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JENKINS, THE PUBLIC CONCERN TEST, AND THE NEED FOR LIMITING PRINCIPLES IN PRIVATE CITIZEN RETALIATION CLAIMS

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"RETALIATION, *n*. The natural rock upon which is reared the Temple of Law."[1]

INTRODUCTION

A. *First Amendment Retaliation Claims*

A retaliation claim is an inherently unique cause of action that arises when an individual engages in constitutionally protected speech and is, as a result, retaliated against by a government entity or actor.[2] Unlike typical First Amendment claims, retaliation claims do not involve the direct prohibition of speech, but rather are constitutional violations which "may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."[3] As a result of their indirect nature, retaliation claims must be alleged under 42 U.S.C. § 1983, which requires that the plaintiff show a deprivation of a constitutionally protected right by a person acting "under the color of state law."[4] This type of claim was first recognized in the public employment context and was used as a means to protect government employees from being demoted or

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[1] AMBROSE BIERCE, THE DEVIL'S DICTIONARY 153 (NuVision Publications 2007) (1881).

[2] *See* Jenkins v. Bd. of Educ., 463 F. Supp. 2d 747, 756 (S.D. Ohio 2006), *aff'd in part, rev'd in part sub nom.* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580 (6th Cir. 2008).

[3] Laird v. Tatum, 408 U.S. 1, 11 (1972).

[4] *See Jenkins*, 463 F. Supp. 2d at 755.

discharged as a result of exercising their fundamental right of free speech by criticizing their government employers.[5] Recognizing that the government also has a great interest in maintaining control over its employees and its workplaces, courts began utilizing the public concern test to limit the types of claims that could be brought. Under the public concern test, employees' speech is protected only if it relates to a matter of public concern, meaning that it must relate to a matter of "political, social, or other concern of the community, rather than merely a personal grievance."[6]

Retaliation claims eventually became an attractive alternative for private individuals seeking redress for only an indirect violation of their First Amendment rights.[7] As a result, courts have been faced with the problem of determining the proper standard to apply to private citizens bringing what has historically been a cause of action reserved for public employees. Recently, in *Jenkins v. Rock Hill Local School District*, the United States Court of Appeals for the Sixth Circuit held that the public concern test does not apply to private citizen retaliation suits.[8] The court held that the plaintiff, speaking as a private citizen, would be protected even if the speech did not relate to a matter of public concern.[9] In eliminating the public concern test for private individuals—the cause of action's major limiting principle—the *Jenkins* Court opened the door to an overwhelming increase in retaliation claim litigation, creating an entirely new problem to be faced by future courts dealing with private citizen First Amendment retaliation claims.

B. *The* Jenkins *Decision*

During the 2000–2001 school year, Shanell Ratcliff was a second-grade student in the Rock Hill School District ("Rock Hill" or "the School").[10] Shanell, who was diagnosed with Type I diabetes in March of 2000, needed Rock Hill employees to aid in

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[5] *See* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 586 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2445 (2008).

[6] Mnyofu v. Bd. of Educ., No. 03-C-8717, 2005 WL 2978735, at *5 (N.D. Ill. Nov. 1, 2005).

[7] *See Jenkins*, 513 F.3d at 587.

[8] *See id.* at 586–87.

[9] *See id.* at 588–89.

[10] *Id.* at 583–84.

her diabetes management during the school day.[11] To authorize the School's involvement, Shanell's mother Shara Jenkins and Shanell's doctor were required to sign "Administration of Medication" forms.[12] These forms gave Rock Hill employees permission to administer a glucogen shot but only in the extreme and unlikely event of Shanell losing consciousness.[13] Under less serious circumstances, the Administration of Medication forms authorized Rock Hill only to contact Jenkins so that she could personally administer an insulin shot to her daughter.[14]

A conflict soon arose between Jenkins and Rock Hill's nurse Marsha Wagner regarding who was responsible for administering Shanell's shots.[15] Jenkins argued that, to prevent her from having to go to her daughter's school herself, Wagner should be responsible for giving the insulin shots when Shanell's blood sugar tested above 250.[16] Wagner maintained that she would need formal authorization to comply with Jenkins's wishes; however, Jenkins refused to fill out another authorization form detailing the new instructions.[17] Instead, Jenkins approached Rock Hill's superintendent Lloyd Evans and complained that the School would not administer Shanell's shots.[18] Evans allegedly responded that Rock Hill was not responsible for her medical care and told Jenkins that Shanell could not come back to school.[19] Shanell had to miss seven days

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[11] *See* Jenkins v. Bd. of Educ., 463 F. Supp. 2d 747, 752 (S.D. Ohio 2006), *aff'd in part, rev'd in part sub nom.* Jenkins. v. Rock Hill Local Sch. Dist., 513 F.3d 580 (6th Cir. 2008).

[12] *Id.*

[13] *See id.* at 751.

[14] *See id.* The Administration of Medication forms for the preceding school year had authorized a slightly different course of action. *See id.* According to those forms, Rock Hill was authorized to give Shanell orange juice and contact her mother if her glucose levels tested below seventy. *Id.* at 750. If Shanell's glucose tested above two hundred, Rock Hill was to give her water and contact Jenkins. *Id.* Lastly, as was agreed during the 2001–2002 school year, the School was authorized to administer a glucogen shot only if Shanell lost consciousness. *Id.* at 750–51.

[15] *See Jenkins*, 513 F.3d at 584.

[16] *See Jenkins*, 463 F. Supp. 2d at 751.

[17] *See id.* Jenkins claims that she did not fill out the forms to give Rock Hill permission to administer the insulin shots because she "couldn't write something down that they refused to do." *Id.* (internal quotations omitted).

[18] *See Jenkins*, 513 F.3d at 584.

[19] *See id.*

of school, during which Jenkins contacted the United States Department of Education's Office of Civil Rights and the Ohio Department of Education to have Shanell readmitted.[20]

The day after Shanell's return to Rock Hill, Jenkins was prohibited from going to her daughter's classroom without first signing in at the office.[21] Jenkins met with Evans to complain about this treatment and about the School's refusal to administer her daughter's medication—irrespective of her own refusal to sign a new authorization form.[22] At this meeting, Evans threatened to call the Lawrence County Department of Job and Family Services ("Child Services").[23]

About one week after the meeting, Jenkins filed a complaint with the United States Department of Education.[24] She also wrote a letter to the editor of a local newspaper complaining about Rock Hill's response to her complaints and her daughter's illness:

> I have a 7-year-old daughter who is diabetic and has attended Rock Hill No. 2 school for three years. I received a phone call from the superintendent Nov. 27 and was told I couldn't bring my daughter back to school. I was told she wasn't enrolled there anymore.
>
> The school took it upon themselves to withdraw her without my permission and said that I was the one who withdrew her. We tried going to the school and got escorted out by a teacher. I made contacts with the state and got her back in school after she missed seven days.
>
> Now, we are being treated differently, just because I'm fighting for my daughter's rights. There's only one teacher in the school willing to take responsibility for my daughter's health issues. This goes to show you how much "teachers" care about your children.[25]

Six days after the letter's publication, an anonymous caller, calling from Rock Hill's principal's office,[26] made a complaint to Child Services, initiating an investigation into whether Jenkins

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[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.* Jenkins claims that at this point, Evans told her, " 'you contacted the Office of Civil Rights and got an investigation started, so I figured I'd start one of my own.' " *Id.*

[24] *See id.*

[25] *Id.*

[26] *See id.*

was medically neglecting Shanell.[27] Child Services filed its own complaint against Jenkins in the Lawrence County Court of Common Pleas the following January, but the case was dropped four months later.[28]

Subsequently, Jenkins initiated her retaliation claim alleging a violation of her rights under 42 U.S.C. § 1983.[29] To establish a § 1983 violation, a plaintiff " 'must identify a right secured by the United States Constitution and deprivation of that right by a person acting under color of state law.' "[30] Here, Jenkins alleged that Rock Hill retaliated against her by contacting Child Services in response to her writing the letter to the newspaper and exercising her First Amendment rights.[31] The district court granted Rock Hill's motion for summary judgment and reasoned that to make out a First Amendment retaliation claim, Jenkins's speech had to relate to a matter of public concern.[32] The court found that Jenkins's speech "fail[ed] as a matter of law to relate to a matter of public concern" because her comments concerned her own personal grievances and did not address the situation of other students.[33] Therefore, the district court held that her First Amendment retaliation claim must necessarily fail.[34]

The Sixth Circuit reversed, holding that, while the public concern test is the appropriate standard to apply in retaliation claims brought by public employees, the district court erred in adopting the public concern test for retaliation claims brought by private individuals like Jenkins.[35] In coming to this conclusion, the *Jenkins* Court recounted the three elements of a retaliation claim:

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[27] *See* Jenkins v. Bd. of Educ., 463 F. Supp. 2d 747, 752 (S.D. Ohio 2006), *aff'd in part, rev'd in part sub nom.* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580 (6th Cir. 2008).

[28] *See id.*

[29] *Jenkins*, 513 F.3d at 585.

[30] *Jenkins*, 463 F. Supp.2d at 755 (quoting Russo v. City of Cincinnati, 953 F.2d 1036, 1042 (6th Cir. 1992)).

[31] *See id.* at 756–57.

[32] *See id.* at 757.

[33] *Id.*

[34] *See id.*

[35] *See* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 583, 587 (6th Cir. 2008) (citing Gable v. Lewis, 201 F.3d 769, 771–72 (6th Cir. 2000)), *cert. denied*, 128 S. Ct. 2445 (2008).

> (1) the plaintiff was engaged in a constitutionally protected activity;
> (2) the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and
> (3) the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.[36]

If these elements are satisfied, the burden of proof shifts to the defendant who then has the opportunity to demonstrate that the same allegedly retaliatory actions would have been taken even in the absence of the constitutionally protected activity.[37]

First, the Sixth Circuit determined that Jenkins was engaged in a constitutionally protected activity.[38] The court reasoned that speech is generally protected under the First Amendment, with only a few limitations.[39] While the public concern test imposes a limitation on the free speech of public employees, the court held that it should not similarly limit the speech of private individuals.[40] Adoption of the public concern test was intended to ensure that public employees, who enjoy slightly less encompassing rights than private individuals, would be free to speak out on matters of public concern without fear of retaliation by their government employers.[41] Unlike the rights of public employees, private individuals' rights are not abridged by the government's interest in controlling its workforce. Therefore, the court found that a private citizen's right to criticize a public official or a government entity falls clearly within the Constitution's protection, thus satisfying the first element.[42]

As articulated by the *Jenkins* Court, the second and third elements require a showing that the defendant's action caused an injury that would likely "chill a person of ordinary firmness" from continuing to engage in the constitutionally protected activity[43] and that the defendant's action was "motivated at least in part as a response to the exercise of the plaintiff's constitutional

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[36] *Id.* at 585–86 (citing Bloch v. Ribar, 156 F. 3d 673, 678 (6th Cir. 1998)).
[37] *See id.* at 586.
[38] *See id.* at 588.
[39] *See id.*
[40] *See id.*
[41] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).
[42] *See Jenkins*, 513 F.3d at 588.
[43] *See id.* at 585–86.

rights."[44] Though these elements were never reached by the district court, the Sixth Circuit held that Jenkins satisfied them.[45] The Sixth Circuit reasoned that having a false claim made with Child Services and having one's daughter dismissed from school were sufficient to "chill a person of ordinary firmness" from continuing his or her protected speech.[46] Also, the court found that Evans's alleged admission that he was going to call Child Services was sufficient to prove the causal connection required by the third element.[47] Therefore, the court held that the district court erred in granting summary judgment to Rock Hill.[48]

C. *This Comment's Ambitions*

This Comment argues that the Sixth Circuit properly concluded that the public concern test should not be applied to private individuals in the context of First Amendment retaliation claims. It takes issue, however, with the Sixth Circuit's reasoning, as well as the lack of attention given to the policy considerations raised in the district court and in other recent cases. Part I examines the origins of retaliation claims and the public concern test. Part II discusses extensions of the public concern test outside of the public employment context and the merit of the *Jenkins* decision to not extend it even further to apply to private individuals. Finally, Part III scrutinizes the Sixth Circuit's failure to examine the policy considerations implicated by its decision, namely, the overwhelming increase in litigation that may result due to the cause of action's undemanding causal standard and the elimination of its major limiting principle.

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[44] *Id.* at 586 (citing Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998)).

[45] *See id.* at 588.

[46] *Id.* at 588–89.

[47] *See id.* at 589.

[48] *Id.*

I. ORIGINS OF THE PUBLIC CONCERN TEST AND RETALIATION CLAIMS

A. *Limitations on the Rights of the Public Employee*

" 'A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.' "[49]

This classic Justice Holmes quote epitomizes the prevailing view of the First Amendment rights of public employees throughout most of the nineteenth and early twentieth centuries.[50] Throughout that time, courts held that public employees surrendered their fundamental rights upon entering government employment.[51] Working for the government was subject to conditional limitations, and those who accepted employment were precluded from challenging them.[52] The tide began to change, however, toward the middle of the twentieth century.

With the onset of the Cold War and McCarthyism, the Supreme Court was confronted with increasingly suspect demands by public employers, requiring their potential employees "to swear oaths of loyalty to the state and reveal the groups with which they associated."[53] In *Wieman v. Updegraff*,[54] the Court considered the constitutional rights of public employees who violated a state law by refusing to take an oath of loyalty within thirty days of its establishment.[55] A taxpayer sought to enjoin the government from paying salaries to the employees who had refused to take the oath and succeeded in doing so at the state court level.[56] The Supreme Court reversed, however, holding that the oath was unconstitutional because it amounted to the government's "assertion of arbitrary power" and

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[49] Connick v. Meyers, 461 U.S. 138, 143–44 (1983) (quoting McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892)).

[50] *See id.*

[51] *See id.*

[52] *See id.* at 143; *see also McAuliffe*, 29 N.E. at 518 ("The servant cannot complain, as he takes the employment on the terms which are offered him . . . . [T]he city may impose any reasonable condition upon holding offices within its control.").

[53] *Connick*, 461 U.S. at 144.

[54] 344 U.S. 183 (1952).

[55] *See id.* at 185. The employees were faculty and staff members at Oklahoma Agricultural Mechanical College. *Id.* Teachers were often targeted by legislation requiring employees to swear similar oaths of loyalty. *See, e.g.*, *Connick*, 461 U.S. at 144.

[56] *See Wieman*, 344 U.S. at 185–86.

resulted in a violation of the employees's rights.[57] Breaking with the traditional notion that public employees surrender their rights upon accepting government employment, the Court reasoned that employees retain their constitutional rights and suggested that these rights must be balanced against the government's interests.[58] The Court recognized that the government has a great interest in protecting national security but stated that "it must do so without infringing the freedom[]" of its employees and its citizens.[59]

B. Pickering *and the Public Concern Test*

The need to balance the rights of public employees with the rights of their government employers was expressly recognized by the Supreme Court in *Pickering v. Board of Education.*[60] There, Pickering was dismissed from his teaching job for exercising his First Amendment right to free speech by sending a letter to a local newspaper criticizing the Board of Education for its methods of raising revenue and its appropriation of funds.[61] The Board of Education argued that this kind of speech was "detrimental" to the school's ability to operate efficiently[62] and that the letter, which came from one of the school district's own employees, "would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissention' among teachers, administrators, the Board of Education, and the residents of the district."[63] Siding with the Board of Education, the state courts held that Pickering's acceptance of a teaching position obligated him to abstain from speaking in ways that otherwise would have been constitutionally protected were he not employed by the government.[64] The Supreme Court could not agree.

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[57] *See id.* at 191–92.

[58] *See id.* at 188.

[59] *Id.*

[60] 391 U.S. 563 (1968).

[61] *See id.* at 564. Specifically, Pickering argued that too much money was being spent on athletics and not enough on education and that the district had previously tried to keep disapproving teachers quiet to prevent them from openly criticizing the school. *See id.* at 566.

[62] *See id.* at 564.

[63] *Id.* at 567.

[64] *See id.* The state court also noted that, due to his employment with the government, Pickering had a "duty of loyalty to support his superiors." *Id.* at 568.

Though the Court recognized the government's interest in maintaining an efficient and disciplined workplace, it also recognized the right of public employees, speaking as citizens, to engage in free speech.[65] To balance these interests, the Court established what has come to be known as the public concern test. Under this test, public employees are free to speak out as citizens on matters of public concern,[66] provided that the interests of the government employer do not outweigh the public employee's constitutional rights.[67] The Court reasoned that speech regarding a matter of public concern should be protected—even in the employment context—since unhindered debate on matters of public concern is "the core value of the Free Speech Clause of the First Amendment."[68] Because debate on public issues is so "vital to informed decision-making by the electorate," and because public employees will likely be informed regarding matters of public concern, the Court determined that government employees play an important role in public debate, and thus should not be precluded from participating simply because of their government employee status.[69] The Court's decision expanded the rights of public employees by recognizing the right of employees to speak on matters of public concern, as well as the need to balance governmental and individual interests.[70]

The public concern test and *Pickering*'s reasoning were upheld in *Connick v. Myers*,[71] in which the Court noted that

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[65] *See id.* at 568.

[66] Matters of public concern are those that "relate to a matter of political, social, or other concern of the community, rather than merely a personal grievance." Mnyofu v. Bd. of Educ., No. 03-C-8717, 2005 WL 2978735, at *5 (N.D. Ill. Nov. 1, 2005).

[67] *See Pickering*, 391 U.S. at 573. The corollary to this is, of course, that public employees' speech that is *not* of public concern is not protected.

[68] *Id.*; *see also* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

[69] *Pickering*, 391 U.S. at 572.

[70] *See* Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

[71] 461 U.S. 138 (1983). *Connick* involved a government employee, Sheila Myers, who claimed that she was terminated due to her outspoken refusal to accept a transfer and because she created a questionnaire that circulated around the workplace, soliciting fellow public employees' concerns about the office. *See id.* at 140–41. Though it was ultimately determined that Myers's speech was not protected, the Court used *Pickering*'s rationale and balanced Myers's interest in exercising her First Amendment rights with the interests of the government in

Pickering's repeated emphasis that an employee's right to speak on matters of public concern should not be ignored.[72] *Connick* observed that *Pickering*'s recognition of the right of public employees to speak on matters of public concern has been "reiterated in all of *Pickering*'s progeny, reflect[ing] both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter."[73]

Though there has been slight variation in the standard throughout the years, *Pickering* is still relied upon by courts when determining the outcome of First Amendment retaliation claims by public employees. Most recently, the Supreme Court confirmed *Pickering*'s validity in *Garcetti v. Ceballos*,[74] in which the Court retained the essential components of the seminal case's decision.[75] The Court framed the test for public employee retaliation claims as a two-step analysis.[76] The first inquiry is whether the public employee spoke "as a citizen on a matter of public concern,"[77] a phrase borrowed from the original *Pickering* analysis.[78] *Garcetti*, however, elaborated on this first step, holding that a public employee's statements made pursuant to his official duties are not considered speech made *as citizens* for First Amendment retaliation claim purposes.[79] Therefore, if the employee is speaking in his professional capacity *or* if the speech is not a matter of public concern, the employee has no First Amendment retaliation claim.[80] If the employee is speaking as a citizen on a matter of public concern, however, the Court next must move to the second step of the analysis to balance the

running an effective, efficient office. *See id.* at 154. The Court determined that in Myers's case, "the balance is struck for the government." *Id.*

[72] *See id.* at 143.

[73] *Id.* (emphasis omitted) (footnote omitted).

[74] 547 U.S. 410 (2006). In *Garcetti*, Deputy District Attorney Richard Ceballos alleged that, in response to a memo he wrote questioning the accuracy of an affidavit used to secure a warrant, his government employer retaliated against him by transferring him to another courthouse and denying him a promotion. *See id.* at 413–15.

[75] *See id.* at 417–18.

[76] *See id.* at 418.

[77] *Id.*

[78] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[79] *See Garcetti*, 547 U.S. at 421.

[80] *See id.* at 418.

parties' interests and determine whether the government employer was justified in treating the employee differently from any member of the general public.[81] Though the details of retaliation claim analysis have changed somewhat over time, the public concern test and the rationale of *Pickering* have survived four decades of litigation and remain an essential part of First Amendment jurisprudence.

II. EXPANSION OF THE PUBLIC CONCERN TEST

It is well-settled that *Pickering* and the public concern test are applicable to public employees alleging First Amendment retaliation claims against their government employers.[82] It is far less certain, however, whether the public concern test applies outside of the public employment context. Efforts have been made throughout the country to expand the public concern test to other situations, yet these attempts have been met with varying degrees of success.[83] This Part explores the circumstances in which the public concern test might be extended to those who are not in the employ of the government, as well as the reasons why the Sixth Circuit was correct in refusing to apply the public concern test to Shara Jenkins.

A. *Expansion to Circumstances Analogous to the Public Employment Context*

Though First Amendment retaliation claims initially arose in cases brought by public employees, and most cases alleging government retaliation for the exercise of free speech continue to relate to the public employment context,[84] nongovernmental employees are not barred from bringing such an action.[85] The

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[81] *See id.*

[82] *See supra* Part I.

[83] *See* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 586–87 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2445 (2008).

[84] *See* Landstrom v. Ill. Dep't of Children and Family Servs., 699 F. Supp. 1270, 1278 n.17 (N.D. Ill. 1988), *aff'd*, 892 F.2d 670 (7th Cir. 1990) (noting that both parties and the court were unable to find a case in which a private individual brought a First Amendment retaliation claim against a state actor).

[85] *See* Blackburn v. City of Marshall, 42 F.3d 925, 932 (5th Cir. 1995) ("Although the *Pickering/Connick* test arose in the context of public employment, courts have not strictly cabined its application."); *see also* Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005) (citing Van Deelen v. Shawnee Mission Unified Sch. Dist. No. 512, 316 F. Supp. 2d 1052, 1057 (D. Kan. 2004)).

question, then, becomes whether the public concern test should also apply to nongovernmental employees.

Cases involving independent contractors working for the government most closely mirror the retaliation cases brought within the public employment context.[86] It was unsettled whether independent contractors should be treated as public employees for the purposes of retaliation claims until the Supreme Court's decision in *Board of County Commissioners v. Umbehr.* [87] Umbehr entered into an agreement with the county making him the exclusive provider of waste disposal services for six of the county's cities.[88] While under this contract, Umbehr was extremely outspoken at board meetings, wrote numerous letters to local newspapers criticizing the County Commissioners, and even ran, unsuccessfully, for election to the Board.[89] The Board threatened to censor the local newspaper to keep it from publishing any more of his letters and ultimately voted to terminate its contract with Umbehr.[90]

Umbehr brought a retaliation claim, alleging that his termination was motivated by his exercise of free speech when he criticized the Board's practices.[91] Although Umbehr was not a public employee, the Court held that the public concern test should still apply, reasoning that the test would be able to accommodate the slight differences between employees and independent contractors.[92] Just as with employees, the government has an interest in maintaining efficiency, responsiveness, and in having the ability to terminate independent contractors for poor performance.[93] Likewise,

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[86] *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) ("The similarities between government employees and government contractors . . . are obvious.").

[87] *See id.* at 673–674. At the time the Supreme Court granted certiorari, there was a split in the circuit courts over whether independent contractors were protected by the First Amendment if they had been retaliated against for speaking on matters of public concern. *Id.* at 673. The Fifth, Eighth and Tenth Circuits applied the public concern test, while the Third and Seventh Circuits held that independent contractors were not protected from retaliation for exercising their First Amendment freedoms. *Id.*

[88] *See id.* at 671.

[89] *See id.*

[90] *See id.* Umbehr, however, was able to renegotiate a similar contract with five out of the six cities he served under the county contract. *Id.*

[91] *See id.* at 671–72.

[92] *See id.* at 678.

[93] *See id.* at 674.

independent contractors are similar to employees in that they " 'are often in the best position to know what ails the agencies for which they work,' " and therefore, might play an important role in debate on public issues.[94] Also, the threat of losing a contract is similar to the threat of losing one's job and is certainly enough to "chill" an independent contractor from speaking about these ailments, thus hindering free public debate.[95] As a result of these similarities, the Court applied the public concern test but noted that the test should be adjusted to recognize that the government's interests were no longer the interests of an employer, but rather the somewhat less weighty interests of one that has hired an independent contractor.[96]

The Court recently reached a similar decision in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*.[97] In this case, the Court considered whether to apply the public concern test to a private high school football program that belonged to a state-run athletic association.[98] After entering an agreement to abide by the association's rules—including one prohibiting the use of "undue influence" when recruiting middle school students—the high school's football coach sent prospects recruiting letters containing coercive language.[99] The Court analogized the relationship between the athletic association and the coach with that of a government employer and a public employee, reasoning that the association's interest in enforcing its rules might, at times, outweigh the speech of its voluntary participants.[100] Therefore, the Court used a standard practically identical to the *Pickering* test, noting that if the "coach in this case was 'speaking as [a] citizen[] about matters of public concern,' [the association] can similarly impose only those

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[94] *Id.* (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994)).

[95] *See id.*

[96] *See id.* at 673.

[97] 551 U.S. 291 (2007).

[98] *See id.* at 299–300.

[99] *See id.* at 294. The letters inviting the boys to spring practice sessions urged that "getting involved as soon as possible would definitely be to [their] advantage," and was signed "Your Coach." *Id.*

[100] *See id.* at 299.

conditions on such speech that are necessary to managing an efficient and effective state-sponsored high school athletic league."[101]

As both *Umbehr* and *Brentwood Academy* demonstrate, the public concern test can be applied outside of the public employment context.[102] Because the plaintiffs' positions in each case required them to work for and represent the government entity and to abide by its rules, the Court found that it was appropriate to apply a test that treated the plaintiffs differently than ordinary citizens who might enjoy much broader rights.[103] Accordingly, *Pickering* and the public concern test were expanded to take the government's interests into account in cases in which plaintiffs were in positions analogous to that of a public employee.

B. The Failed Expansion of the Public Concern Test to Private Individuals

The Sixth Circuit in *Jenkins* correctly determined that the public concern test should not apply to Shara Jenkins or to private citizens generally. Though it has been established that this standard can apply outside of the public employment context, there have been very few cases that attempted to apply the public concern test to private individuals. These few cases have been predominantly at the district court level,[104] with

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[101] *Id.* at 300 (citation omitted) (quoting Garcetti v. Ceballos, 547 U.S. 410, 411 (2006)). The Court ultimately determined that, though this was speech of public concern, the state-run association's interest in ending "hard-sell," exploitative tactics directed at children outweighed the coach's interest in using such methods. *See id.* Therefore, "the First Amendment does not excuse Brentwood from abiding by the same anti-recruiting rule that governs" other voluntary participants in the athletic association. *Id.*

[102] *Pickering* and the public concern test have also been applied to nongovernment employees in other situations. *See, e.g.*, Smith v. Cleburne County Hosp., 870 F.2d 1375, 1382 (8th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989) (applying the public concern test to a doctor seeking medical-staff privileges at a public hospital); Forras v. Andros, 470 F. Supp. 2d 283, 290 (S.D.N.Y. 2005) (discussing the public concern test as applied to a volunteer firefighter retaliated against for criticizing working conditions at Ground Zero after the September 11th terrorist attacks).

[103] *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675–76; *see also Brentwood Acad.*, 551 U.S. at 299–300.

[104] *See, e.g.*, Mnyofu v. Bd. of Educ., No. 03-C-8717, 2005 WL 2978735, at *5 (N.D. Ill. Nov. 1, 2005) (applying the public concern test to students' parents who had no other connection to the public school); Clark v. W. Contra Costa Unified Sch. Dist., No. C-98-4884-RB, 2000 WL 336382, at *8 (N.D. Cal. Mar. 15, 2000) (same).

limited support in the circuit courts.[105] The fatal flaw in the district court decisions is their use of *Pickering*'s rationale, which is specific to the public employment context, to support an extension of the public concern test to private individuals.

Given the fundamental differences between private individuals and public employees, *Pickering* and the public concern test should not be applied to private citizens for a number of reasons. First, the government does not have as great an interest in controlling private citizen speech as it does in controlling the speech of public employees since private citizens' speech will have a far less direct and substantial effect on the government's ability to maintain an efficient office. The aim in *Pickering* was to balance employees' rights with the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[106] Thus, this rationale should not apply to private individuals who will have little effect on how the government performs its public services.

Second, the public concern test is not needed in order to permit private individuals to speak. As will be discussed, private citizens enjoy broader constitutional rights than public employees.[107] The public concern test was established to expand the rights of employees who were thought to have surrendered fundamental rights upon accepting government employment, not to restrict the essentially unburdened fundamental rights of private citizens. As the Sixth Circuit noted in *Jenkins*, "[t]he public concern test was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens."[108]

Lastly, private citizens do not share any of the characteristics of independent contractors that justified an extension of the public concern test to the latter group. As discussed above, the only reason courts have seen it fit to apply the public concern test to independent contractors is that they are in relationships with the government analogous to the public

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[105] *But see* Landstrom v. Ill. Dep't of Children and Family Servs., 892 F.2d 670, 679–80 (7th Cir. 1990) (affirming the lower court's decision to apply the public concern test to private individuals).

[106] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[107] *See infra* Part III.

[108] Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 586 n.1 (quoting Van Deelen v. Johnson, 497 F.3d 1151, 1156 (10th Cir. 2007)), *cert. denied*, 128 S.Ct. 2445 (2008).

employment context.[109] As private citizens have not entered into any contractual agreements with the government, the rationale in cases like *Umbehr* and *Brentwood Academy* should not apply to private citizens any more so than the rationale in *Pickering*.

Accordingly, the *Jenkins* Court properly found that as a private citizen, Shara Jenkins should not be subject to the public concern test when analyzing her First Amendment retaliation claim.

III. POLICY CONSIDERATIONS

While the Sixth Circuit in *Jenkins* correctly held that the public concern test does not apply to private individuals,[110] it failed to adequately address Rock Hill's policy concerns in coming to its decision. Rock Hill argued that, by failing to apply the public concern test to private individuals, the court would open the floodgates of federal litigation.[111] This Part examines Rock Hill's contention further, discussing the overly liberal standard adopted by the court due to its inattention to policy, as well as its failure to properly apply alternatives to the public concern test in order to limit litigation. Had the Sixth Circuit demanded a more stringent causal connection or an opportunity for the defendant to prove that it would have taken the same action regardless of the plaintiff's speech, the court could have adopted a standard that succeeded in reducing the potential for excessive litigation while remaining consistent with Supreme Court precedent.

A. *Potential Problems*

Rock Hill expressed valid concerns regarding the potential for excessive federal litigation, and its position is by no means frivolous or unprecedented. Similar concerns were expressed by district courts in *Landstrom v. Illinois Department of Child & Family Services*[112] and *Clark v. West Contra Costa Unified School District*,[113] both of which adopted the public concern test for private individuals.

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[109] *See supra* Part II.A.
[110] *See Jenkins*, 513 F.3d at 587.
[111] *See* Final Brief of Defendants-Appellees at 17–18, *id.*, 2007 WL 4266667.
[112] 699 F. Supp. 1270, 1279 (N.D. Ill. 1988), *aff'd*, 892 F.2d 670 (7th Cir. 1990).
[113] No. C-98-4884-CRB, 2000 WL 336382, at *9 (N.D. Cal. Mar. 15, 2000).

The decision to utilize the public concern test in these cases was not merely a misapplication of the public concern test, nor a display of the district courts' ignorance regarding *Pickering*'s rationale. Rather, it was a deliberate choice made to limit potentially excessive retaliation claim litigation in the federal courts. Prior to *Landstrom*, retaliation claims were reserved for public employees and those in analogous relationships with the government, despite there being no express limitation to these types of relationships.[114] As a result, it was a legitimate concern that federal courts could be overwhelmed by litigation caused by *Landstrom*'s holding, which allowed retaliation claims to be brought by private citizens for the first time and effectively created a new cause of action.

Another reason for the *Landstrom* and *Clark* Courts' decisions to adopt a limiting principle to reduce litigation is the expansive definition of free speech and free expression under the First Amendment. The wide range of speech protected by the First Amendment is especially relevant when considered in relation to the first element of a retaliation claim: that the plaintiff must engage in constitutionally protected activity.[115] The *Clark* Court noted that "nearly all activity is expressive conduct of some kind . . . ."[116] Likewise, nearly all speech is free speech, as observed by the Sixth Circuit in *Jenkins*.[117] Speech is generally constitutionally protected, and only a limited number of categories of speech may fall outside the bounds of the Constitution's protection.[118] These categories include defamation,[119] obscenity,[120] and "fighting words,"[121] and are not likely to overlap with retaliation cases to the point of providing

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[114] *See* Blackburn v. City of Marshall, 42 F.3d 925, 932 (5th Cir. 1995).

[115] *See Jenkins*, 513 F.3d at 585.

[116] *Clark*, 2000 WL 336382, at *9.

[117] *See Jenkins*, 513 F.3d at 588.

[118] *See id.*

[119] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 753–55 (1985).

[120] *See* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

[121] Virginia v. Black, 538 U.S. 343, 359 (2003) ("[F]ighting words—'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction'—are generally proscribable under the First Amendment." (quoting Cohen v. California, 403 U.S. 15, 20 (1971))).

an effective limitation on the amount of litigation produced by rejecting the public concern test for private citizens. As a result, the *Clark* Court reasoned that failure to adopt some limiting principle "would permit any individual who does not work for the government to bring a federal suit whenever a state actor mistreats him or her as a result of any speech or expressive conduct."[122] Absent some limitation, the sheer number of potential private citizen suits could disrupt the efficient and effective management of government to the same extent as public employee speech since "[e]very discretionary decision made by any government official or actor would give rise to a federal cause of action."[123]

B. The Need for a Limiting Principle

Although the Supreme Court has not yet decided whether a limiting principle should be employed to reduce the potential for excessive First Amendment retaliation suits by private citizens, the Court previously recognized this need in other contexts. For example, in *Wilkie v. Robbins*,[124] a private landowner Robbins attempted to assert a retaliation claim against government actors, arguing that they retaliated against him because of his refusal to grant the government an easement over his property.[125] In considering whether to allow this cause of action, the Court noted that Robbins's claim did not exactly resemble First Amendment retaliation claims of public employees.[126] On one hand, public employee retaliation claims are limited by the courts' use of the public concern test and their consideration of proof tending to show that the government action was justified on other grounds.[127] Contrarily, there is no limiting principle in an "action to redress retaliation against those who resist

[122] Clark v. W. Contra Costa Unified Sch. Dist., No. C-98-4884-CRB, 2000 WL 336382, at *9 (N.D. Cal. Mar. 15, 2000).

[123] *Id.*

[124] 551 U.S. 537 (2007).

[125] *See id.* at 545. Robbins claimed that his Fifth Amendment constitutional "right to exclude the Government from his property and to refuse any grant of a property interest without compensation" had been violated. *Id.* at 548. The right asserted by Robbins is guaranteed under the Fifth Amendment, which states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[126] *See Robbins*, 551 U.S. at 555–56.

[127] *See id.* at 558 n.10.

Government impositions on their property rights."[128] This led the Court to fear that allowing such an unrestricted cause of action "would invite claims in every sphere of legitimate governmental action affecting property interests."[129]

Whereas a limiting principle is already incorporated into public employees' First Amendment retaliation claims through the use of the public concern test and the government's ability to demonstrate that it had independent grounds for its allegedly retaliatory behavior, no such limit was placed on the Fifth Amendment retaliation claim brought by Robbins. As a result, the Court found that any private citizen would be able to bring such a claim, leading to an "enormous swath of potential litigation."[130] Though the potential for excessive litigation does not necessarily demand that a cause of action be rejected,[131] the Court grounded its decision to deny Robbins's claim on the likely inundation of federal courts with similar claims due to "the elusiveness of a limiting principle for Robbins's claim."[132]

By analogy, a similar argument can be made for First Amendment retaliation claims brought by private individuals. As determined above, the public concern test should not be applied to private citizens, thus eliminating one of the limiting principles cited by the *Robbins* Court. Because of the similarity between First and Fifth Amendment retaliation claims with regard to their lack of a well-defined limiting principle, and given the Supreme Court's holding in *Robbins*, it is likely that the Court would recognize the need for a limiting principle to reduce the potentially "enormous swath" of litigation brought by private individuals in First Amendment retaliation claims as well.[133]

C. The Third Element as an Alternative Limiting Principle

Though policy precludes the *Jenkins* Court from adopting the public concern test as its limiting principle, there are other means available to reduce the amount of litigation that may arise out of private citizens' retaliation suits. In fact, the Sixth Circuit briefly touched on one of these methods. The

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[128] *Id.* at 561.
[129] *Id.*
[130] *Id.*
[131] *See id.* at 577 (Ginsburg, J., concurring in part and dissenting in part).
[132] *Id.* at 561 n.11 (majority opinion).
[133] *Id.* at 561.

Jenkins Court determined—in hurriedly disregarding Rock Hill's policy arguments—that the third element of a retaliation claim could sufficiently prevent disputes between individuals and government actors from frequently becoming First Amendment lawsuits.[134]

As articulated and applied in *Jenkins*, however, the remaining elements of a retaliation claim are not an effective safeguard against an inundation of the federal courts with private citizen suits.[135] According to *Jenkins*, the third element of a retaliation claim requires that the adverse action by the government be "motivated at least in part as a response to the exercise of the plaintiff's constitutional rights."[136] The *Jenkins* Court of appeals seemed to suggest that application of this element would limit the amount of cases that could be brought by private individuals by weeding out the claims that lacked a sufficient causal connection between the plaintiff's speech and the defendant's action.[137]

While sound in theory, it is hard to see how the language of the third element could possibly succeed in reducing litigation. As articulated by *Jenkins*, the third element requires a finding of such a minimal causal connection that it destroys any chance of effectively limiting litigation by private individuals. This element requires merely that the adverse action be motivated "*at least in part*" by the individual's exercise of a constitutionally protected activity.[138]

This minimal causal standard is both ineffective and unsupported by precedent. The Supreme Court announced the standard to be used when examining causation in government retaliation claims in an earlier case, *Mt. Healthy City School District Board of Education v. Doyle*.[139] There, Doyle, the plaintiff, argued that he was dismissed from his teaching position in the Mt. Healthy School District for exercising his First Amendment rights by criticizing his school on the radio.[140] The

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[134] Jenkins v. Rock Hill Local Sch. Dist. 513 F.3d 580, 588 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2445 (2008).

[135] *See id.*

[136] *Id.* at 586 (quoting Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998)).

[137] *See id.* at 588.

[138] *Id.* at 586 (quoting *Bloch*, 156 F.3d at 678) (emphasis added).

[139] 429 U.S. 274, 287 (1977).

[140] *See id.* at 282–83. The decision to fire Doyle was made about one month after his call to the radio station. *Id.* at 282. He had, however, also been recently involved

Supreme Court agreed with the court below in that this constitutionally protected "conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' " in the school's decision to fire Doyle.[141]

The "substantial factor" or "motivating factor" test for retaliation claims has continued to be the applicable standard used by the Supreme Court in First Amendment retaliation suits. In *Board of Education v. Pico*, the Supreme Court elaborated on the meaning of "substantial factor."[142] There, the Court noted that the substantial factor standard requires a significant causal connection between the constitutionally protected activity and the government's adverse action.[143] Moreover, the protected conduct must be so decisive that, in its absence, the government would have taken the opposite action.[144] The need for finding this significant causal connection in retaliation cases was reemphasized in *Umbehr*. There, the Court found that the individual must engage in constitutionally protected conduct that ultimately becomes a "substantial or motivating factor" in the government's decision to retaliate.[145] Following the Supreme Court's lead, the Sixth Circuit has also adopted the substantial or motivating factor standard for the third element of retaliation claims, focusing on whether the government action was motivated in substantial part by the individual's constitutionally protected conduct.[146]

In the face of this precedent, the *Jenkins* Court's choice to use the phrase "at least in part," rather than "substantial" or "motivating factor," when describing the causal link between the first and second elements is not merely a matter of semantics. In spite of the Supreme Court and the Sixth Circuit's adoption of the substantial or motivating factor standard, the *Jenkins* Court deliberately chose a less stringent causal standard in an attempt to make it easier for private citizen plaintiffs to bring First

in an altercation with another teacher, referred to students as "sons of bitches," and made an obscene gesture to two female students for their failure to obey his directions. *Id.* at 281–82.

[141] *Id.* at 287. The case was remanded to examine whether the school district would have taken the same action absent Doyle's criticism on the radio. *See id.*

[142] 457 U.S. 853, 871 n.22 (1982).

[143] *See id.*

[144] *See id.*

[145] Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).

[146] *See* Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000).

Amendment retaliation claims.[147] In announcing its version of the elements of a retaliation claim, the *Jenkins* Court cites to a previous Sixth Circuit case, *Bloch v. Ribar*.[148] Though *Bloch* does utilize the "at least in part" standard for causation, it does not cite any supporting cases from which this minimal causal standard originated.[149] Rather, the *Bloch* Court attempted to support its decision to use the "at least in part" language by citing *Mt. Healthy*,[150] which in fact requires a more significant causal connection, and is actually one of the earliest cases to use the substantial or motivating factor standard.[151]

The decision to use a minimal causal standard cannot be justified as a method by which the *Bloch* Court intended to make it easier for private plaintiffs to bring retaliation claims; quite the opposite, as the *Bloch* Court did not discuss this, or any other, policy in making its decision. Instead, the *Bloch* Court supported its decision by analogizing its case to another private citizen retaliation suit—one in which the substantial or motivating factor test was used.[152] Due to the fact that *Bloch* cites only cases that use the substantial or motivating factor standard and that it fails to name any policy reasons for its change to a less stringent causal standard, the Sixth Circuit recognized the need to clarify the standard in *Mattox v. City of Forest Park*.[153] There, the court reiterated the elements of a retaliation claim under *Bloch*, including the minimal causal connection but subsequently noted that the real "issue is whether the adverse action taken against plaintiffs by defendants was

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[147] *See* Jenkins v. Rock Hill Local Sch. Dist. 513 F.3d 580, 588 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2445 (2008).

[148] *Id.* at 585–86.

[149] Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998).

[150] *See id.*

[151] *See supra* text accompanying notes 139–141.

[152] *See Bloch*, 156 F.3d at 680–81 (citing Barrett v. Harrington, 130 F.3d 246, 260–63 (6th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998)). In *Barrett*, the plaintiff was a private citizen who had a judgment rendered against him by Judge Harrington. *See Barett*, 130 F.3d at 249. Barrett openly criticized the judge and began "investigating" her, leading to her retaliating against him by telling the media that he was stalking her. *See id.* at 263. The court used a standard that called for the finder of fact to determine "whether the action taken was because he engaged in the . . . protected conduct[, which] must be a 'substantial factor' or a 'motivating factor' " in the government's decision to act. *Id.* at 262.

[153] 183 F.3d 515 (6th Cir. 1999).

motivated in substantial part by the protected activity of the plaintiffs."[154]

The *Jenkins* Court should have used the substantial or motivating factor standard espoused by the Supreme Court and a great deal of circuit court cases. If it had, it would have been possible to adopt a limiting principle which remained consistent with precedent, while simultaneously taking Rock Hill's policy considerations into account.

D. Independent Reasons for the "Retaliatory" Action

The defendant's ability to prove that he would have taken the same action absent the plaintiff's exercise of his constitutional rights is an additional limiting principle that the *Jenkins* court failed to properly apply. Use of this limiting principle is supported by *Mt. Healthy*, in which the Supreme Court considered alternative reasons for the defendant's action in addition to its consideration of the three traditional elements of a retaliation claim.[155] There, the Court reasoned that the court below should have determined whether the defendant school board "would have reached the same decision . . . even in the absence of the protected conduct."[156] Supreme Court precedent also shows that the government actor's malice or spite does not necessarily render his actions unconstitutionally retaliatory.[157] As long as there are valid, independent grounds for the defendant's actions, a plaintiff's First Amendment retaliation claim may be defeated.[158]

Though the Court has noted that this approach has been taken because any alternative "approach would have frustrated an employer's legitimate interest in securing a competent workforce,"[159] it is illogical to limit the defendant's ability to prove independent grounds for his actions solely to public employment cases. First, it is a limiting principle that could successfully eliminate claims of private individuals in which the government is acting with a legitimate, constitutional purpose.

[154] *Id.* at 520–21 (emphasis added).

[155] *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977).

[156] *Id.* at 287.

[157] *See* Wilkie v. Robbins, 551 U.S. 537, 558 n.10 (2007).

[158] *See id.*

[159] *Id.*

Second, like the third element of retaliation claims—which is clearly applicable to private citizen suits—allowing the defendant to demonstrate an independent purpose also allows him to demonstrate that the plaintiff's speech was not the substantial or motivating factor for his decision to act.

While the *Jenkins* Court mentions the possibility of a defendant having an independent reason for taking the allegedly retaliatory action in the abstract,[160] it does not consider this possibility when applying the law to Jenkins's particular case. Rather, after holding that Jenkins satisfied all of the elements of a retaliation claim, the court concluded that the district court erred in granting summary judgment to the defendants.[161] According to its own explanation of the law, however, Rock Hill would have rightfully been entitled to summary judgment if it took the same actions regardless of Jenkins's exercise of free speech.[162]

Even viewing the facts in favor of the plaintiff, it is impossible to get around the fact that Jenkins illogically made demands that Rock Hill staff administer Shanell's medicine because she no longer wanted to go to the the School to administer it herself, while simultaneously refusing to sign the medical forms required to authorize the School to take the demanded action.[163] Also, once called, Child Services conducted its own, four-month-long investigation, and brought its own case against Jenkins for medical neglect.[164] In light of these facts, the Sixth Circuit should have at least considered whether Rock Hill had independent grounds for contacting Child Services—namely, protecting Shanell's welfare—before determining that the district court erred in granting summary judgment.

The *Jenkins* Court should have considered whether Rock Hill was able to demonstrate an independent reason for calling Child Services. Had it done so, it would have stayed true to its own

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[160] *See* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 586 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2445 (2008).

[161] *See id.* at 588–89.

[162] *See id.* at 586 ("[I]f the defendant can show he would have taken the same action in the absence of the protected activity, he is entitled to summary judgment.").

[163] *See* Jenkins v. Bd. of Educ., 463 F. Supp. 2d 747, 752 (S.D. Ohio 2006), *aff'd in part, rev'd in part sub nom.* Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580 (6th Cir. 2008).

[164] *See id.* at 751.

articulation of the law of First Amendment retaliation claims, while simultaneously adopting a second limiting principle to eliminate claims in which the government has a legitimate, constitutional purpose for acting.

CONCLUSION

Though retaliation claims originated and are most commonly brought within the public employment context, private citizens are also permitted to bring this cause of action.[165] The law governing these two types of retaliation claims, however, is not identical. While public employees' speech must relate to a matter of public concern to be protected, no such limitation exists for retaliation claims brought by private individuals.[166] As a result, as the retaliation claim becomes more and more popular amongst private individuals, there is a legitimate policy concern that such an unrestricted cause of action could result in the federal courts being inundated with First Amendment retaliation claims brought by private citizens.

The Sixth Circuit in *Jenkins* rightfully concluded that the public concern test does not apply to private individuals but too hastily disregarded the policy concerns which result from its rejection of the test. The *Jenkins* Court should have addressed these concerns by applying limiting principles to help curb the potential litigation that could come from private citizen retaliation suits, such as the use of a more stringent causal standard, and by allowing the defendant to prove independent grounds for his allegedly retaliatory actions, both of which are supported by Supreme Court precedent. By failing to properly apply either of these limiting principles and by failing to acknowledge the policy considerations associated with its holding, the *Jenkins* Court improvidently held that the district court erred in its grant of summary judgment to Rock Hill.

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[165] *See Jenkins*, 513 F.3d at 583, 585.
[166] *See id.* at 587–88.