient to satisfy the balancing inquiry at *Connick*'s second step. Because this is the rare case that squarely invokes both steps of the *Connick* framework, it is the perfect context for this Court to address *Connick*'s application to association claims.

This case is also an excellent vehicle because it involves a pure association claim, not a "hybrid" claim based on speech and association. The decision below states clearly that Palardy "does not allege that Gordon retaliated against him because of his speech or advocacy on any particular issue" but instead "simply claims that Gordon prevented him from becoming chief because he was a union man." *Id.* at 14a. This is thus the rare case where this Court will have opportunity to address the question presented in the context of a "pure associational claim," *id.* at 8a, without a speech claim to complicate the analysis.

Finally, this case is also an excellent vehicle to address the application of *Connick* to association

claims in general. While, as discussed above, the circuits are split regarding *Connick*'s application in the specific context of public sector unions, they are also divided on *Connick*'s application to association claims in general. *Supra* at 2-3. This case offers an opportunity to resolve this broader conflict too, both because union affiliation is a typical and recurrent example of an association claim, and because resolution of the broader question would be outcome determinative in this case. If the Court holds that *all* association claims are subject to both steps of the *Connick* framework then the Third Circuit's categorical exclusion of union-affiliation claims from the *Connick* framework is error. Furthermore, because (as the district court concluded) none of Palardy's union-related activity involved matters of public concern, a finding that the *Connick* framework applies to association claims in general would result in summary judgment in petitioners' favor. And, on the other hand, if the Court were to find that the *Connick* framework does not apply to association claims in general, as the Fifth and Eleventh Circuits have held, then the decision below would be affirmed.

In short, it is difficult to imagine a better case for addressing the important question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARCUS CURTIS
LATHAM & WATKINS LLP
12670 High Bluff Drive
San Diego, CA 92127
(858) 509-8465

GREGORY G. GARRE
Counsel of Record
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

December 27, 2018

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Third Circuit, *Palardy v. Township of Millburn*, 906 F.3d 76 (3d Cir. 2018) 1a

Opinion of the United States District Court for the District of New Jersey Granting Defendants' Motion for Summary Judgment, *Palardy. v. Township of Millburn*, Civil Action No. 15–02089(SDW)(LDW), 2017 WL 2968394 (D.N.J. July 11, 2017).....15a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2597

MICHAEL J. PALARDY, JR.,
Appellant
v.
TOWNSHIP OF MILLBURN;
TIMOTHY P. GORDON

On Appeal from the United States District Court
for the District of New Jersey
(D.N.J. No. 2:15-cv-02089)
District Judge: Hon. Susan D. Wigenton

Argued April 24, 2018

906 F.3d 76

Before: AMBRO, SCIRICA, and SILER, JR.*, *Circuit Judges*

(Filed: September 28, 2018)

OPINION OF THE COURT

SILER, *Circuit Judge*

Michael Palardy, a retired police officer of Township of Millburn, New Jersey, alleges that the Township's business administrator, Timothy Gordon,

* Hon. Eugene E. Siler, Jr., United States Court of Appeals for the Sixth Circuit, sitting by designation.

unlawfully prevented him from becoming Chief of Police because Gordon opposed Palardy's union membership and activity. The district court held Palardy's union-related speech and association were not constitutionally protected and granted summary judgment in favor of the Township and Gordon on his 42 U.S.C. § 1983 First Amendment retaliation claims. We agree with Palardy that the district court should have analyzed his speech and association claims separately and that his association with the union deserves constitutional protection. However, Palardy's speech claim must fail because it is indistinguishable from his associational claim. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

I.

Palardy worked as a police officer for the Township from 1988 until his retirement in 2014. During his employment, he was promoted three times: first to sergeant in 1995, then to lieutenant in 1998, and finally to captain in 2012.

Palardy was also active in the police officers' unions—first the Patrolmen's Benevolent Association (PBA), and then the Superior Officers' Association (SOA). In 1991 or 1992, Palardy served as the PBA's sergeant-at-arms. He was also a union delegate from 1992 to 1995. Later in his career, Palardy became more involved in union leadership. He served as the SOA's vice president in 2007 or 2008, and as its president in 2009 or 2010. During his employment, Palardy estimates that he participated in four or five contract negotiations between the unions and the Township. He also attended at least two disciplinary hearings for fellow officers.

Gordon was the Township's business administrator during Palardy's entire employment. Among other duties, he was responsible for the Township's personnel matters and had the authority to hire, fire, and promote Township employees, including police officers. According to Palardy, Gordon repeatedly stymied Palardy's attempts to become Chief of Police. Palardy testified that other officers told him Gordon repeatedly made statements reflecting negatively on Palardy's union activity. For instance, Gordon told officer Robert Brown that Palardy would never become chief "because of his union affiliation and being a thorn in my side for all these years." Gino Baldani said that Gordon told him Palardy "wasn't a good supervisor . . . because [he] was too close to [his] men and [he] would have problems separating [his] union business with police department work and being a supervisor." And Gordon told former chief Paul Boegershausen that Palardy "ha[d] to learn how to separate [him]self from the rank and file."

The events relevant to this case began in late 2010, when the Township was without a chief or a team of captains. By then, Palardy was the department's most senior lieutenant and was next in line to become a captain. The Township's custom during this time was to select its new chief from its roster of captains; during Gordon's tenure, there had never been an exception to this rule. Because Palardy was a lieutenant, he was not eligible to immediately become chief. However, Palardy believed that he could have been promoted to captain for a short time and then promoted to chief. According to Palardy, this is precisely what happened shortly after his retirement: Palardy testified that, as of September 2016, the

acting chief had only been a captain for a few months prior to his promotion.

On this occasion, though, Gordon told Palardy and another lieutenant that he did not believe any of the lieutenants had enough experience to become chief, and that he was considering having the Chief of Police from nearby Livingston, New Jersey, serve in a dual capacity as the chief of both towns. That plan did not come to fruition because Gregory Weber, a Millburn captain who had been on inactive duty for health reasons, returned to active duty and was promoted to chief in September 2011. Weber then gave Palardy the title of "acting captain," which came with additional responsibilities but no pay increase. Around this time, Palardy stepped down as union president because he "knew Mr. Gordon had a problem with [his] union affiliation" and he wanted "to get the stigma off . . . [himself] that [he] was only a union guy." Palardy believed that, if he gave up his union presidency, it would increase his chances to receive an official promotion to captain.

In October 2011, Gordon retained a consultant to study the police department's "rank structure and current vacancies." Gordon admitted that the study "could have" resulted in the rank of captain being eliminated. However, the consultant recommended that the department retain the captain rank and fill the existing vacancies in that position. To that end, Gordon promoted Palardy to captain in February 2012—according to Palardy, "out of desperation."

Chief Weber was scheduled to retire in April 2015. In the summer of 2013, Palardy was offered a part-time position as Security Coordinator for the Township's Board of Education. He says he "saw the writing on the wall that he would never become chief,"

so he decided to retire from the police department and accept the school board's job offer. Beginning on September 1, 2013, Palardy was on terminal leave, and he retired effective February 1, 2014.

Palardy then filed suit against the Township and Gordon. His amended complaint asserted eight claims. The district court granted Defendants' motion for judgment on the pleadings as to five of the eight counts, but allowed his state and federal constitutional free speech and association claims to proceed to discovery. Defendants then moved for summary judgment on Palardy's remaining claims.

The court granted Defendants' motion, holding Palardy's union-related activity was not constitutionally protected. Analyzing his speech and association claims together, the court concluded Palardy neither acted as a private citizen nor spoke out on a matter of public concern, as required by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This appeal followed.

II.

This Court "exercise[s] plenary review over a grant of summary judgment and appl[ies] the same standard the district court applies." *Migliaro v. Fid. Nat'l Indem. Ins. Co.*, 880 F.3d 660, 664 n.6 (3d Cir. 2018) (citation omitted). "Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)).

The Free Speech Clause contained within the New Jersey Constitution "is generally interpreted as co-extensive with the First Amendment," so the analysis of Palardy's state free speech claim is identical to its

federal counterpart. *Twp. of Pennsawaken v. Schad*, 733 A.2d 1159, 1169 (N.J. 1999).

III.

A.

To prevail on a § 1983 First Amendment retaliation claim, the plaintiff must prove that (1) he engaged in "constitutionally protected conduct," (2) the defendant engaged in "retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights," and (3) "a causal link [existed] between the constitutionally protected conduct and the retaliatory action." *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006) (citation omitted). Here, the District Court held that Palardy's First Amendment claims faltered at the first step because he failed to show that his association with, and speech on behalf of, the police officers' union was protected conduct.

Not all First Amendment activity is constitutionally protected in the public workplace. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418 (citation omitted). Insofar as workplace speech is concerned, the Supreme Court has long held that public employees only receive First Amendment protection from retaliation in the workplace when they speak out on a matter of public concern and their interest in speaking outweighs the government's interest in promoting workplace efficiency and avoiding disruption. *See Connick v. Myers*, 461 U.S. 138, 147 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In *Garcetti*, the Court added a further wrinkle to its workplace speech jurisprudence, holding that

"when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. Following *Garcetti*, then, "[a] public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public.'" *Hill v. Borough of Kutztown*, 455 F.3d 255, 241-42 (3d Cir. 2006) (quoting *Garcetti*, 547 U.S. at 418).

Although *Pickering*, *Connick*, and *Garcetti* were cases about speech, some circuits apply the same rubric to cases involving the associational rights of public employees. This is especially true when an employee's freedom of association claim "implicate[s] associational rights in essentially the same way and to the same degree" as his free speech claim. *Sanguigni v. Pittsburg Bd. of Pub. Educ.*, 968 F.2d 393, 400 (3d Cir. 1992) ("We hold . . . that *Connick* governs [the plaintiff's] freedom of association claim because that claim is based on speech that does not implicate associational rights to any significantly greater degree than the employee speech at issue in *Connick*.").

Palardy's case, however, is different. He claims, in part, that Gordon retaliated against him simply because of his union membership, and not because of his advocacy on any particular issue. Indeed, the comments he alleges Gordon made to other officers—for instance, Palardy was disqualified from becoming chief "because of his union affiliation"—evince

hostility toward Palardy solely because of his union membership. Palardy's complaint presents a pure associational claim, so the district court should have analyzed Palardy's speech and association claims separately.

B.

Taking Palardy's freedom of association claim, we must first determine whether Palardy engaged in protected conduct. This question, in turn, depends upon whether *Connick* and *Garcetti* apply to pure associational claims like Palardy's.

The circuits are split on whether *Connick*'s public-concern requirement applies to associational claims, and we have not yet taken a position. *See Sanguigni*, 968 F.2d at 400. The Second, Fourth, Sixth, and Seventh Circuits apply the public concern requirement to public employee association claims. *See Cobb v. Pozzi*, 363 F.3d 89, 107 (2d Cir. 2004); *Edwards v. City of Goldsboro*, 178 F.3d 231, 249-50 (4th Cir. 1999); *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985); *Klug v. Chi. Sch. Reform Bd. of Trs.*, 197 F.3d 853, 857 (7th Cir. 1999). The reasoning of courts adopting this position is exemplified by the Second Circuit's decision in *Cobb*. There, the court wrote that, although in *Connick* "it was the plaintiff's *speech* that was under examination, the Court's concern over the proper balance of the efficient functioning of the government and the First Amendment rights of public employees extended more generally to all forms of First Amendment *expression*, including associational activity." *Cobb*, 363 F.3d at 104. "Because the right of association is derivative of the First Amendment rights of free speech and peaceful assembly," the Second Circuit reasoned, "it would be anomalous to

exempt it from *Connick*'s public concern requirement and thereby accord it an elevated status among First Amendment freedoms." *Id.* at 105. The Sixth Circuit in *Boals* also noted that although *Connick* and *Pickering* were speech cases, they were in turn based upon freedom of association cases. *Boals*, 775 F.2d at 692.

On the other side of the split, the Fifth and Eleventh Circuits hold the public concern requirement does not apply to associational claims. *See Boddie v. City of Columbus*, 989 F.2d 745, 749 (5th Cir. 1993); *Hatcher v. Bd. of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987). The Fifth Circuit suggests that no additional proof of public concern is necessary because the union activity of public employees "is not solely personal and is *inevitably* of public concern." *Boddie*, 989 F.2d at 750 (emphasis added). And the Eleventh Circuit in *Hatcher* fell back upon the Supreme Court's decision in *NAACP v. Alabama*, "in which Justice Harlan wrote for the Court: 'it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . [,] state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Hatcher*, 809 F.2d at 1558 (quoting *NAACP v. Alabama*, 357 U.S 449, 460-61 (1958)). *Connick*, according to the Eleventh Circuit, did not mark a retreat from that position. *Id.*

The Ninth and Tenth Circuits both take unique approaches. The Ninth Circuit applies the public concern requirement to "hybrid" free speech and association claims, but it has not decided the question for freestanding association claims. *See Hudson v. Craven*, 403 F.3d 691, 698 (9th Cir. 2005). The Tenth

Circuit generally requires the public concern requirement for freedom of association claims, *see Merrifield v. Bd. of Cty. Comm'rs*, 654 F.3d 1073, 1083-84 (10th Cir. 2011), but has rejected the requirement in "the specific context of public-employee labor unions," *id.* at 1084 (citing *Shrum v. City of Coweta*, 449 F.3d 1132, 1138 (10th Cir. 2006)).

In this specific context—an associational claim arising from a public employee's union affiliation—the minority position followed by the Fifth Circuit is the better one. Even courts in the majority recognize that at least some union speech and activity touch upon matters of public concern. *See, e.g.*, *Boals*, 775 F.2d at 693. It follows, then, that a public employee's membership in a union might also be a matter of public concern. But how are courts to distinguish between union membership that implicates a public concern, and union membership that does not?

Where speech is concerned, the test is easy: "Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest . . . are matters more immediately concerned with the self-interest of the speaker as employee." *Id.* (quoting *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007)). But union-related speech is different than mere union membership. Because labor unions advocate for their employees on a wide range of issues, the number of possible subjects for union-related speech is similarly wide-ranging. Conversely, union membership is a dichotomy—either an employee is a union member, or he is not. As Seventh Circuit Judge Cudahy recognized, the test used to determine whether speech implicates a matter of public concern does not square with this dichotomy:

> [T]he *Pickering/Connick* test is cumbersome in the context of a pure association claim. Under *Connick*, whether an employee's speech touches on a matter of public concern is determined by an analysis of the "content, form, and context of a given statement." *Connick v. Myers*, 461 U.S. 138, 147-48, (1983). This analysis is applied easily to the hybrid cases cited by the majority. In *Griffin v. Thomas*, for instance, an assistant principal alleged that her employer retaliated against her for filing a grievance through the Chicago Teachers Union. *See* 929 F.2d 1210, 1210 (7th Cir. 1991). To determine whether the plaintiff's activity touched on a public concern, the court was able to review the substance of her grievance. *See id.* at 1215. But how does one neatly apply the "content, form, and context" analysis to a [pure associational] claim . . . ?

Balton v. City of Milwaukee, 133 F.3d 1036, 1041 (7th Cir. 1998) (Cudahy, J., concurring).

Here, the Township does not provide any justiciable basis for us to separate the wheat from the chaff—to determine which union association is worthy of First Amendment protection and which is not. By holding that mere membership in a public union is always a matter of public concern, the Fifth Circuit's approach avoids this problem. *See Boddie*, 989 F.2d at 750. *Connick*'s public-concern requirement thus stands as no obstacle to Palardy's associational claim.

There is less authority regarding whether *Garcetti*'s private-citizen requirement applies to pure associational claims. The Second Circuit has stated

that the issue is unclear. *Lynch v. Ackley*, 811 F.3d 569, 583 n.15 (2d Cir. 2016).

As with *Connick*'s public-concern requirement, it does not make much sense to apply *Garcetti*'s private-citizen requirement to pure associational claims based on union membership. The touchstone of *Garcetti* is whether the public employee was "mak[ing] statements pursuant to [his] official duties." *Garcetti*, 547 U.S. at 421. By the plain language of the Court's opinion, then, *Garcetti* applies to speech, not association.

Moreover, it is hard to imagine a situation where a public employee's membership in a union would be one of his "official duties." *Garcetti*, 547 U.S. at 421. This is especially true in light of *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448, 2460 (2018), where the Supreme Court recently held that public employees who choose not to join their union cannot be compelled to pay agency fees to offset the costs of the union's collective bargaining efforts.

Labor unions, by their very nature, exist to protect the interests of the employees on whose behalf they bargain; job duties derive from the needs of the employer. And in this specific case, there is no evidence that Palardy's membership in the police officers' union was one of his job duties. To the contrary, he alleges he resigned his union presidency because he thought it would help further his career. For these reasons, we decline to apply *Garcetti*'s private-citizen test to Palardy's freedom of association claim.

Having established that *Connick* and *Garcetti* do not bar Palardy's associational claim, it becomes clear

that his union membership is worthy of constitutional protection. Prior to those cases, the Supreme Court noted that a public employee possesses a First Amendment right to associate with a union. *See Smith v. Ark. State Highway Emp.*, 441 U.S. 463, 465 (1979). Palardy was a union member and leader, and he brought forth at least some evidence suggesting Gordon harbored animosity toward him because of his union affiliation. The district court therefore erred by holding as a matter of law that Palardy did not establish the first element of his First Amendment retaliation claim—constitutionally-protected conduct.

Because it found Palardy could not prevail on the first element, the court did not consider whether he created a genuine issue of material fact on the other two elements of his associational claim—whether Defendants 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." *Thomas*, 463 F.3d at 296 (citation omitted). Defendants do not address these elements on appeal, and we do not believe the evidence is so one-sided as to require summary judgment in their favor. Thus, we remand to the district court to consider the remaining two elements of Palardy's associational claim.

C.

Compared to his associational claim, the analysis of Palardy's speech claim is much more straightforward. As noted earlier, we have dismissed associational claims that we viewed as co-extensive with the plaintiff's free speech claim. *See Sanguigni*, 968 F.2d at 400. Here, the opposite is true—speech

claim is co-extensive with his associational claim. He does not allege that Gordon retaliated against him because of his speech or advocacy on any particular issue. He simply claims that Gordon prevented him from becoming chief because he was a union man. Because Palardy did not adequately plead a freestanding speech claim, Defendants are entitled to summary judgment on that claim.

IV.

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL J. PALARDY, JR., Plaintiff, v. TOWNSHIP OF MILLBURN, TIMOTHY P. GORDON, and JOHN DOES 1-5, Defendants.	Civil Action No. 15-02089(SDW)(LDW) **OPINION** July 11, 2017

2017 WL 2968394

WIGENTON, District Judge

Before this Court is the Motion for Summary Judgment of Defendants Township of Millburn and Timothy P. Gordon (collectively, "Defendants"), pursuant to Federal Rule of Civil Procedure 56. This Court, having considered the parties' submissions, decides this matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons stated below, Defendants' Motion is **GRANTED**.

I. JURISDICTION AND VENUE

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

II. BACKGROUND[1]

Plaintiff Michael J. Palardy, Jr. ("Plaintiff") filed the operative Amended Complaint, (Dkt. No. 28), in this matter on February 22, 2016, against Defendants Township of Millburn and Timothy P. Gordon, alleging eight claims arising out of Plaintiff's employment as a police officer for the Department of Police in the Township of Millburn (the "Police Department"). (*See* Am. Compl. ¶ 1.) On May 2, 2016, this Court granted Defendants' Motion for Judgment on the Pleadings as to five of the eight counts in the Amended Complaint. (Dkt. Nos. 37-38.) The remaining counts of the Amended Complaint allege that Defendants violated Plaintiff's rights to free speech and association under the United States and New Jersey Constitutions.[2]

Plaintiff began working as a police officer for the Township of Millburn in 1988. (Defs.' Statement of

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[1] Plaintiff did not submit a responsive statement of undisputed material facts as is required by Local Civil Rule 56.1. Pursuant to Local Civil Rule 56.1, "any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion." Accordingly, this Court will presume that the facts in Defendants' statement of undisputed material facts are true unless they are controverted by the evidence in the record. This Court notes that this task is further complicated by Plaintiff's brief in opposition to the Motion for Summary Judgment because Plaintiff's brief is nearly devoid of any reference to the facts in this matter and, instead, relies almost entirely on conclusory legal arguments.

[2] This Court considers Counts Two, Three, and Six together. To the extent Count Three asserts a violation of the First Amendment, that Count is redundant of Plaintiff's identical claim brought under 42 U.S.C. § 1983 in Count Two. *See Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906–07 (3d Cir. 1997) ("By itself, Section 1983 does not create any rights,

Undisputed Material Facts ("Defs.' SMF") ¶ 8.) After over twenty years as a police officer, Plaintiff submitted his application for retirement to the Township Police Department on August 13, 2013. (*Id.* ¶ 9.) He remained on terminal leave from September 1, 2013, until his effective retirement date of February 1, 2014. (*Id.* ¶ 15.)

Plaintiff was promoted three times over the course of his career: to the rank of sergeant in 1995, lieutenant in 1998, and captain on February 21, 2012. (*Id.* ¶ 8.) He also was a member of the Police Benevolent Association ("PBA") and the Superior Officers Association ("SOA"), both of which acted as collective bargaining representatives for individuals in the Police Department. (*Id.* ¶ 18; Pl.'s Counter Statement of Material Facts ("Pl.'s CSMF") ¶ 1.d.; Am. Compl. ¶¶ 6-7.) Plaintiff had a number of roles with both the PBA and SOA during his career. He claims to have been a sergeant-at-arms for the PBA in the early 1990s, after which he was a union delegate for the PBA from approximately 1992 to 1995. (Defs.' SMF ¶ 19.) Plaintiff also served as the SOA Vice President in approximately 2007 or 2008 and as the SOA President from approximately 2009. (*Id.* ¶ 20.) He stepped down as SOA President in approximately September of 2011, several months before he was promoted to the rank of captain. (*Id.* ¶ 21.)

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but provides a remedy for violations of those rights created by the Constitution . . . .") Moreover, this Court considers Counts Two and Six together because the "[New Jersey] Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment . . . ." *State, Twp. of Pennsauken v. Schad*, 160 N.J. 156, 176 (1999).

The actions Plaintiff took as a union member are not described with much detail in Plaintiff's submissions to this Court. According to Plaintiff, he was "active as a member, officer, and member of the contracting [sic] negotiating committed [sic]." (Pl.'s CSMF ¶ 1.e.) Plaintiff also contends that "when called upon [he] represented members of the bargaining unit in matters of discipline, in matters of terms and conditions of employment, and in contract negotiation with Millburn." (Palardy Cert. ¶ 10.) Plaintiff was not, however, the "lead negotiator" during negotiations on any collective bargaining agreement. (Defs.' SMF ¶ 24.) Moreover, Plaintiff testified that although the "mouthpiece" for the union during arbitration proceedings in the early 2000s was the union's attorney, Plaintiff did research to support a change in the Police Department's work schedule. (*Id*. ¶¶ 27-30.) Finally, Plaintiff claims to have attended a discipline hearing of a PBA president when Plaintiff was still a lieutenant in 1998 or 1999. (Palardy Cert. ¶ 14; Defs.' SMF ¶¶ 31-32.) Plaintiff did not hold any roles in the PBA or SOA, and did not participate in any collective bargaining negotiations, after he stepped down as SOA President in approximately September of 2011. (Defs.' SMF ¶¶ 37-39.)

According to Plaintiff, Defendant Township of Millburn and Defendant Gordon, the Township's former Business Administrator, violated Plaintiff's free speech and association rights through a number of actions Plaintiff claims were retaliatory. (*See generally* Pl.'s Br. Opp. Mot. Summ. J. ("Pl.'s Br. Opp.").) Although Plaintiff does not clearly outline which of Defendants' actions he believes to have been

retaliatory, he appears to complain of the following conduct.

First, Plaintiff contends that Defendants retaliated against him by commissioning two studies performed by Dr. Wayne Fisher: a 2008 study into the overtime authorization procedure and internal affairs procedure, as well as, a 2011 study of the table of organization of the Township Police Department. (Am. Compl. ¶ 10; Defs.' SMF ¶¶ 53-59.) Although Plaintiff contends that at least one of these studies was conducted for the purpose of preventing him from being promoted to the rank of captain, he concedes both that he was eventually promoted to that rank, and also, that he was not adversely impacted by either study. (Defs.' SMF ¶¶ 54, 56, 58-59.)

Second, Plaintiff contends that Defendants retaliated against him by refusing to pay him a retroactive wage increase granted to other Township employees. (Am. Compl. ¶ 13.) However, this retroactive wage increase, which the SOA and Township jointly agreed to on April 21, 2014, as part of changes to their collective bargaining agreement, was made applicable only to those employees on the Township's payroll at the time the agreement was made. (Defs.' SMF ¶¶ 42-44.) Plaintiff was not on the Township's payroll at the time of the agreement because he retired over two months earlier on February 1, 2014. (*Id*. ¶ 42, 44.) Moreover, Plaintiff concedes both that he was aware the Township was considering the retroactive wage increase, and also, that he could have extended his terminal leave past his February 1, 2014 retirement date. In addition, Defendants contend, and Plaintiff does not dispute, that the same retroactive wage increase and the accompanying limitation of eligibility to those

employees on the payroll at the time of the agreement, "was added to all of the Township's union agreements during this time period— including the PBA, the fire department and the road department." (*Id*. ¶ 46.)

Third, although Plaintiff did not include this accusation in his Amended Complaint, he contends that Defendants retaliated against him by considering the Chief of the Livingston Police Department for a position as the Chief of the Millburn Police Department. (*Id*. ¶ 60.) However, Plaintiff concedes that this took place when Plaintiff was a lieutenant, and also, that the Livingston Chief was not hired as the Millburn Chief. (*Id*. ¶ 62.)

Finally, Plaintiff contends that Defendant's retaliated against him by not promoting him to the position of Chief of the Millburn Police Department. (Pl.'s CSMF 1.i.) However, Plaintiff also contends that he retired over a year before the position would have become available in April of 2015 because the "writing was on the wall" that he would not be promoted. (Defs.' SMF ¶¶ 63- 67.) Moreover, Plaintiff admits that he was "never passed over for the chief's position," that he never discussed a promotion to that position with Defendant Gordon, and that he was, in fact, never passed over for any promotion within the Police Department. (Defs.' SMF ¶¶ 68-74.)

In light of these accusations, Plaintiff now contends that Defendants' actions violated his rights to free speech and association in contravention of the United States and New Jersey Constitutions. Defendants filed the Motion for Summary Judgment now before this Court on March 10, 2017. (*See generally* Defs.' Br. Supp. Mot. Summ. J. ("Defs.' Br. Supp.").) Plaintiff filed his brief in opposition on April

24, 2017, and Defendants filed a brief in reply on May 1, 2017.

III. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is only "material" for purposes of a summary judgment motion if a dispute over that fact "might affect the outcome of the suit under the governing law." *Id.* at 248. A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The dispute is not genuine if it merely involves "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party meets its initial burden, the burden then shifts to the non-moving party to set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations, speculations, unsupported assertions, or denials of its pleadings. *Shields v. Zucc arini*, 254 F.3d 476, 481 (3d Cir. 2001). "In considering a motion

for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson*, 477 U.S. at 255). The non-moving party "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (quoting *Celotex Corp.*, 477 U.S. at 325). Further, the non-moving party is required to "point to concrete evidence in the record which supports each essential element of its case." *Black Car Assistance Corp. v. New Jersey*, 351 F. Supp. 2d 284, 286 (D.N.J. 2004) (citing *Celotex Corp*., 477 U.S. at 322-23.) If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which . . . [it has] the burden of proof," then the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322-23.

Furthermore, in deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The non-moving party cannot defeat summary judgment simply by asserting that certain evidence submitted by the moving party is not credible. *S.E.C. v. Antar*, 44 F. Appx. 548, 554 (3d Cir. 2002).

III. DISCUSSION

In order to prove a claim of retaliation in violation of the First Amendment right to free speech, a

plaintiff must show "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Killion v. Coffey*, No. 16-3909, 2017 WL 2628881, at *1 (3d Cir. June 19, 2017) (quoting *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006)) (internal quotation marks omitted).[3] As discussed below, Plaintiff has not identified any evidence to support his assertions that he engaged in constitutionally protected conduct and Defendants are, therefore, entitled to summary judgment.

"[W]hile the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)). Therefore, a public employee's speech is protected under the First Amendment only "when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee different from any other member of the general public' as a result of the statement he made." *Killion*, 2017 WL 2628881, at *1 (quoting *Hill v. Borough of Kutztown*, 455 F.3d 225, 241–42 (3d Cir. 2006)) (internal quotation marks

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[3] To the extent Plaintiff intended to include a freedom of association claim, this Court considers the claims together because his "associational claim is barely an extension of his free speech claim." *Bell v. City of Philadelphia*, 275 F. App'x 157, 160 (3d Cir. 2008) (first citing *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 400 (3d Cir. 1992); then citing *Dible v. City of Chandler,* 502 F.3d 1040, 1050 (9th Cir. 2007)).

omitted).[4] In this instance, Defendants argue that Plaintiff cannot show he engaged in constitutionally protected conduct both because he did not act as a private citizen, and also, because none of his speech was on a matter of public concern. (*See* Defs.' Br. Supp. at 13- 32.) This Court agrees.

In order to satisfy the requirement that he engaged in constitutionally protected conduct, Plaintiff must have acted or spoken regarding a matter of public concern. *See Hill*, 455 F.3d at 241-42 (citing *Garcetti*, 547 U.S. at 417). "Speech involves matters of public concern 'when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (quoting *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011)). That said, Courts in this Circuit generally recognize that speech regarding "working conditions and other issues in union members' employment" are "personnel matters . . . [which are not] of interest to the broader community." *Thomas v. Delaware State Univ.*, 626 F. App'x 384, 389 (3d Cir. 2015) (citations omitted); *see, e.g.*, *Beresford v. Wall Twp. Bd. of Educ.*, No. CIV.A.08-2236(JAP), 2010 WL 445684, at *6 (D.N.J. Feb. 3, 2010) (holding that a union president's speech was not on a matter of public concern because it "related to his and the [union]

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[4] As the core of Plaintiff's freedom of association claim is the same as his freedom of speech claim (i.e., that Defendants retaliated against him because he spoke out as an active member of the PBA and SOA on numerous occasions), both claims are subject to these requirements. *See Killion v. Coffey*, No. 16-3909, 2017 WL 2628881, at *1 (3d Cir. June 19, 2017).

members' employment, raises, sick days and overtime")

In this instance, Plaintiff contends that he was "active as a member, officer, and member of the contracting [sic] negotiating committed [sic]," (Pl.'s CSMF ¶ 1.e.), and that he "represented members of the bargaining unit in matters of discipline, in matter of terms and conditions of employment, and in contract negotiation with Millburn." (Palardy Cert. ¶ 10.) To the extent Plaintiff claims to have engaged in other speech related to his union membership, that speech pertained to matters of employee discipline, promotion, salaries, and work hours. (*See* Defs.' SMF ¶¶ 18-36.) As a result, Plaintiff argues, his "speech concerned a community interest." (Pl.'s Br. Opp. at 9.) However, as Plaintiff's speech related to personnel matters rather than matters of political, social, or community concern, none of the speech Plaintiff engaged in rose to the level of constitutionally protected conduct. *See Thomas*, 626 F. App'x at 389; *Garvey v. Barnegat Bd. of Educ.*, No. CIV. A. 07-6134 MLC, 2008 WL 2902617, at *6 (D.N.J. July 24, 2008) ("Membership in a union 'negotiating team' does not constitute conduct protected by the First Amendment. Further, statements made by a public employee carrying out official duties, including negotiating terms of employment, are not entitled to First Amendment protection."); *Garcia v. Newtown Twp.*, 483 F. App'x 697, 703 (3d Cir. 2012) (explaining that "internal workplace matters and personal grievances . . . fall outside the sphere of First Amendment protection."). Accordingly, Plaintiff has not identified any speech or conduct by which he acted regarding a matter of public concern. Moreover, even if Plaintiff's conduct did address a matter of public concern,

Plaintiff has not identified any evidence to support his contention that he "spoke as a private citizen." (Pl.'s Br. Opp. at 9.)

Although Plaintiff has not identified any evidence to support his contention that he spoke on a matter of public concern, Defendants are entitled to summary judgment for the additional reason that Plaintiff cannot show that he acted or spoke as a private citizen. To the extent that Plaintiff advocated regarding personnel matters, including discipline, work schedules, and salaries, he was "able and eager [to do so] . . . precisely because of [his] employment as [a] police officer[] and the special knowledge and experience acquired through that employment." *Killion*, 2017 WL 2628881, at *2 (citation and internal quotation marks omitted). As the Third Circuit explained in *Killion v. Coffey*, even if union-related speech by a police officer regarding personnel matters did implicate a matter of public concern, the police officer engages in such conduct "to advance [his or her] position as [a] police officer[]." *Id*.; *see also Hill v. City of Philadelphia*, No. CIV.A. 05- 6574, 2008 WL 2622907, at *6 (E.D. Pa. June 30, 2008), *aff'd*, 331 F. App'x 138 (3d Cir. 2009) ("Any activity or related speech which allegedly led to retaliation against [the plaintiff] was conducted pursuant to his official duties as a union delegate acting on behalf of employees of a municipal agency, and not as a citizen.") Accordingly, Plaintiff cannot show that he engaged in constitutionally protected conduct and Defendants are, therefore, entitled to summary judgment.

V. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is **GRANTED**. An appropriate order follows.

s/ Susan D. Wigenton
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

Orig: Clerk
cc: Magistrate Judge Leda D. Wettre
Parties