No. 18-830

IN THE
Supreme Court of the United States

TOWNSHIP OF MILLBURN AND TIMOTHY P. GORDON,
Petitioners,
v.

MICHAEL J. PALARDY, JR.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a public employee's membership in a union is a matter of public concern under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), as every circuit to consider the question has held.

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INTRODUCTION

Petitioners ask this Court to resolve a nonexistent circuit split over a question that this Court all but answered last Term. The Court should decline.

In *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court adopted a two-part test for assessing whether a public employee's speech is entitled to First Amendment protection. That test asks whether (1) the employee spoke on a matter of public concern and (2) the employee's interest in speaking outweighed the employer's competing interest in workplace efficiency. Although *Pickering* involved a claim of protected speech, every circuit to consider the question has held that the same test controls in

determining whether a public employee's *association* is protected by the First Amendment.

Michael Palardy worked for the Township of Millburn as a police officer for over 20 years. Throughout that period, Palardy was an active member of a police officers' union. In 2013, petitioners denied Palardy a promotion because they disapproved of his union membership. Palardy sued, alleging that the denial was retaliation for his protected association, in violation of the First Amendment. The District Court rejected the claim on the ground that Palardy's union membership was not entitled to constitutional protection. But the Third Circuit reversed: It held that "membership in a public union is always a matter of public concern," and thus Palardy satisfied *Pickering*'s first prong. Pet. App. 11a.

Petitioners assert that this holding deepens a dramatic, five-way split over whether union membership is a matter of public concern. In reality, however, every circuit to address the question has held that a public employee's union membership is necessarily of public concern. Petitioners fail to identify a *single* decision—in any district court or court of appeals—to hold otherwise. The principal split that petitioners seek certiorari to resolve is thus not only exaggerated but nonexistent.

Petitioners also claim that the Third Circuit categorically exempted union membership claims from *Pickering*'s interest-balancing prong. That, too, is false. The Third Circuit did not address the interest-balancing prong of *Pickering* because petitioners never raised the issue below. And petitioners' contention that this case would enable the Court to resolve a broader split over whether the public-

concern requirement applies to association claims is belied by the fact that every circuit, no matter how it comes down on that question, treats union membership claims the same way as the Third Circuit.

Finally, the question presented is not only splitless but straightforward. Last Term, in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), this Court held that providing financial support for a public union necessarily entails "speech on matters of substantial public concern." *Id.* at 2460. It is difficult to comprehend how *subsidizing* a union would be of public concern but *being a member* of a union would not. *Janus* thus ratifies the approach taken by the lower courts and all but ensures that the remaining circuits will take the same approach, as well.

This case therefore presents no split or difficult legal question. It does not merit this Court's review. The petition should be denied.

STATEMENT

1. Michael Palardy worked as a police officer for the Township of Millburn from 1988 to 2014. Pet. App. 2a. Palardy was promoted three times during his tenure: to sergeant in 1995, to lieutenant in 1998, and to captain in 2012. *Id.* Throughout this period, Palardy was an active member of a police officers' union. *Id*.

Timothy Gordon was the Township's business administrator for the entire period of Palardy's employment. *Id.* at 3a. Gordon repeatedly made clear that he disapproved of Palardy's union membership, including by stating that Palardy "would never become chief 'because of his union affiliation.'" *Id*.

In 2010, the Township had neither a chief of police nor a team of captains. *Id*. Because Palardy "was the department's most senior lieutenant," he would ordinarily have been next in line to become captain and then chief. *Id*. at 3a-4a. But Gordon declined to promote Palardy; instead, he promoted a captain who had been on inactive duty for health reasons. *Id*. at 4a. When Gordon later promoted Palardy, he made Palardy " 'acting captain,' which came with additional responsibilities but no pay increase." *Id*. Believing "the writing [was] on the wall that he would never become chief," Palardy subsequently resigned. *Id.* at 4a-5a.

2. Palardy sued the Township and Gordon in the District of New Jersey. Among other things, Palardy claimed that petitioners retaliated against him in violation of his First Amendment rights of speech and association by refusing to promote him because of his union membership. *Id*. at 5a. Petitioners moved for summary judgment. *Id*. They argued that Palardy's union membership was not protected by the First Amendment because it was not a matter of public concern and because Palardy was not a member of the union in his capacity as a private citizen. Defendants' Br. in Support of Summary Judgment at 13-21, *Palardy* v. *Twp. of Millburn*, No. 2:15-cv-02089-SDW-LDW (D.N.J. Mar. 10, 2017), ECF No. 77-5. The District Court granted summary judgment to petitioners. Pet. App. 5a. It held that Palardy "neither acted as a private citizen nor spoke out on a matter of public concern" by being a member of a union, and that his union membership therefore was not entitled to constitutional protection. *Id.*

3. A unanimous panel of the Third Circuit reversed in part and affirmed in part. Pet. App. 2a. It ex-

plained that "[t]o 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.'" Pet. App. 6a (citation omitted). The only question presented on appeal was the first element: whether Palardy's union membership was constitutionally protected. *Id.* 13a.

In analyzing this question, the Third Circuit applied the framework this Court set forth in *Pickering* and *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006). First, the court concluded that Palardy's union membership was "a matter of public concern." Pet. App. 11a. The court explained that many courts recognize that "union speech and activity" often "touch upon matters of public concern." *Id.* at 10a. But while it is possible to distinguish between different types of union-related speech, "union membership is a dichotomy—either an employee is a union member, or he is not." *Id.* Because there is no "justiciable basis * * * to separate the wheat from the chaff," the court concluded, "membership in a public union is always a matter of public concern." *Id.* at 11a.

Second, the court held that Palardy's membership in the union was not part of his "official duties." *Id.* at 12a. The court explained that, in light of the Supreme Court's decision in *Janus*, "it is hard to imagine a situation where a public employee's membership in a union would be one of his 'official duties.'" *Id.* (quoting *Garcetti*, 547 U.S. at 421). "And in this specific case, there is no evidence that

Palardy's membership in the police officers' union was one of his job duties." *Id.*

Third, because petitioners made no argument under *Pickering*'s interest-balancing prong, the Court did not address whether the Township "ha[d] 'an adequate justification for treating [Palardy] differently from any other member of the general public.' " *Id.* at 7a (citation omitted).

The Third Circuit therefore held that Palardy's "union membership is worthy of constitutional protection." *Id.* at 13a. It "remand[ed] to the district court to consider the remaining two elements of Palardy's [retaliation] claim." *Id.*[1]

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE QUESTION PRESENTED.

In *Pickering*, this Court adopted a two-part test for determining whether a public employee's speech is entitled to First Amendment protection. The *Pickering* Court held that a public employee is protected by the First Amendment if (1) the employee engaged in speech on a matter of public concern, and (2) the employee's interest in speaking outweighs the employer's interest in workplace efficiency. 391 U.S. at at 568. The Court later added, in *Garcetti*, that an

[1] The Third Circuit affirmed the grant of summary judgment on Palardy's claim that his union membership was constitutionally protected "speech," finding that Palardy did not allege that petitioners "retaliated against him because of his speech or advocacy on any particular issue," but simply "because he was a union man." Pet. App. 13a-14a.

employee may only invoke *Pickering* if he was not speaking "pursuant to [his] official duties." 547 U.S. at 418, 421.

Although *Pickering* involved a claim of protected *speech*, every circuit to consider the question has held that the *Pickering* framework also applies to claims of protected *association*.[2] As many circuits have observed, speech and association are closely related First Amendment rights. And *Pickering* itself was "rooted" in precedents holding that government employees could not be "prevented or 'chilled' * * * from joining political parties *and other associations.*" *Connick* v. *Myers*, 461 U.S. 138, 144-145 (1983) (emphasis added); *see Boals* v. *Gray*, 775 F.2d 686, 692 (6th Cir. 1985).

Petitioners contend, however, that there is disagreement in the circuits as to how the *Pickering* framework applies to claims involving a public employee's "membership in a public union." Pet. 10. Of the three splits that petitioners allege, none has

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[2] *See Piscottano* v. *Murphy*, 511 F.3d 247, 268-278 (2d Cir. 2007); *Edwards* v. *City of Goldsboro*, 178 F.3d 231, 249-250 (4th Cir. 1999); *Boddie* v. *City of Columbus*, 989 F.2d 745, 748-749 (5th Cir. 1993); *Akers* v. *McGinnis*, 352 F.3d 1030, 1036-37 (6th Cir. 2003); *Gregorich* v. *Lund*, 54 F.3d 410, 414 (7th Cir. 1995); *Int'l Ass'n of Firefighters, Local No. 3808* v. *City of Kansas City*, 220 F.3d 969, 973-974 (8th Cir. 2000); *Merrifield* v. *Bd. of Cty. Comm'rs for Cty. of Santa Fe*, 654 F.3d 1073, 1081-82 (10th Cir. 2011); *Hatcher* v. *Bd. of Pub. Educ. & Orphanage for Bibb Cty.*, 809 F.2d 1546, 1559 & n.26 (11th Cir. 1987); *see also Acevedo-Delgado* v. *Rivera*, 292 F.3d 37, 45 n.11 (1st Cir. 2002) (reserving question whether *Pickering* framework applies to association claims); *Hudson* v. *Craven*, 403 F.3d 691, 698 (9th Cir. 2005) (applying *Pickering* framework to hybrid speech/association claim).

merit: The first is nonexistent; the second is based on a plain misreading of the opinion below; and the third is both not presented here and unworthy of certiorari in its own right.

A. There Is No Split Over The Application Of *Pickering*'s First Prong To Union Membership Claims.

Petitioners' principal claim is that the circuits disagree as to how the first prong of *Pickering* should be applied to union membership claims. Pet. 10. According to petitioners, whereas some circuits hold that union membership is always "of public concern," others analyze on a case-by-case basis whether an employee's union membership satisfies the public-concern requirement. *Id.* at 10-19. And by petitioners' telling, this is no ordinary split: They claim that the circuits are in "utter disarray" over this question, have developed "at least five separate doctrinal frameworks" for evaluating it, and are now in such a state of division that it is "difficult to imagine" an "area of constitutional law that is more confused * * * and in need of this court's intervention." *Id.* at 19-20 (emphasis omitted).

The end-of-days circuit split that petitioners allege is—to be blunt—entirely imaginary. Every circuit to consider the question has held that union membership is necessarily "of public concern." Not a single circuit—indeed, not a single case that petitioners can identify—has ever held that union membership should be analyzed case-by-case to determine whether it is of public concern.

1. Six circuits have confronted the question of how to analyze union membership claims under the first prong of *Pickering*. Every one of these circuits has

held that a public employee's membership in a union is necessarily "of public concern."

The Fifth Circuit held over 25 years ago that "union activity of [government] employees * * * is inevitably of public concern." *Boddie* v. *City of Columbus*, 989 F.2d 745, 750 (5th Cir. 1993). Thus, it has explained, employees need not provide "independent proof of public concern * * * in a freedom of association claim arising from union organization activity"." *Id.* at 749. Rather, where a court finds that a public employer has "fir[ed] [an employee] for his association with [a] union," the court should proceed directly to "[t]he fact specific balancing test of *Pickering*." *Id.* at 750.

The Eleventh Circuit has similarly held that courts need not conduct a case-by-case analysis of whether a public employee's union membership is of "public concern." *Cook* v. *Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005). Instead, it has categorically held that "freedom of association protection extends to membership in organizations such as labor unions." *Id*. Thus, the Eleventh Circuit simply "appl[ies] the *Pickering* balancing test" to determine whether an employee's "interest in associating with the [union] * * * outweigh[s] any countervailing state interest." *Id.* at 1320-21.

The Tenth Circuit has adopted the same position. In *Shrum* v. *City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), it stated that "[i]n the specific context of public employee labor unions, this Court has rejected the requirement that a worker demonstrate that his association with the union be a matter of public concern." *Id.* at 1138-39 (citing *Butcher* v. *City of McAlester*, 956 F.2d 973 (10th Cir. 1992); *Morfin* v.

Albuquerque Pub. Sch., 906 F.2d 1434 (10th Cir. 1990)). Indeed, where the union and the employer have a collective bargaining agreement, the Tenth Circuit has held that it is unnecessary to engage in further *Pickering* balancing at all, because the employer "already balanced [its] interests when it agreed to a collective bargaining agreement." *Id.* at 1139.[3]

The Second Circuit has similarly held that union membership is categorically of public concern. In *State Employee Bargaining Agent Coalition* v. *Rowland*, 718 F.3d 126 (2d Cir. 2013), *cert. denied*, 571 U.S. 1170 (2014), the Second Circuit held that "[c]onditioning public employment on union membership, no less than on political association, inhibits protected association and interferes with government employees' freedom to associate." *Id.* at 133. Thus, in the Second Circuit, a public employer may not make "employment decisions based on union membership" except "in the most compelling circumstances," where the employer's interests outweigh those of the employee. *Id.* at 133-134 (citation omitted).[4]

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[3] Petitioners suggest that the Tenth Circuit's public-concern holding is limited to membership in unions with collective bargaining agreements. *See* Pet. 18-19. But the Tenth Circuit stated that its rule regarding the public-concern prong applies to the "context of employee labor unions," full stop, without limiting it to collective bargaining agreements. *Shrum*, 449 F.3d at 1138. And subsequent panels have declined to hold that the rule is limited in this way. *See Cillo* v. *City of Greenwood Vill.*, 739 F.3d 451, 461 n.17 (10th Cir. 2013) (reserving the question).

[4] Petitioners suggest that Second Circuit case law is unclear because of the court's subsequent decision in *Lynch* v. *Ackley*, 811 F.3d 569 (2d Cir. 2016). Pet. 14 n.6. But *Lynch* did not

The Sixth Circuit has also taken this position. In *Boals*, the court stated that it had "no doubt that an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid first amendment claim under *Connick* and *Pickering*." 775 F.2d at 693. Then, in *Van Compernolle* v. *City of Zeeland*, 241 F. App'x 244 (6th Cir. 2007), the Sixth Circuit reaffirmed that "a government employer cannot take adverse action against an employee solely because that employee is a union member." *Id.* at 251; *see also Wells* v. *O'Malley*, 106 F. App'x 319, 323 (6th Cir. 2004) (similar). Thus, in the Sixth Circuit, a public employee who shows that he was fired for his union membership "states a valid first amendment claim" under *Pickering* unless the employer identifies some legitimate reason for the discharge under *Pickering*'s second prong.

Petitioners claim that the Sixth Circuit took the opposite position in *Boals* when it stated 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." 775 F.2d at 693 (emphasis added); *see* Pet. 11-12. But *Boals* and *Van Compernolle* both expressly distinguished between union-related speech or activity and union membership. *Boals* itself held, two sentences after the language petitioners quote, that "[w]e have no doubt that an employee who is disciplined solely in retaliation for his *membership in and support of a*

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involve a claim of retaliation based on union association at all; it involved a claim of retaliation for an employee's "contention[] that [his supervisor] was a bad chief." *Id.* at 582. It thus did nothing to undermine the Second Circuit's holding in *Rowland*.

union states a valid First Amendment claim under *Connick* and *Pickering*." 775 F.2d at 693 (emphasis added) And *Van Compernolle* explained that "the right of a public employee *to be* a union member is not subject to the same limits as the employee's right *to speak or act* as a union member." 241 F. App'x at 251 (emphases in original). "Consequently," it continued, "while a government employer cannot take adverse action against an employee solely because that employee is a union member, the First Amendment does not protect union-related speech or activity affecting the government's interest as an employer unless that speech or activity addresses a matter of public concern." *Id.* at 251-252. The court could hardly have been clearer that, although plaintiffs bear the burden of showing that particular union-related speech or activity is "of public concern," the same case-by-case showing is not required with respect to claims concerning union membership.

In the decision below, the Third Circuit joined these five circuits in holding that public union membership is necessarily of public concern. It held that because there is no sensible basis for "distinguish[ing] between union membership that implicates a public concern, and union membership that does not," "membership in a public union is always a matter of public concern." Pet. App. 10a-11a. The Third Circuit observed that "the number of possible subjects for union-related *speech* is *** wide-ranging" and may sometimes be "more immediately concerned with the self-interest of the speaker as employee." *Id.* at 10a (emphasis added). But "union membership is a dichotomy—either an employee is a union member, or he is not," and so the "public-

concern requirement" is always satisfied in this context. *Id.* at 10a-11a.

2. Petitioners claim that three circuits have taken a contrary position. Pet. 10-14. That is incorrect. Each of these circuits has either aligned with the views of the circuits just discussed, or has not addressed the issue.

As already noted, the Sixth Circuit has expressly held that courts need not analyze whether an employee's union membership "addresses a matter of public concern." *Van Compernolle*, 241 F. App'x at 251. Rather, the Sixth Circuit follows the straightforward rule that "a government employer cannot take adverse action against an employee solely because that employee is a union member." *Id.* at 251-252 (citing *Boals*, 775 F.2d at 693). Petitioners' claim to the contrary rests entirely on their erroneous conflation of "union-related speech or activity" and "union member[ship]," which the Sixth Circuit has explicitly distinguished. *Id.*; *see also Hamilton Cty. Educ. Ass'n* v. *Hamilton Cty. Bd. of Educ.*, 822 F.3d 831, 841 & n.3 (6th Cir. 2016) (reaffirming that "[u]nion-related association"—in that case, a union's "recruiting" activity—"does not inherently touch on a matter of public concern").[5]

[5] The district court cases that petitioners cite involved claims of retaliation based on union activities, not union membership. In *Orick* v. *Banziger*, 945 F. Supp. 1084 (S.D. Ohio 1996), the court concluded that an employee's "participation in [a] strike" and her "statement regarding her back pay" were not "matter[s] of public concern." *Id.* at 1091. In *Cavanaugh* v. *McBride*, 33 F. Supp. 3d 840 (E.D. Mich. 2014), the plaintiff complained that he was retaliated against "because he was a union member *engaged in union activities*," and the court rejected that claim

The Fourth Circuit has not addressed this issue. The principal case petitioners cite, *Wilton* v. *Mayor & City Council of Baltimore*, 772 F.2d 88 (4th Cir. 1985), held simply that "a first amendment right to associate may be validly limited where the limitation is necessary to a substantial and legitimate state interest." *Id.* at 91 (quoting *York Cty. Fire Fighters Ass'n, Local 2498* v. *County of York*, 589 F.2d 775, 778 (4th Cir. 1978)). The court did not address the public-concern prong of *Pickering*, or even use the words "public concern" in its opinion. Still less did it state that an employee must demonstrate case-by-case that his union membership is of public concern. If anything, the opinion suggests the opposite: It proceeded directly to *Pickering*'s second prong, and balanced the employee's interest in union membership against the employer's interest in "efficient administration of local jails." *Id.*[6]

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upon finding that "[t]he only *union activities* [the plaintiff] presents * * * do not touch upon matters of public concern." *Id.* at 848 (emphases added).

[6] Petitioners also cite *Edwards* v. *City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999), and two district court cases from within the Fourth Circuit. None of those cases, however, involved claims of union membership or union association, and none of them said anything about the subject. *See id.* at 237 (claim that employee was retaliated against for improperly teaching "concealed handgun safety course"); *Conley* v. *City of Elkton*, 381 F. Supp. 2d 514, 519-520 (W.D. Va. 2005) (claim that employee was terminated for making "suggestions for improving the operation of the police department"); *Sheaffer* v. *County of Chatham*, 337 F. Supp. 2d 709, 718 (M.D.N.C. 2004) (claim that employee was retaliated against for "suggest[ing]" changes to "children's programming" at several libraries).

The Seventh Circuit also has not addressed this question. In *Gregorich* v. *Lund*, 54 F.3d 410 (7th Cir. 1995), it stated that it analyzes the "precise content, form, and context" of an employee's "*union-organizing efforts*" to determine whether they "touch[] upon matters of public concern." *Id.* at 415-416 (emphasis added). The court said nothing, however, about how to analyze an employee's *union membership*—which, as already noted, several circuits have held stands on a different footing than union-organizing activities. *See* Pet. App. 10a; *Van Compernolle*, 241 F. App'x at 251. Indeed, the test the Seventh Circuit laid out would make no sense as applied to union membership, since an employee's decision to be a member of a union is a dichotomous choice whose "content" and "form" do not meaningfully vary. *See* Pet. App. 10a-11a.

The Seventh Circuit's decision in *Griffin* v. *Thomas*, 929 F.2d 1210 (7th Cir. 1991), is similarly off-point. There, the court held that an employee's "filing [of] a union grievance" was protected under *Pickering* if the grievance "raised an issue of public concern." *Id.* at 1210, 1214-15. The case did not involve, and the court did not discuss, a claim based on union membership.

Indeed, in *Balton* v. *City of Milwaukee*, 133 F.3d 1036 (7th Cir. 1998), the Seventh Circuit expressly declined to decide how the public-concern requirement applies to union membership claims. There, two firefighters alleged that they were retaliated against for ending their membership in an association that the court described as akin to a union. *Id.* at 1038. The court observed that applying "a *Pickering*/*Connick* approach to disputes of this sort * * * presents potential problems." *Id.* at 139-140. The

court thus resolved the case on other grounds: It found that the employees were not penalized "because they associated (or chose not to associate) with the organization," and that even if the defendants "violat[ed] * * * the First Amendment," they were protected by qualified immunity "given the murkiness of the law." *Id.* at 1040. Judge Cudahy agreed that the case was "not a good vehicle for exploring larger questions of First Amendment law," but concurred specifically to explain that the case was distinguishable from precedents like *Gregorich* because "the mere act of joining or not joining a union," unlike "union-organizing activity," should not be analyzed case-by-case to determine whether it is a matter of public concern. *Id.* at 1041 (Cudahy, J., concurring in the judgment).[7]

Finally, petitioners concede that the Ninth Circuit has taken no view on this question. Pet. 17-18. Rightly so. In the sole case they cite, *Hudson* v.

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[7] Petitioners have not identified any district court decision in the Seventh Circuit that has taken their approach. In *Rinella* v. *City of Chicago*, No. 16-cv-04088, 2016 WL 7241185 (N.D. Ill. Dec. 14, 2016), the court held that a union member's "communications with his union * * * touched on matters of public concern." *Id.* at *3. Petitioners' other examples also involve union-related *speech or activities*, and in each instance the court likewise found that they did touch on matters of public concern. *See Kasak* v. *Village of Bedford Park*, 514 F. Supp. 2d 1071, 1077 (N.D. Ill. 2007) (holding that an employee's "union activity," including the formation of union and representation of its members, "involve[d] a matter of public concern"); *Cunningham* v. *Village of Mount Prospect*, No. 02 C 4196, 2002 WL 31628208, at *4-5 (N.D. Ill. Nov. 19, 2002) (holding that an employee's "union-organizing and wage negotiation efforts * * * touch[ed] upon matters of public interest").

Craven, 403 F.3d 691 (9th Cir. 2005), the Ninth Circuit held "that *Pickering* should be applied" to cases in which "[t]he speech and associational rights at issue" are "intertwined." *Id.* at 698. The case did not involve claims of union association or union membership, and the court did not suggest how it would handle pure association claims. Nor did the district court's decision in *Schnabel* v. *Hualapai Valley First District*, No. CV 07-150-PCT-JAT, 2009 WL 322948 (D. Ariz. Feb. 9, 2009), address a union membership claim. *Id.* at *10 (finding that employees' statements at union meetings were of public concern).

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In short, despite their claim of a split of historic proportions, petitioners have not found a single case in any district or appellate court holding that claims of union membership should be analyzed case-by-case to determine whether they are of public concern. On the contrary, all six circuits to confront this issue address it the same way the Third Circuit did, and the remaining circuits have taken no view on the question. The principal split petitioners allege is wholly fictive, and the Court should not grant certiorari to address it.

B. There Is No Split Over The Application Of *Pickering*'s Second Prong To Union Membership Claims.

Perhaps because their principal split withers under scrutiny, petitioners briefly try their hand at another one. They note that after holding that Palardy's union membership was of public concern, the Third Circuit did not go on to apply *Pickering* balancing. Pet. 9. Petitioners infer from this silence that the

Third Circuit has placed "union affiliation *** categorically outside of the *Connick* framework," and that a public employee now "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." *Id.*; *see id.* at 17 (same).

This is a blatant misreading of the Third Circuit's opinion. The reason the Third Circuit did not apply *Pickering* balancing in this case is that *petitioners never asked it to*. In the Third Circuit, the petitioners argued that Palardy's union membership was not constitutionally protected for only two reasons: "because (a) he did not speak on matters of public concern and (b) he did not act as a private citizen." Br. of Appellees at 20, *Palardy* v. *Twp. of Millburn*, 906 F.3d 76 (3d Cir. 2018) (No. 17-2597). Petitioners limited themselves to the same two arguments in the district court. *See* Defendants' Br. in Support of Summary Judgment, *supra*, at 13-21. At no point did petitioners argue that they were justified in failing to promote Palardy because of his union membership. Accordingly, neither the District Court nor the Third Circuit had occasion to address the question.

Furthermore, nothing in the Third Circuit's opinion suggests that the court deemed *Pickering*'s second prong categorically inapplicable to union membership claims. On the contrary, the panel opened its analysis by reciting all three elements of the *Pickering/Garcetti* framework. Pet. App. 7a. It then went on to discuss each of the two elements that petitioners contested. *Id.* at 8a-12a. The absence of any discussion of the third element reflects the panel's faithful application of the party-presentation rule,

not its *sub silentio* abandonment of a requirement it had discussed just a few pages earlier.[8]

C. The Broader Split Petitioners Allege Is Not Presented And Is Not Certworthy In Any Event.

Finally, at various points in their brief, petitioners claim that this case will enable the Court to resolve a broader split over whether the public-concern requirement applies to freedom of association claims in general. Pet. 2-3, 10, 27-28. By their count, five circuits apply the public-concern requirement to association claims, while two—the Fifth and Eleventh Circuits—do not.

Even if this split were certworthy, this case would not present an opportunity for the Court to resolve it. Regardless of which side of petitioners' claimed split the circuits fall on, *every* circuit to address the issue has held that a case-by-case showing of public concern is unnecessary in the case of union-membership

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[8] Petitioners also assert, in passing, that the Third Circuit erred by "categorically eliminating the 'private-citizen requirement' for claims based on union affiliation." Pet. 25. That is another distortion of the panel's opinion. The Third Circuit observed that it is "*hard to imagine* a situation where a public employee's membership in a union would be one of his 'official duties,' " given that it is unconstitutional to make union membership or payment of union fees a condition of public employment. Pet. App. 12a (emphasis added) (quoting *Garcetti*, 547 U.S. at 421, and citing *Janus*, 138 S. Ct. at 2460). But it did not issue any categorical holding on the question; it merely "decline[d] to apply *Garcetti*'s private-citizen test to Palardy's freedom of association claim" because "*in this specific case*, there is no evidence that Palardy's membership in the police officers' union was one of his job duties." *Id.* (emphasis added).

claims. Thus, the Fifth and Eleventh Circuits, on one hand, apply the same approach as the Second, Sixth, and Tenth Circuits, on the other. Indeed, the Third Circuit declined to take a position on this broader question in the decision below, deeming it necessary to resolve only whether, "[i]n this specific context," an employee's "membership in a public union is always a matter of public concern." Pet. App. 10a-11a.

In any event, that split would not be certworthy even if it were presented. For one thing, the split is greatly exaggerated. The Fifth Circuit has never held that all association claims are exempt from the public-concern requirement. Rather, it has held that plaintiffs need not make a case-by-case showing of public concern for certain types of association—such as union membership and political affiliation—that are inherently of public concern. *See Boddie*, 989 F.2d at 749 ("[N]o independent proof of public concern is required in a freedom of association claim arising from union organization activity."); *Coughlin* v. *Lee*, 946 F.2d 1152, 1158 (5th Cir. 1991) ("A public employee's claim that he has been discharged for his political affiliation in violation of his right to freely associate is not subject to the threshold public concern requirement."); *see also Breaux* v. *City of Garland*, 205 F.3d 150, 157 n.12 (5th Cir. 2000) (simply quoting *Boddie* in dicta).

The Eleventh Circuit did hold in 1987 that the public concern requirement "is inapplicable to freedom of association claims." *Hatcher* v. *Bd. of Pub. Educ. & Orphanage for Bibb Cty.*, 809 F.2d 1546, 1558 (11th Cir. 1987). But that precedent has not been revisited in more than 30 years, and the Eleventh Circuit has since questioned its soundness and

declined to extend it. *See D'Angelo* v. *Sch. Bd. of Polk Cty.*, 497 F.3d 1203, 1212 (11th Cir. 2007) (saying that *Hatcher* "disregard[ed] the ordinary rule that rights under the First Amendment are co-equal").

This claimed split is thus overstated, lopsided, and stale. It is also oft-denied. *See* Petition for Writ of Certiorari at i, *Merrifield* v. *Bd. of Cty. Comm'rs for Cty. of Santa Fe*, No. 11-881 (Jan. 17, 2012) (cert. denied Apr. 23, 2012); Petition for Writ of Certiorari at i, *Akers* v. *McGinnis*, No. 04-28 (July 2, 2004) (cert. denied Dec. 6, 2004). And petitioners make no effort to show that this question is frequently recurring, leads to divergent results in the real world, or has real practical significance. Thus, even if this split were presented—which it is not—it would not merit this Court's review.

II. THE DECISION BELOW IS PLAINLY CORRECT IN LIGHT OF *JANUS*.

The position adopted by the Third Circuit is not only consistent with the view taken by every other Circuit to consider the issue; it is also correct. This Court has long held that union membership is a type of association protected by the First Amendment. *See Smith* v. *Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464 (1979) (per curiam). And the choice to be a member of a public union necessarily implicates questions of public concern, from the size of the state budget to the manner of overseeing the government workforce. Furthermore, it would be unworkable and theoretically unsound to hold that union membership implicates public concern in one circumstance but not in another. *See* Pet. App. 10a

("[U]nion membership is a dichotomy—either an employee is a union member, or he is not.").

And if the question was subject to any doubt before, *Janus* has resolved it. In *Janus*, the Court held that the First Amendment prohibits compelling non-consenting public employees to make payments to a union. The Court explained that requiring such individuals to support a union "compel[s] them to subsidize private speech on matters of substantial public concern." 138 S. Ct. at 2460. That is because the activities carried out by public unions—from collective bargaining to the handling of employee grievances—are "overwhelmingly of substantial public concern." *Id*. at 2477. "When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk." *Id*. at 2473. Thus, the Court concluded that requiring public employees to support a union places a "heavy burden" on their "First Amendment interests" that may only be justified by a substantial "state interest." *Id.* at 2477.

In the wake of *Janus*, it is difficult to see how a lower court could hold that union membership is not of public concern. If *subsidizing* a union inevitably entails expression on a matter of substantial public concern, then *being a member* of a union necessarily does so, as well: Such association amounts to a far more direct and potent expression of "support [for] the union" and its political, social, and economic objectives than the passive payment of agency fees. *Id.* at 2478. For that reason, even before *Janus*, it was understood that the First Amendment would bar compelled membership in a union even if it allowed

compelled subsidies to unions. *See Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 233-237 (1977).

Apparently recognizing that *Janus* presents a terminal problem for their case, petitioners bury their discussion of it in a footnote. Pet. 25 n.8. But their attempts to distinguish *Janus* are empty. Petitioners claim that *Janus* did not "consider the *** question of whether an employee's mere membership in a public union is a matter of public concern." *Id.* True enough, but the *logic* of *Janus* applies with equal if not greater force to union membership as it does to agency fees. Petitioners also assert that *Janus* "recognized that 'the *Pickering* framework was developed for use in a very different context' than the compelled subsidy issue in *Janus*." *Id.* (quoting *Janus*, 138 S. Ct. at 2472). The *Janus* Court, however, expressly applied the *Pickering* framework to compelled subsidies and found that they both entail speech that is "overwhelmingly of substantial public concern" and place a "heavy burden" on the employee's "First Amendment interests." 138 S. Ct. at 2477. It is difficult to fathom how a different conclusion would hold for requiring (or prohibiting) an employee from being a *member* of a union.

Janus thus reaffirms the approach taken by every lower court to consider the issue. And it makes it all but certain that, in the future, circuits will continue to adhere to that position.

III. THIS CASE IS A POOR VEHICLE TO CONSIDER THE QUESTION PRESENTED.

Because the question presented is splitless and straightforward, there is no reason for the Court to consider it. But even if the Court were inclined to

address the issue at some point, this case would be an especially poor vehicle in which to do so.

First, the case is in an interlocutory posture. The Court of Appeals resolved only the first of three elements of Palardy's First Amendment claim, while remanding the case to the District Court to resolve "the remaining two elements"—that is, "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.'" Pet. App. 13a (citation omitted). The lower courts therefore have not assembled a full summary judgment or trial record in this case, or resolved all of the questions before them. There is no reason for the Court to depart from its ordinary practice of waiting for a final judgment before granting review.

Second, because proceedings in the lower courts are still ongoing, any constitutional holding in this case might prove advisory. Petitioners' principal defense in this case has been that they did not penalize Palardy for his union membership at all. If petitioners were to prevail on this non-constitutional ground, the question of whether Palardy's union membership is constitutionally protected association would be academic. The Court should avoid expounding on a broad question of First Amendment law when the answer may prove unnecessary to the resolution of the case at hand. *See United States* v. *Locke*, 471 U.S. 84, 92 (1985) (preferring to resolve cases based on "some other nonconstitutional ground fairly available, by which the constitutional question can be avoided").

Third, because of the way petitioners have litigated this case, the Court would be unable to address the full scope of *Pickering*'s application to union membership claims. Petitioners have forfeited any argument that they had an adequate justification for failing to promote Palardy because of his union membership. *See supra* Part I.B. As a result, this case would not allow the Court to decide how *Pickering*'s balancing test applies to union membership claims. *Cf.* Pet. 26-28. If the Court wishes to address the question presented, it should do so in a case in which the full *Pickering* framework is before it, not where review is artificially hamstrung by petitioners' litigation choices.

Fourth, petitioners' attempts to show that this is an "exceptionally important" issue in need of immediate review are unavailing. Pet. 20. Petitioners note that "retaliation claims against public employers are very frequently litigated." Pet. 20-21. But claims alleging that employers discharge employees for their union membership—the only ones at issue here—are quite uncommon. Indeed, the petition identifies only a handful of such cases that have arisen over the past three decades. Petitioners thus make no showing that this case would have a significant effect on litigation in the real world.

Petitioners also claim that this case will have "significant implications for the ability of municipalities and local governments to fulfil their core functions." Pet. 21-22. But they rest that claim entirely on the premise that the Third Circuit "effectively abolish[ed] the *Connick* framework" and made it impossible for employers to raise any justification for firing an employee because of his union membership. Pet. 21-23, 25-26. That is simply false. *See supra* Part

I.B. Employers remain free to argue that adverse actions against union members were necessary to ensure workplace efficiency and to vindicate the very interests petitioners identify.

Finally, petitioners contend that the decision below may "create or exacerbate resentment based on union membership and thereby disrupt the workplace." Pet. 23. Petitioners offer no support for that speculation, and it is belied by the fact that six circuits covering millions of public employees, many of them unionized, have applied this rule for decades, without evident problem.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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