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## Nothing to Gain, Nothing to Lose: How *Heffernan v. City of Paterson, N.J.*, Creates Section 1983 Liability Absent a Deprived Right

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## Note

### Nothing to Gain, Nothing to Lose: How *Heffernan v. City of Paterson, N.J.*, Creates Section 1983 Liability Absent a Deprived Right

*Katherine Trucco\**

*It is historically well-settled that for a constitutional violation to exist, a constitutional right must have been exercised. A public employee fired by his public employer for exercising political speech, conduct, or affiliation has an action against the employer.*

*But recently, the requisite causal connection between conduct and injury necessary to plead a Section 1983 claim against a public employer was upended by the Supreme Court in *Heffernan v. City of Paterson, N.J.* The Court held that a police officer who was demoted for perceived political affiliation, which by the officer's own admission was not affiliation at all, had an actionable Section 1983 claim against the police department for First Amendment retaliation. Though the officer repeatedly admitted during years of litigation that he was not engaging in constitutionally protected conduct, the Supreme Court opened up a new avenue of recovery for injury which, as noted in Justice Thomas' dissent, did not constitute injury at all.*

*This Note ultimately supports the conclusion reached in the dissenting opinion and argues that the majority opinion turns traditional First Amendment retaliation jurisprudence on its head by eliminating the requisite "causation in fact" element of pleading a sustainable Section 1983 claim. This Note further advocates that the majority missed an opportunity to refresh dormant freedom-of-assembly jurisprudence, which would have provided the petitioner relief without navigating around traditional pillars of Section 1983 and First Amendment jurisprudence.*

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#### INTRODUCTION

An apolitical government employee is observed with the website of wildly unpopular Presidential Candidate A open on her computer. Her supervisor, who has mentioned his support for Presidential Candidate B in the past, sees the website while glancing over the employee's shoulder and consequentially demotes her by transferring her to another department. His justification is that the website was distracting to other employees in her work area. The employee contends that she did not support the candidate and was not reading the website, but was simply directed to the site by following a link contained in an email from a family member. The public employee thinks she has been retaliated against because her boss has spoken positively about Presidential Candidate B in the past. She is simply doing her job while taking a moment to address a personal matter and respond to an email from a family member. Does the employee have a claim for First Amendment retaliation?

It should concern both public employers and public employees that the Supreme Court recently decided that public employees now have an

actionable Section 1983 retaliation claim against their public employers alleging First Amendment retaliation for an adverse employment action where no constitutionally protected conduct, actual or perceived, occurred.<sup>1</sup> This ruling widens the class of plaintiffs who may bring retaliation claims and expands the possibility of liability for public employers.<sup>2</sup>

The First Amendment retaliation doctrine has long provided relief for government employees who suffer adverse employment consequences for engaging in constitutionally protected conduct.<sup>3</sup> Specifically, 42 U.S.C. § 1983 provides that every person who under color of law subjects any citizen “to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured. . . .”<sup>4</sup> With the Supreme Court’s recent decision in *Heffernan v. City of Paterson, N.J.*, the Court has expanded the doctrine to provide relief to public employees who suffer adverse employment consequences based on an employer’s perceived, yet mistaken, belief of their political affiliation.<sup>5</sup>

This Note analyzes the outcome of *Heffernan v. City of Paterson, N.J.*, and its impact on First Amendment retaliation claims. Police officer Jeffrey Heffernan filed suit against the City of Paterson, N.J., and its police department for demoting him based on an incorrect and mistaken perception that he was affiliated with the police department’s rival mayoral candidate.<sup>6</sup> Heffernan’s claim hinged on his assertion that while he was not engaged in any First Amendment protected conduct, he was

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1. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1416 (2016).

2. See, e.g., *Why Freedom of Speech Might Protect You When You Aren’t Speaking*, THE ECONOMIST: DEMOCRACY IN AMERICA (Apr. 29, 2016, 17:38), <http://www.economist.com/blogs/democracyinamerica/2016/04/odd-cases-good-law> (noting the holding’s “significant development extending a long line of cases that have broadened the zone of expression protected by the First Amendment”).

3. See *Dye v. Office of Racing Comm’n*, 702 F.3d 286, 286 (6th Cir. 2012) (establishing the doctrinal requirements for a First Amendment retaliation claim); see also Nicholas A. Caselli, Comment, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. CHI. L. REV. 1709, 1710 (2014) (exploring perceived-affiliation adverse employment action and the protected conduct requirement for a retaliation claim).

4. 42 U.S.C. § 1983 (2012); see also Kaitlyn Poirier, Note, *Constitutional Law – The First Amendment Retaliation Doctrine – A Public Employee’s Rights Regarding Perceived Political Association Retaliation: Dye v. Office of the Racing Commission*, 702 F.3d 286 (6th Cir. 2012), 81 TENN. L. REV. 367, 370 (2014) (exploring the development of the First Amendment retaliation claim applied to perceived-affiliation cases as decided in *Dye*).

5. *Heffernan*, 136 S. Ct. at 1418 (“When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge the action . . . even if . . . the employer makes a factual mistake about the employee’s behavior.”).

6. *Id.* at 1416.

nonetheless demoted solely based on his employer's incorrect perceptions of his political affiliation.<sup>7</sup> The Supreme Court should not have granted Heffernan relief under Section 1983 because he failed to assert that he was deprived of any constitutionally protected right, as required under the plain language of the statute. Moreover, he failed to establish the requisite causal link between his demotion and his attendance at the campaign event, as required by employment retaliation precedent. Finally, the Court's holding widens an already expansive class of plaintiffs who can bring retaliation claims against public employers, simply by alleging improper motives without establishing any constitutionally violated rights.

Part I of this Note discusses the background of First Amendment retaliation claims dealing with freedom of speech infringement by public employers<sup>8</sup> and illustrates the public concern test required when analyzing any constitutional violation in retaliation claims.<sup>9</sup> Next, it explores how courts have handled retaliation claims when the alleged injury stems from perceived, rather than actual, political affiliation.<sup>10</sup>

Part II analyzes *Heffernan v. City of Paterson, N.J.*, details the facts<sup>11</sup> and explains the procedural history,<sup>12</sup> outlines the majority opinion of the Court,<sup>13</sup> and concludes by reviewing Justice Thomas' dissent.<sup>14</sup>

Part III analyzes the majority and dissenting opinions in *Heffernan v. City of Paterson, N.J.*, and how the holding signifies a departure from the plain language of the Section 1983 statute. This Part discusses Heffernan's calculated admission of no protected conduct, which should have been fatal to his claim.<sup>15</sup> This Part further analyzes how the Court disregarded its own retaliation precedent by failing to engage in a public concern analysis.<sup>16</sup>

Part IV predicts the impact this holding will have on future retaliation jurisprudence by expanding an already broad class of plaintiffs who are

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7. *Id.*

8. *See generally infra* Part I (detailing the development of the First Amendment retaliation doctrine).

9. *See infra* Part I.A. (discussing the *Pickering-Connick* public concern balancing test and its required application to First Amendment retaliation claims).

10. *See infra* Part I.B. (summarizing recent cases involving retaliation claims premised on an employer's perception of political affiliation).

11. *See infra* Part II.A. (detailing the facts of *Heffernan*).

12. *See infra* Part II.B. (mapping out the procedural history of *Heffernan*).

13. *See infra* Part II.C. (summarizing the majority holding in *Heffernan*).

14. *See infra* Part II.D. (explaining Justice Thomas' dissenting opinion).

15. *See infra* Part III.A. (discussing Section 1983 jurisprudence as applied to the facts of this case and explaining why Justice Thomas' analysis should have prevailed).

16. *See infra* Part III.B. (considering the departure from precedent).

eligible to bring claims against public employers and the ramifications for public employers' risk of liability.<sup>17</sup>

#### I. THE EVOLUTION OF THE FIRST AMENDMENT RETALIATION DOCTRINE

This Part will first discuss the development of the Supreme Court's First Amendment retaliation jurisprudence and how the Court has determined what conduct is protected.<sup>18</sup> Next, it will explain the public interest balancing test stemming from seminal First Amendment cases before the Court and the considerations necessary for First Amendment protection.<sup>19</sup> Finally, the analysis will expand to retaliation jurisprudence and perceived political affiliation.<sup>20</sup>

As a legal theory, the First Amendment retaliation doctrine stems from private employment discrimination jurisprudence and has been applied in cases where a public employee is punished for engaging in certain forms of constitutionally protected speech.<sup>21</sup> Courts have also afforded relief to public employees who experience adverse employment consequences for refusing to participate in political activities.<sup>22</sup> As applied by the Court, the First Amendment is meant to prevent the government from exercising its power as a means of interfering with employees' freedom to express political beliefs and to opt in or out of political association.<sup>23</sup> The doctrine has evolved, initially requiring courts to engage in a balancing test that weighs the interests of the public employer versus those of the public

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17. See generally *infra* Part IV (analyzing the likely impact of the *Heffernan* holding on future retaliation claims).

18. See generally *infra* Part I (detailing the development of the First Amendment retaliation doctrine).

19. See *infra* Part I.A. (discussing the *Pickering-Connick* public concern balancing test and its required application to First Amendment retaliation claims).

20. See *infra* Part I.B. (summarizing recent cases involving retaliation claims premised on an employer's perception of political affiliation).

21. See Caselli, *supra* note 3, at 1721 (highlighting the application of the retaliation doctrine to various types of protected conduct); see also 1 EMP. DISCRIM. COORD. ANALYSIS OF FED. L. § 8:61, Westlaw (database updated Nov. 2016) (“‘Retaliation,’ as a legal theory, comes from employment-discrimination suits and it has been borrowed in cases where an employer punishes an employee on account of speech.”).

22. See *Elrod v. Burns*, 427 U.S. 347, 371 (1976) (establishing that patronage dismissals for affiliation or non-affiliation with a political party are unconstitutional); see also *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (determining that promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on First Amendment rights of public employees); *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (holding that it is sufficient for retaliation plaintiffs to prove they were discharged solely because they were not affiliated with or sponsored by a political party).

23. See *Rutan*, 497 U.S. at 76 (explaining how the First Amendment is a tool that prevents the government from “wielding its power to interfere” with public employees' freedom to associate or not associate).

employee,<sup>24</sup> to infusing that balancing test with public concern considerations,<sup>25</sup> to recently granting relief based on perceived political affiliation.<sup>26</sup>

To establish a *prima facie* First Amendment retaliation claim, a public employee must adduce evidence: (1) that he engaged in constitutionally protected speech or conduct; (2) that he experienced adverse action in employment that would “deter a person of ordinary firmness from continuing to engage in that conduct[;]” and (3) that there is a causal connection between the first two elements, specifically that the adverse action was motivated, even partially, by engaging in protected conduct.<sup>27</sup> Once the *prima facie* elements are established, the burden shifts to the employer to show, by a preponderance of the evidence, that the adverse employment decision would have been made absent the protected conduct at issue.<sup>28</sup>

A court is then tasked with a two-part analysis as a matter of law.<sup>29</sup> First, it must determine whether the protected conduct relates to a matter of public concern, such as political, social, or other community issues.<sup>30</sup> Then, the court must weigh the plaintiff-employee’s interest in commenting on matters of public concern versus the state employer’s interest in promoting efficient public services.<sup>31</sup> As the doctrine has

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24. See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (implementing a balancing test between the interests of the plaintiff-citizen in commenting on matters of public concern versus the interests of the State-employer in promoting services efficiently).

25. See *Connick v. Myers*, 461 U.S. 137, 147–48 (1983) (employee’s speech is considered a matter of public concern only as determined by the content, form, and context of the given statement).

26. See *Dye v. Office of the Racing Comm’n*, 702 F.3d 286, 301–02 (6th Cir. 2012) (finding that a public employee punished for perceived political affiliation has a claim for retaliation).

27. *Id.* at 294 (quoting *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006)).

28. *Id.* (quoting *Eckerman v. Tenn. Dep’t of Safety*, 636 F.3d 202, 208 (6th Cir. 2010)).

29. See Caselli, *supra* note 3, at 1714–15 (noting that *Pickering* and *Connick* provide the necessary framework for any contemporary analysis and disposition of public employee free-speech claims).

30. See *Connick*, 461 U.S. at 147–48 (holding that a public-sector employee’s distributed questionnaire regarding her employer’s practices could have interfered with “close working relationships” which are “essential to fulfilling public responsibilities[,]” but not closely enough related to a matter of public concern to warrant relief under the First Amendment retaliation doctrine); see also Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L. Q. 529, 540–41 (1998) (emphasizing that while the *Connick* test requires an analysis of public concern, it does not “require either a compelling governmental interest or a narrow means to achieve the desired end”).

31. See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (holding that a school district violated a teacher’s First Amendment rights because the state’s interest in “attaining the generally accepted goals of education” could not justify the limitation on speech that dealt with issues of public importance).

developed, an ongoing debate exists as to what constitutes protected speech and conduct arising from a public interest concern.<sup>32</sup> For example, the *Pickering* court held that a teacher's letter criticizing appropriation of funds was protected speech.<sup>33</sup> The *Connick* court, on the other hand, held that a questionnaire requesting employees' opinions on office protocol was a matter of private concern that did not warrant protection.<sup>34</sup>

#### A. *The Pickering-Connick Public Interest Balancing Test*

In what is known as the "seminal public-employee free speech case,"<sup>35</sup> the Supreme Court launched the framework for retaliation claims in *Pickering v. Board of Education of Township High School District 205*.<sup>36</sup> The School Board dismissed Marvin Pickering, a teacher in the school district, after he penned a letter to the local newspaper criticizing a proposed tax increase and the Board's past handling of revenue proposals.<sup>37</sup> The Board concluded that his dismissal was appropriate because the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and was not in the best interest of the school.<sup>38</sup>

Pickering sought review of the Board's decision, but the trial court affirmed.<sup>39</sup> He appealed the trial court's decision directly to the Illinois Supreme Court, arguing that his letter was protected under the First Amendment.<sup>40</sup> The Illinois Supreme Court, upon review of the Board's decision that the letter was detrimental to the school's interest, rejected his claim and held that his status as a public school teacher precluded him

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32. Lawrence Rosenthal has criticized the balancing test, writing:

Ironically, the public concern test requires courts to do something that the First Amendment is ordinarily thought to forbid: discriminate between protected and unprotected speech on the basis of content. The Court consistently explains in other types of First Amendment cases how content-based regulation is particularly suspect because it allows the government to censor disfavored speech or ideas.

Rosenthal, *supra* note 30, at 540.

33. *Pickering*, 391 U.S. at 568.

34. *Connick*, 461 U.S. at 147.

35. David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST AMEND. CTR. 2, 8 (2002), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.PublicEmployees.pdf> (summarizing the *Pickering* holding).

36. 391 U.S. 563, 573–75 (1968).

37. *Id.* at 566 ("The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources . . . [and] charged the superintendent of schools with attempting to prevent teachers . . . from opposing or criticizing the [proposal].").

38. *Id.* at 564–65.

39. *Id.* at 565.

40. *Id.* at 567.



from speaking publicly in opposition to the operation of those schools.<sup>41</sup> “A teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him.”<sup>42</sup>

On appeal before the United States Supreme Court, the Illinois Supreme Court decision was reversed and Pickering prevailed.<sup>43</sup> The United States Supreme Court criticized the Illinois Supreme Court’s decision to the extent it relied on a premise that had been “unequivocally rejected” in prior decisions before the Court: that teachers may be constitutionally compelled to relinquish First Amendment rights to comment on matters of public interest in schools.<sup>44</sup> But, the Court noted, it could not be denied that the state has an interest in regulating the speech of employees.<sup>45</sup> Thus, the Court observed that in any case there is a “problem” balancing the interests of the plaintiff-employee, as a citizen, when commenting on matters of public concern, with the interest of the state-employer in promoting the efficiency of the public services it performs through its employees.<sup>46</sup> The Court finally held that absent any proof of false statements made knowingly or recklessly by Pickering, the exercise of his right to speak on issues of public concern and importance was no basis for his dismissal from public employment.<sup>47</sup>

Fifteen years later, the Court’s ruling in *Connick v. Myers*<sup>48</sup> expanded on the *Pickering* balancing test and focused on the “public concern” prong of the analysis. Now, it was necessary to analyze the “content, form, and context of a given statement” when employing the *Pickering* balancing test to determine if the statement at issue was truly one of public concern that would negatively impact the efficiency of a government employer’s work.<sup>49</sup>

In *Connick*, Louisiana Assistant District Attorney Sheila Myers

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41. *Id.*

42. *Pickering v. Bd. of Educ. of Twp. High School Dist.* 205, 225 N.E.2d 1, 6 (Ill. 1967).

43. *Pickering*, 391 U.S. at 568.

44. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967) (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)) (“[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”); *see also Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (policy requiring public school teachers to disclose any political associations is unconstitutional).

45. *Pickering*, 391 U.S. at 568.

46. *Id.*

47. *Id.* at 574.

48. *Connick v. Myers*, 461 U.S. 137 (1983).

49. *Id.* at 147–48; *see also Rosenthal, supra* note 30, at 535–36 (noting that the questionnaire was a distraction to employees but still a concentrated issue of private concern).

circulated a questionnaire to her colleagues in response to the news that she was being transferred to a new assignment.<sup>50</sup> The questionnaire asked for their views on office transfer policy, morale, a grievance committee, confidence in supervisors, and whether employees felt pressured to work in political campaigns.<sup>51</sup> Harry Connick, the district attorney, subsequently terminated Myers' employment after she refused to accept the transfer.<sup>52</sup> Connick further noted that the questionnaire was an act of insubordination, and cited this as an additional reason for Myers' termination.<sup>53</sup>

The district court held, and the Fifth Circuit affirmed,<sup>54</sup> that Myers was fired because of the questionnaire she distributed, not because she refused to accept the transfer.<sup>55</sup> The questionnaire involved matters of public concern; the state had not "clearly demonstrated" that the questionnaire substantially interfered with efficient operations in the district attorney's office.<sup>56</sup>

But the Supreme Court reversed the Fifth Circuit, finding that the *Pickering* balancing test had been misapplied to the facts.<sup>57</sup> While the Court found that Myers' speech was not totally beyond the protection of the First Amendment,<sup>58</sup> it held that courts must look at the content, form, and context of the record as a whole to determine whether a public employee's speech addresses a matter of public concern.<sup>59</sup> Based on the context of the questionnaire and Myers' motive for its distribution, the Court determined that the questionnaire dealt with matters of public

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50. *Connick*, 461 U.S. at 141.

51. *Id.* (footnote omitted).

52. *Id.*

53. *Id.*

54. *Myers v. Connick*, 654 F.2d 719 (5th Cir. 1981), *aff'g* 507 F. Supp. 752 (E.D. La. 1981), *rev'd*, 461 U.S. 138 (1983).

55. *Connick*, 461 U.S. at 141.

56. *Id.* at 142 ("The [district court] then proceeded to hold that Myers' questionnaire involved matters of public concern and that the State had not 'clearly demonstrated' that the survey 'substantially interfered' with the operations of the District Attorney's office.") (quoting *Myers v. Connick*, 507 F. Supp. 752, 758 (E.D. La. 1981)).

57. *Id.* at 143 ("The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental . . . [it] reflects . . . the common-sense realization that government offices could not function if every employment decision became a constitutional matter.").

58. *Id.* at 147 ("We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.").

59. *Id.*; see also Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5, 24 (1999) (emphasizing the importance of analyzing the context of the speech at issue to include the employee's motive for speaking).

concern in only a limited way<sup>60</sup> and could only be accurately classified as an employee grievance.<sup>61</sup> By requiring the content, form, and context of the speech to be analyzed in light of the putative public concern, the Court thus engrafted on the *Pickering* balancing test a separate analysis of the gravity of the claimed public concern.

The *Pickering-Connick* test is fundamental to any public employee free speech action initiated under 42 U.S.C. § 1983.<sup>62</sup> The Court has even applied the test when refusing to afford protection to speech made pursuant to official duties as government employees or officers.<sup>63</sup> Most notably, the decision in *Waters v. Churchill*<sup>64</sup> emphasized the public employer's interest in efficiency while balancing the interests of the employee.<sup>65</sup> Plaintiff Cheryl Churchill was a nurse at a public hospital who was fired for making allegedly critical statements to a coworker.<sup>66</sup> The content of the statements was in dispute; the employer hospital alleged the statements were critical of Churchill's department and supervisors, while Churchill claimed she made non-disruptive comments on certain training practices.<sup>67</sup> Churchill filed suit against the hospital under Section 1983 on the grounds that her speech was protected under *Connick*.<sup>68</sup>

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60. *Connick*, 461 U.S. at 149 (holding that one item on the questionnaire—whether employees felt pressured to work on political campaigns on behalf of the office's choice candidates—satisfied the public concern test, but was not significant enough to outweigh the other issues of personal interest); see also Rosenthal, *supra* note 30, at 535 (noting that while the question regarding pressure to work on political campaigns satisfied the public concern test, the balancing test still weighed against Myers because the questionnaire generally was disruptive to the efficiency of the workplace).

61. *Connick*, 461 U.S. at 154.

62. See Jessica Reed, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y.C. L. REV. 95, 96 (noting that the first analysis required in a retaliation claim is the public concern balancing test); see also Schoen, *supra* note 59, at 29–30 (finding the correct public concern balance requires a myriad of factors, namely content, manner, and context of the speech).

63. *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006) (using the *Pickering-Connick* test to determine that because government employers need a significant degree of control over employees' words and actions, the First Amendment does not protect statements made pursuant to official duties); cf. *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (distinguishing the question in *Garcetti* from whether the speech at issue is itself within the ordinary scope of an employee's duties, not whether it merely concerns those duties specifically).

64. *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion) (establishing that the procedure for determining whether speech is protected by the First Amendment or is disruptive to workplace efficiency must be tailored relative to the constitutional significance of the risks it would decrease or increase).

65. *Id.* at 673 (revisiting the *Connick* principles to determine the government's role as an employer when regulating the speech of its employees).

66. *Id.* at 666.

67. *Id.*

68. *Id.* at 667.

The district court granted summary judgment in favor of the hospital, holding that neither party's version of Churchill's statements would merit constitutional protection under *Connick*.<sup>69</sup> But the Seventh Circuit reversed, finding that Churchill's speech, when viewed in the light most favorable to her, was a matter of public concern.<sup>70</sup> Additionally, the Seventh Circuit held that the inquiry must surround what the plaintiff's speech actually was, not what the employer perceived it to be.<sup>71</sup>

The Supreme Court vacated the judgment and remanded for the district court to determine whether Churchill was fired for her speech, or for another unrelated reason.<sup>72</sup> In a plurality opinion, the Court relied on *Connick* to determine that the plaintiff's speech at issue, in the context of the record as a whole, was a matter of personal interest, rather than one of public concern.<sup>73</sup> The Court emphasized the importance of ensuring that substantive First Amendment standards are sound, but also applied through reliable procedures.<sup>74</sup> The *Waters* plurality held that the key to First Amendment analysis of employment decisions is the significance of the governmental employer's interest in achieving its goals as effectively and efficiently as possible.<sup>75</sup> The significant interest in a governmental employer's ability to work efficiently and effectively is elevated from a subordinate interest when the government acts as a sovereign, and the First Amendment requires that the public employer reasonably proceed when making management decisions as the result of an employee engaging in protected conduct.<sup>76</sup>

The evolved balancing test presents the daunting task of reviewing an entire record to examine the content, form, and context of the speech at issue to balance competing interests of an employer and employee.<sup>77</sup> Still, as a result of the limited guidance provided by the Supreme Court for lower courts to rely upon, litigants must accept an element of

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 682.

73. *Id.* at 667 (noting that it is the Court's task to apply the *Connick* test to the facts presented in the case that requires a determination of whether speech was a matter of overwhelming public concern warranting First Amendment protection).

74. *Id.* at 669 (“[W]e have often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech.”).

75. *Id.* at 675 (noting that in *Connick*, the Court refrained from intervening in government-employer decisions based on speech that is entirely of private concern).

76. *Id.*

77. See Schoen, *supra* note 59, at 30 (commenting that it is “hardly surprising” that reasonable persons will likely disagree with the ultimate balance struck in each First Amendment case).

uncertainty in the disposition of their suit.<sup>78</sup> But recently, retaliation claims based on *perceived* political affiliation challenged courts to consider modifying the traditional *Pickering-Connick* balancing test.<sup>79</sup>

*B. Political Affiliation Claims, Actual and Perceived*

Courts apply the First Amendment retaliation doctrine regardless of whether the conduct at issue is speech or affiliation.<sup>80</sup> In cases involving speech that expresses actual belief or affiliation, the conduct is easily identified.<sup>81</sup> But when a public employer acts on perceived affiliation, the analysis is not as clear because association can exist solely as a product of the employee's closely held subjective beliefs and convictions with no objective or demonstrable speech.<sup>82</sup> While the requirements for establishing a retaliation claim are the same for cases involving perceived political affiliation,<sup>83</sup> recently, when applying the *Pickering-Connick* balancing test in cases of political speech and conduct, courts favor employees' interests in protected conduct more heavily than an employer's deference to promoting efficiency.<sup>84</sup>

*Pickering* established that public employers cannot retaliate against employees based on their *actual* political beliefs, as expressed through speech, without an overwhelming public and state interest in operating efficiently that should otherwise control.<sup>85</sup> Recently, the Sixth Circuit addressed the issue of perceived political affiliation in *Dye v. Office of the Racing Commission*.<sup>86</sup> This decision heralded a significant departure

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78. *See id.* at 31 ("Lacking further guidance from the Supreme Court, the federal courts of appeals have occasionally supplemented the Court's jurisprudence with their own refinements, nuances, emphases, and 'rules' to simplify resolution of public employee-free speech cases.").

79. *See infra* Part II.B. (discussing the civil action claim Heffernan brought under 42 U.S.C. § 1983 in *Heffernan v. City of Paterson*, N.J., 777 F.3d 147, 150 (3d Cir. 2015), *rev'd*, 136 S. Ct. 1412 (2016)).

80. *See Caselli, supra* note 3, at 1722 (noting that attempts to construct a rigid framework of the doctrine to the various fact patterns retaliation claims can present has posed significant complications).

81. *Id.* ("In the case of speech, the existence of protected conduct may often be easily gleaned from the employee's outward expressions, words, or actions.").

82. *Id.*

83. *Id.* at 1721–22 (citing *Dye v. Office of Racing Comm'n*, 702 F.3d 286, 294 (6th Cir. 2012); *Welch v. Ciampa*, 523 F.3d 927, 936 (1st Cir. 2008); *Gann v. Cline*, 519 F.3d 1090, 1092–93 (10th Cir. 2008); *Ambrose v. Twp. of Robinson*, Pa., 303 F.3d 488, 493 (3d Cir. 2002)); *see also supra* notes 27–28 and accompanying text.

84. *See Poirier, supra* note 4, at 387 (analyzing the Sixth Circuit's holding in *Dye* as creating a broader class of retaliation plaintiffs now that perceived affiliation is protected).

85. *See supra* Part I.A. (discussing the precedent established in *Pickering*).

86. *Dye*, 702 F.3d 286, 298–300 (6th Cir. 2012) (holding that perceived political association constitutes a cognizable legal claim under the First Amendment retaliation doctrine). The *Dye* court relied on other circuits' interpretations of perceived political affiliation in *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) (finding plaintiff's claim sufficient based on evidence that police

from the traditional *Pickering-Connick* balancing test that historically tended to favor an employer's interest in efficiency over employees' interests in engaging in protected conduct.<sup>87</sup>

*Dye* dealt with a claim based on actual speech that betrayed perceived political affiliation.<sup>88</sup> Michigan's Office of the Racing Commission ("ORC") regulates the state's horse-racing industry and hires stewards as independent contractors to perform regulatory and enforcement operations.<sup>89</sup> Defendant Christine White was appointed by the then-governor of Michigan, Democrat Jennifer Granholm, to serve as Racing Commissioner, and White subsequently appointed co-defendant Gary Post to serve as Deputy Racing Commissioner.<sup>90</sup> After these appointments, the defendants began making administrative changes to plaintiff-stewards' job duties.<sup>91</sup> By June 2009, plaintiffs Jeff Dye and Tammie Erskine were terminated from their positions as stewards and subsequently filed a civil action alleging a Section 1983 First Amendment retaliation claim against the ORC, citing their perceived affiliation with the Republican Party and having participated in protected speech during Granholm's gubernatorial election and confirmation process as reasons for their termination.<sup>92</sup>

The district court granted the defendants' motion for summary judgment,<sup>93</sup> and the plaintiffs appealed on their claims for retaliation based on protected speech and political affiliation.<sup>94</sup> In analyzing the protected speech claim, the Sixth Circuit applied *Pickering-Connick*<sup>95</sup> and reversed the lower court's ruling that the plaintiffs did not engage in protected political speech.<sup>96</sup> Further, and most significantly, the court held that perceived political association is protected under the First Amendment and creates a cognizable claim under the retaliation doctrine.<sup>97</sup>

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officers who did not support a recall election were automatically perceived as opposing it), and *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) (discharge is unconstitutional based on political beliefs, affiliation, or non-affiliation unless political allegiance is a job requirement).

87. See *infra* Part IV (noting that *Heffernan* tilted the balance in favor of the employee).

88. *Dye*, 702 F.3d at 292.

89. *Id.* at 293.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Dye v. Office of Racing Comm'n*, No. 09-13048, 2011 WL 2144485, at \*1–\*2 (E.D. Mich. May 31, 2011) (granting summary judgment to defendants where plaintiffs failed to establish a *prima facie* retaliation claim), *rev'd*, 702 F.3d 286 (6th Cir. 2012).

94. *Dye*, 702 F.3d at 292.

95. *Id.* at 295.

96. *Id.* at 309.

97. *Id.* at 298.

Initially, the district court held that the plaintiffs' affiliation claims arose from their speech claims, and because the speech claims could not survive, so too their affiliation claims failed.<sup>98</sup> According to the district court, because none of the plaintiffs could show that the defendants actually knew about their affiliation with the Republican Party, their political affiliation claims failed.<sup>99</sup> But the Sixth Circuit pointed out the fallacy in the district court's analysis: "[W]hile an individual's improper campaigning during work hours may not be protected speech, it certainly could alert those who heard the speech of his political affiliation, thereby fulfilling part of the political-affiliation standard."<sup>100</sup> The district court, according to the Sixth Circuit, erred in determining that a political affiliation claim necessarily fails when a political speech claim fails.<sup>101</sup>

The *Dye* majority demonstrated a shift away from the historically employer-friendly *Pickering-Connick* public concern balancing test.<sup>102</sup> *Connick* had imposed two new public concern considerations to weigh: (1) the employer's view that the employee has threatened the authority of the employer to run the office, and (2) wide deference owed to the employer's judgment regarding personnel decisions.<sup>103</sup> While *Dye* did not lower a plaintiff's initial burden of proof for a *prima facie* retaliation claim, it provided public employees with an additional, broader basis for relief even when they were not overtly associated with a political group at the workplace.<sup>104</sup> Thus, the Sixth Circuit broadened the scope of public employees who can bring a retaliation claim, *i.e.*, those whose protected speech or conduct may intentionally reveal a political affiliation.<sup>105</sup> The Supreme Court would later widen that scope even further.<sup>106</sup>

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98. *Dye*, 2011 WL 2144485, at \*26 ("[T]here is no evidence that any of the Plaintiffs exhibited in any way an affiliation or association with the Republican Party.").

99. *Id.*

100. *Dye*, 702 F.3d at 298.

101. *Id.*

102. *Id.* at 313 (noting that requiring actual speech to bring a retaliation claim is too rigid a test); *see also* Poirier, *supra* note 4, at 384 ("Compared to the weight of [*Pickering* and *Connick*] authority, the decision in *Dye* seems to be a significant departure from current Supreme Court precedent and the trend of Supreme Court decisions regarding a public employee's rights of political speech and political association.").

103. *See Connick v. Myers*, 461 U.S. 138, 152–54 (1968) (holding that defendant-employer was not required to tolerate action that he reasonably believed was disruptive to office efficiency, absent a strong First Amendment interest); *see also* Poirier, *supra* note 4, at 384 (predicting that a post-*Dye* Supreme Court decision would substantially expand public employees' rights).

104. *See* Poirier, *supra* note 4, at 386–87 (commenting on *Dye*'s foreseeable and reasonable expansion of public employees' rights under the First Amendment retaliation doctrine).

105. *See id.* at 387 (concluding that the *Dye* court expanded the rights of public employees in the workplace).

106. *See infra* Part II.C. (discussing the majority's recognition of a claim despite a lack of protected conduct).

## II. *HEFFERNAN V. CITY OF PATERSON, N.J.*

Part II begins with a review of the facts and unusual procedural history of *Heffernan v. City of Paterson, N.J.*<sup>107</sup> Next, it examines the majority's decision, authored by Justice Breyer,<sup>108</sup> then assesses Justice Thomas' dissent, in which Justice Alito joined.<sup>109</sup>

### A. *The Facts*

Petitioner Jeffrey Heffernan was a police officer in the town of Paterson, N.J., when the mayor of Paterson, Jose Torres, ran a reelection campaign against candidate Lawrence Spagnola.<sup>110</sup> Torres had previously appointed the then-Chief of Police James Wittig, as well as other supervisory subordinates, to their positions.<sup>111</sup> Outside of work, Heffernan was good friends with Spagnola.<sup>112</sup> Heffernan's bedridden mother requested that her son pick up a Spagnola campaign sign to replace the one that had been stolen from her front yard.<sup>113</sup> Heffernan contacted Spagnola's campaign manager to arrange a time and a place to pick up the campaign sign, and then drove the sign to his mother's house where he left it to be erected by another family member.<sup>114</sup>

While Heffernan was picking up the sign, a Paterson police officer assigned to Mayor Torres' security detail spotted Heffernan talking to Spagnola's campaign manager with the Spagnola lawn sign in hand.<sup>115</sup> Word of Heffernan's perceived "support" got back to the police department.<sup>116</sup> The next day, Heffernan was demoted from detective to a "walking post" patrol officer position.<sup>117</sup> Wittig's subordinate, who Torres had also appointed, informed Heffernan of the demotion, which was meant as punishment for what the police force considered "overt" involvement in Spagnola's campaign.<sup>118</sup> In protest of his demotion, Heffernan vehemently asserted that he was not "politically involved" with Spagnola's campaign, and was "just picking up a sign for [his]

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107. See *infra* Part II.A., II.B. (describing the facts and procedural history of the case at issue).

108. See *infra* Part II.C. (detailing the majority's ruling).

109. See *infra* Part II.D. (discussing Justice Thomas' dissent).

110. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. at 1416.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Heffernan v. City of Paterson, N.J.*, 777 F.3d 147, 150 (3d Cir. 2015), *rev'd*, 136 S. Ct. 1412 (2016).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*



mom.”<sup>119</sup>

*B. Procedural History in the District and Circuit Courts*

In August 2006, Heffernan filed a civil action under 42 U.S.C. § 1983 in the District Court of New Jersey. His complaint alleged that he was demoted for engaging in constitutionally protected conduct based on the department’s mistaken belief that he was campaigning for Spagnola when he was merely picking up a sign for his mother.<sup>120</sup> Initially, Heffernan brought his claim alleging that his constitutional rights of freedom of speech and freedom of association had been infringed upon.<sup>121</sup> There was significant litigation between the parties in the district court regarding the actual nature of the claims in Heffernan’s complaint.<sup>122</sup> The district court found that the complaint properly alleged: (1) retaliatory demotion based on Heffernan’s exercise of the right to freedom of speech, and (2) retaliatory demotion based on Heffernan’s exercise of the right to freedom of association.<sup>123</sup>

The case made its way through the district and circuit courts under unusual circumstances. The first district judge presiding over the case denied the parties’ cross-motions for summary judgment.<sup>124</sup> Heffernan proceeded to trial on his freedom of association claim, but not on his freedom of speech claim for reasons the Third Circuit characterized as “not entirely clear.”<sup>125</sup> After Heffernan was awarded a jury verdict of \$105,000 on his freedom of association claim, the district judge retroactively recused himself based on what he perceived was a conflict of interest and vacated the jury verdict.<sup>126</sup> The case was reassigned to a second district judge, who granted summary judgment to the defendants.<sup>127</sup> However, like the first judge, the second judge did not allow the parties to file briefs beyond their original motions.<sup>128</sup> The second judge never addressed Heffernan’s freedom of association claim.<sup>129</sup>

On appeal, a Third Circuit panel overturned the second district judge’s ruling because he did not allow the parties to file opposition briefs in

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* Neither party appealed this ruling before the Third Circuit. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

addition to their original motions, and for his additional failure to consider the viability of Heffernan's freedom of association claim, which Heffernan had prevailed on until the jury verdict was vacated.<sup>130</sup> Back on remand, a third district judge allowed a full round of new summary judgment cross-briefing.<sup>131</sup> After review, he concluded that while Heffernan had adequately pleaded and prosecuted a freedom of association claim in the "liberal spirit" of federal pleading standards,<sup>132</sup> he still failed to meet his burden of producing evidence that he *actually* exercised protected First Amendment rights by engaging in protected conduct.<sup>133</sup> The court found that alternatively, he was precluded from seeking relief under Section 1983 based only on conduct motivated by a *perceived* exercise of his First Amendment rights.<sup>134</sup>

On the subsequent appeal, the Third Circuit affirmed the third district court's ruling and held that "a free-speech retaliation claim is actionable under Section 1983 only where the adverse action at issue was prompted by an employee's *actual*, rather than *perceived*, exercise of constitutional rights."<sup>135</sup> The court found *Dye* inapposite to Heffernan's claim, holding that Heffernan did not present evidence that he was retaliated against for taking a stand "of calculated neutrality."<sup>136</sup> Instead, the Third Circuit relied on the holding in *Waters* to conclude that there is no violation of the Constitution where an employer disciplines an employee based on substantively incorrect information related to a perceived political affiliation.<sup>137</sup>

### C. *The Majority Opinion of the Supreme Court*

The Supreme Court granted Heffernan's petition for a writ of certiorari to decide the question of whether Heffernan had a valid First Amendment retaliation claim for his employer's mistaken perception of his political

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130. *Id.* (citing Heffernan v. City of Paterson, N.J., 492 F. App'x 225 (3d Cir. 2012)).

131. *Heffernan*, 777 F.3d at 150.

132. Heffernan v. City of Paterson, 2 F. Supp. 3d 563, 576–83 (D.N.J. 2014) (denying summary judgment to Heffernan), *vacated and remanded*, 668 F. App'x 435 (3d Cir. 2016).

133. *Id.*

134. *Id.*

135. Heffernan v. City of Paterson, N.J., 777 F.3d 147, 153 (2015) (emphasis added) (citing Ambrose v. Robinson, 303 F.3d 488, 496 (3d Cir. 2002)).

136. *Id.* at 154. In *Dye*, the court "adopt[ed] the reasoning of the First and Tenth Circuits in *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008), and *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008), both of which involved adverse employment actions taken against employees who did not adopt a position on a local political issue." The court held that an employer may not punish an employee for opting to not take a political position. (internal citation omitted).

137. *Heffernan*, 777 F.3d at 154 (citing *Waters v. Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion)).

affiliation with the Spagnola campaign.<sup>138</sup> To answer this question, the Court assumed the political activity Heffernan's supervisors thought he had engaged in was fundamentally constitutionally protected, but that his supervisors were in fact mistaken in their belief.<sup>139</sup>

The Court then focused on the construction of Section 1983 and determined that a plain reading alone did not answer the question.<sup>140</sup> The statute authorizes a suit by any person deprived of a right secured by the Constitution.<sup>141</sup> However, the statute does not define what this "right" is, and leaves unanswered whether the statute is meant to govern an employee's actual activity or an employer's motive.<sup>142</sup>

Even seminal First Amendment retaliation precedent did not answer the question for the Court.<sup>143</sup> *Connick* and *Pickering* served as examples of constitutionally-protected *actual* activity through the *Pickering-Connick* balancing test.<sup>144</sup> But the present issue before the Court was one of *perceived* political activity.<sup>145</sup> In *Pickering* and *Connick*, there was no issue of a factual mistake, and the only way to show that the employer's motive was unconstitutional was to prove that the conduct or statement at issue was in fact protected by the First Amendment.<sup>146</sup> Instead, the Court relied on *Waters*,<sup>147</sup> which held that the employer's motive, in relation to the facts as the employer reasonably understood them to be, is what matters in a perceived political affiliation claim, rather than the employee's actual speech or conduct.<sup>148</sup> Justice Breyer, unable to distinguish between the employer's motive in *Heffernan* and the employer's motive in *Waters*, concluded that the *Waters* reasoning was

138. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1416 (2016).

139. *Id.* at 1417 (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990)) (noting that "joining, working for or contributing to the political party and candidates of their own choice" is constitutionally protected activity).

140. *Id.*

141. *Id.*; see also 42 U.S.C. § 1983 (2012) ("Every person who . . . subjects, or causes to be subjected, any citizen . . . or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.").

142. *Heffernan*, 136 S. Ct. at 1417.

143. *Id.*

144. [A] court should first determine whether the plaintiff spoke "as a citizen" on a "matter of public concern." . . . We added that, if the employee has not engaged in what can 'be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."

*Id.* (citing *Connick v. Myers*, 461 U.S. 138, 143 (1968)).

145. *Id.* at 1418.

146. *Id.* at 1417–18.

147. *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion). Justice Thomas, who wrote the dissenting opinion in *Heffernan*, joined Justice Scalia's concurring opinion in *Waters*.

148. *Heffernan*, 136 S. Ct. at 1418.

applicable, noting that “in the law, what is sauce for the goose is normally sauce for the gander.”<sup>149</sup> The Court thus held by a vote of 6–2<sup>150</sup> that Heffernan was entitled to challenge an adverse employment action even though that action was motivated by a *mistaken* belief as to Heffernan’s actual conduct and political activity.<sup>151</sup>

In support of the holding, Justice Breyer, writing for the majority, looked at the construction of the First Amendment in comparison to the Fourth Amendment.<sup>152</sup> The First Amendment focuses on the activity of the government,<sup>153</sup> while the Fourth Amendment focuses on the activity of the citizen.<sup>154</sup> Justice Breyer paralleled the “law of Congress” to action taken by the Paterson Police Department and determined that the police department had impermissibly abridged a citizen’s freedom of speech.<sup>155</sup>

The majority further held that political affiliation plaintiffs are not required to prove either actual or ostensible employer coercion to change their political allegiances.<sup>156</sup> An employer’s factual mistake regarding affiliation does not decrease the risk of causing exactly the same kind and degree of harm as when the employer is unmistaken; nor is the harm diminished when a policy of demoting employees who affiliate politically causes employees to refrain from affiliating out of fear of demotion or termination.<sup>157</sup>

The final point in the majority opinion dealt with governmental cost and efficiency.<sup>158</sup> The majority contended that its holding would deter plaintiffs from bringing retaliation claims given the burden of proving their employer’s motive: “We concede that . . . it may be more complicated and costly for the employee to prove his case. But an employee bringing suit will ordinarily shoulder that more complicated burden voluntarily in order to recover the damages he seeks.”<sup>159</sup> Based on this reasoning, the majority reversed the Third Circuit and remanded the case to determine whether the Paterson Police Department dismissed Heffernan based on a neutral policy prohibiting police officers from

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149. *Id.*

150. This decision was issued after the death of Justice Antonin Scalia in February 2016, and before Justice Neil Gorsuch was sworn into office in April 2017.

151. *Heffernan*, 136 S. Ct. at 1418.

152. *Id.* at 1418–19.

153. U.S. CONST. amend. I (“*Congress shall make no law . . .*”) (emphasis added).

154. U.S. CONST. amend. XIV (“[T]he *right of the people* to be secure in their persons, houses, papers, and effects . . .”) (emphasis added).

155. *Heffernan*, 136 S. Ct. at 1418–19.

156. *Id.* at 1419.

157. *Id.*

158. *Id.*

159. *Id.*

having any involvement in political campaigns.<sup>160</sup>

*D. Justice Thomas' Dissent*

Justice Thomas, joined by Justice Alito, based his dissent on the premise that federal law provides no cause of action to plaintiffs whose constitutional rights have not been violated.<sup>161</sup> Highlighted in the dissent, but omitted in the majority decision, is Heffernan's admission that he was *not* engaging in constitutionally protected conduct or exercising any First Amendment rights when he picked up a Spagnola campaign sign for his mother.<sup>162</sup> For Heffernan to prevail on his Section 1983 claim against the police department, the dissent concluded he needed to establish that the police department actually deprived him of a constitutional right.<sup>163</sup> Justice Thomas argued that, because Heffernan claimed he was picking up the sign solely as a favor for his mother and admitted he was not actually exercising political speech or conduct, his Section 1983 claim must fail: "[d]emoting a dutiful son who aids his elderly, bedridden mother may be callous, but it is not unconstitutional."<sup>164</sup>

Both of the ways to frame Heffernan's First Amendment claim under the majority's reasoning are unpersuasive, Justice Thomas argued.<sup>165</sup> In a traditional Section 1983 suit, Heffernan would have to claim that the police department actually interfered with his freedom to speak or assemble.<sup>166</sup> Here, because Heffernan admitted that he was not engaging in protected speech, affiliation or assembly, Justice Thomas reasoned that his claim should fail because his constitutional rights were not infringed upon.<sup>167</sup>

The second way to frame Heffernan's claim, which Justice Thomas described as "more novel," would have required Heffernan to bring his claim on the basis that the police department unconstitutionally regulated his speech and prove that his demotion was both an injury and a consequence of the policy.<sup>168</sup> The majority framed Heffernan's claim under the First Amendment, whereas Justice Thomas focused on the success (or rather, failure) of Heffernan's claim within Section 1983.<sup>169</sup>

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160. *Id.*

161. *Id.* at 1420 (Thomas, J., dissenting).

162. *Id.*

163. *Id.*

164. *Id.* at 1421.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1420 ("A city's policy, even if unconstitutional, cannot be the basis of a § 1983 suit when that policy does not result in the infringement of the plaintiff's constitutional rights.")

169. *Id.* at 1422.

Justice Thomas recognized that Heffernan suffered a harm, but “Section 1983 provides a remedy only if the City [of Paterson] has violated Heffernan’s constitutional *rights*, not if it has merely caused him harm.”<sup>170</sup> Justice Thomas reasoned that while Heffernan suffered a type of harm, the harm did not result from activities within the “zone of interests” that Section 1983 protects: “Of course the First Amendment ‘focuses upon the activity of the Government . . .’ And here, the ‘activity of the Government’ has caused Heffernan harm . . . [b]ut . . . it has to be the right kind of harm.”<sup>171</sup> Heffernan needed to not only allege that the injury stemmed from an unconstitutional policy, but also establish that the policy actually infringed on his First Amendment rights.<sup>172</sup>

Further, the dissent addressed the majority’s discussion of the textual differences between the First and Fourth Amendments.<sup>173</sup> Justice Thomas characterized the linguistic differences between the two as “immaterial.”<sup>174</sup> He argued that the Fourth Amendment can be reorganized structurally but still retain its meaning substantively, making moot any argument that the organization of the First Amendment (“*Congress shall make no law . . .*”)<sup>175</sup> does not broaden a citizen’s ability to bring retaliation claims to vindicate his speech and assembly freedoms.<sup>176</sup>

Finally, Justice Thomas reasoned that the majority misapplied *Waters v. Churchill* to *Heffernan*.<sup>177</sup> Justice Thomas argued that *Waters* does not support the *Heffernan* expansion of civil rights protection to cases where an employee does not actually exercise First Amendment rights or engage in other protected conduct.<sup>178</sup> Unlike the employee in *Waters*, Heffernan admitted that he was not engaged in First Amendment protected activity and therefore could not allege that the police department interfered with protected conduct.<sup>179</sup> In response to Justice Breyer’s majority conclusion, Justice Thomas closed the dissenting opinion stating: “[W]hat is ‘sauce for the goose’ is not ‘sauce for the gander’ when the goose speaks and the

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170. *Id.*

171. *Id.* (citation omitted).

172. *Id.*

173. *Id.* at 1422–23.

174. *Id.* at 1423 (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008)) (noting that any textual reference to the activity of the Government in the Bill of Rights is done to necessarily take certain policy choices off the table).

175. U.S. CONST. amend. I (emphasis added).

176. *Heffernan*, 136 S. Ct. at 1423.

177. *Id.*

178. *Id.*

179. *Id.*

gander does not.”<sup>180</sup>

### III. THE *HEFFERNAN* DEPARTURE FROM THE LANGUAGE OF SECTION 1983 AND FIRST AMENDMENT RETALIATION PRECEDENT

Part III analyzes why Justice Thomas’ Section 1983 analysis was more consistent with the plain language of Section 1983 and established retaliation precedent.<sup>181</sup> Next, it explains why the majority misapplied *Waters v. Churchill* and the public concern balancing test set forth in *Pickering* and *Connick*.<sup>182</sup>

#### *A. Heffernan’s Calculated Admission That He Did Not Engage in Protected Conduct Should Have Been Fatal to His Section 1983 Claim*

The majority opinion begins, but does not complete, a textual analysis of Section 1983.<sup>183</sup> Noting that the plain language of Section 1983 provides relief to a person “deprived” of a “right,” the majority then analyzes the First Amendment “right” but ignores whether Heffernan was “deprived” of that “right” to engage in protected conduct.<sup>184</sup> Heffernan’s calculated and repeated assertion that he did not engage in protected conduct should have governed the majority’s analysis because Heffernan was not, by his own admission, retaliated against for exercising any First Amendment right.<sup>185</sup> Therefore, he was deprived of nothing.<sup>186</sup>

To obtain redress through Section 1983 for a retaliation claim, a plaintiff must prove the violation of a federal right, not just a violation of federal law.<sup>187</sup> Logically, because there cannot be a deprivation of a right

180. *Id.* (citation omitted).

181. *See infra* Part III.A. (discussing Section 1983 jurisprudence as applied to the facts of this case and explaining why Justice Thomas’ analysis should have prevailed).

182. *See infra* Part III.B. (considering the departure from precedent).

183. *Heffernan*, 136 S. Ct. at 1417 (majority opinion) (“The text of the relevant statute does not answer the question.”); *see also* KAREN M. BLUM AND KATHRYN R. URBONYA, SECTION 1983 LITIGATION 13 (Fed. Judicial Ctr., 1998), <http://www.fjc.gov/sites/default/files/2012/Sect1983.pdf> (explaining that Section 1983 relief is allowed only for the deprivation of certain rights denoted in the Bill of Rights).

184. *Heffernan*, 136 S. Ct. at 1417 (“[I]n this context, what precisely is that ‘right’?”); *see also* *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997) (holding that adverse employment actions related to departmental procedures do not rise to the requisite level of constitutional deprivation).

185. *Heffernan*, 136 S. Ct. at 1421 (Thomas, J., dissenting); *see also* Caselli, *supra* note 3, at 1721–22 (arguing for a more relaxed standard of what constitutes “conduct” for an appropriate retaliation claim, but noting that conduct in either actual or perceived engagement is required nonetheless).

186. *Heffernan*, 136 S. Ct. at 1422; *see also* *Harrington*, 118 F.3d at 365 (“Many actions which merely have a chilling effect . . . are not actionable . . . [and] do not rise to the level of constitutional deprivation.”).

187. 42 U.S.C. § 1983 (2012); *see also* *Heffernan*, 136 S. Ct. at 1422 (citing *Blessing v. Freedstone*, 520 U.S. 329, 340 (1997)) (“In order to seek redress through § 1983 . . . a plaintiff must

where the plaintiff insists he was not exercising that right, Heffernan cannot have a claim under Section 1983.<sup>188</sup> In preemptively granting Heffernan the ability to seek relief for deprivation of a right that he did not even attempt to exercise, the Court ignored its own well-established retaliation precedent.<sup>189</sup>

Central to Justice Thomas' dissenting opinion was Heffernan's repeated and strategic admission that he was not engaged in protected conduct.<sup>190</sup> Justice Thomas logically concluded that because Heffernan contended he was not engaged in protected conduct, he was not "deprived" of any right and thus Section 1983 provided no vehicle for relief.<sup>191</sup> Nor does Section 1983 provide a remedy against public officials who *attempt* but *fail* to violate an employee's constitutional rights.<sup>192</sup> A plaintiff may maintain a suit only for a completed tort. Because the law does not recognize an "attempted tort," Heffernan had no claim for retaliation where there was no conduct for his employer to retaliate against.<sup>193</sup> Heffernan attempted to create a cause of action out of the police department's mistaken impression that he was supporting the Spagnola campaign, but because he repeatedly and strategically contended that he did not engage in protected conduct, he failed to do so.<sup>194</sup> In reviving Heffernan's claim, the majority ignored the plain language of Section 1983 that provides a cause of action only when a plaintiff is "deprived" of a right.<sup>195</sup>

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assert the violation of a federal *right*, not merely a violation of federal *law*." (emphasis in original).

188. See *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989) (stating that Section 1983 does not create substantive rights but simply provides a remedy for the rights it designates); see also *Blessing*, 520 U.S. at 341 (holding that even if a plaintiff shows that a federal statute creates an individual right, there is a rebuttable presumption that the right is enforceable under Section 1983).

189. See *Blessing*, 520 U.S. at 340 (redress through Section 1983 is only available for violation of a federal right, not just federal law); see also *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) (holding that Section 1983 is not the source of federal rights).

190. *Heffernan*, 136 S. Ct. at 1420.

191. *Id.*

192. *Id.*; see also *Andree v. Ashland Cty.*, 818 F.2d 1306, 1311 (7th Cir. 1987) ("[T]he mere attempt to deprive a person of his First Amendment rights is not . . . actionable under section 1983.") (emphasis in original).

193. *Heffernan*, 136 S. Ct. at 1421 (citing *United States v. Stefonek*, 179 F.3d 1030, 1036 (7th Cir. 1999)); see also *Stefonek*, 179 F.3d at 1036 ("The broader principle that encompasses . . . 'harmless error' . . . is that a litigant may not complain about a violation of rights that does not harm the interest. . . .").

194. Brief for the Respondents at 5, *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412 (2016) (No. 14-1280) ("[P]etitioner's position cannot be reconciled with the established regime for asserting this kind of First Amendment [retaliation] claim."); see also *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) (stating that Section 1983 is not a source of federal rights).

195. *Heffernan*, 136 S. Ct. at 1421.



By failing to analyze, or even consider, whether Heffernan was *deprived* of any right, the majority ignored its own employment retaliation precedent, which requires a plaintiff asserting a claim under Section 1983 to show causation in fact when alleging infringing or discriminatory conduct by an employer.<sup>196</sup> In *University of Texas Southwestern Medical Center v. Nassar*,<sup>197</sup> the Court held that in employment retaliation claims, a plaintiff is required to show causation-in-fact, or proof, that the defendant-employer's conduct caused or contributed to the plaintiff's injury.<sup>198</sup> Causation-in-fact requires a plaintiff to establish that his conduct was *at least* a substantial motivating factor in the retaliation, and that the retaliation would not have occurred "but for" the plaintiff's protected conduct.<sup>199</sup> This requirement is foundational to Justice Thomas' dissent, in which he astutely noted that the *Heffernan* majority excused, and thus eliminated, a showing of causation-in-fact.<sup>200</sup>

Had the majority wished to provide relief for Heffernan or was otherwise concerned with the City of Paterson's ill-motive, the Court could have supported its opinion in favor of Heffernan by applying long-dormant freedom of assembly jurisprudence. The record was undisputed that Heffernan attended a Spagnola campaign event where his fellow deputies observed him holding a Spagnola lawn sign. The majority could have proceeded with its analysis on the basis that Heffernan was assembling, even if not affiliating, with the Spagnola campaign, which would have been consistent with its established retaliation jurisprudence.<sup>201</sup> A Section 1983 claim for deprivation of the right to

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196. *Id.* (stating that Heffernan's exercise of his right to not associate with Spagnola did not cause his demotion); see also Timothy M. Holly, *The Causation Standard for Retaliation Claims Under Employment Discrimination Statutes: Ambiguity of "Central Importance"*, 15 DEL. L. REV. 71, 72 (2014) (but-for causation prevents unnecessary and unfounded discrimination claims).

197. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (acknowledging that a successful retaliation claim must establish that the protected activity was a but-for cause of the alleged violation).

198. *Id.* at 2524–25.

199. *Id.* (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)) ("In intentional-discrimination cases, 'liability depends on whether the protected trait' 'actually motivated the employer's decision' and 'had a determinative influence on the outcome.'"). Although the *Nassar* Court utilized a "but for" analysis for Title VII retaliation claims, other courts have noted that for First Amendment retaliation claims, a "substantial motivating factor" test of causation-in-fact can be applied. See *Rivers v. New York City Hous. Auth.*, 176 F. Supp. 3d 229, 247 (E.D.N.Y. 2016) (concluding that the substantial motivating factor test applies rather than the but-for test). Evidence of causation was absent in *Heffernan* under either standard. See *Bailey v. Floyd Cty. Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997) (citing *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1500 (7th Cir. 1994)) ("[T]he employee must link the speech in question to the defendant's decision to dismiss her.").

200. *Heffernan*, 136 S. Ct. at 1421.

201. See *Elrod v. Burns*, 427 U.S. 347, 371 (1976) (holding that dismissals for affiliation or

assemble is not unique,<sup>202</sup> and could have prevented the majority from circumventing the requisite causation element altogether. Heffernan could have simply argued that he was lawfully assembling at the Spagnola campaign event, without attaching any affiliation to the candidate. This would have logically supported a claim that the police department retaliated against him for exercising his “right” to assemble, and thus he was “deprived” of this “right.”<sup>203</sup> This is precisely what Section 1983 protects and redresses, and would have likely addressed the concerns of the dissenting Justices Thomas and Alito.<sup>204</sup>

Considering that the Supreme Court has not heard a freedom of assembly claim in over thirty years, *Heffernan* could have been a pivotal opportunity for the Court to reground its freedom of assembly jurisprudence.<sup>205</sup> The right to assemble has been reduced to a historical footnote in American political theory and law as a result of the Court’s fractured analysis between either freedom of speech or the weaker, atextual “freedom of association.”<sup>206</sup> But the right to assemble is a

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non-affiliation with a political party are unconstitutional); *see also* *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (holding that it is sufficient for retaliation plaintiff to prove they were discharged solely because they were not affiliated with or sponsored by a political party); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (holding that promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on First Amendment rights of public employees).

202. *See* *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (holding that the general right to assemble for lawful purposes is protected); *see also* *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (holding that the right to peacefully assemble is a fundamental right safeguarded by Equal Protection).

203. *See* *Dye v. Office of Racing Comm’n*, 702 F.3d 286, 294 (6th Cir. 2012) (stating that a necessary element of a retaliation claim is that the plaintiff first engaged in protected conduct); *see also* Caselli, *supra* note 3, at 1721 (outlining a successful claim of retaliation which begins with engagement of protected conduct).

204. *Heffernan*, 136 S. Ct. at 1422; *see also* *Heffernan v. City of Paterson – Post-Decision SCOTUScast*, THE FEDERALIST SOCIETY (May 17, 2016), <http://www.fed-soc.org/multimedia/detail/heffernan-v-city-of-paterson-post-decision-scotuscast> (arguing that the “fractured opinion would have been unanimous” if Heffernan’s claim was approached as a violation of his right to assemble); *see also* Jonathan Stahl, *Supreme Court Rules on Political Speech and the First Amendment*, NAT’L CONST. CTR.: CONST. DAILY (Apr. 29, 2016), <http://blog.constitutioncenter.org/2016/04/supreme-court-rules-on-political-speech-and-the-first-amendment/> (noting that the dissent maintained that Heffernan’s claim failed where he did not engage politically with the Spagnola campaign).

205. Brief Amicus Curiae of The Becket Fund for Religious Liberty in Support of Petitioner at 17, *Heffernan v. City of Paterson*, N.J., 136 S. Ct. 1412 (2016) (No. 14-1280) [hereinafter “*Brief for The Becket Fund*”] (arguing that the Court should use *Heffernan* as an opportunity to reestablish association and assembly jurisprudence on firmer grounds); *see also* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566 (2010) (commenting on the sparse development of freedom of assembly jurisprudence before the Court in the last thirty years).

206. *See* Inazu, *supra* note 205, at 792 (tracking the developments during the Civil Rights Era that allowed “freedom of association” to gain traction in a series of cases attacking the NAACP, while the only freedom of assembly cases were those overturning convictions of African Americans

standalone right and should not be subordinate or auxiliary to other rights.<sup>207</sup> *Heffernan* presented the perfect opportunity for the Court to revive freedom of assembly analysis. Furthermore, had the *Heffernan* facts been argued or analyzed as a deprivation of the right to assemble, the longstanding requisite element of causation-in-fact would not be done away with, as it was in *Heffernan*.

While the City of Paterson Police Department's motivation may have been to stifle outward support of its choice-candidate's opponent, *Heffernan* did not engage in any conduct available to be stifled, and therefore should not have been entitled to relief under the plain language of Section 1983.<sup>208</sup> Section 1983 does not provide a remedy for mere harm, only for actual governmental infringement on constitutional rights.<sup>209</sup> Even Justice Thomas acknowledged that the police department's decision to demote Officer *Heffernan* was questionable—but not unconstitutional.<sup>210</sup> Allowing *Heffernan* to maintain his claim despite not having been “deprived” of a protected right, the majority unnecessarily expanded the reach of Section 1983.<sup>211</sup>

*B. The Majority Opinion Avoids the Pickering-Connick Balancing and Public Concern Test*

The *Heffernan* majority reasoned that the *Pickering-Connick* balancing test and public concern principles did not apply because in the aforementioned cases, the employee actually *engaged* in protected conduct.<sup>212</sup> Instead, the majority relied solely on *Waters*, which dealt

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punished for participating in peaceful demonstrations); *see also* Brief for the Becket Fund, *supra* note 205, at 17 (stating that the freedom of assembly as envisioned and protected by the Founders has been replaced with the weaker “freedom of association” that is constitutionally atextual).

207. Brief for the Becket Fund, *supra* note 205, at 17 (emphasizing the independent force of the right to assemble and the need to consider it as a right separate from freedom of speech); *see also* Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 825 (2012) (comparing Inazu's interpretation of “freedom of association” as derived from the Assembly Clause to the Court's interpretation as a derivative of freedom of speech).

208. *Heffernan*, 136 S. Ct. at 1421 (Thomas, J., dissenting); *see also Dye*, 702 F.3d at 301 (either actual or perceived affiliation is sufficient to satisfy the conduct requirement of a First Amendment retaliation claim).

209. *Heffernan*, 136 S. Ct. at 1420 (Thomas, J., dissenting); *see also Blessing v. Freedstone*, 520 U.S. 329, 340 (1997) (Section 1983 only provides relief for violations of constitutional rights, not mere harm).

210. *Heffernan*, 136 S. Ct. at 1421 (Thomas, J., dissenting) (“[D]emoting a dutiful son who aids his elderly, bedridden mother may be callous, but it is not unconstitutional.”).

211. *Heffernan*, 136 S. Ct. at 1418 (majority opinion) (finding that regardless of *Heffernan*'s lack of constitutionally protected conduct, the government acted on a “constitutionally harmful policy” which entitles *Heffernan* to relief).

212. *Id.* at 1418.

with perceived political conduct.<sup>213</sup> But even so, the *Waters* Court did not entirely abandon a public concern analysis.<sup>214</sup> In fact, the *Waters* plurality opinion *did* engage in a public concern analysis, even though the Court finally concluded that the speech at issue was a matter of personal interest, not of public concern.<sup>215</sup> While the *Heffernan* majority in theory relied on *Waters* to support its conclusion,<sup>216</sup> it omitted not only the *Pickering-Connick* balancing test, but any review of a legitimate public concern related to Heffernan's acts as well, thus signaling a major departure from well-settled principles of retaliation jurisprudence.<sup>217</sup>

The majority reasoned that none of the public concern precedent directly answered the question before the Court because the "right" at issue in those cases concerned a public employee's actual rather than perceived activity.<sup>218</sup> In neither *Pickering* nor *Connick* was the public employer mistaken.<sup>219</sup> But, the *Heffernan* majority provided no reasoning for why it abandoned the public interest analysis other than a veiled reference to "a few exceptions" to the fundamental notion that the Constitution prohibits a government employer from demoting an employee based on support for a political candidate.<sup>220</sup> The Court barely references these exceptions that "take account of 'practical realities' such as the need for 'efficiency' and 'effective[ness] in government services.'"<sup>221</sup> In doing so, the majority avoids *Pickering*, *Connick*, and their progeny. Thus, the Court did not balance Heffernan's interest—regardless of whether it was his own interest or his mother's—with the city's interest in promoting efficient police and public safety services.<sup>222</sup> Instead, it assumed, without explanation, that the "exceptions" did not

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213. *Id.* at 1417–18.

214. *Id.* at 1418 ("If the employer's motive . . . is what mattered in *Waters*, why is the same not true here? . . . [W]hat is sauce for the goose is normally sauce for the gander.").

215. To be protected [under the First Amendment], the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion) (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

216. *Heffernan*, 136 S. Ct. at 1418.

217. *Id.* at 1417 (referencing the public concern analysis as requiring an analysis of whether exceptions such as the need for efficiency and effectiveness in public service apply).

218. *Id.*

219. *Id.* at 1417–18. In *Pickering*, there was no mistake that the plaintiff exercised his First Amendment freedom of speech by penning the letter, and in *Connick*, the same principle applied to the public employee's questionnaire.

220. *Id.* at 1417.

221. *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 672, 675 (1994) (plurality opinion)).

222. *Id.*

apply to the case.<sup>223</sup>

To truly rely on *Waters*, the majority should have performed a balancing test. But, any such balancing was impossible because of Heffernan's admission that he did not engage in protected conduct.<sup>224</sup> *Waters* requires balancing the employee's right to engage in protected conduct against the employer's interest in operating efficiently and enforcing reasonable policies and procedures.<sup>225</sup> In *Heffernan*, however, there was no protected conduct to balance against the interest of the City of Paterson Police Department in operating efficiently and employing reasonable policies.<sup>226</sup> This effectively canceled out the need for the *Pickering-Connick* balancing test when Heffernan tried his claim, for a fourth time, on remand before the district court. The trial court then only had to consider the police department's motive behind demoting Heffernan, which had to be weighed against the goal of promoting departmental efficiency, all without considering any of Heffernan's private interests.

As applied by the majority, *Waters* is weak support for providing First Amendment and Section 1983 protections for adverse employment actions stemming from factual mistakes.<sup>227</sup> The majority thus created a new basis for relief under Section 1983 by finding an employer's motive actionable, absent any exercise of a First Amendment right by the public employee.<sup>228</sup> The majority's weak public concern analysis in this case is likely to erode the importance of the *Pickering-Connick* precedent in future First Amendment retaliation cases.<sup>229</sup>

By recognizing Heffernan's claim as actionable under Section 1983, the Court upends public employment efficiency, an important public

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223. *Id.* ("In order to answer the question presented, we assume that the exceptions do not apply here.").

224. *Id.* at 1423 (Thomas, J., dissenting) ("Unlike the employee in *Waters*, Heffernan admits that he was not engaged in constitutionally protected activity.").

225. *Waters*, 511 U.S. at 668 (holding that if an employment action is based on what an employee supposedly said, and a reasonable public employer would recognize that speech as protected, the First Amendment imposes on the employer to proceed with the care that a reasonable manager would use in taking action).

226. *Heffernan*, 136 S. Ct. at 1418 (applying the focus on the police department's motive in lieu of Heffernan's nonexistent protected conduct).

227. *Waters*, 511 U.S. at 668 (while the conduct in *Waters* was in dispute, the holding rested on the public concern analysis and left the determination of what was actually said for the district court on remand).

228. *Heffernan*, 136 S. Ct. at 1418.

229. Brief for the Respondents, *supra* note 194, at 23–25 (arguing that relief for Heffernan was likely to "vastly multiply" retaliation claims and "erod[e] the gatekeeper rule that fully distinguishes serious assertions of constitutional rights from those that should not detail the courts or disrupt the operation of the public workforce").

concern itself.<sup>230</sup> Claims that would have failed because there is no constitutionally protected conduct at issue, such as in the case of *Heffernan*, are now legitimate even without establishing the elements of a *prima facie* retaliation claim—especially proof of causation-in-fact.<sup>231</sup> Now a claim can be based solely on an employer’s motivations—once deemed necessary, but not sufficient, for the causation element of a *prima facie* retaliation claim—rather than on facts establishing the essential elements of a traditional First Amendment retaliation claim.<sup>232</sup>

IV. *HEFFERNAN* EXPANDS THE EXPOSURE OF GOVERNMENTAL EMPLOYERS TO RETALIATION CLAIMS FROM EMPLOYEES WHO DO NOT ENGAGE IN PROTECTED CONDUCT AND WHOSE ACTIONS ARE NOT EVALUATED FOR THE LEGITIMACY OF THEIR PUBLIC CONCERN

This Part discusses how the *Heffernan* decision dismantles the First Amendment retaliation doctrine and significantly widens the class of plaintiffs who may bring employment retaliation claims.<sup>233</sup> It further explores how this decision will encourage public employers to implement over-reaching policies in order to safeguard against any potential liability based on nothing more than an allegedly improper motive.<sup>234</sup>

It is difficult to reconcile with established First Amendment retaliation precedent the fact that *Heffernan* admitted he did not engage in *any* protected conduct by picking up the campaign sign for his mother. A plaintiff’s burden when bringing a retaliation claim includes proving causation-in-fact between his protected political conduct and the resulting adverse employment action in response.<sup>235</sup> Despite the fact that *Heffernan* never established the causation-in-fact element of a *prima facie* retaliation claim, the Court still held that he had a sufficient retaliation claim because of the focus on the City of Paterson’s motive.<sup>236</sup> This reasoning dilutes the well-established *Connick* precedent that an

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230. *Id.* (contending that the burden-shifting dynamic of a holding for *Heffernan* would have costly implications for public employers); *see also* *Connick v. Myers*, 461 U.S. 138, 149 (1983) (“While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints. . . .”).

231. *See Heffernan*, 136 S. Ct. at 1420–21 (Thomas, J., dissenting); *see also* Brief for the Respondents, *supra* note 194, at 7 (noting that granting *Heffernan* relief without requiring a showing of but-for causation would transform grievances only loosely tied to the First Amendment into actionable before the federal courts).

232. *Heffernan*, 136 S. Ct. at 1421 (Thomas, J., dissenting) (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)).

233. *See infra* Part IV.

234. *See infra* Part IV.

235. *Nassar*, 133 S. Ct. at 2526.

236. *Heffernan*, 136 S. Ct. at 1418.

employer's motivation for taking an adverse action is a necessary condition for a retaliation claim, but alone is not sufficient to impose Section 1983 liability.<sup>237</sup>

Consider the hypothetical apolitical public employee discussed in the Introduction who was terminated for having a political website displayed on her computer screen at work.<sup>238</sup> Does she have a Section 1983 claim for First Amendment retaliation?

Before *Heffernan*, likely not, because under the traditional First Amendment retaliation doctrine, her claim fails at the first element.<sup>239</sup> She was not engaging in constitutionally protected conduct because she admitted that she was not actually reading the website or endorsing the unpopular candidate, but had rather just opened a link from a family member's email.<sup>240</sup> Thus, she would not be able to establish the requisite causal connection between her discharge and her political views, or lack thereof. Finally, reading a website on the job is not of sufficient public concern to outweigh the public employer's interest in promoting workplace efficiency and establishing neutral policies restricting Internet access during working hours.

Post-*Heffernan*, however, the apolitical public employee can now bring a claim alleging that her termination was the result of her employer's mistaken perception of political affiliation and thus was based on an improper motive.<sup>241</sup> She no longer needs to meet the first element of a retaliation claim. If she relies on *Heffernan*, all she is required to show is that any adverse employment action against her was the result of the employer mistakenly believing she was affiliated with Presidential Candidate A, the employer disagreed with such alignment, and retaliated against her for it. According to Justice Breyer, that motive is all that is required to bring a First Amendment retaliation claim.<sup>242</sup>

As noted above, in *Pickering*, *Connick* and, to a lesser extent, *Waters*, the Court's focus on a balancing of competing interests often favored the public employer's interests in efficiency in operating its agencies,

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237. Brief for the Respondents, *supra* note 194, at 24–25; *see generally* *Connick v. Myers*, 461 U.S. 138, 150–51 (1983) (holding that even if *Connick's* decision to terminate *Myers* was due to her “mini-insurrection,” the Court still gives deference to employer's judgment especially when the relationships among colleagues is “essential to filling public responsibilities . . .”).

238. *See infra* Part I.

239. *Contra* *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (teacher's letter to the local newspaper criticizing school board's fund allocation was protected speech); *see also* *Dye v. Office of Racing Comm'n*, 702 F.3d 286, 299 (6th Cir. 2012) (retaliation based on perceived political affiliation is actionable as a claim).

240. *See supra*, Part I.

241. *Heffernan*, 136 S. Ct. at 1419.

242. *Id.*

especially when it was not just any speech that was protected, but speech regarding a matter of legitimate public concern. Then, in *Heffernan*, the Court tilted the balance in favor of the employee by allowing a claim to stand absent the necessary Section 1983 deprivation of a protected right and avoiding any examination of the legitimacy of the public concern associated with an employee's conduct.<sup>243</sup>

The ease with which a public employee can institute a First Amendment retaliation claim against a public employer post-*Heffernan* has significant implications.<sup>244</sup> First, by punishing motive and excusing proof of causation-in-fact, the universe of potential public employee plaintiffs is expanded.<sup>245</sup> This will expose public employers to ever-expanding disruption, expense, and liability. This expansive application of First Amendment standing is bound to cause government employers to incur significant costs litigating these cases, given their factual intricacies and the often-tortured courses that these cases can take, *Heffernan* being no exception.<sup>246</sup> Considering the potential for such fact-intensive litigation, with both sides conducting extensive discovery to determine a government employer's motive, it will be increasingly difficult for defendant-employers to avoid costly summary judgment or trial.<sup>247</sup> Virtually any terminated or demoted public employee will have an actionable claim if they allege that their employer was improperly motivated by any form of perceived affiliation, be it actual or mistaken.<sup>248</sup> Employers may be incentivized to impermissibly yet affirmatively investigate employees' political beliefs and affiliations in an effort to avoid mistaken perceptions and to limit liability resulting

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243. See, e.g., *Why Freedom of Speech Might Protect You When You Aren't Speaking*, THE ECONOMIST: DEMOCRACY IN AMERICA, (Apr. 29, 2016, 5:38 PM), <http://www.economist.com/blogs/democracyinamerica/2016/04/odd-cases-good-law> (noting the holding's "significant development extending a long line of cases that have broadened the zone of expression protected by the First Amendment").

244. See Jeannie O'Sullivan, *Justices Put Target on Employer Motives in Free Speech Suits*, LAW360, (Apr. 26, 2016, 9:41 PM), <https://www.law360.com/articles/789265/justices-put-target-on-employer-motives-in-free-speech-suits> (noting labor defense attorney's concern with the *Heffernan* holding that the "majority skipped the first step to proving a First Amendment claim, namely proof that *Heffernan* actual[ly] spoke on a matter of public concern – especially when *Heffernan* testified he was not engaging in First Amendment activity . . .").

245. *Heffernan*, 136 S. Ct. at 1421 (Thomas, J., dissenting) (citing *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)).

246. Brief for the Respondents, *supra* note 194, at 25 ("Given how hard these kinds of subjective facts are to disprove, the odds of avoiding summary judgment and being forced to trial or settlement are overwhelming.").

247. See *id.* (noting that the range of activities one's employer could mistakenly believe to be politically motivated is nearly "limitless" and therefore opens the floodgates to potential litigation).

248. See *id.* at 28 ("[T]he new doctrine that petitioner would create seemingly would not even be limited to the public employment context.").



from factual mistakes.

After *Heffernan*, all that is required to bring a sufficient First Amendment retaliation claim is a rumor stemming from any commonplace act, such as listening to certain radio stations, jokes with coworkers, or hobbies employees pursue.<sup>249</sup>

Third, because the *Heffernan* majority recognized that a “neutral” policy may provide a safe harbor for employers against retaliation claims, employers will be encouraged to establish so-called “neutral”—but over-reaching—workplace policies as protection, which may curtail legitimate protected conduct.<sup>250</sup> Any policies that a public employer may implement to decrease the risk of litigation could chill legitimate political activity both in and out of the workplace.

#### CONCLUSION

By recognizing Heffernan’s claim as actionable under Section 1983, the Supreme Court is allowing claims that would have previously failed. Now, a First Amendment retaliation claim can be based solely on an employer’s motivations, rather than on facts establishing the requisite elements of the traditional *prima facie* retaliation claim. The *Heffernan* ruling relieves the plaintiff of the burden of proof to show the causal link between the adverse employment action and the employee’s conduct. The ruling further erodes the importance of the public concern balancing test. This ruling has significant ramifications for public employers, who now bear the burden of operating efficiently while simultaneously ensuring they protect themselves from the multiple avenues of liability the *Heffernan* ruling opens up.

Thus, the Court should have held that because Heffernan did not engage in protected conduct, and therefore was not deprived of a right as required under the plain language of Section 1983, his claim could not survive.

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249. *See id.* at 25 (“A claim could arise from anything . . . such as the radio station they listen to, the jokes employees tell at work, the hobbies they pursue [and] the kinds of music they listen to.”) (internal citation omitted).

250. *Heffernan*, 136 S. Ct. at 1419.