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## ***Janus*, Union Member Speech, and the Public Employee Speech Doctrine**

**M. Linton Wright\***

### *Abstract*

*In Janus v. American Federation of State, County, and Municipal Employees (“AFSCME”), the Supreme Court held that public sector unions can no longer collect fees from nonmembers to fund the costs of representing them in collective bargaining and grievance proceedings.<sup>1</sup> The Court determined that virtually all union speech is political speech and that collection of these fees is impermissible compelled speech under the First Amendment. However, not everything in Janus harms public union interests. The Janus Court’s discussion of Garcetti v. Cabellos and Connick v. Myers actually helps protect union member speech in the context of First Amendment retaliation cases.<sup>2</sup> This Article argues that, after Janus, speech by union representatives on behalf of their union is not “employee speech” under Garcetti and is almost always a matter of public concern under Connick. Further, this Article argues that ordinary union member speech and union grievance filings are not “employee speech” either. In support of the latter, this Article also looks to the Supreme Court’s decision in Lane v. Franks<sup>3</sup> as well as the nature of union membership generally.*

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\* The author serves as a clerk for Colorado Court of Appeals Judge Terry Fox. The views expressed here are the author’s alone and do not represent the views of his former employer, the Colorado Office of the Attorney General. The author thanks Professor Alan Chen and Judge Terry Fox for reviewing previous versions of this Article, as well as Professor Nancy Ehrenreich for her advice during the research process. Lastly, the author would not have completed this Article without the support of his wife, Louise.

1. 138 S.Ct. 2448 (2018).
2. *Id.*
3. 573 U.S. 228 (2014).

## Introduction

Many commentators have declared that the Supreme Court's recent First Amendment decision in *Janus v. AFSCME*<sup>4</sup> severely weakens the power of public sector unions.<sup>5</sup> In *Janus*, the Supreme Court held that the First Amendment prohibits public sector unions from collecting "agency fees," which are dues non-union members must pay to compensate unions for representing them in collective bargaining and grievance procedures.<sup>6</sup> This decision overrules *Abood v. Detroit Board of Education*,<sup>7</sup> which held that public sector unions could collect such fees from non-members so long as the union used the money for non-political purposes. The Court now holds that all agreements to collect fees from non-union members violate "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."<sup>8</sup> Thus, virtually all union speech is now effectively a form of political speech from which non-union members have a right to withhold their financial support.<sup>9</sup>

The *Janus* decision left many wondering if the First Amendment could serve the interests of public sector unions and their supporters.<sup>10</sup> However, parts of the Court's decision in *Janus* actually protect public union interests in certain contexts.<sup>11</sup> One commentator recently noted that *Janus* might protect public union interests in cases of public employer

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4. *Janus*, 138 S.Ct. 2448.

5. Adam Liptak, *Supreme Court Ruling Delivers a Sharp Blow to Labor Unions*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html>; Dylan Matthews, *6 Excerpts that Explain the Supreme Court's Big Anti-Union Ruling*, VOX (June 27, 2018, 11:48 AM), <https://www.vox.com/2018/6/27/17509460/supreme-court-janus-afscme-public-sector-union-alito-kagan-dissent>.

6. *Janus*, 138 S.Ct. at 2460.

7. 431 U.S. 209 (1977).

8. *Janus*, 138 S.Ct. at 2460.

9. *Id.*; see also Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2062–63 (2018).

10. See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>.

11. See *infra* Part II; see also Fisk, *supra* note 9, at 2062–63; *Janus*, 138 S.Ct. 2448.

retaliation against employees for their union-related speech.<sup>12</sup> This Article argues that the *Janus* decision and other recent Court rulings help protect public employees from retaliation for their speech as union representatives, union members, and for filing union grievances.

The First Amendment protects the free speech rights of public employees and prevents employers from retaliating against employees because of their speech under certain circumstances.<sup>13</sup> Specifically, public employers cannot retaliate against an employee when that employee speaks “as a citizen . . . [on] matters of public concern” and when the employee’s free speech interests outweigh the government’s interests in maintaining an effective workplace.<sup>14</sup> However, when an employee speaks, not as a citizen but pursuant to their “official duties” or speaks on matters of private as opposed to public concern, the employee enjoys no First Amendment protection.<sup>15</sup> Under those circumstances, a public employer is free to retaliate against that employee for their speech under the First Amendment.

In addressing public employee retaliation cases, the Federal Circuits are divided as to the precise nature of employees’ union-related speech.<sup>16</sup> For example, the Sixth Circuit has held that an employee’s speech as a union representative or member is never speech tied to the employee’s job responsibilities.<sup>17</sup> However, the Second Circuit refused to declare, categorically, that an employee’s speech as a union member is never speech pursuant to that employee’s job duties.<sup>18</sup> This Article aims to resolve the issue in the Sixth Circuit’s favor.

Part I of this Article provides an overview of the Supreme Court’s public employee speech doctrine and surveys Circuit court cases addressing when an employee’s union speech is citizen speech on matters of public concern. Part II of this

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12. Theo A. Lesczynski, *Redefining Workplace Speech After Janus*, 113 NORTHWESTERN U. L. REV. 885, 911–14 (2019).

13. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

14. *Id.*

15. *Garcetti v. Ceballos*, 547 U.S. 410, 417, 421 (2006).

16. *See infra* Part I(C).

17. *See, e.g., Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015).

18. *Montero v. Police Ass’n of City of Yonkers, Inc.*, 890 F.3d 386, 389–99 (2d Cir. 2018).

Article begins by examining *Janus*' implications for an employee's union speech under the public employee speech doctrine. It notes that *Janus* determined that speech on behalf of a union in collective bargaining and grievance proceedings (1) is not speech pursuant to an employee's job duties and (2) almost always involves matters of substantial public concern.<sup>19</sup>

Part II of this Article then argues that a public employee's speech in his or her capacity as an ordinary union member or an employee's filing of a union grievance is speech *as a citizen* and not speech pursuant to their *ordinary* or *official* job duties under *Janus*, *Garcetti*,<sup>20</sup> and *Lane*.<sup>21</sup> It argues that *Janus*' reasoning regarding speech on behalf of unions in collective bargaining and grievance procedures should apply with equal force to speech by ordinary union members. This Article also argues that the Court's decision in *Lane* eliminated certain broad interpretations of *Garcetti* and thus undermines the rationale of *Weintraub v. Board of Education*, a Second Circuit case which held that an employee's union grievance was speech consistent with his job duties.<sup>22</sup> It maintains that the fundamental purpose and structure of unions strongly supports the position that an employee's speech as a union member, or in filing a union grievance, is not speech pursuant to his or her *ordinary* or *official* job responsibilities. Finally, the Article concludes with a brief discussion of the circumstances under which employees speak as union members.

## I. Background

### A. The Supreme Court's Public Employee Speech Doctrine

The modern era of the Supreme Court's public employee speech jurisprudence began with *Pickering v. Board of Education*.<sup>23</sup> In *Pickering*, the Board of Education in Township, Illinois fired a teacher at Township High school after the teacher

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19. See also Lesczynski, *supra* note 12, at 902–04.

20. See generally *Garcetti*, 547 U.S. 410.

21. See generally *Lane v. Franks*, 573 U.S. 228 (2014).

22. 593 F.3d 196 (2d Cir. 2010).

23. 391 U.S. 563 (1968); see also Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 304 (2015).

wrote a letter to a local newspaper criticizing the Board's fundraising activities.<sup>24</sup> The Supreme Court held that the First Amendment protected the teacher's speech, declaring that there must be "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>25</sup> In balancing these competing interests, the Court reasoned that the letter did not interfere with the teacher's ability to instruct his students or the school's ability to operate normally.<sup>26</sup> Thus, *Pickering* established that the First Amendment protects public employee speech on matters of public concern unless the state can demonstrate that its interest in efficient operations outweighs the speech interests of the employee.<sup>27</sup>

*Pickering* did not make entirely clear the extent to which the First Amendment protected public employee speech on private matters, but the Supreme Court later clarified that the First Amendment only protected public employee speech on matters of public concern in *Connick v. Myers*.<sup>28</sup> In *Connick*, an Assistant District Attorney named Shylia Myers drafted and distributed a memorandum asking for other employee's opinions on the office transfer policy, employee morale, and the office's lack of a grievance committee.<sup>29</sup> Myers' superior fired her for distributing the letter.<sup>30</sup>

The Supreme Court ruled against Myers, holding that the First Amendment did not protect her speech because her letter did not comment on matters of public concern.<sup>31</sup> The Court stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."<sup>32</sup> Further, it characterized speech

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24. *Pickering*, 391 U.S. at 564.

25. *Id.* at 568.

26. *Id.* at 569–70.

27. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 212 (4th. ed. 2014); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1149 (4th ed. 2011).

28. 461 U.S. 138 (1983).

29. *Id.* at 141.

30. *Id.*

31. *Id.* at 146.

32. *Id.* at 147–148.

on matters of public concern as “relating to any matter of political, social, or other concern to the community.”<sup>33</sup> In this case, the Court determined Myer’s questionnaire did not comment on matters of public concern because it did not seek to publicly evaluate the conduct of the District Attorney as an elected official or bring attention to any actual or potential wrongdoing within the office.<sup>34</sup>

In 2006, the Supreme Court substantially altered the application of the First Amendment to public employee speech. In *Garcetti v. Ceballos*,<sup>35</sup> the Los Angeles County District Attorney’s Office allegedly retaliated against Richard Ceballos, a deputy district attorney, for drafting a memo in which he questioned the veracity of a police affidavit that provided the basis for a search warrant.<sup>36</sup> Cabellos sued the district attorney’s office, arguing the office’s retaliation violated his First Amendment rights.<sup>37</sup>

The Supreme Court held that the First Amendment did not apply to Cabello’s speech.<sup>38</sup> Specifically, the Court found that Cabello drafted his memo “pursuant to his duties as a calendar deputy”<sup>39</sup> and declared that “when 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.”<sup>40</sup> In reaching this decision, the Court emphasized that it did not want courts to oversee public employers’ management or discipline of public employees “in the course of official business.”<sup>41</sup>

However, the Court did not provide much guidance on how to determine when a public employee speaks *pursuant to or in the scope of* his official duties.<sup>42</sup> The Court stated that employers cannot circumvent First Amendment rights by crafting

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33. *Id.* at 146.

34. *Connick v. Myers*, 461 U.S. 138, 148 (1983).

35. *See generally* 547 U.S. 410 (2006).

36. *Id.* at 413–15.

37. *Id.* at 415.

38. *Id.* at 421.

39. *Id.*

40. *Id.*

41. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

42. *Id.* at 424; *see also* CHEMERINSKY, *supra* note 27, at 1148.

“excessively broad job descriptions” and that “the proper inquiry is a practical one.”<sup>43</sup> Thus, *Garcetti* established that the First Amendment does not apply to public employee speech related to the scope of their job duties.<sup>44</sup>

The Court revisited the issue of public employee speech pursuant to employee job duties in *Lane v. Franks*.<sup>45</sup> In *Lane*, Edward Lane, the director of a youth outreach program at Alabama Community College, discovered that an Alabama state representative was on the College’s payroll but never actually reported to her office.<sup>46</sup> Lane confronted the representative, and when she refused to report to the college, Lane fired her.<sup>47</sup> Lane later testified on multiple occasions about the state representative and his decision to fire her.<sup>48</sup> Steve Franks, President of the College, fired Lane shortly after he testified.<sup>49</sup> Lane sued Franks, arguing that Franks violated the First Amendment by retaliating against him for his testimony.<sup>50</sup>

The Supreme Court ruled in favor of Lane and held that the First Amendment protects a public employee who provides truthful, sworn testimony outside the scope of the employee’s “ordinary job responsibilities.”<sup>51</sup> Addressing the issue of whether Lane testified as a citizen or as an employee, the Court found that Lane spoke as a citizen even though he “learned of the subject matter of that testimony in the course of his employment.”<sup>52</sup> The Court declared that “the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech.”<sup>53</sup> The Court reasoned that this result is consistent with *Garcetti* because that Court’s holding “did not turn on the fact that the memo at issue ‘concerned the subject matter of [the prosecutor’s]

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43. *Garcetti*, 547 U.S. at 424.

44. *Id.*

45. *See generally* 573 U.S. 228 (2014).

46. *Id.* at 231–32.

47. *Id.* at 232.

48. *Id.* at 232–33.

49. *Id.* at 233.

50. *Id.* at 234.

51. *Lane v. Franks*, 573 U.S. 228, 238 (2006).

52. *Id.* at 230.

53. *Id.* at 240.

employment.”<sup>54</sup> Further, the Court stated that the proper inquiry under *Garcetti* is whether the employee’s speech is “ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>55</sup>

Most recently, the Supreme Court discussed *Pickering*, *Connick*, and *Garcetti* in *Janus v. AFSCME*.<sup>56</sup> As mentioned, this case addressed the constitutionality of contracts and statutes requiring non-union members to pay agency fees for certain public sector union activities that benefit nonmembers, such as representation in collective bargaining and grievance procedures.<sup>57</sup> The Court found that agency fees are a form of compelled speech in violation of the First Amendment,<sup>58</sup> but in an attempt to convince the Court otherwise, the AFSCME and its *amici* attempted to use *Pickering* and its progeny in surprising ways.<sup>59</sup> The AFSCME argued that the First Amendment does not apply to the union’s collection of agency fees because those fees and the activities they support are (a) speech pursuant to a nonmember’s job duties and (b) speech that addresses only matters of private concern.<sup>60</sup>

The Court began its discussion the public employee speech doctrine by noting that the *Pickering* line of cases does not fit well with the facts at issue in *Janus*.<sup>61</sup> First, the Court stated that agency-fee cases deal with “broad categories of employees” while the *Pickering* cases deal with government restrictions of individual employee speech.<sup>62</sup> Cases involving “widespread” speech implications like agency fees are of more serious concern than individual speech restrictions, and the Court affords less deference to the Government in assessing the potential harm

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54. *Id.* at 239 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)) (alteration in original).

55. *Id.* at 240.

56. 138 S.Ct. 2448, 2471–77 (2018).

57. *Id.* at 2460.

58. *Id.* at 2486.

59. *See id.* at 2471–78.

60. *Id.* at 2474–77.

61. *Id.* at 2472–74.

62. *Janus v. AFSCME*, 138 S.Ct. 2448, 2472–73 (2018). For example, the Court stated that when a single employee asks for a 5% raise, it is likely not a matter of public concern; however, when a union asks for a 5% raise on behalf of thousands of employees, it likely is a matter of public concern. *Id.*

under the First Amendment.<sup>63</sup> Second, agency-fee cases deal with compelled speech while *Pickering* cases deal with speech restrictions.<sup>64</sup> According to the Court, “the calculus is very different” when considering government compelled speech versus restricted speech, and the Court has never applied *Pickering* in compelled speech cases.<sup>65</sup> Lastly, while both the Court’s agency-fee cases and *Pickering* cases divide speech into political and non-political speech, the “categorization schemes do not line up” perfectly.<sup>66</sup> *Abood* flatly forbids compelling non-union employees to pay for political speech, but *Pickering* allows the government to restrict an employee’s political speech if the government has a sufficient interest in doing so.<sup>67</sup>

Despite the Court’s skepticism about the *Pickering* cases’ applicability, it went on to fully consider the union’s arguments under the public employee speech doctrine.<sup>68</sup> First, the Court rejected the union’s argument that union speech in collective bargaining and grievance proceedings is speech pursuant to an employee’s job duties under *Garcetti*.<sup>69</sup> The Court declared that the union’s *Garcetti* argument “distorts collective bargaining and grievance adjustment beyond recognition.”<sup>70</sup> The *Janus* Court stated that an employee’s speech pursuant to his job duties is really the employer’s speech and in those scenarios an “employee is effectively the employer’s spokesperson.”<sup>71</sup> However, union negotiation or representation of employees in collective bargaining or grievance proceedings is speech on behalf of *employees*, not the employer.<sup>72</sup> To hold otherwise would be nonsensical and lead to results unacceptable to public sector unions in any other circumstance.<sup>73</sup>

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63. *Id.*

64. *Id.*; see also William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 176 (2018).

65. *Janus*, 138 S.Ct. at 2473.

66. *Id.*

67. *Id.* at 2474.

68. *Id.* at 2474–78.

69. *Id.* at 2474.

70. *Id.*

71. *Janus v. AFSCME*, 138 S.Ct. 2448, 2474 (2018).

72. *Id.*

73. *Id.*

The Court proceeded to reject the union's argument under *Connick*<sup>74</sup> as well, holding that union speech in collective bargaining and grievance proceedings addresses significant matters of public concern such as expenditure of public money, education, child welfare, healthcare, minority rights, climate change, sexual orientation, gender identity, evolution, and religion.<sup>75</sup> Lastly, the Court applied the *Pickering* balancing test and determined that the non-union members' First Amendment rights against compelled speech far outweigh the state's and the union's interests in imposing agency fees.<sup>76</sup>

#### B. Federal Circuit Applications of *Garcetti* and *Connick* Generally

In *Garcetti*, the Supreme Court did not announce a specific formula or test for determining when an employee speaks as a citizen or pursuant to his job duties.<sup>77</sup> While the Court mentioned a few factors for lower courts to consider,<sup>78</sup> it stated that it had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."<sup>79</sup> Thus, Federal Circuits have developed their own, additional factors for determining when an employee speaks pursuant to his or her job duties.<sup>80</sup>

For example, the First Circuit considers the following factors: (1) whether the employer commissioned or paid for the employee's speech; (2) the subject matter of the speech; (3) whether the employee directed the speech up the chain of command; (4) whether the employee spoke while at work; (5) whether outsiders thought the employee spoke for the employer in making the speech; (6) whether the speech involved special knowledge the employee learned as a result of his or her

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74. *Id.* at 2474–77.

75. *Id.*

76. *Id.* at 2477–78.

77. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

78. *Id.* at 424–25 (stating that speech pursuant to an employee's job duties has no analogue to citizen speech and that employers cannot turn all employee speech into official job duties speech via excessively-broad job descriptions).

79. *Id.* at 424.

80. *See, e.g.*, 5 EMPLOYMENT COORDINATOR § 1:18 (2019).

employment; and (7) whether a “citizen analogue” exists in comparison to the employee’s speech.<sup>81</sup> Similarly, the Eleventh Circuit has identified the following factors as relevant: “(1) speaking with the objective of advancing official duties; (2) harnessing workplace resources; (3) projecting official authority; (4) heeding official directives; and (5) observing formal workplace hierarchies.”<sup>82</sup>

However, *Garcetti* emphasized that “the proper inquiry is a practical one,”<sup>83</sup> and lower courts have stated that no single factor is dispositive in determining when employees speak pursuant to their job duties.<sup>84</sup> For example, “an employee’s job description is not dispositive” and “speech may be entitled to constitutional protection even when it is made at work about work.”<sup>85</sup> Courts must closely examine the facts of each case in making their determination.<sup>86</sup>

Federal Circuits have somewhat differing views on *Connick* as well. Like *Garcetti*, *Connick* did not provide a comprehensive framework for determining when speech is of public concern beyond that courts must consider “the content, form, and context of a given statement.”<sup>87</sup> Some Courts consider the content of an employee’s speech to be the most important factor.<sup>88</sup> Some Courts also consider the speaker’s motivation to be critical,<sup>89</sup> though others consider the speaker’s motive to be non-dispositive.<sup>90</sup> Employee speech involving government

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81. *Decotiis v. Whittemore*, 635 F.3d 22, 32 (1st Cir. 2011); *Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21 (D. Mass. 2015).

82. *Fernandez v. Sch. Bd. of Miami-Dade Cty.*, 898 F.3d 1324, 1332 (11th Cir. 2018).

83. *Garcetti*, 547 U.S. at 424.

84. *See, e.g., Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010).

85. *Id.* at 714.

86. *Id.*

87. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

88. *See, e.g., Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1069 (9th Cir. 2012); *Nagle v. Village of Calumet*, 554 F.3d 1106, 1123 (7th Cir. 2009).

89. *See, e.g., Denton v. Yancey*, 661 F. App’x. 933, 937 (10th Cir. 2016) (stating “we focus on the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public’s interest”) (internal quotation marks omitted).

90. *Bivens v. Trent*, 591 F.3d 555, 561 (7th Cir. 2010) (quoting “the motive of the speaker is a relevant, though not dispositive, factor because speech will

impropriety is usually of public concern,<sup>91</sup> but mere personal dissatisfaction with a government entity's policies is not.<sup>92</sup>

### C. Union Member Speech in the Federal Circuits

The First Amendment protects the right of public employees to associate with a union.<sup>93</sup> However, whether the First Amendment protects public employees from retaliation for speaking on union-related matters depends on the nature of the speech and the position of the speaker.<sup>94</sup> Federal Circuit Courts have reached differing conclusions regarding union-related speech under *Garcetti* and *Connick*.

The Federal Circuit courts generally hold that when a public employee speaks as a *representative* of a union, the employee speaks as a citizen under *Garcetti*. In *Fuerst v. Clarke*, the Seventh Circuit held that a police officer's public criticism of an elected-sheriff was not speech pursuant to his job duties because the officer spoke in his capacity as the President of the local police union.<sup>95</sup> Similarly, in *Ellins v. City of Sierra Madre*, the Ninth Circuit held that “[g]iven the inherent institutional

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not be protected if the only point of the speech was to further some purely private interest”) (internal quotation marks omitted); *Sousa v. Roque*, 578 F.3d 164, 171 (2d Cir. 2009); *Campbell v. Galloway*, 483 F.3d 258, 269 (4th Cir. 2007) (quoting “to conclude, as the defendants would have us do, that a personal complaint . . . affecting only the complaining employee can *never* amount to an issue of public concern could improperly limit the range of speech that is protected by the First Amendment”) (emphasis in original).

91. See *Swineford v. Snyder Cty.*, 15 F.3d 1258, 1272 (3rd Cir. 1994).

92. See *Desrochers v. City of San Bernardino*, 572 F.3d 703, 715–17 (9th Cir. 2009).

93. See *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979).

94. *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 509 (E.D.N.Y. 2011) (stating “an employee's association with a union, as well as any speech that arises from his or her position in a union, is constitutionally protected under the First Amendment”).

95. 454 F.3d 770, 774 (7th Cir. 2006) (quoting that “[b]ecause Fuerst's comments that precipitated the adverse action taken against him were made in his capacity as a union representative, rather than in the course of his employment as a deputy sheriff—his duties as deputy sheriff did not include commenting on the sheriff's decision to hire a public-relations officer—the Supreme Court's recent decision in *Garcetti v. Ceballos* . . . is inapposite”) (citations omitted); see also *Graber v. Clarke*, 763 F.3d 888, 895–96 (7th Cir. 2014); *Olendzki v. Rossi*, 765 F.3d 742, 747–49 (7th Cir. 2014).

conflict of interest between an employer and its employees' union, we conclude that a police officer does not act in furtherance of his public duties when speaking as a representative of the police union."<sup>96</sup>

The Second and Sixth Circuits have reached similar conclusions.<sup>97</sup> However, a District Court within the Third Circuit held that a police officer and union president "was not acting as a private citizen when engaging in speech as a public employee and President of the [local police] union because such speech was performed while Plaintiff was in his official capacity as negotiator of his union."<sup>98</sup>

A deeper split exists among the Circuits as to whether a public employee speaks pursuant to his job duties when the employee speaks as a mere *member* of a union. The Sixth Circuit has held that "[i]t is axiomatic that an employee's job responsibilities do not include acting in the capacity of a union member, leader, or official."<sup>99</sup> However, in *Montero v. City of Yonkers*, the Second Circuit declined to declare, categorically, that employee speech in his or her capacity as a union member is speech *as a citizen* under the First Amendment.<sup>100</sup> While the Second Circuit found that a police officer and union representative spoke as a citizen under the facts of *Montero*,<sup>101</sup> it refused to extend that holding to all union member speech.

The depth of the Second Circuit's reasoning regarding union member speech is thin: Its analysis consists solely of a rejection of the officer's reliance on *Clue v. Johnson*,<sup>102</sup> a pre-*Garcetti* case that addressed whether speech made pursuant to union

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96. 710 F.3d 1049, 1060 (9th Cir. 2013).

97. See *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015); *Montero v. Police Ass'n of the City of Yonkers, Inc.*, 890 F.3d 386, 398 (2d Cir. 2018).

98. *Beresford v. Wall Twp. Bd. of Educ.*, No. 08-2236 (JAP), 2010 WL 445684, at \*6 (D.N.J. Feb. 3, 2010). The Third Circuit approved of this reasoning in *Killon v. Coffey*, 696 Fed. App'x 76, 79 n.4 (3rd Cir. 2017); see also *Hill v. City of Phila.*, No. 05-6574, 2008 WL 2622907, at \*6 (E.D. Pa. June 30, 2008), *aff'd*, 331 Fed. App'x 138 (3d Cir. 2009) (stating "[a]ny activity or related speech which allegedly led to retaliation against [plaintiff] was conducted pursuant to his official duties as a union delegate acting on behalf of employees of a municipal agency, and not as a citizen").

99. *Boulton*, 795 F.3d at 534.

100. 890 F.3d at 398–99.

101. *Id.* at 398.

102. 179 F.3d 57 (2d Cir. 1999).

activities raise matters of public concern.<sup>103</sup> The Second Circuit offered no positive argument for its refusal to declare that all employee speech as a union member is considered citizen speech under *Garcetti*.<sup>104</sup>

Similarly, in *Killon v. Coffey*, the Third Circuit accepted the district court's holding that police officers and union members who advocated for their department to implement twelve-hour shifts spoke as employees and rejected the officers' argument that *Garcetti* does not apply to union activity.<sup>105</sup> The District Court did not contest the officers' assertion that they spoke as union members but nonetheless held that they spoke pursuant to their job duties "because of their employment as police officers and the special knowledge and experience acquired through that employment."<sup>106</sup>

When an employee spoke on union-related matters but not as union representative or member, the Eleventh Circuit declared that the employee spoke pursuant to his job duties. In *Moss v. City of Pembroke Pines*,<sup>107</sup> the Eleventh Circuit held that an Assistant Fire Chief's critical comments to the local union president and other employees about the City's behavior during collective bargaining negotiations was speech pursuant to his job duties.<sup>108</sup> The Court stated that the employees sought the Assistant Chief's opinion because of his "experience and leadership role in the department and on the pension board."<sup>109</sup>

Federal Circuit courts have also addressed whether an employee's filing of a union grievance is speech as a citizen or as an employee under *Garcetti*. The leading case on this issue is *Weintraub v. Board of Education*.<sup>110</sup> In considering whether a school teacher's grievance against his school was citizen speech, the Second Circuit held that "by filing a grievance with his union

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103. *Montero*, 890 F.3d at 399.

104. *See id.*

105. 696 F. App'x at 78–79 n.4.

106. *Killion v. Coffey*, No. 13-1808 (RMB/KMW), 2016 WL 5417193, at \*11 (D.N.J. Sept. 27, 2016), *aff'd*, 696 F. App'x 76 (3rd Cir. 2017).

107. 782 F.3d 613 (11th Cir. 2015).

108. *Id.* at 619. The Assistant Fire Chief was active in the union for many years but ceased to be a member of the bargaining unit when he accepted his management position. *Id.* at 616.

109. *Id.* at 620.

110. 593 F.3d 196 (2d Cir. 2010).

to complain about his supervisor's failure to discipline a child in his classroom, [the teacher] was speaking pursuant to his official duties and thus not as a citizen."<sup>111</sup> In so holding, the Second Circuit pointed to language in *Garcetti* defining speech made pursuant to one's job duties as "speech that owes its existence to a public employee's professional responsibilities."<sup>112</sup> Further, it portrayed the teacher's filing of a union contract grievance as "'part-and-parcel of his concerns' about his ability to 'properly execute his duties.'"<sup>113</sup>

Lastly, most Circuits do not have a *per se* rule about whether union-related speech is a matter of public concern.<sup>114</sup> However, some Circuits have stated that union-related speech is more likely to be of public concern than not.<sup>115</sup> Whether or not union grievances are a matter of public concern may depend, in part, on whether the grievance is individual or collective in nature. In *Ellins*, the Ninth Circuit found that a collective union grievance regarding department-wide problems was a matter of public concern.<sup>116</sup> Other Circuits have ruled that individual union grievances are not of public concern.<sup>117</sup>

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111. *Id.* at 201.

112. *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

113. *Id.* at 203.

114. *See, e.g.*, *Boulton v. Swanson*, 795 F.3d 526, 534–35 (6th Cir. 2015); *Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21, 40 (1st Cir. 2015) (stating "the First Circuit has declined to endorse the notion that such speech, by its nature, touch[es] on a matter of inherent public concern") (internal quotation marks omitted) (alteration in original); *Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir. 1995); *see also* *Thomas v. Del. State Univ.*, 626 Fed. App'x 384, 388 (3d Cir. 2015) (discussing union grievances).

115. *See, e.g.*, *Meagher*, 94 F. Supp. 3d at 40 (stating "union-related speech 'does point in the direction of finding that the speech involved a matter of public concern'" (citing *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008)); *Boddie v. City of Columbus*, 989 F.2d 745, 750 (5th Cir. 1993) (stating "speech in the context of union activity will seldom be personal; most often it will be political speech").

116. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1057–58 (9th Cir. 2013).

117. *Lynch v. Ackley*, 811 F.3d 569, 580–82 (2nd Cir. 2016); *Thomas*, 626 Fed. App'x at 388; *Bivens v. Trent*, 591 F.3d 555, 561–62 (7th Cir. 2010).

## II. Analysis

A. *Janus* Determined that Employee Speech on Behalf of Public Unions is Speech as a Citizen and Almost Always a Matter of Public Concern.

As discussed *supra* in Part I(A), *Janus* addressed the issue of whether “union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, *i.e.*, as speech ‘pursuant to [an employee’s] official duties.’”<sup>118</sup> The union in *Janus* argued that agency-fee supported union speech is “part of the official duties of the union officers who engage in the speech.”<sup>119</sup> In other words, the AFSCME wanted the Court to declare that when an employee who serves as union official or representative speaks during collective bargaining or grievance procedures, that employee speaks pursuant to his or her official job duties.

The Court rightly rejected this argument. In so doing, the Court held that “when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer.”<sup>120</sup> Thus, when a public employee serving as a union official speaks on behalf of the union writ large or on behalf of another individual employee in either collective bargaining or grievance procedures, that employee speaks as a citizen under *Garcetti*.<sup>121</sup>

The AFSCME and its *amici* were likely dismayed by the *Janus* Court’s rejection of this argument. Evidently AFSCME was willing to make any argument that would save the constitutionality of agency fees. However, the *Janus* Court’s holding regarding union speech under *Garcetti* actually helps union members guard against retaliation by their employers for their union activities. Specifically, whenever an employee serving as a union official or representative speaks on behalf of the union or one of its members, that employee speaks as a

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118. *Janus v. AFSCME*, 138 S.Ct. 2448, 2474 (2018) (citing *Garcetti*, 547 U.S. at 421) (emphasis in original) (alteration in original).

119. *Id.*

120. *Id.* (emphasis in original).

121. *See id.*

citizen, and the *Garcetti* test does not apply.<sup>122</sup>

This holding is consistent with the Second, Sixth, Seventh, and Ninth Circuits' decisions regarding union representatives.<sup>123</sup> In those cases, the police officers served as union officials, and the Second, Sixth, Seventh, and Ninth Circuits determined that the officers spoke in their capacities as union representatives.<sup>124</sup> The *Janus* Court's holding makes perfect sense with the facts of those cases: The officers, in criticizing their respective employers publicly or during union meetings, clearly did not speak on behalf of their employers. To hold otherwise would suggest that the employer speaks to and criticizes itself.<sup>125</sup>

However, *Janus*' discussion of *Pickering* and its progeny only addresses union representative speech and does not, on its face, resolve the issue of whether employee speech made as an ordinary union member or pursuant to union grievance procedures is citizen speech. In some cases, a union member speaks not on behalf of the union or another member, but rather *as an individual* in their capacity as a union member or pursuant to union-created grievance procedures. For example, it would be difficult to characterize the teacher's filing of a union grievance in *Weintraub* as speech on behalf of the entire union because the teacher's grievance arose out of his individual interactions with his superiors. Similarly, it seems likely that a union member, who does not serve as a union official or representative, often speaks for his or herself when criticizing employer decisions at a union meeting. In such instances, employees speak as individuals to their union or to their employer. Part II(B)(ii), *infra*, addresses this issue further.

The *Janus* Court also held that union speech during collective bargaining procedures is of public concern and that union speech during grievance procedures frequently is as

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122. See Lesczynski, *supra* note 12, at 912–13.

123. See, e.g., *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013); *Nagle v. Village of Calumet*, 554 F.3d 1106, 1111 (7th Cir. 2009); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006).

124. *Fuerst*, 454 F.3d at 774; *Nagle*, 554 F.3d at 1111; *Ellins*, 710 F.3d at 1060.

125. See *Janus*, 138 S.Ct. at 2474.

well.<sup>126</sup> AFSCME and its *amici* argued that speech by union representatives during collective bargaining procedures was of purely private interest.<sup>127</sup> In reaching its decision regarding collective bargaining, the Court relied on recent disputes between AFSCME and the Governor of Illinois regarding the impact of pension and benefit plans on the state budget.<sup>128</sup> The Court stated that to deny the public's interest in these discussion is to "deny reality."<sup>129</sup>

However, the Court did not stop with state budgetary issues; it also held that public unions can and often do address virtually every political issue under the sun when they engage in collective bargaining.<sup>130</sup> Further, the Court held that union speech during grievance procedures "may be of substantial public importance and may be directed at the 'public square.'"<sup>131</sup> Though it stopped short of declaring all union speech during grievance procedures a matter of public concern, the Court's holding declared that nearly all speech made on behalf of a union is political speech that implicates the First Amendment.<sup>132</sup> Thus, nearly all speech on behalf of unions must also be of public concern.<sup>133</sup>

Taken together, the *Janus* Court's holdings regarding union speech provide considerable First Amendment protection for public sector employees who serve as union officials or representatives. Because all speech on behalf of a union is speech "as a citizen" and nearly all such speech addresses matters of public concern, public sector employees who feel their

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126. *Id.* at 2474–77.

127. *Id.* at 2474.

128. *Id.* at 2475.

129. *Id.*

130. *See Janus v. AFSCME*, 138 S.Ct. 2448, 2475–76 (2018).

131. *Id.* at 2476.

132. Fisk, *supra* note 9, at 2062–63 (2018) ("[e]xplaining why collective bargaining should be regarded as a form of political speech for which financial support cannot be compelled, the five Republican-appointed Justices noted that labor costs have a substantial budget impact and bargaining implicates education, health care, anti-discrimination, and other policy . . . . But if all union speech is political, that must mean that restrictions on union speech are unconstitutional").

133. *See Connick v. Myers*, 461 U.S. 138, 143 (1983) (defining matters of public concern as those "relating to any matter of political, social, or other concern to the community"); *see also Lesczynski, supra* note 12, at 912.

employer retaliated against them because of their speech as a union official or representative have all but cleared the initial hurdles to First Amendment protection established in *Connick* and *Garcetti*.<sup>134</sup> To establish a *prima facie* case for retaliation under the First Amendment, employees in these circumstances need only convince the court that (1) their speech was the basis for their employer's retaliation and (2) that their interest in speaking on behalf of the union outweighs their employer's interest in "promoting the efficiency of the public services it performs through its employees."<sup>135</sup>

While the *Pickering* test does not guarantee that union speech always outweighs an employer's efficiency interests, employees serving as union officials stand a much better chance of winning their retaliation cases under *Pickering's* balancing test alone. For example, after the Court in *Boulton* determined the sergeant made his comments as a citizen and that he addressed matters of public concern, it quickly resolved the *Pickering* balancing test in the sergeant's favor by noting that Sierra Madre County "presented no countervailing interest in repressing his speech."<sup>136</sup> Similarly, in *Ellins*, the Court did not even address the *Pickering* balancing test after concluding the officer satisfied the threshold inquiry of citizen speech on a matter of public concern.<sup>137</sup> Lastly, the Second Circuit in *Clue v. Johnson* concluded that transit employees' speech was a matter of public concern and immediately declared that their employer's interests in the efficiency of its services did not outweigh the employees' First Amendment rights.<sup>138</sup>

One might object that *Janus*, an agency-fee case, should not alter the Court's public employee speech jurisprudence.<sup>139</sup> Indeed, the *Janus* Court prefaced its discussion of *Pickering* and its progeny by noting that those cases are not a good fit for analyzing agency-fee cases and suggesting that the two lines of

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134. See Lesczynski, *supra* note 12, at 912–13.

135. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); CHEMERINSKY, *supra* note 27, at 1151.

136. *Boulton v. Swanson*, 795 F.3d 526, 535 (6th Cir. 2015).

137. See *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1057–63. (9th Cir. 2013).

138. 179 F.3d 57, 61 (2d Cir. 1999).

139. See, e.g., *id.* at 906–11 (addressing arguments that *Janus'* holding regarding matters of public concern is confined to agency-fees).

cases should have no bearing on one another.<sup>140</sup> In particular, one might argue that *Janus* should have no effect on public employee speech cases because (1) the agency fee cases involve the speech of numerous employees while *Pickering* cases typically address individual speech; (2) agency fees are a form of compelled speech, and *Pickering* cases address speech restrictions; and (3) the two lines of cases' speech categorization schemes do not line up perfectly.<sup>141</sup>

In response to such arguments, one commentator recently argued that agency fees and public employee speech are closely related and that the Court cannot limit *Janus*' holdings to agency fee cases, at least with regard to *Janus*' holding about matters of public concern.<sup>142</sup> First, *Pickering* cases can involve multiple employees,<sup>143</sup> and the *Janus* Court did not limit its holding to large unions only.<sup>144</sup> The number of employees the Government affects through its speech regulation should not be of First Amendment significance.<sup>145</sup>

Second, while compelled speech and restricted speech are distinct and raise somewhat differing concerns, it is certainly not impossible that a *Pickering* case could arise when a government employer compels (or attempts to compel) employee speech.<sup>146</sup> For example, imagine a government employer demands that a union official quiet union members who are critical of

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140. *Janus v. AFSCME*, 138 S. Ct. 2448, 2472–74 (2018); *see also* Baude & Volokh, *supra* note 64, at 176.

141. *See Janus*, 138 S.Ct. at 2472–74.

142. Lesczynski, *supra* note 12, at 914–18.

143. *See, e.g.*, Killion v. Coffey, No. 13-1808 (RMB/KMW), 2016 WL 5417193, at \*8 (D.N.J. Sept. 27, 2016), *aff'd*, 696 F. App'x 76 (3rd Cir. 2017).

144. Lesczynski, *supra* note 12, at 909.

145. *See id.* at 908–09.

146. *Janus*, 138 S. Ct. at 2473. The *Janus* Court doubted that an employer would compel an employee to speak on matters outside of the employee's job duties about which the employee disagreed. However, the *Janus* Court acknowledged that such a scenario could arise and that *Pickering* could apply, though it declined to decide that issue. *Id.* While government compulsion of speech may implicate more serious First Amendment concerns than restricted speech, as Lesczynski notes, the difference between compelled speech is one of degree and not kind. Lesczynski, *supra* note 12, at 909. A case of compelled speech may alter the Court's application of the *Pickering* balancing test, but it should not make a difference in its application of *Garcetti* and *Connick*.

management.<sup>147</sup> If the union official refused and the employer retaliated against the official, it seems likely that a court would look to *Pickering* to resolve the case.

Further, the Court's agency fee cases do cohere with *Pickering*'s framework.<sup>148</sup> While the cases' speech categorizations do not line up perfectly, both lines of cases fundamentally involve "the extent of the government's authority to make employment decisions affecting expression."<sup>149</sup> Both *Abood* and *Pickering* deal with government employee speech on similar subject matters that employees "direct[] (at least mainly) to the employer."<sup>150</sup> Both cases allow the government to infringe on employee speech rights only when it has a sufficient managerial interest in doing so.<sup>151</sup>

Even if the Court could technically limit *Janus*' holdings to the agency-fee context, it would be hard-pressed to justify a different analysis of union speech in public employee speech cases. This seems especially true when considering *Garcetti*: There seems to be no reason why the *Janus* Court's conclusion that union representatives speak for their unions during collective bargaining and grievance proceedings would suddenly change in the public employee speech context.<sup>152</sup>

Thus, though much of *Janus* is hostile to public union interests, some aspects of the *Janus* decision actually help

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147. See, e.g., *Gloembiewski v. Logie*, 852 F. Supp. 2d 908, 914–15 (N.D. Ohio 2012), *aff'd* 516 F. App'x 476 (6th Cir. 2013), *cert. denied*, 571 U.S. 890 (2013). In that case, a university employee and active union member circulated a petition critical of the university's sick leave policy during a university staff meeting. *Id.* After confronting the employee, a university management official approached the union President, who was also present at the meeting, and said "[y]ou had better get control of [the employee] . . . she's being grossly insubordinate and . . . discipline [is] forthcoming." *Id.* at 915. The union President was not the plaintiff in that case (the employee was), but one can imagine a First Amendment retaliation case arising under these facts. *Id.*

148. *Janus*, 138 S. Ct. at 2493 (Kagan, J., dissenting).

149. *Id.*

150. *Id.*; see also *Lesczynski*, *supra* note 12, at 904.

151. *Janus*, 138 S. Ct. at 2493 (Kagan, J., dissenting). *Abood* discussed public employers' managerial interest in negotiating with a single union. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–22, 224–26 (1977).

152. See *Palardy v. Twp. of Millburn*, 906 F.3d 76, 83 (3d Cir. 2018) (stating "it is hard to imagine a situation where a public employee's membership in a union would be one of his 'official duties.' This is especially true in light of *Janus* . . .") (citations omitted).

secure the rights of union officials and representatives to speak on behalf of their union and criticize management decisions and personnel without fear of retaliation. Further, courts should extend *Janus*' reasoning to include all public employees speaking as union members or pursuant to union grievance procedures.

B. Public Employee Speech Made as a Union Member or Pursuant to a Union Grievance is Citizen Speech under *Janus*, *Lane*, and *Garcetti*

1. *Lane* Eliminates Broad Interpretations of *Garcetti*

In 2017, the Second Circuit refused to declare categorically that “when a person speaks in his or her capacity as a union member, he or she speaks as a private citizen.”<sup>153</sup> Though the Court did not explicitly say as much, part of the Second Circuit's rationale in reaching this decision appears to be its unwillingness to overturn (or at least call into question) *Weintraub*, which held that a public employee's filing of a grievance with his union was speech pursuant to his job duties.<sup>154</sup> The Second Circuit cited *Weintraub* as good law throughout its decision,<sup>155</sup> and though it arguably could have distinguished union grievance filings from pure union member speech,<sup>156</sup> the Second Circuit's categorical protection of union member speech would at the very least undermine its holding in *Weintraub*. However, the Second Circuit should have reconsidered *Weintraub* because it decided that case before the Supreme Court's decision in *Lane*,<sup>157</sup> and *Lane* significantly

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153. *Montero v. Police Ass'n of City of Yonkers, Inc.*, 890 F.3d 386, 398–99 (2d Cir. 2018).

154. *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 202–03 (2d Cir. 2010).

155. *See Montero*, 890 F.3d at 396–99.

156. As the issue in *Janus* illustrates, an employee need not be an official union member to take advantage of a union's collectively-bargained grievance procedures. *See Janus* 138 S.Ct. at 2460 (stating “protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike”).

157. *See generally Lane v. Franks*, 573 U.S. 228 (2006); *Weintraub*, 593 F.3d 196.

challenges the basis of *Weintraub*'s holding.<sup>158</sup>

To begin, there is some debate about the significance of the *Lane* Court's use of the term "ordinary job responsibilities."<sup>159</sup> *Lane* used that term to demarcate the line between citizen and employee speech,<sup>160</sup> but this language is a shift from *Garcetti*, which utilized the term "official duties."<sup>161</sup> Some courts and commentators have indicated that *Lane*'s shift in language could narrow the types of employee speech excluded from First Amendment protection.<sup>162</sup> Other courts state that *Lane*'s shift in terminology was meant to merely clarify and not modify *Garcetti*.<sup>163</sup> Still others avoid the issue entirely.<sup>164</sup>

While the Supreme Court has not commented on the shift since *Lane*, this author believes that *Lane*'s shift in language should narrow the scope of unprotected speech under the Court's *Garcetti* analysis. "Ordinary" is not synonymous with "official," and a plain reading of the two terms indicates that the Court in *Lane* intended to limit the extent to which lower courts can

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158. See *Lane*, 573 U.S. at 238–41.

159. See, e.g., John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in Lane v. Franks*, 34 HOFSTRA LAB. & EMP. L.J., 243, 261–64 (2017).

160. *Lane*, 573 U.S. at 240 (stating "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties").

161. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

162. Rumel, *supra* note 159, at 262 (citing *Dibrito v. City of St. Joseph*, No. 16-1357, 2017 WL 129033, at \*3 (6th Cir. 2017); *Lynch v. Ackley*, 811 F.3d 569, 582 n.13 (2d Cir. 2016); *Alves v. Bd. of Regents*, 804 F.3d 1149, 1163 (11th Cir. 2015); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015); *Gibson v. Kilpatrick*, 773 F.3d 661, 668 (5th Cir. 2014); *Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014); *Hagan v. City of New York*, 39 F. Supp. 3d 481, 510 (S.D.N.Y. 2014)).

163. *Id.* at 263 (citing *Flora v. Cty. of Luzerne*, 776 F.3d 169, 179 (3d Cir. 2015); see also *Fernandez v. Sch. Bd. of Miami-Dade Cty.*, 898 F.3d 1324, 1333 (11th Cir. 2018) (stating "[i]n *Lane*, the Supreme Court modified the phrasing slightly, although not the substance of the question, and asked whether the employee spoke pursuant to his 'ordinary job duties'").

164. Rumel, *supra* note 159, at 263 (citing, *inter alia*, *Cory v. City of Basehor*, 631 F. App'x 526, 529 (10th Cir. 2015); *Lefebvre v. Morgan*, No. 14-CV-5322 (KMK), 2016 WL 1274584, at \*10 n.12 (S.D.N.Y. Mar. 31, 2016)); see also *Knopf v. Williams*, 884 F.3d 939, 959 (10th Cir. 2018) (applying *Garcetti*'s "official duties" and *Lane*'s "ordinary" duties language without noting any distinction); *Rayborn v. Bossier Par. Sch. Bd.*, 881 F.3d 409, 418 (5th Cir. 2018) (noting the difference in terminology in *Garcetti* and *Lane* but using language from both cases in its recitation of the citizen speech test).

define speech by public employees as part of their job responsibilities.<sup>165</sup> However, the remainder of this Article's analysis does not depend on the distinction, if any, between an employee's "ordinary" and "official" job duties.

What *is* clear in *Lane* is that the Court explicitly rejected the Eleventh Circuit's broad interpretation of *Garcetti*.<sup>166</sup> The Eleventh Circuit had declared that a public employee speaks pursuant to his or her job duties when the speech in question "owes its existence to [the] employee's professional responsibilities."<sup>167</sup> This is precisely the same standard the Second Circuit applied in *Weintraub*. The *Lane* Court rejected it by noting that "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment."<sup>168</sup> According to the *Lane* Court, "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."<sup>169</sup>

The Third Circuit also relied on a broad interpretation of *Garcetti* in *Killon v. Coffey*,<sup>170</sup> when it refused to consider police officers' union member speech as citizen speech because it involved "special knowledge" gained through the officers' employment.<sup>171</sup> However, *Lane* explicitly states, "the mere fact

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165. See Rumel, *supra* note 159, at 264 (stating "a strong argument can be made that the Court's use of the adjective ordinary . . . could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*." (citations omitted) (internal quotation marks omitted)); Lemay Diaz, *Truthful Testimony as the "Quintessential Example of Speech as a Citizen": Why Lane v. Franks Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565, 586 (2016). Of course, *ordinary* and *official* are not mutually exclusive terms either, and it is certainly possible that the *Lane* court did not intend to limit *Garcetti*'s application. One can imagine scenarios where an employee speaks outside of their *ordinary* job duties but nonetheless appears to speak as an employee.

166. *Lane*, 573 U.S. at 239 (stating "[i]n holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly").

167. *Id.* at 235 (citing *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App'x 709, 710 (11th Cir. 2013) (alteration in original)).

168. *Id.* at 239.

169. *Id.* at 240.

170. 696 F. App'x 76, 78–79 (3d Cir. 2017).

171. *Id.*

that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech.”<sup>172</sup>

Thus, to the extent *Weintraub* and *Killon* relied on overly-broad readings of *Garcetti*, one must reconsider their holdings regarding union grievances and union member speech generally.<sup>173</sup> As discussed *infra*, the Court's holding in *Janus* provides additional reasons to reconsider those cases.

2. The Purpose and Structure of Unions Indicates that Public Employee Speech as a Union Member or Pursuant to Union Grievance Procedures is Speech as a Citizen.

Labor unions exist “for the purpose of advancing [their] members' interests in respect to wages, benefits, and working conditions.”<sup>174</sup> Specifically, “[u]nions seek to increase the proceeds from work, improve the conditions under which work is carried on, determine the rights of each individual worker, and establish a mechanism by which these rights may be protected.”<sup>175</sup> To accomplish these goals, unions “establish a united front of employees in dealing with the employer so as to obtain the maximum concessions from him and to bring the united power of the group to bear when any one of them suffers a wrong.”<sup>176</sup> A united front is necessary to secure these goals because, according to unions, employers will not grant employees such benefits on their own accord even when the employer and the economy at large can afford to do so.<sup>177</sup>

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172. *Lane*, 573 U.S. at 240.

173. *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203–04 (2d Cir. 2010). The Second Circuit also justifies its holding in *Weintraub* by arguing that the filing of a union grievance has no “citizen analogue.” This Article addresses *Weintraub*'s “citizen analogue” argument in Part II(B)(ii).

174. *Labor Union*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/labor%20union> (last visited May 17, 2019).

175. Joel Seidman, *The Labor Union as an Organization*, in *INDUSTRIAL CONFLICT* 114, 115 (Arthur Kornhauser et al. eds., 1954).

176. *Id.*

177. Maurice S. Trotta, *Understanding the Union*, in *DEALING WITH A UNION* 48 (Marceau Leroy ed., 1969).

Once a group of employees unionize, the union typically has the exclusive right to bargain with the employer on behalf of all employees within a given workplace.<sup>178</sup> As a part of the collective bargaining process, unions will frequently seek to have the employer agree to a grievance procedure through which employees can report violations of the collective bargaining agreement or complain of other management decisions.<sup>179</sup> Grievance procedures usually involve the aggrieved employee(s) meeting with several levels of management with a representative of the union.<sup>180</sup> If the employer and the employee are unable to resolve their conflict, then the employee can submit the issue to binding arbitration.<sup>181</sup>

An employee joins a union by paying initiation fees and regular dues.<sup>182</sup> Once a member of the union, the employee has the right to participate in union politics by voting in the election of union officials or on other union matters such as whether to strike or ratify a collective bargaining agreement.<sup>183</sup> Union members have the right to express their opinion on any of these matters during union meetings.<sup>184</sup>

Though they have a shorter history in United States,<sup>185</sup> public sector unions exist to secure the same goals as their private sector counterparts. However, unlike private sector unions, state and local law governs the relationship between a public sector union and state employers.<sup>186</sup> Some states prevent public sector unions from collectively bargaining with state employers, and others allow collective bargaining but significantly limit the scope of the process or only allow it for

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178. *See, e.g.*, *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). However, some states do not allow public sector unions to collectively bargain. *See* Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 532 (2013).

179. Edward J. McMahon, *Vital Interests of Employer and Union*, in *DEALING WITH A UNION*, 119 (Marceau Leroy ed., 1969).

180. *Id.*

181. *Id.*

182. Trotta, *supra* note 177, at 52.

183. *Id.*

184. *Id.*

185. *See* Slater, *supra* note 178, at 512.

186. *Id.* (citing The National Labor Relations Act, 29 U.S.C. § 152(2) (2006)).

specific types of public employees.<sup>187</sup> Despite these obstacles, public sector unions still exist in states that forbid public sector collective bargaining, finding other ways to advocate for public employees.<sup>188</sup>

Given the purpose and structure of unions, conflict between a union and a respective employer is inevitable.<sup>189</sup> This inevitable conflict explains why an employee cannot speak pursuant to their *ordinary* or *official* job duties when they speak in their capacity as a union member.

When an employee speaks as a union member, that employee assumes a role distinct from his or her employer. As the Court stated in *Janus*, “when public employees are performing their job duties, their speech may be controlled by their employer” and “the employee’s words are really the words of the employer.”<sup>190</sup> However, when employees speak as union members, they speak not for their employer, but *for themselves* or their union coworkers. To hold that union members speak for their employers when voting for union officials or expressing their opinion on union matters would suggest that the employer is in some sense electing union officials and establishing union policies. To quote the Court in *Janus*, “[t]hat is not what anybody understands to be happening.”<sup>191</sup>

This same rationale applies to employee’s initiation of union grievance procedures.<sup>192</sup> In raising a grievance, an employee

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187. *Id.* at 512–13.

188. See Richard B. Freeman & Eunice S. Han, *Public Sector Unionism Without Collective Bargaining*, Am. Econ. Ass’n. 2 (2012).

189. George C. Homans, *Industrial Harmony As A Goal*, in INDUSTRIAL CONFLICT 48 (1954); Seidman, *supra* note 175, at 48.

190. *Janus v. AFSCME*, 138 S. Ct. 2448, 2474 (2018); see also *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 207 (2d Cir. 2010) (Calabresi, J., dissenting) (stating “[w]hen an employee is engaged in speech that the ‘employer itself has commissioned or created,’ then the employee is acting as an agent or a mouthpiece of the employer, and the employer must have a substantial degree of control over the employee’s execution of his responsibilities.”) (citations omitted).

191. *Janus*, 138 S. Ct. at 2474.

192. Eric Marshall, *Rescuing the Union Grievance from the Shoals of Garcetti: A Call for the Return to Reason in Public Workplace Speech Jurisprudence*, 57 N.Y. L. SCH. L. REV. 905, 921 (2013) (stating “when an employee files a grievance, he is not speaking *for* the employer; he is speaking *for* himself *to* the employer, invoking the rights accorded to him by his union contract and protected by law” (emphasis in original)).

asserts that management violated the collective bargaining agreement or engaged in other problematic behavior.<sup>193</sup> If the employee speaks for his or her employer in filing a grievance, then the employer is raising a complaint against itself and thus “disputing its own actions.”<sup>194</sup>

Nonetheless, one might insist that even if an employee does not speak for his employer when speaking as a union member or in grievance procedures, an employee can still speak both as a union member and pursuant to his or her “ordinary” or “official” job duties. One factor courts consider in determining if an employee speaks as a citizen is if the employee’s speech has a “citizen analogue.”<sup>195</sup> For instance, the Second Circuit held in *Weintraub* that the filing of a union grievance has no “citizen analogue” because it is “not a form or channel of discourse available to non-employee citizens” and thus must be speech pursuant to a teacher’s job duties.<sup>196</sup>

The Court in *Garcetti* established the “citizen analogue” inquiry as a factor that courts may consider in determining if the speech at issue is citizen or employee speech.<sup>197</sup> However, *Garcetti* states that this inquiry is not dispositive,<sup>198</sup> and the “citizen analogue” factor is particularly ill-suited for considering the status of an employee’s union-related speech.<sup>199</sup> One must be an employee of some kind to join a union, and an employee’s union-related speech will frequently have no citizen analogue given the unique relationship between an employee’s union and his or her job.<sup>200</sup>

Other factors courts apply in determining citizen versus employee speech are similarly unhelpful for analyzing union

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193. McMahon, *supra* note 179, at 119.

194. *See Janus*, 138 S. Ct. at 2474.

195. *See, e.g., Weintraub*, 593 F.3d at 203–04; *see also* Decotiis v. Whittemore, 635 F.3d 22, 32 (1st Cir. 2011).

196. *Weintraub*, 593 F.3d at 204.

197. *See Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

198. *Id.* at 420.

199. For a critique of the *Weintraub* court’s use of the “citizen analogue” factor as it related to union grievances, *see* Marshall, *supra* note 192, at 920–23.

200. *See id.* at 921 (stating that “when an employee files a [union] grievance, he is not speaking *for* the employer; he is speaking for himself *to* the employer, invoking the rights accorded to him by his union contract and protected by law . . .”) (emphasis in original).

member speech. For example, union member speech can occur at the workplace and utilize workplace resources.<sup>201</sup> Similarly, union members can direct their speech up the chain of command, such as when a union member speaks during a union meeting at which management is present.

Another fact worth noting is that employers cannot require workers to join a union.<sup>202</sup> Though *Weintraub* notes that an employer need not require speech in order for it to be pursuant to an employee's job duties, it is hard to imagine that an employee's union member speech is part of their job duties when union membership itself is optional. Even an employer's mere expectation that an employee should join a union would be quite strange considering the "inherent institutional conflict of interest between an employer and its employees' union"<sup>203</sup> discussed above. In his dissent in *Weintraub*, Judge Calabresi doubts "that most employers would view union activity as something that their employees do *for the employer's benefit*."<sup>204</sup> Further, he notes the "distinct irony in the idea that unions, which so many employers seek to exclude from the workplace, are somehow transmuted into entities that 'promote the employer's mission'" and thus become part of an employee's official duties.<sup>205</sup>

It is possible that an employer may require an employee to raise any workplace complaints through a collectively-bargained union grievance procedure.<sup>206</sup> However, even if an employer did

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201. See, e.g., N.J. Stat. Ann. § 34:13A-5.12 (West 2018) (giving public unions the right to conduct worksite meetings during lunch or non-work breaks on the employer's premises to discuss union matters).

202. *N.L.R.B. v. Gen. Motors Corp.*, 373 U.S. 734, 743 (1963) (holding that a private sector employee in a "union shop" cannot be fired for failing to honor any union-imposed obligations, such as formal union membership, except the "duty to pay dues and fees"); 2 N. PETER LAREAU, *LABOR AND EMPLOYMENT LAW* § 25.08 (Matthew Bender & Co., Inc. rev. ed. 2018). But see *Justice v. Danberg*, 571 F. Supp. 2d 602, 609 (D. Del. 2008) (stating that Delaware law required a public employee to be a member of a union, but not an active member). *Janus* makes even the mandatory payment of dues and fees unconstitutional. See generally *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

203. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013).

204. *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 209 n.6 (2d Cir. 2010) (Calabresi, J., dissenting) (emphasis in original).

205. *Id.*

206. See *id.* at 209 (stating "[i]t is possible that the union grievance was an official part of a process by which employees brought subjects of concern to

require utilization of union grievance procedures, that does not necessarily make those filings part of the employee's "ordinary" or "official" duties.

*Garcetti* states that the inquiry into whether an employee speaks as a citizen is "a practical one" and that the "listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties."<sup>207</sup> This suggests that an employer cannot simply transform an employee's filing of a union grievance into speech pursuant to the employee's job duties by including those activities in the employee's job description or requiring it as a matter of government policy. Courts must look beyond formal job requirements and examine the realities of an employee's job duties in determining when he or she speaks pursuant to them. It is reasonable to expect an employee to raise certain workplace concerns with their employer, but to suggest that it is an employee's job duty to raise them via a union's adversarial grievance procedure stretches the concept of job duties beyond its reasonable limits.

Cases discussing union grievances also describe them as procedures that are "internal" to or established by the employer.<sup>208</sup> This fact supposedly justifies, at least in part, the conclusion that union grievance filings are a part of a public employee's job duties. However, it is unions that typically insist on implementing these grievance procedures,<sup>209</sup> hence their description as *union grievances* as opposed to other types of grievance procedures that exist. To describe union grievances as entirely internal procedures to the employer ignores the union's fundamental role in creating and implementing them.<sup>210</sup>

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[the school system's] attention, facilitating corrective action; if this were the case, then Weintraub's grievance might be pursuant to his official duties and exempt from First Amendment protection").

207. *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006).

208. *Weintraub*, 593 F.3d at 204; *see also* *Bivens v. Trent*, 591 F.3d 555, 561–62 (7th Cir. 2010).

209. *McMahon*, *supra* note 179, at 119.

210. *See* *Marshall*, *supra* note 192, at 927–28 (discussing how New York law protects employees' right to file union grievance and would punish an employer for unilaterally instituting grievance procedures without negotiating with the union).

Thus, under *Janus*, *Lane*, and *Garcetti*, there appears to be little reason for courts to hold that union member speech and union grievances are speech pursuant to an employee's job duties. *Lane* eliminated the primary rationale for that conclusion, and *Janus* provides strong reasons to conclude otherwise.

### 3. The Scope of Union Member Speech

So far, this Article has discussed union member speech without precisely defining under what circumstances that speech occurs. With the exception of cases involving union grievances, most of the cases this Article discusses address employer retaliation against a union official or representative.<sup>211</sup> Few cases address ordinary union member speech, and even *Boulton* and *Montero*, two cases that take opposing stances on *Garcetti*'s application to union member speech, involve union representatives.<sup>212</sup> Further, the courts in most of these cases accept without question the employees' assertions that they in fact spoke as union representatives.<sup>213</sup>

Courts that have addressed whether an employee spoke as a union representative or member have focused on both the content and the context of the employee's speech. For example, in *Graber v. Clarke*, the Seventh Circuit found that an employee spoke as union Vice President when initiating union grievance procedures on behalf of another employee, but not when commenting on the well-being of specific jail deputies.<sup>214</sup> The Court found it significant that, in making the latter comments, the employee did not mention the union or the collective bargaining agreement at any point during the conversation.<sup>215</sup> The employee's supervisor stated, "when Graber spoke about union issues in the past, he always mentioned the union or its

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211. See *supra* Part I(C).

212. *Montero v. City of Yonkers*, 890 F.3d 386, 398–99 (2d Cir. 2018); *Boulton v. Swanson*, 795 F.3d 526, 530 (6th Cir. 2015).

213. See, e.g., *Boulton*, 795 F.3d at 534; *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1060 (9th Cir. 2013); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006).

214. 763 F.3d 888, 894–97 (7th Cir. 2014).

215. *Id.* at 897.

members.”<sup>216</sup> Further, the Court stated the employee’s comments about the jail deputies were specific to the deputies under his supervision, and if he had spoken as a union representative, he “would have been concerned for all deputies who were getting insufficient rest, not just those under his control at the jail.”<sup>217</sup>

Another issue courts have considered is whether the union itself sanctioned an employee’s speech or the forum in which it occurred. In *Olendzki v. Rossi*, the Court found that a government psychologist spoke as a union official when representing another employee in a disciplinary meeting and when speaking at union and labor management meetings.<sup>218</sup> The Court stated, “these forums were sanctioned by the union as a venue to allow [the psychologist] to voice concerns on behalf of its members” and thus fall “outside of *Garcetti* strictures.”<sup>219</sup> Similarly, in *Gloembiewski v. Logie*, the Northern District of Ohio seriously doubted that an employee engaged in union activity when circulating a petition critical of an attendance policy agreed upon by her union and her employer.<sup>220</sup> The Court noted that the union “unequivocally disavow[ed]” the employee’s stance on the attendance policy.<sup>221</sup>

This Article does not establish a precise framework for determining when an employee speaks as a union member. Courts must examine the content and context of an employee’s speech in each case to make that determination. An employee’s speech at a union meeting on union matters or during a labor strike should almost certainly qualify as union member speech. However, statements an employee makes at work during normal work hours will require more careful analysis. Statements which the union itself disavows may not qualify as union member speech unless the context suggests otherwise, such as if the union sanctions the forum in which the employee speaks.

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216. *Id.*

217. *Id.*

218. 765 F.3d 742, 748 (7th Cir. 2014).

219. *Id.* at 748.

220. *Golembiewski v. Logie*, 852 F. Supp. 2d 908, 920 n.2 (N.D. Ohio 2012).

221. *Id.*

### Conclusion

Public labor unions certainly have reasons to lament the Court's decision in *Janus*. Unions that previously relied on agency fees from nonmembers will see their revenues decline significantly. However, as news of teacher strikes ripple across the nation,<sup>222</sup> it is clear that public sector unions are resolved to carry on. This Article demonstrates that the First Amendment can protect the interests of public unions from threat of employer retaliation against employees for union-related speech.

*Janus* establishes that the First Amendment should protect union officials and representatives from employer retaliation for their union-related speech under most circumstances. Speech on behalf of a union is not a part of their job duties and, according to *Janus*, is almost always a matter of public concern. With these hurdles cleared, union representatives must demonstrate that their First Amendment interests in speaking outweigh their employer's interests in maintaining efficient operations. Union representatives should have little trouble meeting that burden.

*Janus*'s rationale for union representatives should also apply with equal force to ordinary union members and employees utilizing union grievance procedures. Employees in those circumstances speak for themselves, not their employers, and to suggest otherwise runs counter to common sense. Further, the very nature of unions and membership therein makes it difficult to imagine how speech as a union member could ever be a part of one's job duties because such speech nearly always implicates the inherent tension between employer and union.

Nonetheless, employees speaking as ordinary union members or pursuant to union grievance procedures have additional burdens they must meet before the First Amendment will protect them from employer retaliation. First, employees must establish that they in fact spoke in their capacity as a union member. Second, employees speaking as union members

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222. Clare Lombardo & Anya Kamenetz, *Oakland, Los Angeles And More To Come: Why Teachers Keep Going On Strike*, NAT'L PUB. RADIO (Feb. 22, 2019, 7:00 AM), <https://www.npr.org/2019/02/22/695957426/oakland-los-angeles-and-more-to-come-why-teachers-keep-going-on-strike>.

still must establish that they spoke on matters of public concern. Many circuits do not recognize a *per se* rule about whether a public employee's union-related speech addresses a matter of public concern,<sup>223</sup> and it seems reasonable to think that not every union member comment or union grievance will address matters of public concern.<sup>224</sup>

While public employees must address these concerns in bringing First Amendment retaliation claims based on their union-related speech, this Article demonstrates that *Garcetti* should not pose an obstacle. This may be a small victory for public unions in light of *Janus*'s primary holding, but it has the potential to assist unions in their continued efforts to represent public workers.

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223. See, e.g., *Boulton v. Swanson*, 795 F.3d 526, 534–35 (6th Cir. 2015); see also *Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir. 1995) (stating “Courts have recognized that such activity, in a broad sense, touches upon matters of public concern.” However, the fact that an employee’s expression concerns a topic of public import “does not automatically’ render his expression protected”).

224. *Connick v. Myers*, 461 U.S. 138, 154 (1983) (addressing employee grievances, *Connick* states that “it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment’s safeguarding of a public employee’s right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance.”); see also *Janus v. AFSCME*, 138 S. Ct. 2448, 2472–73 (2018) (stating “[s]uppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*”).