FIRST AMENDMENT — PUBLIC EMPLOYMENT — ELEVENTH CIRCUIT HOLDS THAT A PUBLIC EMPLOYEE WHOSE STATUTORY DUTIES ARE IDENTICAL TO HER SUPERIOR'S MAY BE TERMINATED FOR POLITICAL CANDIDACY IN OPPOSITION TO HER EVENTUAL SUPERIOR. — *Underwood v. Harkins*, 698 F.3d 1335 (11th Cir. 2012).

Employees generally do not enjoy constitutional protection against private employers' infringements of employees' freedom of speech or political association, but they are protected against infringements of those rights by public employers.[1] In *Elrod v. Burns*[2] and *Branti v. Finkel*,[3] the Supreme Court established that the First Amendment protects government employees from termination for their failure "to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question."[4] Recently, in *Underwood v. Harkins*,[5] the Eleventh Circuit held that under the *Elrod-Branti* doctrine, an elected public official does not violate the First Amendment by discharging an immediate subordinate for running against the official in an election if the immediate subordinate and the official have the same duties under local or state law.[6] By relying on a subordinate's formal job duties, the court's rule gives undue weight to the government's interest in political loyalty in cases, such as *Underwood*, in which the subordinate does not in fact perform the duties entrusted to her elected superior. *Underwood* therefore inadequately protects the First Amendment interests of public employees running for office.

Sarah Jane Underwood and Rita Harkins were coworkers as superior court deputy clerks in Lumpkin County, Georgia.[7] Georgia law provides that the "[p]owers and duties of deputy clerks shall be the

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[1] *See* Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464 (2007).

[2] 427 U.S. 347 (1976).

[3] 445 U.S. 507 (1980).

[4] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 714 (1996). *Elrod* initially established that "nonpolicymaking, nonconfidential government employee[s]" are protected from firings based on their political beliefs, 427 U.S. at 375 (Stewart, J., concurring in the judgment), but *Branti* declared that labeling a position as "policymaker" or "confidential" is not dispositive, 445 U.S. at 518 (internal quotation marks omitted). Nevertheless, these categories remain salient. *See* Michael T. Jilka, *Political Spoils and the First Amendment*, 77 J. KAN. B. ASS'N. 20, 22–26 (2008). "[A] different, though related, inquiry" governs public employees' free speech rights. *O'Hare Truck Serv.*, 518 U.S. at 719. This inquiry involves a "balanc[ing of] . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[5] 698 F.3d 1335 (11th Cir. 2012).

[6] *Id.* at 1343.

[7] *Id.* at 1337.

same as those of [superior court] clerks,"[8] but in practice, the role of the deputies is administrative.[9] After the sitting clerk announced he would not seek reelection, Harkins, Underwood, and two others ran for the Republican nomination for clerk.[10] The primary contest was "'not contentious' and focused on the candidates' experience."[11] Harkins won the nomination and the uncontested general election.[12] Her first official act as clerk was to terminate Underwood's — and only Underwood's — employment.[13] Underwood sued Harkins under 42 U.S.C. § 1983, alleging that the termination violated Underwood's First Amendment rights to free association and participation in the political process.[14] For purposes of summary judgment, Harkins admitted to firing Underwood because she ran in the Republican primary.[15]

The federal court in the Northern District of Georgia granted the defendant's motion for summary judgment.[16] Applying the *Elrod-Branti* doctrine,[17] Judge Story found that the government employer's interests in loyalty and in avoiding potential office disruption outweighed Underwood's First Amendment interest in political candidacy.[18]

The Eleventh Circuit affirmed.[19] Writing for a divided panel, Judge Jordan[20] noted that "First Amendment jurisprudence in the area of firings based on political affiliation or candidacy is, at best, muddled," and stated that the court sought to "harmonize [its] existing cases and enunciate a workable and relatively predictable standard."[21] Judge Jordan then reviewed the Supreme Court's *Elrod-Branti* doctrine and its past applications in the Eleventh Circuit.[22] The Eleventh Circuit applies *Elrod-Branti* using a "least restrictive means test which balances [F]irst [A]mendment rights of [employees] and the need for

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[8] *Id.* (alterations in original) (quoting GA. CODE ANN. § 15-6-59(b) (2012)).

[9] Underwood, for example, performed general secretarial and accounting duties. *See id.* at 1337–38. Even after Harkins assumed the role of clerk, "deputy clerks ha[d] little discretion in their job and instead [we]re required to follow specific instructions to execute limited, well-defined tasks." *Id.* at 1347 (Martin, J., dissenting).

[10] *Id.* at 1338 (majority opinion).

[11] *Id.*

[12] *Id.*

[13] *Id.* Superior court deputy clerks in Lumpkin County are not protected by the civil service system and therefore serve at the will of the clerk. *Id.* at 1337.

[14] *Id.* at 1336; Underwood v. Harkins, Civil Action No. 2:10-CV-20-RWS, 2011 WL 2457680, at *2 (N.D. Ga. June 16, 2011).

[15] *Underwood*, 698 F.3d at 1338.

[16] *Underwood*, 2011 WL 2457680, at *6.

[17] *Id.* at *3 & n.1.

[18] *Id.* at *4, *6.

[19] *Underwood*, 698 F.3d at 1346.

[20] Judge Jordan was joined by Judge Carnes.

[21] *Underwood*, 698 F.3d at 1338.

[22] *See id.* at 1338–42.

efficient and effective delivery of public services."[23] In *Randall v. Scott*,[24] the Eleventh Circuit extended *Elrod-Branti* to cover dismissals based on political candidacy.[25] While *Randall* established that a public employee running for office has "*some* First Amendment protection," the *Underwood* court noted that *Randall* did not determine the extent of that protection because the termination at issue was motivated by personal reasons and furthered no governmental interest.[26]

After considering Supreme Court and Eleventh Circuit precedent, Judge Jordan announced a clear rule: "An immediate subordinate who has the same statutory powers and duties as the elected official for whom she works is the type of confidential employee who can be terminated under *Elrod*, *Branti*, and their progeny . . . if she runs in an election against her eventual superior."[27] "Without minimizing the First Amendment interest in candidacy," the court stated, "in this scenario the subordinate's constitutional rights lose out under a *Randall* balancing analysis."[28] The court noted, "[w]hat matters in a case like this one is not what the subordinate actually does on a day-to-day basis . . . . [Rather,] we look at the position in the abstract and at what state or local law allows a person in that position to do . . . ."[29]

The court justified this rule on multiple grounds. First, the court reasoned that a deputy clerk is "essentially the legal alter ego of the clerk"[30] and is an employee in whom the clerk must be able to have "total trust and confidence."[31] Second, the categorical approach gives a public official the flexibility "to expand a subordinate's duties [because the official] is able to hire the subordinate of her choice."[32] Finally, the rule is predictable, enabling a legislature assigning duties to elected officials and their subordinates to consider whether a position warrants First Amendment protection, and providing fair warning to

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[23] *Id.* at 1341 (first and second alterations in original) (quoting Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989)). While *Elrod* directly addressed terminations for failing to support a party or its candidates, the Eleventh Circuit also applied *Elrod-Branti* to terminations for supporting an individual official's electoral opponents. *See id.* at 1340–43 (discussing *Terry*, 866 F.2d at 377, and *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979), a decision of the former Fifth Circuit that is binding precedent in the Eleventh Circuit).

[24] 610 F.3d 701 (11th Cir. 2010).

[25] *Underwood*, 698 F.3d at 1340.

[26] *Id.* (quoting *Randall*, 610 F.3d at 713) (internal quotation mark omitted).

[27] *Id.* at 1343.

[28] *Id.*

[29] *Id.* at 1344. The methodology of evaluating a job's requirements using exclusively the formal job description extends to all *Elrod-Branti* cases. *See id.* However, the court clarified that the bright-line rule only governs when the statutory duties of the subordinate and superior are the same; otherwise, whether the subordinate "is a confidential employee from whom loyalty can be demanded will ordinarily need to be determined as a matter of fact." *Id.* at 1345.

[30] *Id.* at 1343.

[31] *Id.* (quoting Stegmaier v. Trammell, 597 F.2d 1027, 1040 (5th Cir. 1979)).

[32] *Id.* at 1344; *see also id.* at 1344–45.

public employees "that their jobs may be subject to termination if they challenge their current or eventual superior in an election or support their boss' electoral opponent."[33]

Judge Martin dissented.[34] She argued that "[t]he majority ma[de] a significant mistake" in deciding that "the specific facts regarding the employee's *actual* job duties" are not relevant.[35] First, she noted that the Eleventh Circuit's candidate-support precedent, while not uniform, requires determining whether political loyalty is an appropriate job requirement as a "question of fact"[36] based in part on an employee's "actual job responsibilities."[37] Second, while acknowledging the "sharply conflicting views" of other circuits over whether to rely exclusively on formal job descriptions under *Elrod-Branti*, Judge Martin cautioned that the Supreme Court's language in *Garcetti v. Ceballos*[38] "casts doubt" on the majority's approach.[39] She observed that *Garcetti* requires a "practical"[40] inquiry into an employee's official duties to guard against cases involving "excessively broad job descriptions."[41] Judge Martin concluded that because the deputy clerks in fact had little discretion in their jobs, the court's reliance solely on the statutory job description "ha[d] the effect of burdening Ms. Underwood's First Amendment rights beyond that which the Constitution allows."[42]

The Supreme Court generally has not afforded political candidacy robust constitutional protection,[43] and lower courts are split on whether a public employee's candidacy even implicates First Amendment rights.[44] Although *Underwood* is far from unique in upholding a pub-

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[33] *Id.* at 1345. Predictability would also benefit the elected official, who would know which positions may be filled with loyalists. *See* Jilka, *supra* note 4, at 24.

[34] *Underwood*, 698 F.3d at 1346 (Martin, J., dissenting).

[35] *Id.*

[36] *Id.* (quoting *Stegmaier*, 597 F.2d at 1034 n.8) (internal quotation marks omitted).

[37] *Id.* (quoting Parrish v. Nikolits, 86 F.3d 1088, 1093 (11th Cir. 1996)).

[38] 547 U.S. 410 (2006).

[39] *Underwood*, 698 F.3d at 1347 (Martin, J., dissenting).

[40] *Id.* (quoting *Garcetti*, 547 U.S. at 424).

[41] *Id.* (quoting *Garcetti*, 547 U.S. at 424) (internal quotation mark omitted). *Garcetti* involved a challenge under the *Pickering* free speech doctrine. *See Garcetti*, 547 U.S. at 417.

[42] *Underwood*, 698 F.3d at 1348 (Martin, J., dissenting).

[43] Under equal protection doctrine, the Supreme Court has found that restrictions on candidacy themselves do not trigger heightened scrutiny. *See* Clements v. Fashing, 457 U.S. 957, 962–66 (1982) (plurality opinion); Bullock v. Carter, 405 U.S. 134, 143 (1972). The Court has also rejected First Amendment challenges to the Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended in scattered sections of the U.S. Code), and local versions of the Act, which bar covered federal, state, and local employees from participating in political campaigns. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 98–104 (1947); Paul R. Koster, Recent Development, *Election Battles and Their Impact on the Public Employer*, 38 URB. LAW. 1187, 1196 (2006).

[44] The Sixth and Seventh Circuits have found that a public employee's announcement of candidacy, without more, does not implicate the First Amendment, while the Fifth and Tenth Circuits treat a public employee's candidacy under the *Pickering* free speech doctrine. *See* Koster, *supra* note 43, at 1190–91 & nn.12–14. Fewer courts have treated public-employee candidacy un-

lic employee's termination as a result of political candidacy,[45] the court's approach is nevertheless problematic. Relying on a position's formal requirements is inconsistent with the Supreme Court's functional approach to evaluating job responsibilities and fails to account for differences in the strength of the government employer's loyalty interest when a position's formal and actual requirements differ. Where, as in *Underwood*, the formal and actual requirements differ, the court's balancing analysis does not sufficiently evaluate or protect the employee's First Amendment interests in candidacy.

In its formalist approach to the *Elrod-Branti* inquiry, the *Underwood* rule is underprotective of public employees' First Amendment interests. In the related context of public-employee free speech, the Supreme Court in *Garcetti* rejected this type of approach and demanded a "practical"[46] inquiry into an employee's "official duties."[47] This methodology is important to avoiding undue restrictions on an employee's First Amendment rights because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform."[48] Thus, as Judge Martin's dissent argued,[49] *Garcetti* suggests that an inquiry into the actual job duties of a position is better suited to determining "[t]he nature of the [public employee's] responsibilities"[50] and to evaluating whether political loyalty is an "appropriate requirement" for the employee's position.[51]

The danger motivating *Garcetti*'s admonition against formal job descriptions is evident in the *Underwood* rule. *Underwood*'s formalist rule relies on the judgment that when a superior and her immediate subordinate share identical statutory duties and run against each other in an election, the government employer's interest in loyalty categorically outweighs the public employee's First Amendment interests in political candidacy.[52] But the formalist rule overlooks differences between the government employer's interests when a position's formal and actual job requirements are the same and when they differ.

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der the *Elrod-Branti* doctrine. *See* Kevin C. Quigley, Case Comment, *Wading Through the "Morass": The Eleventh Circuit Recognizes a Right to Candidacy in* Randall v. Scott, 52 B.C. L. REV. E. SUPP. 185, 192 (2011). Of particular note is *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997), which found that a termination based on a subordinate's running for office against her current boss did not constitute retaliation based on political beliefs or associations. *Id.* at 850.

45 *See* Koster, *supra* note 43, at 1198.

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

47 *Id.* at 421. However, the *Garcetti* "official duties" analysis is a threshold inquiry in the *Pickering* doctrine to determine whether the employee was speaking "as a citizen." *Id.* at 417. This inquiry thus is external to the balancing inquiry. *See* Estlund, *supra* note 1, at 1470–71.

48 *Garcetti*, 547 U.S. at 424–25.

49 *See Underwood*, 698 F.3d at 1347–48 (Martin, J., dissenting).

50 Elrod v. Burns, 427 U.S. 347, 367 (1976) (plurality opinion).

51 Branti v. Finkel, 445 U.S. 507, 518 (1980).

52 *See Underwood*, 698 F.3d at 1343.

When the subordinate in fact performs some or all of the same statutory duties as her superior, the subordinate behaves as "the legal alter ego of the clerk,"[53] and as a result, the clerk "must be able to select a deputy in whom [s]he has total trust."[54] Accepting the *Underwood* court's reasoning, the government's need for loyalty appears absolute because the official "must" have "total trust" in a subordinate to perform the duties the official was elected to perform. Loyalty would thus be an appropriate requirement for that position because, regardless of the First Amendment interests the employee may have, the employer's interests seem categorically to outweigh the employee's interests.

By contrast, the government's interest in loyalty is weak when the employee is permitted by statute to perform the same duties as her superior but does not actually perform any of those duties in her day-to-day responsibilities. In this context, the court's formalist rule advances two interests of the government as employer: predictability in administration and flexibility in expansion of the employee's duties.[55] The *Underwood* rule implies that these interests also categorically outweigh the employee's interest in political candidacy. But in this second scenario, the deputy does not act as "the legal alter ego of the clerk" by performing the duties that the clerk was elected to perform. The government has a legitimate administrative interest and a potential loyalty interest. Yet the need for political loyalty is far from absolute because the duties the employee currently performs do not require such loyalty.[56]

*Underwood* spent little time evaluating the First Amendment interests that may outweigh the government's interests in cases in which

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[53] *Id.*

[54] *Id.* (alteration in original) (quoting Stegmaier v. Trammell, 597 F.2d 1027, 1040 (5th Cir. 1979)) (internal quotation mark omitted).

[55] *See id.* at 1344–45 (flexibility); Jilka, *supra* note 4, at 24 (predictability). The strength of these interests is an open question. With regard to predictability, the government interest in easily determining which positions are constitutionally protected appears strongest when an official uses patronage to fill numerous positions in a new administration. *See, e.g.*, Riley v. Blagojevich, 425 F.3d 357, 360–62 (7th Cir. 2005). Yet public officials infrequently face legal challenges under *Elrod-Branti*, suggesting that the cost of terminating an employee in contravention of the doctrine is low. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 724 (1996) (noting that in the six years after *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), which expanded *Elrod-Branti*, only eighteen such cases were filed against Illinois officials). Additionally, if the *Elrod-Branti* doctrine is primarily intended to protect public employees' First Amendment rights, a less predictable rule may incentivize public employers to demand political loyalty only for positions for which it is truly necessary.

With regard to flexibility, if the court's rule relied on a position's actual responsibilities, the superior could expand the job's requirements and constitutionally terminate a nonloyal subordinate. *See Underwood*, 698 F.3d at 1347 (Martin, J., dissenting) (looking to the responsibilities of deputies before and after Harkins became clerk).

[56] The official's need for political loyalty is distinct from her need for competence, which is always a ground for dismissal. *See Underwood*, 698 F.3d at 1348 n.5 (Martin, J., dissenting).

the "alter ego" employee's formal and actual duties differ.[57] The court simply declared that the First Amendment interests "lose out" in the balancing analysis.[58] But determining whether loyalty is an appropriate requirement for the employee's position in this scenario demands careful evaluation and balancing of the employee's First Amendment interests against the employer's interests.

The *Elrod-Branti* doctrine recognizes public employees' rights to freedom of political belief and association. The *Elrod* Court was concerned that conditioning public employment on party affiliation would have coercive effects on an individual employee's political beliefs and associations.[59] The Court further acknowledged the public's First Amendment interest in "[t]he free functioning of the electoral process," reflecting a concern about the power of the party in office to "prevent[] support of competing political interests."[60]

The Eleventh Circuit in *Randall* recognized that a public employee's political candidacy implicates these First Amendment interests. *Randall* found "that political candidacy is entitled to at least a modicum of constitutional protection."[61] The court decided that a public employee's political candidacy should be evaluated under the Eleventh Circuit's *Elrod-Branti* balancing analysis in the same way that the circuit evaluates restrictions on supporting opposition candidates.[62] *Randall* was not prepared to afford these interests robust protection, stating in dicta that if the employee were to run against his current boss, the boss "would have good legal reason to discharge [the employee] due to the state's interest in office loyalty."[63] Nevertheless, the logic of *Randall* suggests that important First Amendment interests are at stake. An employee's First Amendment interests in her own candidacy should be at least as great as her interests in supporting other opposition candidates, because preventing the candidacy denies the employee the opportunity to manifest political support for, and to develop a political affiliation with others around, her own candidacy.[64]

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[57] *See id.* at 1343–46 (majority opinion). The court may have refrained from engaging in a qualitative assessment of the First Amendment interests because of its conclusion that the employer's interest in loyalty was all but absolute and could not be overcome. It is also possible that the court's failure to evaluate qualitatively the First Amendment interests facilitated the court's creation of a rule that relied only on a position's formal requirements.

[58] *Id.* at 1343.

[59] *See* Elrod v. Burns, 427 U.S. 347, 355 (1976) (plurality opinion).

[60] *Id.* at 356.

[61] Randall v. Scott, 610 F.3d 701, 711–12 (11th Cir. 2010). *But see* Quigley, *supra* note 44, at 193–94 (criticizing *Randall*'s characterization of Supreme Court precedent).

[62] *See Randall*, 610 F.3d at 712–13.

[63] *Id.* at 714.

[64] *But see* Quigley, *supra* note 44, at 192 (noting one court's finding that "[t]he right to political affiliation does not encompass the mere right to affiliate with oneself" (alteration in original)

Although the Eleventh Circuit analyzes political candidacy under *Elrod-Branti*, an employee's potential interest in free speech under *Pickering v. Board of Education*[65] is also worth considering.[66] In protecting a teacher's First Amendment right to publish a letter to the editor criticizing the local school board,[67] *Pickering* found it "essential" that teachers, who are "most likely to have informed and definite opinions" regarding school administration,[68] be permitted to contribute to "free and open debate . . . without fear of retaliatory dismissal."[69] By analogy, *Pickering* presents two First Amendment interests in a public employee's candidacy. First, an employee, as a public servant, has a particularly strong personal interest in contributing to the public debate regarding the administration of a public office via her candidacy.[70] Second, the public has a strong interest in hearing from, and deliberating about the selection of, a candidate whose insights from experience are especially valuable to the public debate.[71]

A public employee's political candidacy involves interests in freedom of political belief, association, and speech under the First Amendment. As the Eleventh Circuit stated in *Randall*, "[a]n interest in candidacy, and expression of political views without interference from state officials who wish to discourage that interest and expression, lies at the core of values protected by the First Amendment."[72] Professor Kathleen Sullivan has argued that strong justifications should be required from government officials seeking to impose employment conditions that impinge on employees' First Amendment rights.[73] Courts in the political-candidacy context, whether under *Elrod-Branti* or *Pickering*, should evaluate critically the government's loyalty interests based on the employee's actual job requirements when balancing them against the steep costs to the employee's and the public's First Amendment interests.

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(quoting Jantzen v. Hawkins, 188 F.3d 1247, 1252 (10th Cir. 1999)) (internal quotation marks omitted)).

65 391 U.S. 563 (1968).

66 *See* Underwood v. Harkins, Civil Action No. 2:10-CV-20-RWS, 2011 WL 2457680, at *3 n.1 (N.D. Ga. June 16, 2011). Several circuits treat a public employee's candidacy under the *Pickering* doctrine, and at least one court has treated a policy restricting candidacy as a hybrid issue implicating both free speech and association. *See* Koster, *supra* note 43, at 1191 & n.14.

67 *Pickering*, 391 U.S. at 564–65.

68 *Id.* at 572.

69 *Id.* at 571–72.

70 *See* Estlund, *supra* note 1, at 1471.

71 *See* Koster, *supra* note 43, at 1197 ("[W]ho better to run for office against the sheriff than his chief deputy for twenty-five years.").

72 Randall v. Scott, 610 F.3d 701, 713 (11th Cir. 2010).

73 *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1503–04 (1989).