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THE CONNICK / GARCETTI SPLIT: IS PUBLIC EMPLOYEE ASSOCIATION A MATTER OF PUBLIC CONCERN?

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I. INTRODUCTION

Of the nearly 150 million adults currently employed in the United States[1], over 21 million are employed in the public sector.[2] Public sector employees are workers employed by the U.S. federal government, a state, a political subdivision of a state, or an Indian tribe.[3] By contrast, private sector employees are employed by non-governmental entities.[4] In 2020, over seven million public sector employees exercised their associational right to join a labor union.[5] The union membership rate is highest in local governments, which employ workers in heavily unionized occupations, such as police officers, firefighters, and teachers.[6] These unions, the associational activity they exercise, and the historic labor and employment laws they have fought for in consort with allies in the private sector, are responsible for many of the workplace standards workers cherish today, such as the eight-hour workday[7], the forty-hour workweek[8], a minimum wage[9], time-and-a-half overtime pay[10], and a general prohibition on child labor[11].

The U.S. Supreme Court's decisions in *Connick v. Myers*[12] and *Garcetti v. Ceballos*[13] have left the U.S. Circuit Courts of Appeals in

* This article would not be possible without the assistance of my friends, Paul Rando and Lisa Rosenof, and my wife, Emily Wishart. Thank you all.

1. News Release, U.S. Bureau of Labor Statistics, Union Members — 2021, USDL-22-0079 (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf.

2. *Id.* at tbl.3.

3. *See, e.g.*, 49 U.S.C. § 5102(10).

4. *See, e.g.*, U.S. Equal Employment Opportunity Commission, Characteristics of Private Sector Employment, (Jan. 29, 2004), https://www.eeoc.gov/special-report/characteristics-private-sector-employment#intro.

5. News Release, U.S. Bureau of Labor Statistics, Union Members — 2020, USDL-21-0081 (Jan. 22, 2021), https://web.archive.org/web/20210208214526/https://www.bls.gov/news.release/pdf/union2.pdf.

6. *Id.*

7. 29 U.S.C § 207.

8. *Id.*

9. 29 U.S.C § 206.

10. 29 U.S.C § 207.

11. 29 U.S.C § 212.

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

13. Garcetti v. Ceballos, 547 U.S. 410 (2006).

disarray on how to apply the law to public sector employee claims of infringed First Amendment associational rights. There exists no consensus on whether the First Amendment protects state employees' associational activity in cases where state employees are retaliated against for exercising their associational rights. Consequently, individuals in public sector professions go about their daily work and union activity with their First Amendment associational rights in an impermissible state of limbo. In the sixteen years since the U.S. Supreme Court decided *Garcetti*, the circuit courts have reached a tripartite split in determining how to apply the *Connick/Garcetti* framework to state employee associational retaliation claims.

This Note examines how the circuit split developed, the current state of the split, and how the Supreme Court may resolve the split in the future. Additionally, this Note considers the Supreme Court's recent decision in *Janus v. AFSCME*[14] as the potential bellwether needed to determine how the Court will decide the issue, with particular attention paid to the recent shifts in the Court's composition since *Janus* was decided. Section II of this Note discusses the background of the circuit split. Part A of Section II provides historical context of the circuit split. Part B of Section II explores the circuit split itself. Specifically, the Sixth Circuit's decision in *Boals v. Gray*,[15] the Second Circuit's decision in *Cobb v. Pozzi*[16] the Eleventh Circuit's decision in *Hatcher v. Board Of Public Educaction & Orphanage*,[17] the Third Circuit's decision in *Palardy v. Township of Millburn*,[18] the Ninth Circuit's decision in *Hudson v. Craven*,[19] and the Tenth Circuit's decision in *Merrifield v. Board of County. Commissioners*[20] are examined. Part C of Section II briefly discusses *Janus*. Finally, this Note will conclude in Section III by urging the Supreme Court to resolve the circuit split and providing guidance as to what that resolution should be.

II. BACKGROUND

Before analyzing the circuit split at issue or the Supreme Court's potential solution to it, some background of how the split developed must be examined. First, Part A describes the historical context for the circuit split, and the cases that the Court relied on in deciding *Connick*

14. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).
15. Boals v. Gray, 775 F.2d 686 (6th Cir. 1985).
16. Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2003).
17. Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546 (11th Cir. 1987).
18. Palardy v. Twp. of Millburn, 906 F.3d 76 (3d Cir. 2018).
19. Hudson v. Craven, 403 F.3d 691 (9th Cir. 2005).
20. Merrifield v. Bd. of Cnty. Comm'rs, 654 F.3d 1073 (10th Cir. 2011).

and *Garcetti*. Then, Part B examines the circuit split, focusing on the majority group, minority group, and the unique approaches of the circuit courts. The Sixth Circuit's decision in *Boals v. Gray* and the Second Circuit's decision in *Cobb v. Pozzi* serve as the representative cases for the majority group, while the Eleventh Circuit's decision in *Hatcher v. Bd. of Pub. Educ. & Orphanage* and the Third Circuit's decision in *Palardy v. Township of Millburn* highlight the arguments and conclusions that the Circuit Courts have developed in the minority group. The Ninth Circuit's decision in *Hudson v. Craven* and the Tenth Circuit's decision in *Merrifield v. Board of County. Commissioners* are considered as unique approaches to the circuit split. Finally, Part C discusses the Supreme Court's recent decision in *Janus v. AFSCME*.

A. Historical Context

The United States Constitution enshrines the freedoms of speech and assembly in the First Amendment.[21] Under the First Amendment, the federal government may not abridge "the freedom of speech" or "the right of the people peaceably to assemble."[22] Further, the Fourteenth Amendment to the U.S. Constitution decrees that "no state may deprive any person of life, liberty, or property without due process of law."[23] While the First and Fourteenth Amendments do not explicitly state that the right to association is also constitutionally protected, the Supreme Court found in *NAACP v. Ala. ex rel. Patterson* that the freedom of association is "inherent" in both the First and the Fourteenth Amendments.[24] The Court wrote that "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the due process clause of the Fourteenth Amendment, which embraces freedom of speech."[25] "Whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters" is "immaterial" to the protection and rights afforded to the associational activity.[26]

The Supreme Court considered the intersection of the First Amendment and public employment in the seminal case *Pickering v. Board of Education*.[27] In a disagreement between a dismissed teacher

21. U.S. CONST. amend. I.
22. *Id.*
23. U.S. CONST. amend. XIV.
24. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).
25. *Id.*
26. *Id.* at 460–61.
27. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

and the Board of Education that formerly employed him, the Court weighed the conflicting claims of First Amendment protection and the "need for orderly school administration . . . ."[28] The Board of Education allegedly dismissed the teacher for writing and publishing a letter criticizing the Board's allocation of school funds and the Board's refusal to inform the school district's taxpayers of the real reasons why additional tax revenues were being sought.[29] The Board of Education claimed "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education . . . ."[30] The dismissed teacher argued that, for public statements of teachers to be actionable, the statements must be made "with knowledge that they were false or with reckless disregard of whether they were false or not."[31] The teacher claimed they were protected speech if the statements were not false or reckless, and the teacher's dismissal was held unconstitutional.[32]

Due to "the enormous variety of factual situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal," the Court deemed it either inappropriate or unfeasible to issue a "general standard against which all such statements may be judged."[33] Instead, the Court indicated "some of the general lines along which an analysis of [conflicting claims of First Amendment protection and the need for orderly administration] ought to run."[34] In doing so, the Court elucidated what is now commonly referred to as the *Pickering* test. The Court considered the subject matter of the teacher's letter as *legitimate public concern*, weighing (1) the wider public's interest in having free and unhindered debate on matters of public importance, and (2) the threat of dismissal from public employment as a potent means of inhibiting the free speech of a citizen commenting on matters of public importance.[35] Finding no proof of false statements knowingly or recklessly made by the dismissed teacher, and considering wider public policy concerns, the Court found that the "teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from

28. *Id.* at 569.

29. *Id.* at 564.

30. *Id.* at 569.

31. *Id.* at 569 (parentheses omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

32. *Id.* at 565.

33. *Id.* at 569.

34. *Id.*

35. *Id.* at 569–74.

public employment."[36]

The Court's decision in *Pickering* was re-affirmed in *Smith v. Arkansas State Highway Employees*.[37] However, in considering the claim of an aggrieved state employee, the Court expanded the decision in *Pickering* by holding that, although "the First Amendment is not a substitute for the national labor relations laws[,]" public employees are protected from retaliation when they engage in their First Amendment right to association.[38] While the Court found that the First Amendment right to association provides no "affirmative obligation on the government to listen, respond, or in this context, recognize the association[,]" the *Smith* Court explicitly recognized the right to association as falling under the First Amendment protections umbrella established by *Pickering*.[39]

The intersection of the First Amendment and public employment was further developed by the Supreme Court in *Connick v. Myers.*[40] Returning to the *Pickering* conflict of balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," the Court considered whether the First and Fourteenth Amendments prevented the discharge of Myers, a state employee, for circulating a questionnaire concerning internal office affairs.[41] The Court began by revisiting the central holding of *Pickering* and affirming that *Pickering*'s subject was "a matter of legitimate public concern" on which "free and open debate is vital to informed decision-making by the electorate."[42]

The Court found in *Connick* that, if the speech in question does not constitute speech on a matter of public concern, the reasons for employee discharge are irrelevant.[43] Where speech "cannot be fairly considered as relating to any matter of [public] concern . . . , government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[44] For example, "[w]hen a government employee personally confronts his immediate superior, the employing agency's

36. *Id.* at 574–75.
37. Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464–65 (1979).
38. *Id.*
39. *Id.* at 465.
40. Connick v. Myers, 461 U.S. 138 (1983).
41. *Id.* at 140 (alteration in original).
42. *Id.* at 145.
43. *Id.* at 146.
44. *Id.*

institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered."[45] Whether "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record" presented to the court.[46] Speech generally involves a matter of public concern if it affects the social, political, or general well-being of a community.[47] Where employee speech addresses a matter of public concern, the *Pickering* balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[48] However, finding that "Myers' questionnaire touched upon matters of public concern in only a most limited sense[,]" the Court found that Myers' speech was "most accurately characterized as an employee grievance concerning [an] internal office policy."[49] Myers' dismissal therefore did not violate the First Amendment under the *Pickering* analysis.[50]

Two decades after *Connick* was decided, the Supreme Court revisited the intersection of the First Amendment and state employment in *Garcetti v. Ceballos*.[51] The Court considered "whether the First Amendment protects [state employees] from discipline based on speech made pursuant to the employee's official duties."[52] Ceballos, then deputy district attorney for the Los Angeles County District Attorney's Office, wrote a memorandum recommending the dismissal of a criminal case.[53] After submitting the memorandum to his supervisors, Ceballos claimed that "he was subjected to a series of retaliatory employment actions" and subsequently filed suit in the United States District Court for the Central District of California.[54]

"Noting that Ceballos wrote his memo pursuant to his employment duties," the court "concluded he was not entitled to First Amendment protection for the memo's contents."[55] However, on appeal, the U.S. Court of Appeals for the Ninth Circuit relied on the framework established by the Supreme Court's decisions in *Pickering* and *Connick*, finding that Ceballos' "allegations of wrongdoing in the

45. *Id.* at 153.
46. *Id.* at 147–48.
47. *Id.* at 146.
48. *Id.* at 150.
49. *Id.* at 154.
50. *Id.*
51. Garcetti v. Ceballos, 547 U.S. 410 (2006).
52. *Id.* at 413.
53. *Id.* at 414.
54. *Id.* at 415.
55. *Id.*

memorandum constituted protected speech under the First Amendment."[56] The Ninth Circuit "determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was inherently a matter of public concern" and protected by the First Amendment."[57]

The Supreme Court then granted certiorari to consider whether the First Amendment protects a government employee's speech expressed strictly pursuant to the duties of employment. The Court began its analysis by affirming *Pickering* and *Connick* by ruling that "public employees do not surrender all their First Amendment rights by reason of their employment" and "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[58] The Court described the *Pickering* and *Connick* cases and their progeny as establishing a two-part test for analyzing cases where dismissed state employees claim First Amendment protections.[59] First, the court must decide whether the employee spoke as a citizen on a matter of public concern.[60] "If the answer is no," then the employee did not speak as a citizen on a matter of public concern, and the employee "has no First Amendment cause of action based on their employer's reaction to the speech."[61] "If the answer [to the first question] is yes," the court must then determine "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[62]

In determining the first element of the test—whether Ceballos spoke as a citizen on a matter of public concern when he wrote his memorandum—the Court found that the controlling factor, in addition to the two factors considered by *Pickering* and *Connick*, was whether Ceballos' expression was "made pursuant to his duties as [an employee]."[63] Ceballos speaking within his capacity as a prosecutor, as a public employee, "distinguishes Ceballos' case from those in which the First Amendment [traditionally] provides protection against discipline."[64] The Court held that where "public employees make statements pursuant to their official duties, the employees are not

56. *Id.*

57. *Id.* at 416.

58. *Id.* at 417.

59. *See* Rankin v. McPherson, 483 U.S. 378 (1987); United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

60. *Garcetti*, 547 U.S. at 418.

61. *Id.*

62. *Id.*

63. *Id.* at 421.

64. *Id.*

speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[65] In doing so, the Court explicitly rejected the idea that the First Amendment shields the expressions employees make pursuant to their professional duties from discipline, even if those expressions are about a matter of public concern.[66] As such, under *Garcetti*, the First Amendment will not protect public employees from retaliation in the workplace where their expressions are the cause of adverse action.

B. The Circuit Split

The Supreme Court's innocuous holdings in *Pickering*, *Connick*, and *Garcetti* have left a split in the U.S. Circuit Courts. The circuit courts arrive at radically different answers when considering cases of alleged First Amendment freedom of association violations and are unable to consistently answer whether the *Connick* public-concern requirement ought to apply to associational cases. This Part explores three categories of approaches. Under the majority approach, the Second, Fourth, Sixth, and Seventh Circuits find that the public-concern requirement of *Connick* applies to public employee association claims. Under the minority approach, the Third, Fifth, and Eleventh Circuits find that the public-concern requirement does not apply.[67] Not fitting into either box, the Ninth and Tenth Circuits have each taken unique approaches to address the issue.[68] The First, Eighth, and D.C. circuits have yet to consider the issue.

1. The Majority Group: *Connick's* Public-Concern Requirement Applies to Public Employee First Amendment Associational Claims.

The Second, Fourth, Sixth, and Seventh Circuits hold that the public-concern requirement of *Connick* applies to First Amendment associational claims by public employees.[69] Although these circuits

65. *Id.*

66. *Id.* at 426.

67. *See* Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999); Klug v. Chi. Sch. Reform Bd. of Trs., 197 F.3d 853 (7th Cir. 1999); Boals v. Gray, 775 F.2d 686 (6th Cir. 1985); Palardy v. Twp. of Millburn, 906 F.3d 76 (3d Cir. 2018); Boddie v. City of Columbus, 989 F.2d 745 (5th Cir. 1993); Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546 (11th Cir. 1987).

68. *See* Hudson v. Craven, 403 F.3d 691 (9th Cir. 2005); Merrifield v. Bd. of Cnty. Comm'rs, 654 F.3d 1073 (10th Cir. 2011).

69. *See* Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999); Klug v. Chi. Sch. Reform Bd. of Trs., 197 F.3d 853 (7th Cir. 1999); Boals v. Gray, 775

agree on the application of *Connick* to associational claims, they are split on whether union-activity associational claims are matters of public concern as a matter of law (a matter of public concern *prima facie*). This division, along with the wider consensus that has been established, will be examined under the Sixth Circuit's *Boals v. Gray* decision and the Second Circuit's *Cobb v. Pozzi* decision.[70]

The Sixth Circuit, in *Boals v. Gray*, was the first circuit court to establish that *Connick*'s public-concern requirement applies to public employee First Amendment associational claims.[71] The court considered whether an employer violated the First Amendment associational rights of Boals, a former Ohio correctional officer.[72] Boals, a former Ohio correctional officer, filed suit in United States District Court for the Northern District of Ohio claiming that he had been suspended from work for five days after actively engaging in union activity at his place of employment.[73] The district court "awarded Boals [damages] as compensation for the discomfort and frustration caused by defendant's interference with his rights of freedom of speech and association."[74] On appeal, the Sixth Circuit considered the application of *Connick* in the associational context as a matter of first impression.[75]

At the outset of their review, the Sixth Circuit noted that the district court failed to apply the then recently-decided *Connick* decision to Boals' claim.[76] As such, the court found it appropriate to "raise the issue of whether plaintiff's [F]irst [A]mendment rights of speech and association as exercised in this case related to matters of public concern and hence gave rise to a cause of action in federal court."[77] In doing so, the court analyzed two issues: (1) whether the Supreme Court's decision in "*Connick* applies to association [claims] as well as speech [claims]" and (2) "whether union-related speech and association inherently touches on a matter of public concern as a matter of law."[78]

F.2d 686 (6th Cir. 1985).

70. Because the Sixth and Second Circuit cases are representative of the Fourth and Seventh Circuit positions, the Fourth and Seventh Circuit cases will not be thoroughly examined in this paper. For a full treatment of the Fourth Circuit's and Seventh Circuit's positions, see Edwards, 178 F.3d 231; Klug, 197 F.3d 853.

71. *Boals*, 775 F.2d 686.

72. *Id.* at 687.

73. *Id.* at 689.

74. *Id.* at 691.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 691–92.

Considering the first issue, the Sixth Circuit found "no logical reason for differentiating between speech and association in applying *Connick* to [F]irst [A]mendment claims."[79] While the Supreme Court in *Connick* did not specifically refer to the right of association in its opinion, it did explicitly trace a line to the decision in *Pickering*. The Supreme Court found that *Pickering* was the controlling precedent and held that the precedent *Pickering* is rooted in "invalidated statutes and actions sought to suppress the rights of public employees to participate, or associate, in public affairs."[80] *Pickering* noted that government employees ought not "be prevented or 'chilled' by the fear of discharge from joining political parties or other associations."[81] As such, the Sixth Circuit found that *Pickering,* and subsequently *Connick*—both being speech cases—were "based upon and applied to freedom of association cases."[82]

Upon holding that *Connick* applies to freedom of association claims, the Sixth Circuit turned to the question of whether union-related speech and association touches on a matter of public concern as a matter of law under the *Connick* test.[83] Relying on the Supreme Court's decision in *Smith v. Arkansas State Highway Employees*, the court found that "applying *Connick* to union speech and activity is not inconsistent with the well-established principle that such speech and activity is protected by the [F]irst [A]mendment."[84] However, the court also found "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."[85] In doing so, the court cited the District Court for the District of Columbia's decision in *American Postal Workers Union v. United States Postal Service* to distinguish union-related speech and activity from speech and activity that is a matter of public concern as a matter of law.[86] Union-related associational activity, while *potentially* a matter of public concern (depending on the facts of the case), is not a matter of public concern *prima facie* for the purposes of a *Connick* analysis.[87]

The Second Circuit also recently held that the public-concern requirement of *Connick* applies to associational claims. In *Cobb v.*

79. *Id.* at 692.

80. *Id.* (quoting *Connick*, 461 U.S. at 144-45).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 693.

86. *Id.* at 692–93 (citing American Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 598 F. Supp. 564, 568–69 (D.D.C. 1984)).

87. *Id.* at 693.

Pozzi, the court considered claims by Officer Cobb and Officer Rouse, corrections officers who alleged that they were retaliated against in violation of the First Amendment based on their association with the Corrections Officers' Benevolent Association (COBA).[88] The defendants, Cobb and Rouse's employer and superiors, argued that, "to be protected under the First Amendment, the plaintiffs must show that their associational activity touches on a matter of public concern" and, "because the plaintiffs have not made this showing, their freedom of association claim fails."[89] The defendants contended that "a retaliation claim predicated on an employee's right to freedom of association requires that a plaintiff satisfy *Connick* by demonstrating that his associational activity touche[d] on a matter of public concern."[90] The plaintiffs responded that *Connick* was instead "limited to retaliation claims premised on free speech, and that their associational activity, to be protected, need[ed] not touch on a matter of public concern."[91]

The Second Circuit agreed with the defendants and joined the Fourth, Sixth, and Seventh Circuits in holding that a public employee bringing a First Amendment freedom of association claim must demonstrate that the associational conduct at issue touches on a matter of public concern.[92] To reach this conclusion, the court relied on the *Pickering* and *Connick* decisions to reference the specific language of employee *expression*.[93] When discussing the public-concern requirement, the court explicitly referenced employee *expression* as protected broadly, not employee *speech* narrowly.[94] Thus, "the Court's concern over the proper balance of the efficient functioning of the government and the First Amendment rights of public employees extended more generally to all forms of First Amendment expression, including associational activity."[95] The Second Circuit found "nothing in *Connick* that would limit the public[-]concern requirement to First Amendment claims based on free speech, as opposed to claims premised on other forms of First Amendment expression . . . ."[96]

In addition to the language of *Pickering* and *Connick*, the

88. Cobb v. Pozzi, 363 F.3d 89, 99 (2d Cir. 2003).

89. *Id.* at 101.

90. *Id.* at 102.

91. *Id.*

92. *Id.* at 102–03 (quoting Klug, v. Chi. Sch. Reform Bd. of Trs., 197 F.3d 853, 857 (7th Cir. 1999); Edwards v. City of Goldsboro, 178 F.3d 231, 249–50 (4th Cir. 1999); Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985)).

93. *Id.* at 104.

94. *Id.*

95. *Id.* (emphasis omitted).

96. *Id.*

Second Circuit, in reaching its decision, derived support from the Supreme Court's "teaching that there should exist no hierarchy among First Amendment rights."[97] The court cited language from Supreme Court precedent in which the Court declined to elevate any particular First Amendment right to a special status.[98] The court found that, "[b]ecause the right of association is derivative of the First Amendment rights of free speech and peaceful assembly, . . . it would be anomalous to exempt it from *Connick*'s public[-]concern requirement and thereby accord it an elevated status among First Amendment freedoms."[99] Unwilling to elevate a claim under the freedom of association over other First Amendment rights, such as freedom of speech or right to petition, the Second Circuit joined the Fourth, Sixth, and Seventh Circuits in finding that *Connick*'s public-concern requirement applies to public employee associational claims.[100]

The Second, Fourth, Sixth, and Seventh Circuits have thus reached a consensus that the matter of public-concern requirement of *Connick* also applies to public employee First Amendment associational claims.[101] Relying on the Supreme Court's language in both *Pickering* and *Connick* as well as the wider jurisprudence surrounding the First Amendment, these circuits have found no satisfactory reason to treat associational claims differently from other First Amendment claims.[102]

2. The Minority Group: *Connick*'s Public-Concern Requirement Does Not Apply to Public Employee First Amendment Associational Claims.

The Third, Fifth, and Eleventh Circuit Courts hold that the public-concern requirement of *Connick* should not apply to public employee First Amendment associational claims.[103] This consensus will be examined under the Eleventh Circuit's *Hatcher v. Board of Public Education & Orphanage* decision and the Third Circuit's *Palardy v. Township of Millburn* decision. Because the arguments and

97. *Id.* at 105.

98. *Id.* (quoting McDonald v. Smith, 472 U.S. 479, 482 (1985)).

99. *Id.* (citation omitted).

100. *Id. See* Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999); Boals v. Gray, 775 F.2d 686 (6th Cir. 1985); Klug v. Chi. Sch. Reform Bd. of Trs., 197 F.3d 853 (7th Cir. 1999).

101. *See* Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999); Klug v. Chi. Sch. Reform Bd. of Trs., 197 F.3d 853 (7th Cir. 1999); Boals v. Gray, 775 F.2d 686 (6th Cir. 1985).

102. *Id.*

103. *See* Palardy v. Twp. of Millburn, 906 F.3d 76 (3d Cir. 2018); Boddie v. City of Columbus, 989 F.2d 745, 749 (5th Cir. 1993); Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546 (11th Cir. 1987).

conclusions raised by the Fifth Circuit are also found in the Third and Eleventh Circuits' opinions, the Fifth Circuit's position will not be examined in this Note.[104]

The Eleventh Circuit established the minority group position in *Hatcher v. Board of Public Education & Orphanage*.[105] There, the court considered First Amendment claims raised by Hatcher, a school principal who claimed she was demoted because she engaged in protected associational activity.[106] Hatcher argued that her First Amendment claim must be considered in light of the Supreme Court's decisions in *Pickering* and *Connick*.[107] The Eleventh Circuit, while noting the difficulty in properly applying the *Pickering* and *Connick* framework to First Amendment claims in practice, held that it need not attempt to work through the framework because Hatcher's claims were based upon freedom of association.[108] The court held that freedom of association claims are not subject to *Connick* because "application of a requirement that associational activity relate to a matter of public concern in order to be constitutionally protected would overturn Supreme Court and Eleventh Circuit jurisprudence and exact a substantial toll upon [F]irst [A]mendment liberties."[109] Due to these concerns, the court declined to apply *Connick* to Hatcher's associational claim.[110]

Recently, the Third Circuit in *Palardy v. Township of Millburn* joined the minority.[111] Palardy, a retired police officer, claimed that his township's business administrator, Gordon, "unlawfully prevented him from becoming Chief of Police because Gordon opposed Palardy's union membership and activity."[112] The United States District Court for the District of New Jersey held that "Palardy's union-related speech and association were not constitutionally protected" and, "[a]nalyzing his speech and association claims together, . . . Palardy neither acted as a private citizen nor spoke out on a matter of public concern," as required by the Supreme Court's decision in *Garcetti*.[113]

On appeal, the Third Circuit considered Palardy's case in light of the Supreme Court's decisions in *Pickering*, *Connick*, and *Garcetti*. Distilling the tripartite framework to a simple rule, the Third Circuit

104. For a full treatment of the Fifth Circuit's positions, see *Boddie*, 989 F.2d at 749.

105. Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546 (11th Cir. 1987).

106. *Id.* at 1548.

107. *Id.* at 1556.

108. *Id.* at 1556–57.

109. *Id.* at 1558.

110. *Id.*

111. Palardy v. Twp. of Millburn, 906 F.3d 76 (3d Cir. 2018).

112. *Id.* at 78–79.

113. *Id.* at 80.

found that a public employee's speech "is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public.'"[114] In considering Palardy's freedom of association claim in light of this rule, the Third Circuit found that it must, as a matter of first impression, pick a side in the circuit split and determine whether *Connick* and *Garcetti* apply to associational claims.[115]

Considering *Connick* and *Garcetti*'s application, the court examined the reasoning offered by both the majority group and the minority group. The majority group generally found that, although in *Connick* the claimant's speech was under examination, the Supreme "Court's concern over the proper balance of the efficient functioning of the government and the First Amendment rights of public employees extended more generally to all forms of First Amendment expression . . . ."[116] Further, the majority group found that it was "anomalous to exempt [associational claims] from *Connick*'s public[-]concern requirement and thereby accord [the freedom of association] an elevated status among First Amendment freedoms."[117]

In contrast, the Third Circuit explained, "the Fifth and Eleventh Circuits hold the [*Connick*] public[-]concern requirement does not apply to associational claims."[118] The minority group found "no additional proof of public concern is necessary because the union activity of public employees 'is not solely personal and is inevitably of public concern.'"[119] Further, citing the Supreme Court's decision in *NAACP v. Ala. ex rel. Patterson*, the minority group found that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters ... [,] state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[120]

Weighing the majority group and minority group positions, the Third Circuit found that, in Palardy's "associational claim arising from a public employee's union affiliation[,]" the minority group position was the "better" position.[121] The court reasoned that courts in both

114. *Id.* at 81 (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 241–42 (3d Cir. 2006)).

115. *Id.*

116. *Id.* at 82 (emphasis omitted) (quoting Cobb v. Pozzi, 363 F.3d 89, 104–05 (2d Cir. 2003)).

117. *Id.*

118. *Id.*

119. *Id.* (emphasis omitted) (quoting Boddie v. City of Columbus, 989 F.2d 745, 750 (5th Cir. 1993)).

120. *Id.* (citing NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958)).

121. *Id.*

groups found "that at least some union speech and activity touch upon matters of public concern[,]" satisfying *Connick's* requirement.[122] "It follows, then, that a public employee's membership in a union might also be a matter of public concern[,]" also satisfying *Connick*.[123] Issues then inevitably arise as to how courts are "to distinguish between union membership that implicates a public concern, and union membership that does not[.]"[124] The Third Circuit found that, "by holding that mere membership in a public union is always a matter of public concern," the court could avoid the issue of determining which union association is worthy of First Amendment protection entirely.[125]

Further, the Third Circuit considered whether *Garcetti's* private-citizen requirement applies to "pure associational claims."[126] The court found that, "[a]s with *Connick's* public-concern requirement, it does not make . . . sense to apply *Garcetti's* private-citizen requirement to pure associational claims based on union membership."[127] "By the plain language of the Court's opinion" in *Garcetti*, writing that the decision turned on whether the public employee was "mak[ing] statements pursuant to [his] official duties," *Garcetti* necessarily applies to speech claims and not associational claims.[128] Moreover, the court found it "hard to imagine a situation where a public employee's membership in a union would be one of [their] 'official duties.'"[129] Thus, the Third Circuit joined the minority group when it declined to apply both *Connick* and *Garcetti* to Palardy's freedom of association claim.[130]

3. Novel Approaches Considered by the Ninth and Tenth Circuit Courts

The Ninth and Tenth Circuits, while leaning more towards adopting the position taken by the Second, Fourth, Sixth, and Seventh Circuits in the majority group, have adopted unique approaches for addressing public employee freedom of association claims.[131] While the Supreme Court is unlikely to adopt either of these approaches to settle the circuit split, the approaches taken by the Ninth and Tenth Circuits merit

122. *Id.*
123. *Id.*
124. *Id.* at 82–83.
125. *Id.* at 83.
126. *Id.*
127. *Id.*
128. *Id.* (alteration in original) (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).
129. *Id.*
130. *Id.* at 84.
131. *See* Hudson v. Craven, 403 F.3d 691 (9th Cir. 2005); Merrifield v. Bd. of Cnty. Comm'rs, 654 F.3d 1073 (10th Cir. 2011).

discussion as approaches that may contend with the majority or minority groups or as approaches that may persuade the Supreme Court to modify the majority or minority approach.

The Ninth Circuit considered, as a matter of first impression, the appropriate test for a hybrid speech and associational rights claim under the First Amendment in *Hudson v. Craven*.[132] Hudson, a community college instructor, claimed she had been unconstitutionally recommended for non-renewal as an instructor for exercising her First Amendment rights.[133] Finding that Hudson's claim involved aspects of both speech and association, and finding little satisfaction in either the majority group or minority group approaches, the Ninth Circuit found it appropriate to analyze the claim as a hybrid First Amendment claim.[134] Because the speech and associational rights at issue were "so intertwined[,]" the Court saw "no reason to distinguish this hybrid circumstance from a case involving only speech rights."[135] While the circuit courts in the majority group and minority group analyze speech and associational rights claims as distinct claims, the Ninth Circuit has implicitly declined to do so. Instead, the Ninth Circuit contributes a novel approach to the circuit split by analyzing the First Amendment claims discussed in this Note as hybridized.[136]

The Tenth Circuit considered the claims of Merrifield, a former administrator at a youth correctional facility in *Merrifield v. Board of County Commissioners*.[137] Merrifield claimed that "he had been fired in retaliation for retaining an attorney, in violation of his First Amendment right of association."[138] The Tenth Circuit held that, generally, the *Connick* "public-concern requirement applies to a claim that a government employer retaliated against an employee for exercising the instrumental right of freedom of association for the purpose of engaging in speech, assembly, or petitioning for redress of grievances."[139] The court, siding in part with the majority group, wrote that it would be "ironic, if not unprincipled, if the public-concern requirement derived from freedom-of-association cases did not likewise apply to retaliation for such association."[140]

While the Tenth Circuit applied the *Connick* public-concern

132. Hudson v. Craven, 403 F.3d 691 (9th Cir. 2005).
133. *Id.* at 695.
134. *Id.* at 696.
135. *Id.* at 698.
136. *Id.* at 696.
137. Merrifield v. Bd. of Cnty. Comm'rs, 654 F.3d 1073 (10th Cir. 2011).
138. *Id.* at 1075.
139. *Id.* at 1081–82.
140. *Id.* at 1082.

requirement to associational claims, it carved out an exception "in the specific context of public-employee labor unions . . . ."[141] The Tenth Circuit explicitly "rejected the requirement that a worker demonstrate that his association with the union be a matter of public concern."[142] The Tenth Circuit has thus adopted an approach that sits somewhere between the majority and minority approaches. While *Connick* applies to public employee associational claims, labor union association claims are *prima facie* exempt from the same requirement.[143]

C. Janus v. AFSCME*: The Bellwether Case*

While not directly touching on a public employee's associational claim, the Supreme Court recently considered the intersection of associational activity, labor unions, and the First Amendment in *Janus v. AFSCME*.[144] *Janus* followed a long line of controversial labor law cases that had culminated in the Court's decision in *Abood v. Detroit Board of Education.*[145] In *Abood*, the Court held that a public sector labor unions' historic practice of charging nonmembers agency fees is constitutional under the First and Fourteenth amendments.[146] In overruling their prior decision in *Abood*, the *Janus* Court announced that such agency fee arrangements are an unconstitutional violation of the freedom of speech under the First Amendment.[147] Focusing primarily on the freedom of speech under the First Amendment, the Court examined the *Pickering*, *Connick*, and *Garcetti* framework. Considering an application of *Connick's* public-concern requirement to union agency fees, the Court found that union speech in public sector collective bargaining was overwhelmingly of great public concern.[148] Further, in considering the balancing of the overall *Pickering* framework, the Court found that "the balance tips decisively in favor of the employees' free speech rights" in First Amendment cases.[149] Because *Janus* is the most recent decision in a long line of Supreme Court cases considering the intersection of the public sector and the First Amendment, it may be the bellwether needed to determine how the Supreme Court should settle the circuit split.

141. *Id.* at 1083–84.

142. *Id.* at 1084 (quoting Shrum v. City of Coweta, 449 F.3d 1132, 1138 (10th Cir. 2006)).

143. *Id.*

144. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

145. *See* Steele v. Louisville & Nashville Ry. Co., 323 U.S. 192 (1944); Hughes Tool Co. v. NLRB, 147 F.2d 69 (1945); Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

146. *Abood*, 431 U.S. at 232.

147. *Janus*, 138 S. Ct. at 2486.

148. *Id.* at 2477.

149. *Id.*

III. SETTLING THE CIRCUIT SPLIT

The question at the heart of this Note now lies: how should the Supreme Court settle this circuit split if and when it reaches the Court? While it is impossible to determine how the Supreme Court will decide a given case, the circuit split's historical context and the recent precedent set in *Janus*, coupled with the arguments presented within the circuit courts' decisions elucidate a path that the Court should take in applying *Connick* to public sector employee associational claims. First, Part A of Section III argues that the Court must imminently address the circuit split. Afterwards, Part B of Section III contends that the Supreme Court should adopt the majority group position alongside the Tenth Circuit's unique approach excepting union associational activity.

A. The Supreme Court Must Address the Split

The Supreme Court's failure to address the circuit split allows First Amendment rights in public sector employment to exist in a state of limbo. Currently, a public employee's First Amendment right to associate is constitutionally protected in the minority group circuits, but is subject to *Connick/Garcetti* scrutiny in the majority group circuits.[150] In *NAACP v. Ala. ex rel. Patterson*, the Supreme Court found that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[151] State action is subject to the strictest of scrutiny because the rights affected by the state action are of the utmost importance. By failing to address the circuit split, and subsequently leaving the First Amendment rights of public employees in limbo, the Court's silence enables state action that curtails public sector employee's freedom to associate.

Public employees who are unsure about the protections afforded to their associational activity are less likely to engage in associational activity for fear of retaliation by their state employers. By silently acquiescing to the current circuit split, the Court undermines the First Amendment protections of public sector employees by chilling their right to engage in associational activity. While associational activity may range from benign association with coworkers after work to concerted association to form a labor union in the workplace, all is equally important as constitutionally ensured activity.

It is imperative that the Court issue a decision to settle this circuit

150. *See, e.g.*, Palardy v. Twp. of Millburn, 906 F.3d 76 (3d Cir. 2018); Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004).

151. 357 U.S. 449, 460–61 (1958).

split and give public sector employees the peace of mind to choose to engage in associational activity with a clear understanding as to what legal framework will apply to their claims. Failure to remedy the split will disincentivize public sector employees' engagement with their constitutionally ensured rights.

B. The Supreme Court Should Apply Connick/Garcetti *to Public Employee Association Claims, Except in the Union Context.*

Based on precedent and the arguments presented by the majority group circuit courts, the Supreme Court should adopt the Second, Fourth, Sixth, and Seventh Circuit's approach and apply the *Connick*/*Garcetti* framework and public-concern requirement to public employee First Amendment associational claims. The majority approach properly maintains historic and recent precedent and conforms to a textualist approach.[152] These reasons will each be considered in turn. Next, a potential downside to adoption of the majority group approach is considered. Finally, the Tenth Circuit's unique approach is addressed as an additional approach the Court should adopt in the narrow labor union context.

First, adoption of the majority group's approach maintains the Court's precedent. Adherence to precedent is the preferred course of jurisprudence "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[153] The Supreme Court should adopt the majority group's position to remedy the circuit split because the position adheres to both historic precedent and more recent jurisprudence.

Historically, the Supreme Court has treated associational claims and speech claims under the First Amendment as necessarily equal.[154] The Supreme Court has traditionally held that there should exist no hierarchy among First Amendment rights and that there is no sound basis for affording greater protection to one First Amendment right over another.[155] The Second Circuit in *Cobb* utilized this fact in support of its finding that *Connick*'s public-concern requirement

152. *Cf.* John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding Of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S. L. WK. 393 (2011) (finding that the majority approach among the circuit courts is not necessarily determinative of the approach adopted by the Supreme Court) https://www.hangley.com/wp-content/uploads/2016/08/Summers_Toward_A_Better_Understanding_of_USSC_Decisions.pdf.

153. *Janus*, 138 S. Ct. at 2478 (quoting Payne v. Tennessee, 501 U. S. 808, 827 (1991)).

154. McDonald v. Smith, 472 U.S. 479, 482 (1985).

155. *Id.* at 489.

should apply to associational claims.[156] By adopting the majority group approach, the Court respects the historic equipoise that exists between the First Amendment rights and does not anomalously accord the right to association an elevated status among First Amendment freedoms.

Further, an adoption of the majority group's position does not conflict with the Supreme Court's recent precedent set in *Janus*. In *Janus*, the Supreme Court positively cited *Pickering*, *Connick*, and *Garcetti* as binding precedent at the intersection of the First Amendment and public sector employment.[157] By addressing *Pickering* and its progeny as the binding line of cases that control this area of the law, the Court supports an application of *Connick/Garcetti* to the intersection of the First Amendment and public sector employment. Coupling that recent affirmation with the Court's precedent of equal application of First Amendment rights, the Court should conclude that the public-concern requirement necessarily applies to associational rights claims of public sector employees.

Second, the majority group's position is supported by a textualist reading of the First Amendment and Supreme Court precedent. The Court has undoubtedly taken a textualist approach to the law over the past decades and a textualist approach supports adoption of the majority position.[158] While the First Amendment does not explicitly state that the right to association is constitutionally protected,[159] the Supreme Court in *NAACP v. Ala. ex rel. Patterson* noted that, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.".[160] In applying a textualist approach to both the language of *Pickering* and *Connick*, the Sixth Circuit noted that, while "*Connick* did not specifically refer to association in drawing the distinction between speech on matters of public concern and matters of private interest only[,] [i]t did . . . suggest that its decision was simply an exposition of *Pickering* . . . ."[161] From a plain reading of the text of *Pickering*, the Supreme Court in *Smith* explicitly recognized the right to association as falling under the

156. Cobb v. Pozzi, 363 F.3d 89, 105 (2d Cir. 2003).

157. *Janus*, 138 S. Ct. at 2471.

158. Judge Diarmuid F. O'Scannlain, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, "We Are All Textualists Now": The Legacy of Justice Antonin Scalia (Sept. 29, 2017), *in* 91 ST. JOHN'S L. REV. 303, 308 (2017) (discussing Justice Scalia's influence in the Supreme Court's adoption of textualism).

159. U.S. CONST. amend. I.

160. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

161. Boals v. Gray, 775 F.2d 686, 692 (6th Cir. 1985).

First Amendment protections umbrella established by *Pickering*.[162]

One possible obstacle for adopting the majority group's approach is that the *Connick* public-concern requirement could potentially create a higher bar to successful First Amendment associational claims for certain public sector employees. Because employees would need to prove that their associational activity rises to the level of public concern, employees who are unable to argue or support that statement may have their First Amendment claim rejected. While this requirement for public sector employees could lead to otherwise sound First Amendment claims being rejected by the courts, the omnipresent threat of a false negative does not defeat established precedent and a plain reading of the law. Any interpretation of the law that raises the bar for a plaintiff to file a successful claim necessarily increases the risk that a valid claim will be excluded. However, if that interpretation of the law is the *correct* interpretation, the increased risk of a mistaken exclusion is unavoidable in upholding the law as written and is supported by precedent. It seems unlikely at this time that the risk of false negatives would be increased by the application of the *Connick/Garcetti* framework to public sector employee associational claims, but, if such an increase develops, the Supreme Court can modify the framework to exclude fewer valid claims.

While the Supreme Court should adopt the majority group's position and apply *Connick/Garcetti* to public sector employee First Amendment associational claims, the Court should additionally adopt the Tenth Circuit's unique approach to the labor context. The Tenth Circuit's approach, while comparable to the broader majority group's approach, takes the additional step of carving out an exception in the specific context of public sector labor unions.[163] This approach has the benefit of a broad, categorical application of the majority group's position while also protecting the unique legal position of public sector unions and union members by not requiring these employees to be subject to the public-concern requirement of *Connick*. The Tenth Circuit's approach further respects Supreme Court precedent that elevates the position of unions in the workplace, while also acknowledging the longstanding legal tradition that the First Amendment ought not function as a replacement for labor law.

The Tenth Circuit's approach respects the Court's holding in *Smith* that the First Amendment is not a substitute for labor law.[164] By excepting associational claims within the labor law context from a broad, categorical application of the *Connick* public-concern

162. Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464–65 (1979).

163. Merrifield v. Bd. of Cnty. Comm'rs, 654 F.3d 1073 (10th Cir. 2011).

164. *See Smith*, 441 U.S. at 465.

requirement, the Court would simultaneously respect the equipoise of First Amendment rights in the broader employment context and prevent an inadvertent undermining of labor law within the public sector. Adoption of the Tenth Circuit's approach paradoxically conforms with the Third Circuit's recent *Palardy* holding that membership in a public union is *always* a matter of public concern.[165] In doing so, the Court avoids the impossible issue of determining which union association is of public concern and worthy of First Amendment protection. While following the Court's precedent that the First Amendment ought not supplant labor law, the Court can except associational union activity from the broader issue of the public-concern requirement.

Finally, adoption of the Tenth Circuit's approach acknowledges *Janus* as the controlling precedent in the labor law context. The Supreme Court in *Janus* argued at length as to why *Abood* is not supported by the Court's line of decisions stemming from *Pickering*.[166] In overturning *Abood*, the Court rejected the arguments raised by proponents of maintaining *Abood* and explicitly rejected *Pickering* as the binding precedent that undergirded the Court's decision in *Abood*.[167] By excepting the labor law context from the *Connick/Garcetti* framework, the Court respects the arguments raised in *Janus* that overturned *Abood* and eliminates potential conflicts of case law between *Janus* and the future Supreme Court decision addressing this circuit split.

IV. CONCLUSION

The Supreme Court's decisions in *Connick* and *Garcetti* have left the Courts of Appeals in disarray. While the first of the circuit courts' decisions came closely after *Connick*, the Third Circuit's 2018 decision in *Palardy* demonstrates that the circuit split is alive and well. With a new addition to the split, and an addition to the minority group at that, it is imperative that the Supreme Court addresses the growing split. The Supreme Court should side with the majority group and hold that *Connick*'s public-concern requirement applies to public employee First Amendment associational claims. However, the Court should also hold that the Tenth Circuit's broad adoption of *Connick*, with an exception for union-based associational claims, is the proper application of the Court's prior decisions. This approach, a broad adoption of *Connick/Garcetti* to associational claims with an exception

165. Palardy v. Twp. of Millburn, 906 F.3d 76, 83 (3d Cir. 2018).

166. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2471–74 (2018).

167. *Id.* at 2472.

for union associational activity, conforms to both the Court's precedent and a textualist approach to the First Amendment and precedent. Regardless of how the Court inevitably decides the circuit split, it is imperative that the Court reaches a decision. The current limbo that millions of public employees' First Amendment rights exist in is unacceptable and undermines the First Amendment as it applies to the public sector. Public sector employees serve a critical role in our nation. The unstable foundation that their First Amendment rights rest on must be remedied; otherwise, their associational activity will continue to be unacceptably chilled.