Association, Religion and Speech, Oh My!

Section 1983 Claims By Employees

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The First Amendment

- The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

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Civil Actions for Redress of Constitutional Violations

- Citizens whose rights, under the First Amendment or otherwise, have been violated by an individual acting on behalf of the government at any level are able to seek redress for those violations in accordance with 42 U.S.C. §1983, which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States 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 in an action at law, suit in equity, or other proper proceeding for redress . . . ."

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Government Employees as Citizens

- The Supreme Court has held on numerous occasions that, when a citizen enters government employment, the citizen by necessity must accept certain limitations on his or her freedom because the government, like a private employer, needs a significant degree of control over their employees' words and actions to ensure the efficient provision of government services. See Garcetti v. Ceballos, 547 U.S. 410, 418-419 (2006).
- At the same time, a citizen who works for the government remains a citizen, and the First Amendment "limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." Id., citing Perry v. Sindermann, 408 U.S. 593, 597 (1972).
- Additionally, government employees are among the most informed citizens, and therefore are likely to have the most defined opinions on matters of public concern, thereby holding positions of trust that can advance a vibrant dialogue on those matters. Garcetti at 419-420.

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It’s a Balancing Act

- The Supreme Court has therefore explained that its task is to seek “a balance between the interests of the [employee], as a citizen….and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Connick v. Myers, 461 U.S. 348, 142 (1983), citing Pickering v. Board of Ed. of Township High Sch. Dist. 205, Will Cty., 391 U.S. 563, 568 (1968).
- In addition, the Court recognizes that were public employees not able to speak on matters of public concern, "the community would be deprived of informed opinions on important public issues." Hunter v. Town of Mocksville, 789 F.3d 389, 396 (4th Cir. N.C. 2015), citing San Diego v. Roe, 543 U.S. 77, 82 (2004). Indeed, "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." Id. The Supreme Court thus underscored last year in Lane that "[i]t bears emphasis that our precedents . . . have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." 134 S. Ct. at 2379.

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The Free Speech Balancing Act

- In the context of employee speech, in order to balance the speech rights and the state's interest as an employer, the Court in Waters v. Churchville, 511 U.S. 661, 668 (1994), and later in Garcetti, stated that the following analysis applies in order to be protected:
  - The employee must be speaking as a citizen;
  - Speech must be on a matter of public concern; and
  - The interest in expressing oneself on the matter must not be outweighed by any injury the speech could cause to the state.

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Citizen vs. Employee Speech

- "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti at 421.
- In the alternative, though, where a statement is made by an employee outside of the scope of their "ordinary job duties", it "is speech as a citizen for First Amendment purposes…" Lane v. Franks, 134 S. Ct. 2369, 2378 (2014).
  - While job descriptions may be relevant, ad hoc or de facto duties not appearing in the written job description may render a speaker's speech unprotected. Fox v. Traverse City Area Pub. Schs. Bd. of Educ., 605 F.3d 345, 348-490 (6th Cir. 2010).
- The question of an employee's motives, or the fact that the speaker obtained information by virtue of the public employment is not dispositive of, although it may be relevant to, whether the speech is employee versus citizen speech. Lane at 2379.

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Examples of Employee Speech

- Employees voicing disagreement with or criticism of management's policy, particularly if they are voicing those complaints directly to supervisors, are doing so pursuant to their official duties and owe their existence to the professional responsibilities of the speaker. See Krycia v. Twp. Of Clinton, 2015 U.S. Dist. LEXIS 176509, *16-17 (E.D. Mich. Dec. 16, 2015).
- An employee whose duties included educating law enforcement during training sessions and analyzing the effectiveness of that training spoke as an employee when he criticized law enforcement training sessions and the funding of those sessions. Alomari v. Ohio Dep't of Pub. Safety, 2015 U.S. App. LEXIS 16237, *22-25 (6th Cir. 2015).
- A library trustee who complained about the heating system, mishandling of library funds, and the inadequacy of library staff was speaking in the context of her employment where they are the types of critiques and analyses that she is charged with generating as a library trustee. Langton v. Town of Chester, 2016 U.S. Dist. LEXIS 26982, *12-13 (S.D.N.Y. Mar. 2, 2016).

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Examples of Citizen Speech

- An employee who, while also having complained internally up his chain of command regarding the waste occurring as a result of a non-functional fire training center and a boat, spoke to a reporter both before, during and after a Township council meeting spoke as a citizen. While the matter involved his job duties as fire chief, he was not expected to make those communications to reporters, or to law enforcement officials, as he did, and therefore his speech was clearly citizen speech. Jerri v. Harran, 2015 U.S. App. LEXIS 13948, *14-16 (3d Cir. 2015).
- A fire chief who contacted council members to give them a citizen taxpayer's perspective on the department's plan to expend money on a new rescue truck was speaking as a citizen where he expressly stated he was contacting them as a taxpayer and not an employee, called from home during his off-time, and made no other reference to his employment, was speaking as a citizen. Stinebaugh v. City of Wapakoneta, 2015 U.S. App. LEXIS 19817, *13-16 (6th Cir. 2015).
- An employee who was called to testify in a union arbitration concerning firearms, Taser and CPR training was on a matter of public concern even though it was in an arbitration setting because his testimony in that regard was actually contrary to his and his union's interests, proper training in use of force and the potential for excessive force is a significant public interest, and therefore were made as a citizen and on a matter of a public concern. Boulton v. Swanson, 795 F.3d 526, 534-535 (6th Cir. 2015).

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What's the Matter? Of Public Concern…

- "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick at 147-148.
- "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of a legitimate news interest; that is, a subject of general interest and of value and concern to the public." Snyder v. Phelps, 562 U.S. 443, 453 (2011).
  - An employee's speech on the allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue was a legitimate matter of public concern and therefore protected by the First Amendment. Pickering at 571-572.
  - Corruption and misuse of funds, failure to follow state law, and discrimination, are matters of public concern. See Chappel v. Montgomery Cnty. Fire Protection Dist. No. 1, 131 F.3d 564, 576-77 (6th Cir. 1997), Banks v. Wolfe Cnty. Bd. of Educ., 330 F.3d 888, 896-97 (6th Cir. 2003), Hughes v. Region VII Area Agency on Aging, 542 F.3d 169, 181-82 (6th Cir. 2008).

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I'm a Member of the Public and It's of Interest to Me

- Mere assertions of incompetence and poor management decision-making are run-of-the-mill employment disputes, particularly where the recommended course of action would benefit the employee, and therefore is not speech on a matter of public concern. See Boulton at 532.
- Matters of internal policy, including allegations of favoritism, employment rumors, other complaints of interpersonal discord, personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest are matters more immediately concerned with the self-interest of the speaker and therefore are not generally matters of public concern. See Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 (4th Cir. 2000); Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992).
- Complaints about a residency requirement that an employee could not comply with and a change in employee status from provisional to in-house employee were purely private grievance about the employee's own private grievance and not matters of public concern. Wyatt v. Phila. Hous. Auth., 2016 U.S. Dist. LEXIS 25738, *10-11 (E.D. Pa. Mar. 1, 2016).

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Where is the Tipping Point?

- In DeSantis v. N.J. Transit, 103 F. Supp. 3d 583, 596 (D.N.J. 2015), the Plaintiff questioned the qualifications of a co-employee for a promotion. Plaintiff was seeking to be promoted into the same position. The Court noted that the question of whether a public official is qualified for her job might, in some contexts, be a matter of public concern. But, whether an official is more qualified than the speaker is primarily a matter of personal interest. Otherwise, the speech touches on matters of public concern only in the most limited sense.

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I Don't "Like" Your Tone

- Yes, there are free speech considerations when it comes to Facebook!
  - An employee's "like" of a political campaign Facebook page constitutes First Amendment protected speech. Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012).
  - An employee's reference on his Facebook page to the firing of various employees was an expression of constitutionally protected speech. Mattingly v. Milligan, 2011 U.S. Dist. LEXIS 126665 (E.D. Ark. Nov. 1, 2011).
  - An employee's comment about the public safety impact and liability resulting from the shortcomings of the promotional process was of general interest to the public and therefore a matter of public concern. Contrarily, comments specific to a particular promoted employee which referenced the speaker and the impact of same on the speaker were not a matter of public concern. Liverman v. City of Petersburg, 106 F. Supp. 3d 744, 755-757 (E.D. Va. 2015).

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What's the State's Interest?

- The State's interest is in promoting the efficiency of the public services it provides through its employees. Pickering at 568.
- The following government interests are therefore considered as part of the balancing test, as per Pickering at 570-573:
  - Whether the employee's statement impairs discipline by supervisors or harmony among co-workers;
  - Whether the employee's statement has a detrimental impact on close working relationships for which personal loyalty and confidences are necessary; and
  - Whether the employee's statement impedes the performance of the employee's duties or interferes with the regular operations of the enterprise.

  See also Rankin v. McPherson, 483 U.S. 378, 388 (1987).

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Justifying a Speech Restriction

- The government cannot rely on mere speculation or conjecture…it must demonstrate that the harms it recites and that the restrictions will in fact alleviate them to a material degree. Edenfield v. Fane, 507 U.S. 761, 770-771 (1993).
- While the government must show an actual harm, it is not required to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. Connick at 152.

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Justifying a Speech Restriction

- In Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006), the Court held that a City's concern for disruption in the department when officers' participation in "blackface" was broadcast in local news and covered in the print media was reasonable.
- A City's termination of a clerical employee in the Sheriff's office who appeared on the local news as a recruiter for the Ku Klux Klan was appropriate because her continued employment would threaten the ability of the agency to effectively perform its duties. McMullen v. Carson, 754 F.2d 936, 940 (11th Cir. 1985).
- Where a comment on Facebook was not widely publicized beyond current and former employees of the department, the comment cannot properly be said to be likely to or actually cause harm to the government that would justify a speech restriction; while their might be some disruption internally within the department, the disruption has to be sufficient to outweigh the employee's free speech interests. Liverman at 766-767.

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Employee Religious Expression

- As noted above, the "Free Exercise Clause" provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"
- The Supreme Court has made clear that public employment cannot be conditioned on someone's willingness to subscribe to a particular religious principle or to any religious belief at all. Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961).
- "At a minimum, the protections of the Free Exercise Clause pertain if the (action) at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

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The Claim Framework

- There's not a wealth of information regarding employee §1983 religious freedom claims, in large part because these claims are also provided for under Title VII – so most claims are made under that statute as opposed to the First Amendment.
- To the extent that claims are made under §1983, they're evaluated under the same framework as Title VII claims. See Lawson v. Washington, 296 F.3d 799, 806 (9th Cir. 2002); Floyd v. State of Mo. Dep't of Soc. Servs., Div. of Family Sevs., 188 F.3d 932, 936 (8th Cir. 1999).
- Some of the cases, for example, bear a direct resemblance to Title VII claims, such as in Thompson v. Apache County, 2011 U.S. Dist. LEXIS 132068, *16 (D. Arz. Nov. 15, 2011), where the plaintiff argued that he was terminated because he is not a member of the Church of Jesus Christ of Latter-day Saints. The Court in Thompson noted a lack of evidence of disparate treatment of non-LDS members in the context of this First Amendment claim in reaching its decision to grant summary judgment for the employer.

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Religious Influence

- The few cases that are out there tend to surround the question of public officials coercing or influencing employees towards a particular faith.
- For instance, in Venters v. City of Delphi, 123 F.3d 956, 970 (7th Cir. 1997), a radio dispatcher for the city police department complained that she was repeatedly subjected to lectures on appropriate Christian behavior, admonitions regarding her need to be "saved" or face damnation, and inquiries into her social and religious life unsolicited and to her displeasure. When she complained, he indicating that she was at risk of losing her job if she failed to bring herself into conformity with his beliefs…and she ultimately did lose her job for purportedly non-protected reasons. The Court refused to grant summary judgment in the case, finding that a jury could find that this constituted coercion and intimidation in violation of the First Amendment as recognized by the Supreme Court in Everson v. Bd. of Education, 330 U.S. 1, 15-16 (1947).

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Religious Influence

- Additionally, though, an employee who himself engages in that kind of influence or religious conversation in the workplace will not always be entitled to the protection of the First Amendment. In Braswell v. Bd. of Regents of the Univ. Syst. of Ga., 369 F. Supp. 2d 1362, 1366-1368 (N.D. Ga. 2005), the Court held that an employee's personal religious practice was not restricted when the University suspended and then placed her on probation following a complaint that she was injecting prayer and religious practices into her work as a University coach. While the University imposed restrictions on her discussion of religion with her students, the Court found that these restrictions did not compromise her religious beliefs or prevent her from doing anything essential to the exercise of her religion generally.

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Benefits of Employment

- "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." Thomas v. Review Board of the Indiana Employment Security Div., 450 U.S. 707, 717-18 (1981).
- In Pinsker v. Joint Dist. Number 281, 735 F.2d 388, 391 (10th Cir. 1984), the Court found that loss of a day's pay (or use of a vacation day) for time not worked due to a religious holiday absence did not constitute substantial pressure on a teacher to modify his or her behavior.
- In contrast, the Court in Shrum v. City of Coweta, 449 F.3d 1132, 1144 (10th Cir. 2006), found that the deliberate transfer of an officer from a night shift to the day shift in the face of a known religious commitment of the Officer that would be impacted by the decision, without some neutral and justifiable reason for the transfer, violated the employee's First Amendment rights.

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Discipline and Counseling

- One of the other interesting ways that religion comes up in this context is with regard to employee counseling services, particularly as they may be mandated in the context of employee discipline. Employees in several cases have challenged being required to attend programs that might have a religious aspect to them.
- In Buneo v. City of New York, 2007 U.S. Dist. LEXIS 24766, *18-20 (E.D.N.Y. Mar. 30, 2007), relying on a line of cases in the criminal probation context that found that requiring a criminal defendant's participation in Alcoholics Anonymous violated the First Amendment because AA is religious in nature, the court credited the argument that such requirements in the employment context could be similarly problematic despite ultimately finding that Buneo had failed to plead sufficient facts about the religious nature of the counseling program mandated by his employer.

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You Can Pick Your Friends…

- Although the freedom of speech may be the most well-known and most cited portion of the First Amendment, the freedom of association is another oft-litigated issue in the government employment context.
- The Supreme Court has held that "the First Amendment forbids" firing, threatening to fire, transferring or recalling public employees based on political affiliation "unless party affiliation is an appropriate requirement for the position involved." Rutan v. Republican Party of Ill., 497 U.S. 62, 64 (1990).
  - In Wiemann v. Updergraff, 344 U.S. 183 (1952), the Supreme Court held that a state could not require its employees to give an oath denying past affiliation with Communists.
  - Previous membership in a particular party cannot be a disqualifying factor for government employment. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).
  - Official pressure on employees to work for political candidates not of the workers' own choice constitutes coercion of belief in violation of the constitution. See Branti v. Finkel, 455 U.S. 507, 515-516 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

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…But Sometimes Patronage Requirements Prevail

- Patronage dismissals (i.e., dismissals for failure to support a particular party or candidate) have been, since Elrod, generally unconstitutional.
- Patronage requirements for non-confidential, non-policymaking government employees violate an employee's fundamental rights. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 717-718 (1996).
  - But, keep in mind that "policy-making" has to be of a particular nature – the policy-making that comes with the job of a university football coach isn't the kind of policy-making that one could argue necessitates loyalty to the state's governing party. See Branti v. Finkel, 445 U.S. 507 (1979).
- However, such dismissals and requirements may be acceptable in circumstances where political affiliation is a legitimate requirement for government employment. Id.

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Four Categories of Acceptable "Patronage" Positions

- Category One: Positions specifically named in relevant federal, state, county or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
- Category Two: Positions where a significant portion of the total discretionary authority available to Category One position-holders has been delegated, or positions not named in law but possessing by virtue of the jurisdiction's pattern or practice the same kind of discretionary authority held by Category One positions in other jurisdictions;
- Category Three: Confidential advisors who spend a significant portion of their time on the job advising Category One and Two positions on how to exercise their authority, or other confidential employee who control the lines of communication to Category One, Two or Confidential advisor positions; and
- Category Four: Positions that are part of a group of positions that are filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

See McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996).

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Permitted Patronage

- A legal office manager in the District Attorney's office who works closely with the prosecutor and who runs his office, and who is therefore a confidential employee, falls within this limited exception. Bauer v. Saginaw Cnty., 2016 U.S. App. LEXIS 2409, *7-15 (6th Cir. 2016).
- Political loyalty is an appropriate requirement for the job of deputy sheriff because of the "closeness and cooperation required between sheriffs and their deputies" in fulfilling overlapping duties. Ezell v. Wynn, 802 F.3d 1217, 2333 (11th Cir, 2015), citing Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989).

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Pending Before the Supreme Court

- In January, the United States Supreme Court heard oral argument in Heffernan v. City of Paterson, No. 14-1280, in which the Court is asked to decide whether or not the First Amendment protects an employee who was fired based on the employer's mistaken belief that he was supporting a candidate challenging the incumbent mayor in an upcoming election.
- In particular, Heffernan was seen picking up a lawn sign from the campaign headquarters of the challenging candidate, and the activity was reported to Heffernan's supervisors. The supervisors confronted Heffernan and then demoted him. He brought suit on the grounds that he was denied his freedom of association under the First Amendment.

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Heffernan's Problem

- The problem for Heffernan is that his argument is that he wasn't actually picking up the sign for himself, as he wasn't even eligible to vote in the election as a non-resident of the municipality. Instead, he was picking up the sign for his ailing mother at her request.
- Based upon a finding, then, that Heffernan wasn't actually exercising his freedom to associate, both the District Court for the District of New Jersey and the Third Circuit granted and affirmed the City's Motion for Summary Judgment. Heffernan v. City of Paterson, 2 F. Supp. 3d 563 (D.N.J. 2014), aff'd at 777 F.3d 147 (3d Cir. 2015).
- In making this finding, the Third Circuit appears to have taken the position that the Court should look to the employee's conduct rather than the government's motivation in associational cases. Heffernan, 777 F.3d at 152-153.
- The Third Circuit's finding was a split from several other Circuit Courts, and thus provided the basis for the Supreme Court's intervention.

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The Case Before the Court

- Heffernan's position seems to be that employers should not be able to evade liability when they intend to act improperly but are fortuitously saved because the individual was not actually engaged in the perceived association; to excuse the conduct would force employees into the position of having to scrutinize constantly whether their behavior could be misperceived. This would have a chilling effect on their exercise of rights under the First Amendment.
- The City, on the other hand, argued that the Constitution should only protect the actual exercise of constitutional rights, because otherwise the employee grievance process would be constitutionalized and take the place of state legislation, civil service protections and collective bargaining agreements.

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Did the Court Telegraph its Position?

- Commentators seem to think that the Court was split evenly, with Justice Ruth Bader Ginsburg noting that the First Amendment prohibits government action – suggesting that the Court should only inquire into the government's motive, a feeling that seemed to be shared by Justices Stephen Breyer and Justice Elena Kagan. Justice Sonya Sotomayor's comments were focused on the chilling effect of the government's actions. See Howard M. Wasserman, *Argument analysis: The First Amendment, political inactivity, and improper government motive*, SCOTUSblog (Jan. 20, 2016, 7:08 AM), available at http://www.scotusblog.com/2016/01/argument-analysis-howard-wasserman/ (last accessed March 11, 2016); Stephen A. Miller and Nicholas Karwacki, *Scope of First Amendment Protection of Public Employees*, The Legal Intelligencer, (March 10, 2016), available at http://www.thelegalintelligencer.com/home/id=120275179927 6?kw=Scope%20of%20First%20Amendment%20Protection%20of%20Public%20Employees&cn=20160310&pt=AM%20Legal%20Alert&src=EMC-Email&et=editorial&bu=The%20Legal%20Intelligencer&slreturn=20160211104833 (last accessed March 11, 16).

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Did the Court Telegraph its Position?

- In contrast, Chief Justice John Roberts, Justice Samuel Alito and Justice Antonin Scalia focused on the availability of a legal remedy via means other than the constitution, with Justice Scalia indicating his position that an individual should be actually associating to be protected.
- In the middle, as per usual, was Justice Anthony Kennedy, although even he appeared inclined to support Heffernan's position, suggesting a discomfort with a government employer guessing wrong about an employee's belief.

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