WHY THE EIGHTH CIRCUIT GOT IT RIGHT IN
INTERNATIONAL FIREFIGHTERS: A SPOUSE’S FIRST
AMENDMENT RIGHTS AND STANDING IN THE
PUBLIC EMPLOYEE POLITICAL ARENA

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INTRODUCTION

In *International Ass’n of Firefighters Local 2665 v. City of Ferguson,* the Eighth Circuit Court of Appeals held that Ms. Mendez-Thompson, the wife of a city firefighter, had standing to challenge a provision of the Ferguson, Missouri, city charter that prohibited city employees from directly or indirectly engaging in certain political activities. In doing so, the Eighth Circuit reversed the judgment of the United States District Court for the Eastern District of Missouri. The Eighth Circuit held that Mendez-Thompson had standing for two reasons: (1) she was directly injured by having her First Amendment freedom of speech rights chilled as a result of fears that the city would fire her husband if she participated in political activities; and (2) she sustained a threat of indirect economic injury because her husband’s ability to provide economic support would be reduced if he were fired.

In holding that Mendez-Thompson had standing, the Eighth Circuit created a split between it and three other circuit courts. The Fourth, Ninth, and Tenth Circuits had previously held that the spouse of a public employee did not have separate standing to challenge similar provisions under different standards than those

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1 283 F.3d 969 (8th Cir. 2002) ("Firefighters II"), cert. denied, 537 U.S. 1105 (2003).
2 See *Firefighters II*, 283 F.3d at 971 (citing Ferguson, Mo. Charter § 5.3). The city charter states:

Neither the city manager nor any person holding an administrative office or position under the city manager’s supervision shall be a candidate for mayor or city council member or engage, directly or indirectly, in sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council... Any person violating the provisions of this section shall be removed in the manner provided in the personnel code.

Id. (emphasis added).

5 Id. at 976.
6 Id. at 973-74 ("[P]laintiff has an interest of her own to defend. Not only is it her own political activities that she seeks to protect, but her own personal and economic status as well.").

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governing the public employees.\textsuperscript{5} The Eighth Circuit recognized these other decisions but decided to disagree for a number of reasons discussed further below, and granted Mendez-Thompson standing to challenge the Ferguson ordinance.\textsuperscript{6} The Supreme Court denied certiorari in 2003,\textsuperscript{7} leaving this circuit split to be resolved by another case. Because the rights at stake are so important, the Court should take a similar case soon to resolve the split. This Comment illustrates the argument that plaintiffs such as Mendez-Thompson could and should be granted standing when the Supreme Court decides to resolves the circuit split.

This Comment will discuss why the Eighth Circuit was correct to grant Mendez-Thompson standing. Mendez-Thompson could suffer from an imminent, concrete economic injury due to the loss of her husband’s income. She was also suffering from a chill of her First Amendment freedom of speech rights due to the “indirect” language in the Ferguson ordinance. Denying separate standing under more favorable legal standards than those under which the government employee’s claims are examined could have broad ramifications for the families of all public employees in terms of their First Amendment free speech rights. Courts should conduct a searching inquiry into a claim that rests on the free speech rights granted to all citizens by the U.S. Constitution before denying a plaintiff a day in court to challenge an ordinance prohibiting direct or indirect political speech by a public employee.

Section I of this Comment will discuss the circuit split between the Eighth Circuit and the Ninth, Tenth, and Fourth Circuits, and explain why the Eighth Circuit disagreed with the holdings of the other circuits in similar circumstances. It will also discuss the minimal protections provided for public employee speech under the First Amendment. While the United States Supreme Court has allowed restrictions on the free speech of public employees, the Ferguson ordinance applies to persons who are not public employees and therefore should be analyzed under different standards than those used in

\textsuperscript{5} See Biggs v. Best, Best & Krieger, 189 F.3d 989 (9th Cir. 1999) (holding that relatives whose claims are derivative in nature do not have standing when the main claimant does not have a valid claim); Horstkoetter v. Dep’t of Pub. Safety, 159 F.3d 1265 (10th Cir. 1998) (holding that the spouse of a city employee has standing only to raise the same claims as the city employee derivatively); English v. Powell, 592 F.2d 727 (4th Cir. 1979) (holding that a wife’s injuries were too indirect and speculative to support her claim of standing in a lawsuit filed to challenge the propriety of her husband’s demotion).

\textsuperscript{6} Firefighters II, 283 F.3d at 975 (“We express our disagreement with these cases . . . . The injury may be indirect, in that it occurs initially to the husband, through loss of his job. It is nonetheless real and tangible.”).

\textsuperscript{7} 537 U.S. 1105 (2003).
public employee cases. Standing was correctly granted to Mendez-Thompson so that a more favorable standard could be established.

Section II will discuss the standing doctrine. First, it will analyze the constitutional and prudential requirements of the standing doctrine, showing that Mendez-Thompson met the constitutional three-prong test of injury, causation, and redressability, as well as the prudential considerations. Special emphasis is placed on the injury requirement, which "has accurately been described as a 'powerful barrier to federal court review.'" Then, it will outline the purposes served by the standing requirements. Finally, it will review scholars' criticism of the standing doctrine.

Section III will discuss essential First Amendment considerations. It will particularly focus on why the chilling of free speech should constitute injury under the standing requirements and will consider the overbreadth doctrine.

I. PUBLIC EMPLOYEE POLITICAL SPEECH AND THE CIRCUIT SPLIT

A. International Association of Firefighters Local 2665 v. City of Ferguson

Plaintiffs Lloyd Thompson and his wife Alma Mendez-Thompson, together with the International Association of Firefighters of St. Louis, Franklin and Jefferson Counties Local 2665, brought suit under 42 U.S.C. § 1983 against the city of Ferguson and the city manager, Alan Gill. The suit challenged a provision of the city charter that prohibits city employees from engaging in certain political activity, claiming that it violated their freedom of speech under the First

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9 Int'l Ass'n of Firefighters Local 2665 v. City of Ferguson, No. 4:00CV00241 ERW, 2001 U.S. Dist. LEXIS 23869, at *1-3 (E.D. Mo. Apr. 17, 2001) ("Firefighters I").
10 Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2003), providing in part: Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
11 Id.
Amendment. The city argued that the provision was designed to protect employees from political coercion by candidates.

The "directly or indirectly" language in the charter provision meant that Mendez-Thompson could not participate in political activity, because it would constitute indirect activity on the part of Mr. Thompson. Mendez-Thompson had participated in political activities when she lived in New York, assisting with a campaign for a councilwoman. She had also participated in the re-election campaign of a candidate for city council in Calverton Park, Missouri, when she lived there. Mendez-Thompson hoped to similarly participate in local politics in Ferguson. However, she felt that she was prevented from doing so because of the city charter provision, as she believed that it would lead to the termination of her husband's city employment.

In order to determine whether Mendez-Thompson's fears that her husband would be fired were justified, her lawyer sent a letter requesting the City's interpretation of the provision, but the City did not answer. However, Allen Gill, the city manager, testified that the prohibition on indirectly sponsoring a candidate means that a spouse cannot contribute to a candidate from a joint checking account held with a city employee. Also, during deposition under oath, the mayor of Ferguson, Steven Wegert, testified that he believed that a city employee's spouse should not contribute to candidates for mayor or council because it would be difficult to show that the money was not coming directly from the employee. He also stated that he believed...

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12 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

13 See Firefighters I, 2001 U.S. Dist. LEXIS 23869, at *9 ("[T]he intent of the restriction contained in the Charter is to protect employees from undue pressure from candidates...") (quoting Alan Gill, city manager).

14 See Firefighters II, 283 F.3d 969, 972 (8th Cir. 2002) ("The prohibition against 'indirect,' as opposed to 'direct,' political activities... does apply to Mr. Thompson."), cert. denied, 537 U.S. 1105 (2003).

15 Id.

16 Id.

17 See Firefighters I, 2001 U.S. Dist. LEXIS 23869, at *8 ("Mendez-Thompson alleges that she has not been active in the City because of her concern that her husband's job would be in jeopardy.").

18 Firefighters II, 283 F.3d at 972.


a spouse should not erect yard signs for a candidate for mayor or council, and should not run for mayor or council. 21

Gill and Wegert's statements indicate that if Mendez-Thompson had participated in local politics, her husband's job would have been in jeopardy. Because Gill and Wegert are in charge of administering and enforcing the Ferguson ordinance, Mendez-Thompson's belief that her husband's job was in jeopardy was reasonable.

It is clear that the city charter provision is valid as applied to Mr. Thompson. The Supreme Court has held that the First Amendment does not prohibit a law barring partisan political conduct by government employees. 22 The courts have allowed the government to impose restrictions on public employees speech because First Amendment rights "must yield on occasion to the demands of public safety." 23 The reasoning used to support this argument is that "[p]eople who become public employees receive certain benefits and undertake certain duties. One of those duties may require the surrender of rights that would otherwise be beyond the reach of governmental power." 24 In this case, however, Mendez-Thompson is not a public employee and did not voluntarily give up her First Amendment rights.

In a line of cases beginning with Pickering v. Board of Education 25 and Connick v. Myers, 26 the Supreme Court has determined that a public employee's First Amendment right to free speech is only violated when the employee's speech relates to matters of public concern and the employee's interest in speaking outweighs the employer's or government's interest in running an efficient operation. 27 Pickering was a review of an Illinois Supreme Court decision upholding a school board's dismissal of a teacher for writing a letter to a local newspaper criticizing the board's handling of various financial matters. 28 Connick involved a district attorney who fired an assistant district attorney. 29

21 Id. at *12-13 (citing Plaintiff's Motion for Summary Judgment, Ex. F, Wegert Dep., at 15-22).
22 See Broadrick v. Oklahoma, 413 U.S. 601, 606 (1973) ("Appellants do not question Oklahoma's right to place evenhanded restrictions on the partisan political conduct of state employees.").
23 Reeder v. Kan. City Bd. of Police Comm'rs, 733 F.2d 543, 547 (8th Cir. 1984).
24 Id. ("It is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife.").
27 See, e.g., Pickering, 391 U.S. at 568 ("The problem in any case is to arrive at 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.").
28 Id. at 564-68.
29 461 U.S. at 140-41.
The assistant district attorney had been annoyed by a proposed transfer, and had circulated a questionnaire among her fellow assistants asking if they were satisfied with their employment. In *Pickering*, the Court held that the teacher's right to speak on matters of public importance could not be used as the reason for dismissal. In *Connick*, the Court held that a violation of the First Amendment did not occur because the questionnaire was not speech about a matter of public concern.

In *Firefighters II*, the Eighth Circuit agreed with the district court, which held that the provision in question, as applied to Mr. Thompson, was constitutional because it was needed to maintain public confidence in the impartiality of government employees, to encourage fairness, and to ensure efficiency in city operations. The provision was also narrowly tailored, applying only to local elections for mayor and council.

The district court concluded that Mendez-Thompson lacked standing to bring her claim challenging the city charter provision. According to the court, "[e]ven if she were to take actions disapproved of by the City, the City could take no legal action against her personally under § 5.3." Thus, the court found that she lacked "injury in fact," and therefore did not have standing. However, the Eighth Circuit Court of Appeals reversed this holding, and held that Mendez-Thompson did have standing to challenge the provision of the city charter. The Eighth Circuit found that Mendez-Thompson had been injured by having her First Amendment freedom of speech rights chilled due to the fear that the city would fire her husband if she participated in political activities. If this occurred, she would be economically injured because of her husband's consequent loss of income. The court found that "the economic adverse effect on her would be clear, especially, perhaps, in view of the fact that they have a joint bank account."

The reasoning that supports the application of the provision to Mr. Thompson is not necessarily valid with respect to Mendez-

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50 Id. at 141.
51 *Pickering*, 391 U.S. at 574.
52 *Connick*, 461 U.S. at 154.
54 Id.
56 Id.
57 Id.
58 See supra note 6.
59 See id. at 975 ("The injury may be indirect, in that it occurs initially to the husband, through loss of his job. It is nonetheless real and tangible.").
60 Id. at 973.
Thompson. She is not a city employee and therefore is not required to remain impartial about local politics. For the same reason, her political activism would not interfere with the efficient operations of the city. To find otherwise would imply that because his wife is taking part in local politics in her own right, Mr. Thompson would relinquish his duty to remain impartial by abandoning his own beliefs for those of his wife. There is no support for such an implication. The Eighth Circuit was correct to grant Mendez-Thompson standing and to allow her a chance to show that the provision as it relates to her is invalid under the First Amendment.

It can be argued that even if Mr. Thompson remains impartial, the actions of Mendez-Thompson could cause concern on the part of the Ferguson citizens. This argument would be more valuable if Mr. Thompson were a public employee with a position that required legislative and policy-making responsibilities. However, Mr. Thompson is a city firefighter, and does not have the type of responsibilities that merit this type of concern. Also, Mendez-Thompson and Mr. Thompson can take action to ensure that her statements are clearly shown to be her own, minimizing any reason for concern on the part of the residents.

The Eighth Circuit was correct in granting standing to Mendez-Thompson because the courts should have a chance to determine if Ferguson’s interests in this case outweigh the strength of Mendez-Thompson’s First Amendment freedom of speech rights. It is possible that the courts would find that Ferguson’s interests outweighed those of Mendez-Thompson, particularly if the situation were different and the public employee involved was high-ranking; however Mendez-Thompson should at least have the chance to vindicate her rights in court.

B. Disagreement by the Other Circuit Courts

In holding that Mendez-Thompson had standing, the Eighth Circuit split with three sister circuits. In *Biggs v. Best, Best & Krieger,* the husband and daughter of a city attorney wanted to engage in local politics, but the city council ordered them to stop, threatening to fire the city attorney unless her “family was silenced in Redlands community politics.” The Ninth Circuit held that the husband and daughter of the city attorney did not have standing to raise claims of their own, but only had standing to raise, derivatively, the same

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41 189 F.3d 989 (9th Cir. 1999).
42 Id. at 992 (quoting James Foster, city council member).
claims as the city attorney. This means that the husband and daughter lacked standing to assert claims that would get the benefit of a more favorable legal standard than the city attorney's claims. Instead, the husband and daughter were subject to the same difficult standards for establishing a First Amendment violation that public employees face. Thus, the potential harm to the husband and daughter was described as "indirect."

In *Horstkoetter v. Department of Public Safety*, a state trooper's wife wanted to place a political sign in the front yard of their house. The Tenth Circuit held that the state trooper's wife had standing only to raise the same claims as her husband, and not to raise any separate claims of her own. Again, this means that the wife would lack standing to assert claims that would get the benefit of a more favorable legal standard than the government employee's claims. The court acknowledged that indirect economic injury constitutes injury in fact, if the injury is "neither speculative nor merely incidental." The court emphasized the fact that no action could be taken against the wife directly, so the injury was only indirect, and the wife's claim would be analyzed under the same set of standards as that of the husband.

In *English v. Powell*, a husband who was demoted by his county employer was told that if his wife made any further complaints to the employing board about his demotion, he would be fired. His wife
challenged this action, claiming it was a subjective chill on her First Amendment rights because she was not allowed to express her disapproval to the county composite board. She also claimed objective harm due to the loss of her husband’s income. The Fourth Circuit held that the wife had no standing to enforce her right to challenge the demotion despite the fact that she was forced to take on employment to supplement the family income. The court described this injury as “indirect and speculative” because the wife’s interest in her husband’s salary did not qualify as a claim.

The Eighth Circuit noted that these circuit courts had held differently in very similar situations. However, it disagreed with these holdings, stating that the injury to Mendez-Thompson was “real and tangible.” The court emphasized that the effects of her husband’s job loss on her life and economic status would be “quite substantial.” In addition, the loss of income would have just as severe an effect on Mendez-Thompson as it would on her husband. The court also found that her claim was “distinct” because her own political expression was being chilled by the threat of her husband’s loss of employment.

The courts should not take the loss of First Amendment free speech rights by those like Mendez-Thompson lightly. Considering the number of public employees in the United States, these ordinances could suppress the free political expression of a large portion of the population. Standing should be granted to Mendez-Thompson, and others in similar situations, so that courts can consider whether the state’s interest in prohibiting public employee speech should indeed be extended to cover the spouses of public employees.

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55 Id.
56 Id.
57 Id.
58 Id. ("It is a novel theory that a wife possesses such a proprietary interest in her husband’s position that a decrease in his salary gives her an actionable claim. Plaintiffs admit that this theory is without precedent, and we decline to write new law on the facts of this case.").
59 Firefighters II, 283 F.3d 969, 975 (8th Cir. 2002) ("We express our disagreement with these cases with respect and with some reluctance, but also with a firm conviction."), cert. denied, 537 U.S. 1105 (2003).
60 Id.
61 Id.
62 Id.
II. THE STANDING DOCTRINE IN FEDERAL COURTS

A. Rationales Underlying the Standing Doctrine

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts is "to adjudge the legal rights of litigants in actual controversies." The concern with standing to bring suit stems from the separation of powers doctrine and the position of the judiciary with respect to the legislative and executive branches. The judicial branch is limited by the Constitution to review decisions of the other branches only by deciding actual cases under the law, while the legislative branch is responsible for creating the law. If the courts took cases without a real dispute and injury, they would infringe on the legislature's power to create laws.

In addition to the separation of powers concerns, there are other rationales that underlie the standing doctrine. It is argued that standing requirements improve the quality of the courts' decisions by requiring: (a) a well-developed real-life dispute so that there is a "concrete factual context" for developing the law; and (b) a plaintiff with a personal stake in the litigation so that both parties are motivated to litigate zealously, thus bringing out all relevant facts and legal arguments. This is strongly connected to the injury requirement in the standing doctrine. However, it seems that neither a real-life dispute nor a plaintiff with a personal stake ensures that the legal standards governing the case will be fully developed and all of the facts will be divulged. Another justification for the standing doctrine is conservation of judicial resources. Standing should not be

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64 Id. at 471 (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).
65 See Allen v. Wright, 468 U.S. 737, 751 (1984) ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as ... the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches . . . .").
67 See, e.g., Adam Kolber, Note, Standing Upright: The Moral and Legal Standing of Humans and Other Apes, 54 STAN. L. REV. 163, 193 (2001) ("A principal rationale for standing doctrine is to make sure that plaintiffs are sufficiently vested in the outcome of a case so that they seek to vigorously argue their position.").
denied, however, to a plaintiff who has important rights to be vindicated solely to conserve judicial resources.

Finally, judicial discretion is important. Some scholars have argued that the flexibility of the standing doctrine is good because it gives courts discretion as to when and under what circumstances they will hear certain types of disputes. Of course, other scholars believe that this discretion is not a positive attribute because it prevents the courts from setting forth a clear standard that allows plaintiffs to recognize what must be argued in order for standing to be granted.

In the case of Mendez-Thompson, a real-life dispute has occurred. The ordinance prevents her from taking part in political activities guaranteed under the First Amendment because she fears that her husband will lose his job, and thus, they will lose his income. It is true that Mendez-Thompson has not participated in political activity to see if Mr. Thompson would be fired. However, longstanding case law suggests that it is not necessary for a plaintiff to participate in the activity. Mendez-Thompson has a strong reason for litigating zealously, particularly considering her history of political activity and her desire to continue such activities in Ferguson.

Some of these rationales are reflected in the decisions of those circuit courts that did not grant the spouse of a public employee separate standing under differing legal standards. Certainly, the judges were allowed discretion to determine that the spouses should not have separate standing, and this would conserve judicial resources. However, these justifications should not warrant refusing to hear a plaintiff with important First Amendment freedoms at stake.

B. Article III Constitutional Requirements

To satisfy the “case or controversy” requirement of Article III, which is the “irreducible constitutional minimum” of standing, a plaintiff must present a concrete dispute involving a personal injury.

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69 See, e.g., Neal Devins & Michael A. Fitts, The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court’s Attempt to Control Constitutional Confrontations, 86 GEO. L.J. 351, 372 (1997) (“Because the standing doctrine is not a highly principled and predictable process, it can afford the Court the ‘judicial discretion to engage in such avoidance of decision’ and the ‘flexibility needed to discharge the Article III function wisely.’” (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 87 (2d ed. 1988))).

70 See Firefighters II, 283 F.3d 969, 975 (8th Cir. 2001), cert. denied, 537 U.S. 1105 (2003).

71 See, e.g., Horstkoetter v. Dep’t of Pub. Safety, 159 F.3d 1265 (10th Cir. 1998).


73 Id.
A plaintiff must meet three constitutional requirements: (1) injury—the plaintiff must allege that she has suffered or imminently will suffer an injury; (2) causation—the plaintiff must allege that the injury is fairly traceable to the defendant’s conduct; and (3) redressability—the plaintiff must allege that a favorable federal court decision is likely to redress her injury.\(^\text{74}\)

As discussed further below, Mendez-Thompson meets all of the standing requirements. This section focuses on the injury requirement of the test, as it is the requirement that the other circuit courts incorrectly found was not met in situations similar to Mendez-Thompson. After demonstrating that the injury test has been satisfied, this Comment will argue that the injury to Mendez-Thompson is fairly traceable to the Ferguson ordinance, and that Mendez-Thompson’s injury can be redressed by changes to the ordinance.

1. Injury Analysis

An injury is necessary because it is thought to give the plaintiff the desire to argue vigorously.\(^\text{75}\) Situations with an injury to a particular plaintiff provide the format best suited for judicial resolution, whereas without injury the legislature might be a better body from which to seek redress.\(^\text{76}\) To prove an injury, a plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest that is “concrete and particularized.”\(^\text{77}\) The injury also must be “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”\(^\text{78}\) While some scholars argue that this standard seems very straightforward,\(^\text{79}\) the Court continues to expand and contract the definition of what

\(^{74}\) Id.

\(^{75}\) See Note, And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers, 109 Harv. L. Rev. 1066, 1072 & n.46 (1996) (citing Erwin Chemerinsky, Federal Jurisdiction § 2.3.2 (2d ed. 1994)).

\(^{76}\) See Valley Forge Christian Coll., 454 U.S. at 471-75 (“The effect is, of course, most vivid when a federal court declared unconstitutional an act of the Legislative or Executive Branch.”).

\(^{77}\) See Allen v. Wright, 468 U.S. 737, 756 (1984) (“It is in their complaint’s second claim of injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances.”); Warth v. Seldin, 422 U.S. 490, 508 (1975) (stating that a plaintiff challenging exclusionary zoning practices must provide “specific, concrete facts”); Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972) (quoting De Tocqueville’s observation that “judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.”).


\(^{79}\) See Nichol, supra note 8, at 309 (“It should not require the skill of Lord Coke to determine whether someone is injured ‘in fact.’ Plaintiffs are either hurt or they are not. Harms are either real or fanciful. They are concrete or abstract, individual or shared, objective or subjective, particular or common, hypothetical or imminent.”).
constitutes an injury. This has created widespread confusion and criticism among some scholars and lower courts alike.\textsuperscript{80}

In the case at hand, Mendez-Thompson has suffered an injury. Her First Amendment right to free speech was chilled because she feared her husband would be fired, causing an economic injury—the loss of his income.\textsuperscript{81}

It does not matter that Mendez-Thompson has not been specifically threatened with the enforcement of the provision. The courts have held that when a plaintiff wants to engage in an action that involves First Amendment rights, but cannot do so because she is limited by statute, there is standing to challenge the issue, "even absent specific threats of enforcement."\textsuperscript{82} Even though the danger of sustaining the injury must be realistic, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."\textsuperscript{83}

The testimony by the city manager, Allen Gill, and the deposition of Mayor Wegert show that if Mendez-Thompson had engaged in political activity, it would have been considered an action in contravention of the charter provision, and she would have had to face the consequential loss of her husband's income.\textsuperscript{84} While it has not been shown that the city punishes every person who acts in contravention of this ordinance, it appears that the city manager and mayor felt that there was a strong possibility that Mr. Thompson would be fired. At any time, the city could determine that the statute had been violated and fire Mr. Thompson accordingly. In addition to the economic loss, Mendez-Thompson's First Amendment rights will continue to be chilled because of her concern that her husband could be fired.

The three circuit courts that held that a spouse did not have standing seemed to have been concerned with the indirectness of the injury to the spouse of the public employee.\textsuperscript{85} It is not clear why the courts would believe that the injury sustained by Mendez-Thompson was indirect. In general, a married couple is treated as a single

\textsuperscript{80} See Eric J. Kuhn, Standing: Stood up at the Courthouse Door, 63 GEO. WASH. L. REV. 886, 892 (1996) ("The Court's willingness to recognize certain injuries while dismissing other similar ones has baffled commentators and has been the target of widespread criticism.").

\textsuperscript{81} Firefighters II, 283 F.3d 969, 975 (8th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

\textsuperscript{82} See Firefighters I, No. 00CU00241 ERW, 2001 U.S. Dist. LEXIS 23869, at *26 (E.D. Mo. Apr. 17, 2001) (quoting United Food & Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 428 (8th Cir. 1988) (granting standing to picketers because they were likely to engage in further picketing in violation of the statute, yet were arguably protected by the Constitution)).

\textsuperscript{83} Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quoting Pennsylvania v. West Virginia, 262 U.S. 558, 593 (1923)).

\textsuperscript{84} Firefighters II, 283 F.3d at 972-73.

\textsuperscript{85} See, e.g., Biggs v. Best, Best & Krieger, 189 F.3d 989, 998 (9th Cir. 1999) ("As in Horshoetter, the only damage to [the husband and daughter] was the indirect harm that would result from the loss of [the city attorney's] income.").
economic unit. For example, the laws regarding taxes and government benefits treat married persons as one unit, along with gift and estate tax laws.\(^6\) The reason for this is that "[g]overnment taxing and benefit regulations of other sorts also build on the expectation that married couples will share resources and recognize that one spouse is often economically dependent on the other."\(^8\) This concept should also be recognized in the case at hand. The loss of Mr. Thompson's income would be a direct economic injury to Mendez-Thompson because it would harm the single economic unit of Mendez-Thompson and Mr. Thompson.

Even if a court found that the economic injury to Mendez-Thompson would be indirect, it should not be the end of her standing case. In *Warth v. Seldin*,\(^5\) the Court recognized that indirectness was not necessarily fatal to standing. Although, it does make it substantially more difficult to meet the Article III requirement that the injury be a consequence of the defendant's actions or that prospective relief will remove the harm.\(^9\) First, Mendez-Thompson's First Amendment free speech rights are chilled by the ordinance directly. Second, Mendez-Thompson's potential economic injuries should also qualify as direct injury. Finally, even if the injury is deemed indirect, and requires a higher standard, Mendez-Thompson does meet the Article III requirements of injury, causation and redressability.

a. Economic Injury

Economic harm has often qualified as a sufficient injury for a court to grant standing.\(^9\) In *Ass'n of Data Processing Service Organizations v. Camp*,\(^9\) for example, the Court granted standing to a bank

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\(^6\) David L. Chambers, Essay, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 472-74 (1996). Examples of these laws include joint tax returns, social security benefits that are derived through a working spouse to a spouse who has never worked in the labor force, and transfers of property to a spouse not subject to federal gift tax. *See* Kelly M. Martin, Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. CAL. L. REV. 1467, 1476 (1996) (citing Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125, 1133-34 (1981) (arguing that couples are a single economic unit; they live together, make purchases as a unit, and contribute to the financial well-being of the unit by helping to support each other)).

\(^8\) Chambers, *supra* note 86, at 474.

\(^9\) Id. at 505.

\(^9\) See, e.g., Clinton v. City of New York, 524 U.S. 417 (1998) (granting standing for a change in market conditions); Barlow v. Collins, 397 U.S. 159 (1970) (granting standing to tenant farmers to challenge a regulation forcing them to assign benefits in advance as a condition to obtaining a lease to work the land); Hardin v. Ky. Utils. Co., 390 U.S. 1, 6 (1968) ("[W]hen the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.").

based on economic injury caused by a government ruling allowing competition from data processing companies. These data processing companies were providing services to bank customers, and these were services that the bank had previously provided. In *Clinton v. City of New York,* the State was granted standing based of the economic injury it suffered after President Clinton used his line item veto power. The President used his veto power to cancel the elimination of a multibillion-dollar contingent liability. The Court also granted standing to the Snake River farmers' cooperative because it suffered injury when the "President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants." The Court granted standing despite the fact that the cooperative could not show that it would have actually been able to benefit from the tax benefits in the first place. Standing has therefore been granted even when economic injury was not certain to occur.

The court could still grant standing when the plaintiff claims only potential indirect economic injury. In *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County,* the Eighth Circuit held that indirect economic injury constituted an injury in fact for standing requirements. The plaintiffs were businesses, and their injury was that they had to pay higher fees for waste collection. Waste haulers had passed on the costs of higher disposal resulting from the county's Ordinance 12 by requiring "all 'designated waste,' which includes most forms of nonhazardous commercial and residential solid waste, be delivered only to County-designed transfer stations or processing facilities." The court held that the haulers generally responded by charging the waste generators higher fees, and that this economic burden was "concrete, particularized, and actual, and [was] in no way hypothetical or conjectural."
Indirect economic harm can be enough to constitute injury in fact. In this particular case, Mendez-Thompson would suffer the substantial economic injury of the loss of her husband's income, which would have a large effect on her life. Even if her injury were indirect, the situation is different than that faced by plaintiffs in *Ben Oehrleins* because in *Ben Oehrleins* the injury was based on the economic decisions of another business in response to a government action. Mendez-Thompson faces injury because of the effect a government action will have on her finances. Therefore, the economic harm faced by Mendez-Thompson should not be qualified as indirect, but in fact as direct injury. As discussed above, the determination of economic harm will likely depend on whether Mendez-Thompson and Mr. Thompson are determined to be a single economic unit or separate individuals. Combined with the direct chill on her First Amendment freedom of speech rights, Mendez-Thompson meets the concrete and imminent constitutional injury requirement.

b. *When Standing Has Been Granted for Less Concrete Injuries*

In certain situations, the Court has granted standing to plaintiffs who, unlike Mendez-Thompson, do not appear to have suffered individual injury. Professor Nichol observed that federal taxpayers have gained standing in order to challenge "spending programs assisting religious institutions without demonstrating individual injury." For example, in *Bowen v. Kendrick*, the Court granted standing to a group of federal taxpayers, clergymen, and the American Jewish Congress to adjudicate an as-applied challenge to the Adolescent Family Life Act, which authorized federal funding to organizations with religious ties. "Frequently, the opinions in these cases don't even appear to acknowledge an injury requirement." In other cases, the Court has found sufficient individual injury to grant standing, although that injury has seemed negligible. For example, in *Craig v. Boren*, standing was granted based on the harm suffered by an eighteen-year-old boy who was unable to buy an alcoholic beverage. Also, in several voting rights cases, plaintiffs have been granted

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103 *Id.* at 619.
104 Nichol, *supra* note 8, at 310.
106 *Id.* at 194.

The Court has also granted standing in several cases where the plaintiff was unable to show that he would be eligible to enjoy any changes in the law.\footnote{108}{See, e.g., Heckler v. Mathews, 465 U.S. 728, 737-40 (1984) (allowing an attack on social security rule giving more benefits to females even though Congress had decided that if the plan were to be invalidated both men and women would receive a lower amount); Orr v. Orr, 440 U.S. 268, 271-72 (1979) (allowing a challenge to a state law limiting alimony liability to males and alimony benefits to women, even though the plaintiff would have been liable for alimony, but not eligible for payment from his wife as he would if the law were gender neutral); Regents of the Univ. of Cal. v. Bakke 438 U.S. 265 (1978) (allowing challenges to medical school admissions programs giving preference to minorities even when the particular plaintiff would not have been admitted if the challenged preference system were eliminated).}

In *Bryant v. Yellen*,\footnote{109}{447 U.S. 352 (1980).} the Court granted standing to farmers “even though they could not with certainty establish that they would be able to purchase excess lands if § 46 were held applicable.”\footnote{110}{Id. at 367.} The decision concerned whether a rule limiting water deliveries to 160 acres from a reclamation project applied to the Imperial Irrigation District in southeastern California. This would have given large landowners an incentive to sell excess land at prices below the market price.\footnote{111}{Id. at 355.} The Court held that the rule did not apply. The farmers who had hoped to purchase land appealed and were granted standing, despite the fact that they could not show they would have been able to purchase the land initially.\footnote{112}{Id. at 367.}

Finally, the Court has granted standing for expressive harms. Unlike those injuries normally recognized, such as physical or economic injuries, expressive harms are “specifically concerned with the message—often a message of racial, gender, or religious inferiority—expressed by governmental action.”\footnote{113}{Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1314 & n.7 (1999) (citing Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993) (coining the term "expressive harm").} The case of *Gladstone, Realtors v. Village of Bellwood* is an example of a case where an expressive harm was injury enough to grant standing.\footnote{114}{441 U.S. 91 (1979).} In *Gladstone*, the plaintiffs brought suit claiming that realtors in their community were practicing racial “steering,” or directing prospective homebuyers to certain neighborhoods according to their race.\footnote{115}{Id. at 94-95.} The Court found that
individuals who resided in the community had standing because they were deprived of the advantages of living in an integrated community. This is one of several cases where the Court has allowed standing based on subjective "benefits of interracial association."117

Of course, expressive harms are not the only injuries caused by racial steering. There are certainly economic injuries experienced by disfavored racial groups. However, the courts have held that the expressive harms caused by racial steering do constitute injury so that standing should be granted.

The point is not that these plaintiffs should have been denied standing. Rather, if plaintiffs with these types of injuries are granted standing, Mendez-Thompson is just as, if not more, deserving of the right to pursue her case. Beyond expressive harms, which are substantial, Mendez-Thompson would suffer an economic injury that is certainly no less concrete and imminent than the expressive harms that include the "benefits of interracial association." Free political speech protected under the First Amendment, with its promotion of diverse ideas and belief systems, is one of the important foundations that led to integrated communities in the United States. If living without the advantages of an integrated community is an injury deserving standing, and it certainly is, then the prohibition of free speech is as well.

c. Environmental Standing

Environmental cases have seen the greatest expansion of injury analysis with regard to standing. In these cases a showing of harm less concrete than economic injury has been sufficient for standing. In Ass'n of Data Processing Service Organizations v. Camp,118 the Court decided that an injury sufficient for standing included "aesthetic, conservational, and recreational" as well as economic values.119 These

116 See id. at 112-14 (granting standing based on the loss of benefits of interracial association).
117 Nichol, supra note 8, at 317 (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209-10 (1972) (recognizing standing under the Civil Rights Act of 1968 for injury for loss of important benefits from interracial association)). Standing in these cases was based on the statutory standing provisions of the Civil Rights Act and the Fair Housing Act, respectively. However, in Warth v. Seldin, 422 U.S. 490 (1975), a nonstatutory case, the Court rejected the assertion of standing.
119 Id. at 154 (quoting Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965)); see also Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").
aesthetic and conservational values go beyond the standard economic injuries because they are less concrete, and therefore, harder to prove. It is also more difficult to prove that these aesthetic injuries are actual or imminent rather than conjectural. If these values can be sufficient to establish a concrete, imminent, economic injury, a chill on First Amendment rights must also create sufficient injury to support a finding of standing.

In *United States v. Students Challenging Regulatory Agency Procedures* ("SCRAP"), members of an environmental group protested a freight rate increase by railroads as it related to the shipment of recycled goods. They alleged that the increase would "discourage the use of 'recyclable' materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities." The group argued that the increased use of new raw products would ultimately create more litter in the Washington, D.C. area where the students hiked, fished, and backpacked. In addition, they claimed that they breathed the air and used the rivers, forests, mountains and streams, as well as other natural resources in the area that would be affected by the rate hike.

The Court found standing, despite recognizing that the "alleged injury to the environment [was] far less direct and perceptible" and "the Court was asked to follow a far more attenuated line of causation to the eventual injury" than in *Sierra Club v. Morton*, where the Court did not grant standing. The Court distinguished *Sierra Club* because its members had never used Mineral King Valley, the area of natural resources at issue, and thus, failed to allege a specific injury, whereas the plaintiffs in *SCRAP* had alleged harm to their ability to use natural resources.

Similar to *SCRAP*, in *Lujan v. Defenders of Wildlife*, the Court held that plaintiffs did not have standing because they could not demonstrate that they had suffered "imminent" injury simply because they had once visited, and planned to return to, the federal land that was being mined under new federal regulations. "Such 'some day'
intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."

Unlike the plaintiffs in Sierra Club who had never used the land, and the plaintiffs in Lujan who claimed only to have the intent to re-visit project sites at some indefinite point in the future, Mendez-Thompson has participated in local politics on several occasions. And like the plaintiffs in SCRAP, who had used and planned on continuing to use the effected land specifically for recreational use, Mendez-Thompson wanted to participate in specific local elections in the immediate future. Her inability to do so demonstrated an "imminent" and concrete injury that deserved judicial recognition.

2. Causation Analysis

After the court determines that the plaintiff suffered an injury sufficient to confer standing, it must determine causation. In order for a plaintiff to prove causation, there must be a causal connection between the injury and the conduct complained of—the injury has to be an injury that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Critics argue that causation is another element the Court manipulates based on its view of the merits.

In Simon v. Eastern Kentucky Welfare Rights Organization, the Internal Revenue Service ("IRS") issued a ruling allowing favorable tax treatment for nonprofit hospitals that offered only emergency room services to indigents. The Court recognized that indigent plaintiffs might have suffered an injury, in that they might lose access to hospitals or might be denied hospital services because of their indigence. However, the Court did not grant standing because the plaintiffs sued

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129 Id. (referring to "imminent" requirement elucidated by Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).
130 Id. at 560 (alterations in original) (quoting Simon v. E. Welfare Ky. Rights Org., 426 U.S. 26, 41-42 (1976)).
133 Id. at 28.
134 Id. at 40.
a Treasury official, not any named hospitals. The Court found that "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."

This is in direct contrast to the injury caused to Mendez-Thompson. Her injuries, both the economic harm she would suffer from loss of her husband's income and the chill on her First Amendment free speech rights, stem directly from the Ferguson ordinance. The ordinance described actions that could potentially be taken against her husband by the city if it found that he acted in contravention of the statute due to Mendez-Thompson's actions. Enforcement of the ordinance was the direct cause of Mendez-Thompson's fear that she could not express her political views without endangering her husband's employment as a city firefighter.

3. Redressability Analysis

After proving injury and causation, the plaintiff must show redressability. It must be "likely," as opposed to merely speculative, that the injury will be "redressed by a favorable decision." If Mendez-Thompson were to prevail in this suit the ordinance would be invalidated because the defendants are those who administer and enforce the ordinance. If the ordinance were declared invalid in this respect, she would be free to express her political speech in accordance with the First Amendment without fearing for her husband's employment.

C. Standing and Prudential Considerations

In addition to the Article III constitutional elements, the doctrine of standing also includes "prudential" concerns that limit the exercise of federal jurisdiction. First, the complaint must fall within the zone of interests protected by the invoked law. Second, a plaintiff must usually assert his own legal rights and interests, and cannot rest

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135 Id. at 42-43.
136 Id.
137 Id. at 38; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (stating same).
138 See Bennett v. Spear, 520 U.S. 154, 162 (1997) (discussing the numerous and mutable prudential concerns of standing which limit federal courts' jurisdiction and adjudicating standing based on the "zone of interests" prudential concern).
139 See id. ("[A] plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."); see also Ass'n of Data Processing Servs. Org. v. Camp, 397 U.S. 150, 153 (1970) (employing the "zone of interests" formulation for the first time).
his claim to relief on the legal rights or interests of third parties.\textsuperscript{140} Third, the suit must present more than abstract questions of wide public significance that amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches of the government.\textsuperscript{141}

Mendez-Thompson would prevail under the zone of interests test. The First Amendment is specifically addressed to United States citizens. The First Amendment directly protects the political activity that Mendez-Thompson wants to engage in. Because political speech is, in fact, one of the most important types of speech that is protected by the First Amendment, it should not be taken lightly when considered in the context of standing.

This suit also presented more than a generalized grievance. Generalized grievances often come up in suits brought by citizens as taxpayers or suits brought under the Administrative Procedure Act. In this particular case, Mendez-Thompson brought suit because of an injury she alone had sustained. She was not acting as part of a large group that believed the government was passing legislation that was unconstitutional; rather, she is bringing suit because the city of Ferguson injured her in a way that the First Amendment prohibits.

1. Third Party Standing

Even when a plaintiff has alleged injury sufficient to meet the "case" or "controversy" requirements, she must assert her own legal rights and interests, and cannot rest her claim to relief solely on the legal rights or interests of third parties.\textsuperscript{142} While this principle seems straightforward, like the injury requirement, it is not always easy to determine if the complaint asserts only the rights of others. The rule against third party standing is generally thought to help courts exercise judicial restraint and adjudicate only actual, rather than hypothetical, disputes.\textsuperscript{143} It also protects courts from becoming "roving

\textsuperscript{140} See Warth v. Seldin, 422 U.S. 490, 499 (1975) (denying standing based on the holding that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

\textsuperscript{141} See Lujan, 504 U.S. at 573 (rejecting the Eighth Circuit's holding that the abstract "right" to have executives adhere to procedures required by law which is conferred upon all persons satisfied the injury-in-fact requirement for standing).

\textsuperscript{142} See JAMES P. GEORGE, THE FEDERAL COURTHOUSE DOOR: A FEDERAL JURISDICTION GUIDE 30 (2002) ("Parties ordinarily have no standing to challenge a statute's constitutionality if its adverse effect is to others.").

While the district court held otherwise, Mendez-Thompson brought suit based on her own chilled First Amendment rights and economic injury, not those of her husband. As the Eighth Circuit noted, "[her] claim is distinct. It is that her own political rights cannot be chilled by the threat of discipline against her husband." She wanted to be able to express her own political views as a nonpublic employee; this requires a different analysis than would occur if Mr. Thompson, as a public employee, tested the legality of the ordinance.

When these prudential policies are not met, the Court is sometimes willing to relax the rule against third party standing. Exceptions to the third party rule include the overbreadth doctrine, discussed in Section III below, and the jus tertii standing cases, in which litigants related to third parties are able to raise the third party's rights. Therefore, those who have met the case and controversy requirement may be granted standing to invoke the rights of a third party in some circumstances.

2. Jus Tertii Exception to Third Party Standing

The general restriction on asserting third party standing is not absolute. There are limited exceptions for specific situations, particularly situations where First Amendment rights are at issue. "Moreover, other policy considerations, notably the fear of chilling expression in First Amendment cases, may at times outweigh the policies behind the general rule against third party standing."

145 Firefighters II, 283 F.3d 969, 975 (8th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).
146 See Frattone, supra note 143, at 1122 ("Since the Barrows decision, the Supreme Court has consistently recognized jus tertii standing to be appropriate when the policies underlying the restrictions on such standing are not furthered.").
147 See Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 278 (1984) ("Increasingly, litigants whose own activities are assumed to fall within a statute's valid applications are permitted to assert the statute's potentially invalid applications with respect to persons not before the court."); Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844, 848 n.18 (1970) (asserting that "[s]tatutory overbreadth—susceptibility to invalid application—can be conceptualized in terms of hypothetical privileged persons coming within the statutory ban").
148 See Monaghan, supra note 147, at 278 (discussing the overbreadth and jus tertii doctrines). Monaghan distinguished the two:

In differentiating jus tertii from overbreadth standing commentators have emphasized the relationship between the litigant and the third party right holders. In a jus tertii case, the litigant has a preexisting relationship with "real" third parties whose interests are implicated; in an overbreadth case, the litigant is permitted to raise the rights of "hypothetical" third persons.

Id. at 278 n.5.
149 Amato v. Wilentz, 952 F.2d 742, 748-49 (3d Cir. 1991).
When the constitutional rights of someone who is not a party to litigation would be harmed, and the person effected has no way to preserve their rights, the Court will grant standing to a third party to defend those rights. However, the litigant still must have suffered injury in fact and be closely related to the third party, as well as meeting the case or controversy requirement before prudential considerations are examined. The Supreme Court has set forth three factors for examining prudential considerations: (1) the relationship between the litigant and the third party; (2) the ability of the third party to advance his own interests; and (3) the impact of potential litigation by the third party.

Third party standing is illustrated by *Barrows v. Jackson* and *NAACP v. Alabama*. In these cases, the Supreme Court allowed litigants to invoke the rights of other parties because the other parties were not in a position to assert their own rights. At times, the Court has even granted standing when there was no barrier to the party acting on its own behalf.

In *Eisenstadt v. Baird*, the Court allowed a doctor, who was prosecuted for distributing contraceptive foam to unmarried women, to defend the rights of individuals to have access to and use contraceptives. The Court stated, "unmarried persons denied access to contraceptives in Massachusetts... [were] not themselves subject to prosecution and, to that extent, [were] denied a forum in which to assert their own rights." The Court granted standing to the doctor to...
assert his unmarried patient's rights because they were unable to sue on their own behalf. Surely Mendez-Thompson, who is asserting her own rights, was also correctly granted standing.

Third party standing is also sometimes permitted when the individual seeking standing is integrally connected to the third party's constitutionally protected activity. In Pierce v. Society of Sisters, the Court held that a parochial school had standing to challenge an Oregon law requiring all parents to send their children to public school and making a parent's failure to do so a misdemeanor. The Court found that the law violated the rights of parents to control the upbringing of their children. In part it seemed that the school was granted standing because of the close relationship between the school and the parents and because the school was part of the "useful and meritorious" activity of providing primary education. Mendez-Thompson suffered from personal, concrete injury and was not trying to assert her rights through a third person. However, if the Court grants a school standing to assert the rights of parents because the school was part of the regulated activity, Mendez-Thompson was correctly granted standing because she was also part of the regulated activity. Her political speech is prohibited by the Ferguson ordinance due to the "indirectly" language.

D. Slamming the Courthouse Door

Despite a long-standing set of standards, critics have accused the Supreme Court of using standing to "slam the courthouse door" when the Court should have considered the merits of a case. Critics have also accused the Court of disfavoring the standing of a plaintiff based on various considerations, including "separation of powers."

158 268 U.S. 510 (1925).
159 Id. at 530.
160 Id. at 534.
162 Gene R. Nichol, Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. PA. L. REV. 655, 649 & n.70 (1985) (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976) (noting the principle that the court must not "overstep[,] its assigned role in our system") (alteration in original); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (warning that to adjudicate in the absence of actual injury would "distort the role of the Judiciary in its relationship to the Executive and the Legislature"); United States v. Richardson, 418 U.S. 166, 179 (1974) (stating supervision of government is a congressional, not a judicial, function); Laird v. Tatum, 408 U.S. 1, 15 (1972) (noting that the function of monitoring the executive branch is most appropriately left to Congress)).
"federalism," "limits on the exercise of judicial remedial powers," and "the Court's view of the claim on the legal merits." Some critics have also argued that the justices make decisions based on their own views as to whether they believe the legal claim in the case is one worth taking the time to review, or based on personal experience. Often, the Court does not provide strong and detailed opinions as to why some plaintiffs are granted standing while others, in seemingly similar situations, are not.

163 Nichol, supra note 162, at 649 & n.71 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (noting that federal courts should be mindful of the balance between state and federal power); Rizzo v. Goode, 423 U.S. 362, 379 (1976) ("[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief."); O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (recognizing that the balance between state and federal courts "counsels restraint against the issuance of injunctions").

164 Nichol, supra note 162, at 649 & n.72 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 488-90 ("The Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing.").

165 Id. at 649 & n.73 (comparing Orr v. Orr, 440 U.S. 268 (1979) (granting standing for an equal protection challenge against a state alimony law applying only to husbands) and Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (defining standing broadly to uphold a federal limitation on nuclear power plant liability) to O'Shea v. Littleton, 414 U.S. 488 (1974) (denying standing in a challenge to alleged racial discrimination in a state court system), and Linda R.S. v. Richard D., 410 U.S. 614 (1973) (denying standing plaintiffs challenging child support laws enforced only on behalf of legitimate children); see also id. at 641 & n.30 (citing Mark V. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 CORNELL L. REV. 663 (1977), for his discussion that the Court often manipulated standing rules based on its views of the merits of particular cases).

166 See Nichol, supra note 8, at 304 ("[Standing] also systematically favors the powerful over the powerless . . . . As elite judges summarily determine which interests are worthy of legal cognizance, they unsurprisingly embrace concerns that strike closest to home, sustaining 'harms' that mirror the experiences and predilections of their own lives.").

167 See id. at 326. The author explained:

On these frontiers, judges are far more likely to embrace jurisdiction if the plaintiff seems to be saying something that the judge understands, somehow, as his own. If the potential litigant "stands" on ground with which the judge is familiar, or if he states his objection in a way a judge can imagine uttering herself, the chances are understandably improved that the judge will determine that the claimed harm is actually a legally cognizable injury.

Id.

168 See id. at 332. He further observed:

[S]tanding rulings are often no more enlightening than a simple declaration that "we choose to hear this case" and "we choose not to hear that one."

For the judges, of course, this is clear luxury. Imagine how much more difficult the judicial task would be if the Justices felt compelled to offer a theory explaining why some shared and intangible claims are heard and others rejected, why some subjective interests are judicially enforceable and others are not, why some litigants' worries constitute injuries and others are mere speculations, or why some constitutional interests give rise to lawsuits and others don't.

Id.
Critics have long argued that the standing doctrine has led to inconsistent decisions by the Court.\textsuperscript{169} Apparently, the justices would agree because they have stated:

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.\textsuperscript{170}

If consistent decisions are not made, it is difficult for plaintiffs to know how to argue that they have standing. It makes it easy, however, for the justices to make decisions based on discretion. Some would argue that there is in fact no standing doctrine at all.\textsuperscript{171} Critics have argued that the justices prefer it that way.\textsuperscript{172} Nonetheless, in determining that Mendez-Thompson was correctly granted standing, analysis of the standing doctrine is necessary, as it is what the Court will use in making its decision.

III. FIRST AMENDMENT CONSIDERATIONS

As the Eighth Circuit stated, "The political activities in which the plaintiff wishes to engage fall within the very heart of the interests protected by the First Amendment."\textsuperscript{173} Because the First Amendment protects long-standing, fundamental freedoms provided to citizens of

\textsuperscript{169} Id. Nichol noted:
Some intangible claims are entertained, others rejected. Some group interests easily pass muster, others are dismissed out of hand. Distinctions that would prove laughable in most arenas are repeatedly embraced. Lines are drawn that can't be sustained, or even understood. Positions described as crucial to the effective operation of democratic government one week, are ignored the next.

\ldots It is, no doubt, the United States Supreme Court's particular province to "say what the law is." The standing doctrine, however, is an extremely poor example of its handiwork.


\textsuperscript{171} Nichol, \textit{supra} note 8, at 315-16. Nichol explained:
So, in fact, the Supreme Court's mantra of injury, causation, and redressability means very little in operation\ldots The sophisticated federal courts lawyer can add no more than: "the judges are generous in these kinds of cases and skeptical in others." The same rules do not apply across the board. They are, then, not rules after all.

\textsuperscript{172} Nichol, \textit{supra} note 162, at 658 ("It may well be, however, that the Supreme Court has no desire to make sense of the standing doctrine. As the doctrine presently exists, standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values.").

\textsuperscript{173} Firefighters II, 283 F.3d 969, 973 (8th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).
the United States, it deserves special consideration when determining
whether or not a plaintiff has standing.174 As one commentator notes:

[I]n contrast to the protections of freedom of speech and freedom of the
press contained in many other constitutions and in national legal systems
where such liberties are implicit without textual designation, ours is a
structure in which freedom of expression is the norm, or at least the pre-
sumption, and the denial of protection is the exception.175

There are many rationales for the modern Court’s strong protec-
don for freedom of political speech. In Whitney v. California,176 Justice
Brandeis’s concurrence outlined several of those rationales. One key
rationale is that people should be allowed to develop their own per-
sonalities, in order to enable decisions to be made by a democratic
deliberative process rather than by the arbitrary exercise of author-
ity.177 Freedom of speech also advances the pursuit of truth by allowing
all opinions to be disseminated to the citizens.178 Similarly, free-
dom of speech provides an avenue for dissent, which preserves social
stability. By fostering gradual societal change and by allowing every-
one to express their views, whether dissenting from the majority or
not, free speech may actually promote stability and help to prevent
revolution.179

In deciding whether or not to grant standing to Mendez-
Thompson, the Eighth Circuit appropriately placed special emphasis
on the chilling effect the ordinance had in preventing her political
speech. The First Amendment’s right to freedom of political speech
is a crucial tool that was put in place by the founders of our country.
If someone such as Mendez-Thompson, whose political speech rights
are so clearly chilled, is not granted standing, the courts are not
showing enough concern for this foundational value of the govern-
ment.

Amendment is by far the oldest and most durable of the world’s guarantees of free expression.
It has been in existence for nearly 210 years in precisely its current form.”).
175 Id. at 7.
176 274 U.S. 357 (1927).
177 See id. at 375-76 (Brandeis, J., concurring) (“Believing in the power of reason as applied
through public discussion, [the Founders] eschewed silence coerced by law—the argument of
force in its worst form.”).
178 See id. at 375 (Brandeis, J., concurring) (“[The Founders] believed that freedom to think
as you will and to speak as you think are means indispensable to the discovery and spread of
political truth; that without free speech and assembly discussion would be futile . . . .”)
179 See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) (“Freedom of
expression thus provides a framework in which the conflict necessary to the progress of a society
can take place without destroying the society.”); see also Broadrick v. Oklahoma, 413 U.S. 601,
620 (1973) (Douglas, J., dissenting) (“First Amendment rights are indeed fundamental, for ‘we
the people’ are the sovereigns, not those who sit in the seats of the mighty.”).
A. Standing and the First Amendment Chill

A person's claims that his or her First Amendment freedom of speech rights have been injured should be adequate for standing purposes, as long as that person has suffered from a particular harm due to the loss of First Amendment rights. The Court appears to agree:

The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection.¹⁸⁰

Protection of political speech is one of the most important rights the Constitution provides to citizens of the United States. Because freedom of speech occupies "the highest rung of the hierarchy of First Amendment values," the prohibition against Mendez-Thompson's political speech should at least provide her standing. The courts then can decide whether the ordinance preventing her political speech is invalid with respect to her.

A restriction on free speech does not have to be direct for the court to strike it down. "Government action may . . . deter someone from engaging in First Amendment activity without actually prohibiting it. This deterrence is a 'chilling effect.'"¹⁸¹ The Court has held that constitutional violations may arise from "the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights . . . . [T]he challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature . . . ."¹⁸²

In Laird v. Tatum, the Court recognized that even government actions that have an indirect effect on First Amendment rights could be challenged.¹⁸³ However, the Court found that the plaintiffs suffered only from a subjective chill, which differs from a "claim of specific present objective harm or a threat of specific future harm."¹⁸⁴ The difference is that a subjective chill, because it may or may not occur,

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¹⁸² Laird v. Tatum, 408 U.S. 1, 11 (1972).
¹⁸³ Id. at 13-14.
¹⁸⁴ Id. at 14.
forces the court to hand down an advisory opinion rather than an actual adjudication.185

The plaintiffs in Laird claimed their First Amendment rights were chilled by the "mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose."186 The plaintiffs did not meet Article III standing requirements because they did not show that they suffered from a specific injury or imminent injury caused by the existence of the government's activities.187 In contrast to the plaintiffs in Laird, Mendez-Thompson has suffered more than a subjective chill, and instead has a claim of a present objective harm—the direct and current chill on her First Amendment political free speech rights.188 She can also claim a threat of specific future harm—the loss of her husband's income.

The Supreme Court most recently adjudicated claims of "chilling effects" in its decision in Meese v. Keene.189 Keene, a member of the California state senate, wished to exhibit films that had been labeled "political propaganda" under the Foreign Agents Registration Act.190 Because the senator was not an agent of a foreign government, the statute did not apply to him directly. However, Keene believed that if the films were labeled "political propaganda" he could not show them, which violated his First Amendment right of free expression.191 The Court held that "[i]f Keene had merely alleged... a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek invalidation of the statute."192 The Court found, however, that Keene had suffered more than a "subjective chill" because he had established a threat of cognizable injury to his

185 Id.
186 Id. at 10; cf. Laird, 408 U.S. at 26 (Douglas, J., dissenting) ("One need not wait to sue until he loses his job or until his reputation is defamed. To withhold standing to sue until that time arrives would in practical effect immunize from judicial scrutiny all surveillance activities, regardless of their misuse and their deterrent effect.").
187 Cf. Socialist Workers Party v. Attorney Gen., 419 U.S. 1314 (1974) (opinion in chambers) (holding that plaintiffs had standing when they argued that government surveillance of the national convention for the Socialist Workers Party would dissuade some delegates from participating actively and would result in possible loss of employment for those who are identified as attending).
188 See Broadrick v. Oklahoma, 413 U.S. 601, 619 (1973) (Douglas, J., dissenting) ("Public discussion of local, state, national, and international affairs is grist for the First Amendment mill. Our decisions emphasize that free debate, uninhibited discussion, robust and wide-open controversy, a multitude of tongues, the pressure of ideas clear across the spectrum set the pattern of First Amendment freedoms.").
190 Id. at 467-68.
191 Id.
192 Id. at 473.
This opinion continues to suggest that a claim of "subjective chill" alone will not be a basis for standing, but adds that a chilling effect on First Amendment rights combined with "specific present harm or a threat of specific future harm" will be sufficient grounds for standing.

The Court of Appeals for the District of Columbia has weighed in on this subject as well. The court determined that a "[c]hilling effect is cited as the reason why the governmental imposition is invalid rather than as the harm which entitles the plaintiff to challenge it." Whether the plaintiff has standing, therefore rests on "how likely it is that the government will attempt to use these provisions against them—that is, on the threat of enforcement—and not on how much the prospect of enforcement worries them."

According to Laird, in order to prove that Mendez-Thompson's First Amendment rights have been chilled, there must be a credible threat of enforcement and her fear of enforcement must be objectively reasonable. As noted by the Eighth Circuit, "certainty of injury is not necessary, at least in the First Amendment context. She should not be required to undertake a prohibited activity, and risk the consequent economic loss, in order to test the validity of the threatened application of the charter."

Mendez-Thompson's fear of enforcement was objectively reasonable for two reasons. First, the city of Ferguson did not answer her lawyer's letter requesting information about how the provision should be interpreted. Second, Mayor Wegert's answers during his deposition indicate that had Mendez-Thompson taken the actions she wanted to, he would have considered them a violation of the provision. The Eighth Circuit correctly held that the chilling of her First Amendment rights provided Mendez-Thompson with sufficient injury for the court to grant her standing.

B. First Amendment and the Overbreadth Doctrine

There is another exception to the general rules governing third party standing. This exception, called the overbreadth doctrine,
"reflects the transcendent value to all society of constitutionally protected expression." The overbreadth doctrine is limited to First Amendment cases. It stems from a fear that an overbroad law will chill protected speech and that encouraging this type of expression provides a sufficient basis for allowing third party standing. A party has standing to challenge a statute because it is overbroad whether or not his own conduct can be governed by it, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." This doctrine thus recognizes the chilling effect of a statute as a basis for third party standing. It would seem to make sense, therefore, that the chilling effect should also be a basis for standing for the original plaintiff.

A plaintiff must show that the law substantially punishes protected free speech "judged in relation to the statute's plainly legitimate sweep." Once this is proved, all enforcement of that law stops until the law is narrowed. As discussed above, in order to have standing, an individual still must meet the case or controversy requirements in

200 Bigelow v. Virginia, 421 U.S. 809, 816 (1975); see also Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."); Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 YALE L.J. 853, 867 (1991) ("Any substantial 'chilling' of constitutionally protected expression is intolerable.").

201 See Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) ("In ... First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech ... may be inhibited by the overly broad reach of the statute.").

202 NAACP v. Button, 371 U.S. 415, 433 (1963); see also Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) ("Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge."); Gooding v. Wilson, 405 U.S. 518 (1972) (permitting appellant to challenge the unconstitutional overbreadth of a statute as applied to others when the statute broadly limited protected speech); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (reversing convictions of appellants convicted for violation of an overbroad statute targeting "annoying" behavior); Dombrowski v. Pfister, 380 U.S. at 486 (allowing appellants to challenge a statute prohibiting subversive activities under which they had been charged but not yet convicted); Kunz v. New York, 340 U.S. 290 (1951) (permitting appellant to challenge statute restricting religious speech).

203 Siegel, supra note 181, at 920. Siegel noted:

Yet when the third party shows up in court himself as plaintiff and claims chilling injury, the Supreme Court refuses to hear the case, and tells him that he is not even injured.

This anomaly should be eliminated: The party actually suffering chilling injury should be allowed to plead his case himself.

Id.


205 See Virginia v. Hicks, 123 S. Ct. 2191, 2196 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech-especially when the overbroad statute imposes criminal sanctions.").
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Article III, with a "claim of specific present objective harm or a threat of specific future harm."\(^{206}\)

The overbreadth doctrine allows a party to overcome the normal prudential consideration against third party standing, so that the plaintiff is able to challenge the statute not because his own expression is chilled, but because the breadth of the statute means that other persons' free expression is being chilled.

[In the First Amendment context, ""[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."\(^{207}\)]

The Court determines whether the plaintiff satisfies the case and controversy requirement and whether it will frame the issues in the case and argue zealously.\(^{208}\)

Mendez-Thompson was correctly granted standing so that the courts may decide if the Ferguson ordinance is constitutional as applied to a nonpublic employee. However, even if the court decides that the government can restrict Mendez-Thompson's speech, Mendez-Thompson should be able to challenge the ordinance based on its "sweeping and improper application."\(^{209}\) Because of the "indirect" language contained in this ordinance, all city employees, including their families, might be prevented from exercising their essential First Amendment freedom of speech rights. "Public discussion of local, state, national, and international affairs is grist for the First Amendment mill. Our decisions emphasize that free debate, uninhibited discussion, robust and wide-open controversy, a multitude of tongues, the pressure of ideas clear across the spectrum set the pattern of First Amendment freedoms."\(^{210}\) The courts should not be so quick to reject standing when rights that maintain the fundamental freedoms of United States citizens are at the core of the claim.

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\(^{206}\) Laird v. Tatum, 408 U.S. 1, 14 (1972).


\(^{208}\) See Joseph H. Munson Co., 467 U.S. at 957 (asserting that the plaintiff is a satisfactory party to challenge an overbroad statute).


\(^{210}\) Broadrick, 413 U.S. at 619 (Douglas, J., dissenting).
CONCLUSION

The Eighth Circuit correctly granted standing to Mendez-Thompson in *International Ass'n of Firefighters Local 2665 v. Ferguson*. She would potentially have suffered concrete economic injuries that are stronger than many other injuries for which the Court has granted standing. She also suffered from a chill on her First Amendment freedom of speech rights.

When a claim is made that involves such fundamental freedoms as First Amendment freedom of speech, the courts should make a searching inquiry into the injury claimed under the standing doctrine. There have to be limits when a person has not suffered from something that could at all be classified as an injury, either economically or under the First Amendment. However, when an ordinance prohibits a person from expressing political speech, the courts should not easily dismiss the claim for lack of standing due to indirect injury. The Eighth Circuit was correct to grant Mendez-Thompson standing in order to consider whether the Ferguson ordinance, as applied to a nonpublic employee, was constitutionally improper.

The importance of the First Amendment issues affecting Mendez-Thompson underscore the need to grant her standing. Admittedly, the approach taken by the Eighth Circuit may increase the caseload of the federal courts. However, these types of concerns should not prevent the courts from hearing cases that present important First Amendment claims. It is particularly important that the Supreme Court grant certiorari in a case similar to *Firefighters* to establish that plaintiffs in the situation of Mendez-Thompson deserve standing.