DEL VALLE GROUP V. PUERTO RICO PORTS AUTHORITY: FIRST-TIME CONTRACT BIDDERS AND FIRST AMENDMENT PROTECTIONS AGAINST SPEECH AND POLITICAL AFFILIATION RETALIATION

ARTICLE

*Ryan Lozar**

All private citizens enjoy broad speech and associational rights under the First Amendment of the United States Constitution. A citizen entering government service, however, must "accept certain limitations on his or her freedom."[1] This is not to say that public employees have no expressive rights whatsoever, but that these rights yield in the face of sufficient government interests. This First Amendment flexibility bows to the practical recognition that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[2] Cases involving First Amendment protections for public employees fall into two general categories: lawsuits alleging *speech* discrimination and lawsuits alleging *political affiliation* discrimination. Speech discrimination suits are governed by the United States Supreme Court's

---

* The author would like to thank Michael Boucai for his invaluable counsel during the writing of this article.

[1] *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

[2] *Id.*

decision in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*,[3] and political affiliation suits are governed by the Supreme Court's holdings in *Elrod v. Burns* and *Branti v. Finkel*.[4]

Prompted by a 2010 decision from the United States District Court of Puerto Rico, this Article is concerned with the categories of persons who may file lawsuits claiming *Pickering* and *Elrod* protections. *Elrod* and *Pickering* established that public employees could file claims challenging dismissals based on political affiliation and speech. Later, the Supreme Court held in *Rutan v. Republican Party of Ill.*[5] that First Amendment retaliation claims were also available to *applicants* for public employment. In *Board of Comm'rs, Wabaunsee Cty v. Umbehr*[6] and *O'Hare Truck Service, Inc. v. Northlake*,[7] the Court extended these principles to independent contractors with a pre-existing commercial relationship with the government. Because the Court explicitly declined to say whether its holding applies equally to contractors *without* a pre-existing relationship, lower courts have since debated whether to grant *Pickering* or *Elrod* relief to such contractors. The two most prominent decisions on the issue are *McClintock v. Eichelberger*,[8] where the Third Circuit held that contractors without a pre-existing relationship could not bring such claims, and *Oscar Renda Contracting, Inc. v. City of Lubbock, Tex.*,[9] where the Fifth Circuit held that they could.

In *Del Valle Group v. Puerto Rico Ports Authority*, Judge Gustavo Gelpí of the District of Puerto Rico adopted the Fifth Circuit's approach in *Oscar Renda*,[10] permitting a contractor without a pre-existing relationship to plead a retaliation claim under the First Amendment. This was a first among published decisions in the District of Puerto Rico, as two earlier court decisions from that jurisdiction had ruled to the contrary.[11]

---

[3] *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968) [hereinafter *Pickering*].

[4] *Elrod v. Burns*, 427 U.S. 347 (1976) [hereinafter *Elrod*]; *Branti v. Finkel*, 445 U.S. 507 (1980) [hereinafter *Branti*].

[5] *Rutan v. Republican Party of Ill*., 445 U.S. 507 (1980) [hereinafter *Rutan*].

[6] *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668 (1996) [hereinafter *Umbehr*].

[7] *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) [hereinafter *Northlake*].

[8] *McClintock v. Eichelberger*, 169 F.3d 812 (3rd Cir. 1999) [hereinafter *McClintock*].

[9] *Oscar Renda Contracting, Inc. v. City of Lubbock, Tex*., 463 F.3d 378 (5th Cir. 2006) [hereinafter *Oscar Renda*].

[10] *Del Valle Group v. Puerto Rico Ports Authority*, 756 F.Supp.2d 169 (D.P.R. 2010) [hereinafter *Del Valle Group*].

[11] *San Juan Towing and Marine Services, Inc. v. Puerto Rico Ports Authority*, 2009 WL 564163 (D.P.R. Mar. 5, 2009)(J. Pieras); *Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon,* 162 F. Supp. 2d 1 (D.P.R. 2001), *aff'd on other grounds*, 310 F.3d 1 (1st Cir. 2002). As a point of explanation, this Article takes pains to state that *Del Valle Group* is the first published opinion to apply the First Amendment to first-time bidding contractors because federal courts issue many opinions that are not published in federal reporters or in on-line legal databases. These unpublished decisions are not easily searchable, and it is therefore hard to make blanket claims regarding their content.

This Article predicts the further extension of *Pickering*/*Elrod* along the lines suggested in *Del Valle Group*. Section I summarizes the Supreme Court's decisions in *Pickering*, *Elrod* and their progeny, and emphasizes the distinct analyses governing employees' speech and political-affiliation claims, respectively. Section II discusses the plaintiff categories recognized under existing *Pickering*/*Elrod* doctrine: public employees, applicants for public employment, and independent contractors with a pre-existing commercial relationship with the government. The section also analyzes what it means, under standards that vary by circuit and that remain undefined in others, for an independent contractor to have a qualifying "pre-existing commercial relationship with the government." Section III discusses the question, contested between federal circuits, of whether independent contractors without a pre-existing commercial relationship with the government can sue for First Amendment retaliation, and it observes the absence of a definitive First Circuit ruling on the issue. Finally, Section IV summarizes the District of Puerto Rico's decision in *Del Valle Group* and critiques its analysis in light of some important cases and considerations discussed earlier in the Article.

I. *Pickering*, *Elrod*, and Their Applications

A. *Pickering* and Its Progeny

In 1968, the Supreme Court crafted a balancing test that remains the controlling analysis for allegations of free speech violations by government employers. In *Pickering*, the Court overturned the dismissal of a high school teacher who had been fired for publicly criticizing how the School Board allocated funds. Pickering's dismissal, according to the Court, failed to strike the proper balance "between 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."[12] This balance, the Court said, is a fact-specific inquiry that varies from case to case.[13]

The Supreme Court has since fine-tuned public employee speech doctrine to more clearly define the reach and limitations of the First Amendment's protections for public employees, as well as the extent of the government's authority to regulate its personnel. Three opinions neatly reflect the *Pickering* doctrine's evolution, and together indicate the basic elements and evidentiary burdens involved in such cases.

In *Mt. Healthy City Bd. of Educ. v. Doyle*,[14] a teacher challenged his termination on the ground that the board retaliated against him for speaking on a matter of

---

[12] *Pickering*, 391 U.S. at 568.

[13] *Id.*

[14] *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) [hereinafter *Mt. Healthy*].

public concern. The teacher's case was complicated by several incidents that called into question his suitability for continued employment: a physical altercation with another teacher, and an argument with a cafeteria worker over the amount of spaghetti he received at lunchtime.[15] The district court found for the plaintiff because speech retaliation played a substantial part in the dismissal.[16] The Supreme Court, however, rejected the district court's blurry "rule of causation which focuse[d] solely on whether protected conduct played a part" in an adverse employment decision.[17] Such a rule "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[18] Instead, the Court adopted a burden-shifting test, "which distinguishes between a result caused by a constitutional violation and one not so caused."[19] Under the *Mt. Healthy* test, a plaintiff bears the initial burden of showing that his constitutionally protected conduct was a "substantial" or "motivating" factor in the government's adverse employment action.[20] Upon this showing, the burden shifts to the government to show "by a preponderance of the evidence" that it would have taken the adverse employment action "even in the absence of the protected conduct."[21]

Connick v. Myers[22] involved an Assistant District Attorney who was unwillingly transferred to another division, and then was fired after circulating a questionnaire among her peers soliciting opinions about the office transfer policy, the need for a grievance committee, and employees' "confidence" in the representations of their supervisors.[23] The Supreme Court held that before *Pickering* could apply, the plaintiff first had to show that her speech touched on a matter of "public concern."[24] For "[w]hile . . . public officials should be receptive to constructive criticism offered by their employees," the First Amendment did not operate to "constitutionalize the employee grievance."[25] With respect to the questionnaire specifically at issue, the Court found that it was not circulated out of public concern, but rather "to gather ammunition for another round of controversy" in the workplace.[26]

---

[15] *Id*. at 281.
[16] *Id.* at 284.
[17] *Id.* at 285.
[18] *Id.*
[19] *Id.* at 286.
[20] *Id.* at 287.
[21] *Id.*
[22] *Connick v. Myers*, 461 U.S. 138 (1983) [hereinafter *Connick*].
[23] *Id.* at 141.
[24] *Id.* at 147.
[25] *Id.* at 149.
[26] *Id.* at 148.

In *Garcetti v. Ceballos*,[27] the plaintiff, a police deputy, was denied a promotion after he made unintentionally false departmental misconduct allegations in an internal investigation he conducted at the behest of his superiors. The Supreme Court held that the government's failure to promote did not violate the First Amendment because it was motivated by dissatisfaction relating to speech the plaintiff made in the course of his job duties, rather than as a private citizen.[28] In short, the First Amendment does not excuse poor job performance; it does not prohibit "managerial discipline based on an employee's expressions made pursuant to official responsibilities."[29] As a result, when the government uncovered the deputy's embarrassing speech, its response was disciplinary, not retaliatory.

A five-element analytic framework drawing on *Pickering*, *Mt. Healthy*, *Connick*, and *Garcetti* currently governs public employee speech discrimination cases. First, the court determines whether the public employee spoke pursuant to his official duties; if so, the inquiry ends pursuant to *Garcetti*.[30] Second, the court determines whether the subject of the speech was a matter of public concern; if not, the inquiry ends pursuant to *Connick*.[31] Third, the court determines whether the employee's interest in commenting on the issue outweighs the interest of the state as employer; if not, then there is no First Amendment violation under *Pickering*.[32] Fourth, if there is a *Pickering* violation, the employee must show under *Mt. Healthy* that his speech was a substantial or motivating factor in the challenged employment decision.[33] Fifth, if the employee establishes that his speech was such a factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.[34] The first three steps are to be resolved as a matter of law by the trial judge. The last two elements are for the trier of fact.[35]

B. The *Elrod-Branti* Rule

A separate but related line of First Amendment public employment cases, dealing with political affiliation discrimination, began with *Elrod v. Burns*[36] in 1976 and *Branti v. Finkel*[37] in 1980. The resulting *Elrod-Branti* rule sets

---

[27] *Garcetti v. Ceballos*, 547 U.S. 410 (2006) [hereinafter *Garcetti*].

[28] *Id.* at 422.

[29] *Id.* at 424.

[30] *Garcetti*, 547 U.S. 410 (2006).

[31] *Connick*, 461 U.S. 138 (1983).

[32] *Pickering*, 391 U.S. 563 (1968).

[33] *Mt. Healthy*, 429 U.S. 274 (1977).

[34] *Id.*

[35] *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007).

[36] *Elrod*, 427 U.S. 347 (1976).

[37] *Branti*, 445 U.S. 507 (1980).

constitutional bounds on the government's use of political patronage dismissals, or terminations of public employment on the basis of individuals' political affiliation. Patronage dismissals typically take place shortly after elections, when a newly installed party, eager to reward supporters, terminates out-party employees and replaces them with party members. Some commentators credit political patronage practices, which were common in the United States since the beginning of the Republic, with incentivizing citizens' active political engagement. Legislative civil service reforms, which set aside certain government jobs as tenured and immune to political patronage practices, established a baseline of government stability and continuity lest an arriving administration engage in especially sweeping patronage purges.

At issue in *Elrod* was a newly elected Republican sheriff's dismissal of employees because of their membership in the Democratic Party.[38] Justice Brennan's plurality opinion emphasized the strong coercive effect that such patronage dismissals can work upon public employees' allegiance to personal political commitments, and held that the First Amendment consequently did not permit the termination of a non-policymaking, non-confidential public employee on the sole basis of his political beliefs.[39] Justices Stewart and Blackmun concurred only as to that succinct holding, but refused to join the rest of the plurality's wide-ranging analysis.[40]

Justice Brennan's opinion applied strict scrutiny to the challenged terminations, and asked whether they "further[ed] some vital government end by a means that is the least restrictive of freedom of belief and association in achieving that end," and whether "the benefit gained . . . outweigh[ed] the loss of constitutionally protected rights."[41] The Court rejected the government's claim that patronage dismissals were justified because they improve government effectiveness and efficiency by eliminating unmotivated out-party members from staff ranks.[42] Case-specific personnel actions, it observed, were a more tailored way to discharge subpar employees.[43] The Court next acknowledged that while patronage employment energized political participation and democracy by giving citizens a personal stake in campaign work, the extent of that benefit did "not suffice to override [patronage's] severe encroachment on First Amendment freedoms."[44]

Justice Brennan conceded in *Elrod* that patronage dismissals were acceptable—indeed necessary in a democracy—for "policymaking, confidential" jobs within

---

[38] *Elrod*, 427 U.S. at 350-51.

[39] *Id.* at 359.

40 *Elrod*, 427 U.S. at 374-75 (Stewart, J., concurring); *see also Branti*, 445 U.S. at 516 (observing that the concurring judgment in *Elrod* "avoided comment on the first branch of Justice Brennan's analysis").

[41] *Elrod*, 427 U.S. at 363.

[42] *Id.* at 364-66.

[43] *Id.*

[44] *Id.* at 368-70.

an administration.[45] The Court elaborated this concession in *Branti*, where two Democrat assistant public defenders argued that an incoming Republican administration had unconstitutionally fired them after erroneously designating their posts as "policymaking and confidential."[46] The Court agreed, finding that whatever policymaking or confidentiality is involved in a public defender's work relates to individual cases and clients, not to the government employer.[47] Thus the defendant in *Branti* failed to meet its burden of showing "that party affiliation [was] an appropriate requirement for the effective performance of the public office involved."[48]

Despite *Elrod*'s characterization as an "inflexible prescription" of patronage, the amount of *Branti* litigation in the lower federal courts suggests that its exception is as important as its rule.[49] In sum, *Elrod-Branti* doctrine bars patronage dismissals except where the government can show, as it often can, that "party affiliation" is relevant to effective job performance.

C. *Pickering* and *Elrod-Branti*: Shared Roots and Divergent Paths

Pickering and *Elrod* clearly share doctrinal roots. Addressing criticism that *Elrod* was a departure from American legal and political tradition, Justice John Paul Stevens opined that the decision was actually a natural outgrowth of "several decades" of First Amendment jurisprudence, including *Pickering*.[50] Yet it is equally clear that *Elrod* diverged from *Pickering* insofar as it situated patronage employment practices outside *Pickering* balancing. Indeed, where political affiliation is found to be "entirely irrelevant to the public service to be performed," the Supreme Court has said that patronage dismissal of a public employee on that basis is per se unconstitutional, and that "it is unacceptable to balance the constitutional rights of the individual against the political interests of the party in power."[51] This divergence from *Pickering* is not altered by government actors' frequent claim, in *Elrod-Branti* litigation, that the government has an "interest" in making party affiliation a material requirement for the public office involved. When invoked, such an interest is contemplated as an *Elrod* exemption; it is not balanced, as in *Pickering*, against the employee's First Amendment rights.

---

[45] *Id.* at 367-68, 372.

[46] *Branti*, 445 U.S. at 508-09.

[47] *Id.* at 519-20.

[48] *Id.* at 518.

[49] *Rutan*, 497 U.S. at 94 (Scalia, J., dissenting); *Juarbe-Angueira v. Arias,* 831 F.2d 11, 13-14 (1st Cir. 1987).

[50] *Rutan*, 497 U.S. at 84 (Stevens, J., concurring).

[51] *Id.* at 90-91.

II. What Categories of Plaintiffs do *Pickering* and *Elrod* Presently Protect?

A. *Pickering* and *Elrod* Clearly Protect Public Employees, Applicants for Public Employment, and Independent Contractors with a Pre-existing Commercial Relationship with the Government

Supreme Court precedent to date has established First Amendment protection from speech and affiliation retaliation for public employees, applicants for public employment, and independent contractors with a pre-existing commercial relationship with the government. Current doctrine does not, however, establish First Amendment protection for bidding independent contractors without a pre-existing commercial relationship with the government.

Protections for public employees against speech and affiliation-based retaliation were established by *Pickering* and *Elrod* themselves, as reflected by the plain facts of those cases.[52] In *Rutan v. Republican Party of Ill.* the Supreme Court extended the scope of *Elrod* to cover applicants for public employment.[53] There the government pushed for a distinction between existing and prospective public employees, but the Court held that, regardless of whether applicants had any entitlement to a job, they still suffered a deprivation of a right because patronage hiring, like patronage dismissals, worked a coercive interference upon applicants' constitutional rights and therefore warranted strict scrutiny.[54] The Court noted that this was all the more true for social workers, teachers, and prison guards, for whom the government was often a near-exclusive source of available jobs. Observing that the government's claimed interests in patronage hiring were essentially the same as those that *Elrod* already found unconvincing regarding patronage firing, *Rutan* extended First Amendment protection against political affiliation retaliation to applicants for public employment.[55]

While the Supreme Court has not made a similarly blunt pronouncement that *Pickering* protects public employment applicants, there appears to be little doubt that this is true. In *Garcetti v. Ceballos*, for example, the Court applied *Pickering* in the context of a First Amendment failure-to-promote claim, indicating that speech-based hiring cases would also be actionable.[56] *Rankin v. McPherson* also offers support for *Pickering*'s availability to applicants for public employment, the Supreme Court observing there in dicta that *Pickering* regulated the "government's

---

[52] *See generally Pickering*, 391 U.S. 563 (1968); *Elrod*, 427 U.S. 347 (1976).

[53] *Rutan*, 497 U.S. 62 (1990). *Rutan* also established that any sufficiently adverse employment action, even one stopping short of dismissal, was actionable under *Elrod*. While this is certainly an important doctrinal development, this aspect of the ruling is tangential to our discussion here.

[54] *Rutan*, 497 U.S. at 77-79.

[55] *Id.* at 78.

[56] *Garcetti*, *547* U.S. 410 (2006).

power as an employer to make *hiring* and firing decisions" on the basis of speech.[57] Finally, federal circuits have applied *Pickering* to cover rejected applicants for public employment without debate or comment.[58]

Most recently, the Supreme Court sanctioned *Pickering* and *Elrod* protections for independent contractors with a pre-existing commercial relationship with the government in a pair of 1996 cases: *Board of County Commissioners, Wabaunsee Cty., Kansas v. Umbehr*[59] and *O'Hare Truck Service, Inc. v. Northlake*.[60] *Umbehr* established *Pickering* protections, and *Northlake* established *Elrod* protections, for independent contractors with a pre-existing commercial relationship with the government.[61] The coincident publication of *Umbehr* and *Northlake* highlighted once again the different treatment that speech and political affiliation-based retaliation claims receive.[62]

The plaintiff in *Umbehr* was a waste-removal contractor whose contract with a county was terminated in response to public criticisms about the secretive operations of the county's Board of Commissioners.[63] The Supreme Court, which to that point had only applied *Pickering* to public employees, ruled that independent contractors could invoke its protections as well.[64] The similarities between public employees and independent contractors regarding speech protections were "obvious": both jobs provide a "valuable financial benefit," the threatened retaliative loss of which can chill speech.[65] The Court rejected the defendant government's asserted interest in more expansive regulation of contractors, who work at greater remove from traditional supervisory authority than public employees.[66] To the extent such a distinction was relevant in any given case, the Court stated that fact-specific *Pickering* balancing could account for it, rendering a categorical exclusion of First Amendment protection unnecessary.[67]

In *Northlake*, the government removed the plaintiff towing company from a city "call list," but did not terminate an active contract, due to the company's refusal to contribute to the incumbent mayor's re-election campaign.[68] The Supreme Court ruled that the plaintiff independent contractor's *Elrod* claim could proceed. To

---

[57] *See Rankin*, 483 U.S. 378, 395 (1987) (emphasis added).

[58] *See e.g. Worrell v. Henry*, 219 F.3d 1197, 1207 (10th Cir. 2000) (hiring context); *Hubbard v. E.P.A.*, 949 F.2d 453 (D.C. Cir. 1991) (hiring).

[59] *Umbehr*, 518 U.S. 668 (1996).

[60] *Northlake*, 518 U.S. 712 (1996).

[61] *Umbehr*, 518 U.S. 668 (1996); *Northlake*, 518 U.S. 712 (1996).

[62] *See Supra* Part I.

[63] *Umbehr*, 518 U.S. at 671-72.

[64] *Id.* at 678.

[65] *Id.* at 674.

[66] *Id.* at 676.

[67] *Id.* at 678.

[68] *Northlake*, 518 U.S. at 715.

reach this result, the Court rejected the contention that independent contractors were less susceptible to patronage coercion than public employees because they were less economically dependent on a government paycheck.[69] This generalization, the Court said, ignored political patronage's coercive effects on vulnerable independent contractors and "does not excuse wrongs done to those who exercise their rights."[70]

The Supreme Court has never ruled on whether the First Amendment protects bidding independent contractors without a pre-existing commercial relationship with the government. In fact, it expressly reserved the question upon closing its analysis in *Umbehr*.[71]

B. The Circuits Split on the Meaning of "Pre-existing Commercial Relationship": Ongoing vs. Previous Commercial Relationships

In the wake of *Umbehr* and *Northlake*, lower federal courts have struggled to define who qualifies as "an independent contractor with a pre-existing commercial relationship with the government." It is clear from *Umbehr* that an independent contractor whose current government contract was terminated due to his speech or political affiliation will have an actionable First Amendment retaliation claim, but the nature of an independent contractor's pre-existing relationship with the government may not always be so straightforward. The Third and Eighth Circuits are divided as to whether a pre-existing relationship must be "ongoing" at the time of the challenged government action.

In *McClintock v. Eichelberger*,[72] a government planning commission rejected a firm's 1997 contract bid on the basis of the firm's political affiliation, after having previously entered contracts with the firm for similar but unrelated work in 1985, 1992 and 1995-1997.[73] The aggrieved firm argued that all these prior contractual dealings established a pre-existing commercial relationship, but the Third Circuit disagreed. Whereas the plaintiffs in *Umbehr* and *Northlake* were providing "ongoing" services when the government terminated their relationship, the Third Circuit noted that *McClintock* involved a new bid for work unrelated to previous projects.[74] In *Heritage Constructors, Inc. v. City of Greenwood, Ark.*,[75] the Eighth Circuit adopted a more permissive standard for establishing when a commercial relationship is "pre-existing." There, the defendant city refused to consider a construction firm's bid

---

[69] *Id.* at 722.

[70] *Id.* at 724.

[71] *Umbehr*, 518 U.S. at 685.

[72] *McClintock*, 169 F.3d 812 (3rd Cir. 1999).

[73] *Id.* at 813-14.

[74] *Id.* at 816-17.

[75] *Heritage Constructors, Inc. v. City of Greenwood, Ark.*, 545 F.3d 599 (8th Cir. 2008) [hereinafter *Heritage Constructors*].

for a construction contract approximately four years after the firm had haled the city into an arbitration—which is conduct protected under the First Amendment when it touches upon a matter of public concern[76]—stemming from a different, completed contract between them. The plaintiff in *Heritage Constructors* did not have an "ongoing" relationship with the city at the time its bid was rejected, but the Eighth Circuit nonetheless held that the firm's "previous" commercial relationship, though four years past, qualified as "pre-existing."[77] The Eighth Circuit was likewise untroubled by the fact that the disputed bid rejection was wholly unrelated to the previous contract.

Outside the Third and Eighth Circuits, what constitutes a "pre-existing commercial relationship" remains an open question. In other jurisdictions, it is unclear whether an "ongoing" or just a "previous" government relationship will be required of an independent contractor challenging a bid rejection under *Umbehr*/*Northlake*.

III. The Circuits Split on the Novel Question of Whether Pickering and Elrod Protect Bidding Independent Contractors without a Pre-existing Commercial Relationship with the Government

A. The Third Circuit and the Fifth Circuit Reach Opposite Conclusions

Although *Heritage Constructors* and *McClintock* stand for the proposition that independent contractors may sue for retaliatory bid rejections if they can show, under standards that vary by circuit and that remain undefined in others, a pre-existing commercial relationship with the government, not all bidding independent contractors will be able to meet this burden. Under such circumstances, a court must consider whether to extend First Amendment protections to first-time bidders. Only two circuits have ruled on the issue to date, one of them being the Third Circuit in *McClintock v. Eichelberger* itself.[78] There, the plaintiff argued in the alternative that if its earlier contracts with the government did not constitute a pre-existing commercial relationship under *Umbehr*, the First Amendment should in any event also protect first-time bidders. Though the court conceded that *Rutan* had granted First Amendment protections to applicants for public employment, and that contract bidders were similarly situated, it refused to extend *Elrod-Branti*. The Supreme Court had so "carefully cabined" *Umbehr* and *Northlake* that "if expansion in the

---

[76] *Id.* at 602.

[77] *Id.*

[78] *McClintock*, 169 F.3d 812 (3rd Cir. 1999). As described, *supra*, the Third Circuit first analyzed whether the plaintiff marketing firm's past contracts the commission constituted a pre-existing commercial relationship. After holding that they did not, the court continued to consider whether the plaintiff marketing firm merited First Amendment protection as a first-time bidder.

area is to come[,] the source should be the Supreme Court."[79] One judge vigorously dissented, protesting that the majority's "status-based limitation on individuals' rights of political expression and association" ignores *Rutan*'s animating principle.[80]

In *Oscar Renda Contracting, Inc. v. City of Lubbock, Tex.*,[81] the Fifth Circuit parted ways with *McClintock* and extended First Amendment protections to all independent contractors, including first-time bidders. The construction company plaintiff in *Oscar Renda* sued the city of Lubbock for explicitly rejecting its bid on the basis that the company, which had sued another Texas city in a contract dispute, appeared "lawsuit happy."[82] The court held that reading *Umbehr* and *Rutan* together, it was inevitable that a hopeful "contractor—like the individual job applicant—is protected by the First Amendment if its bid is rejected in retaliation [for] its exercise of protected speech."[83] One judge dissented; he disagreed with the entire jurisprudence of employment retaliation and did not wish to extend it further.[84]

B. The First Circuit has Not yet Ruled on Whether *Pickering* and *Elrod* Protect Independent Contractors without a Pre-existing Commercial Relationship with the Government

The First Circuit has not yet ruled on whether an independent contractor without a pre-existing commercial relationship with the government is entitled to First Amendment protections over rejected contract bids. It has skirted the issue in two decisions, both of which assume *arguendo* that such protection exists but dismiss the suit on other grounds. The most substantial of these opinions is *Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon*.[85] Contractor Prisma Zona had been in talks with the government to spearhead the development of a new children's museum, a contract award which would have effectively privatized the project.[86] A new gubernatorial administration led by a different political party later informed Prisma Zona that the deal would not happen, and Prisma Zona sued.[87] The First Circuit observed that the case dealt with "the next area of contest" in the field of First Amendment retaliation claims, the unresolved question of protection for "those who wish for the first time to bid for government contracts."[88] The court assumed, "purely *arguendo*," that

---

[79] *McClintock*, 169 F.3d at 817.

[80] *Id*. at 818-19.

[81] *Oscar Renda*, 463 F.3d 378 (5th Cir. 2006), *cert. denied*, 549 U.S. 1339 (2006).

[82] *Id.* at 381.

[83] *Id.* at 385.

[84] *Id.* at 386-87 (Moss, J., dissenting).

[85] *Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon*, 310 F.3d 1 (1st Cir. 2002) [hereinafter *Prisma Zona*].

[86] *Id.* at 2-3.

[87] *Id.* at 4-5.

[88] *Id.* at 7.

a government could not invite first-time contract bids with "a caveat that no company headed by a Democrat could apply."[89] But it held that Prisma Zona was not entitled to relief because the government asserted that it had decided not to privatize the museum at all, rendering its prior negotiations with Prisma Zona irrelevant.[90] Citing *Branti*, the court refused to second-guess such policy-motivated decisions.[91] The First Circuit similarly assumed protection for a first-time bidder for the sake of argument in *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, but dismissed that case on the separate grounds that the government had never made an open call for bids nor had the plaintiff submitted one, such that no retaliatory action was alleged.[92]

One concern that often arises when courts consider First Amendment expansion is the excessive litigation that might result, although both the Supreme Court and the First Circuit have disavowed this as a legitimate consideration in such cases.[93] Jurisprudential irrelevance aside, excessive litigation is a particularly potent worry for Puerto Rico's Treasury, which already has to budget for a significant number of First Amendment retaliation lawsuits due to the island's famously charged political environment. As just one example of the volume of such litigation, then-Judge Stephen Breyer recalled in his concurrence in *Agosto-de-Feliciano v. Aponte-Roque*,[94] a First Circuit *Elrod* case, that when the governorship of Puerto Rico changed hands in 1984, three hundred public employees filed federal lawsuits in the District of Puerto Rico after they were removed from posts that the government believed had a justifiable political affiliation requirement.[95]

Some argue that extending First Amendment protections to independent contractors creates an especially acute risk of excessive litigation insofar as independent contractors, which are very often corporations, have more resources to litigate than individuals. And while an independent contractor's entire livelihood may not turn on getting one particular contract, the financial stakes behind a government contract are often enormous and offer a tremendous incentive to sue. The rejected contract bid in *Del Valle Group*, to present just one example, was $1,464,000.[96]

Given the territory's litigious political climate, it is no surprise that Puerto Rico filed an *amicus* brief to the Supreme Court in *Rutan*, arguing against extension of the retaliation doctrine to cover applicants for public employment. Not one of the fifty

---

[89] *Id.*

[90] *Id.* at 7-8.

[91] *Id*.

[92] *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1 (1st Cir. 2005).

[93] *Umbehr*, 518 U.S. at 681.

[94] *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989).

[95] *Compare Agosto-de-Feliciano*, 889 F.2d at 1225 (Breyer, J., concurring) (noting the three hundred First Amendment employment lawsuits filed in Puerto Rico in 1984), *with Northlake*, 518 U.S. at 724 (observing that only eighteen First Amendment employment lawsuits had been filed against Illinois state officials in the six years since *Rutan*).

[96] *Del Valle Group*, 756 F.Supp.2d at 172 (D.P.R. 2010).

states felt compelled to do the same. Indeed, Puerto Rico stressed its particular stake in the case, arguing that any First Amendment extension to cover job applicants would mean that all incoming administrations on the island "would risk facing numerous judicial complaints and having to prove objective rationales to defend [themselves] from imputations of political motivation."[97]

In the absence of a First Circuit opinion on point, two federal district judges in Puerto Rico have denied First Amendment protection to first-time bidders in recent years. Both District Judge Jaime Pieras in *San Juan Towing and Marine Services, Inc. v. Puerto Rico Ports Authority*[98] and District Judge Juan Manuel Perez-Gimenez in *Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon*[99] dismissed First Amendment retaliation lawsuits brought by independent contractors who could not show a pre-existing commercial relationship with the government.

IV. *Del Valle Group v. Puerto Rico Ports Authority* and its Significance

In *Del Valle Group v. Puerto Rico Ports Authority*, decided in late 2010, federal district Judge Gustavo Gelpí broke ranks with Judges Pieras and Perez-Giménez and granted First Amendment protection to a bidding contractor apparently for the first time in a published Puerto Rico decision.[100] In *Del Valle Group*, a contractor (hereinafter "DVG") won a construction contract with the Puerto Rico Ports Authority (hereinafter "PRPA") for the first time in 2001.[101] The contract became the subject of litigation between the parties in 2010, and that same year DVG submitted a bid for a second PRPA contract, this time relating to airport construction work.[102] DVG's bid for the airport construction work was the lowest, but agency policy against entering contracts with firms in pending litigation with "the Commonwealth of Puerto Rico, its agencies or instrumentalities" rendered DVG ineligible.[103] DVG and PRPA disputed whether DVG, as a bidding contractor, could claim First Amendment coverage.[104] Relying heavily on *Oscar Renda* and calling First Amendment protections for first-time bidders "[t]he logical extension of previous Supreme Court rulings," Judge Gelpí ruled for DVG.[105]

---

[97] *Rutan v. Republican Party of Ill.*, 1989 WL 1127279 at *13 (U.S. Supreme Court amicus brief, Mar. 5, 1989).

[98] *San Juan Towing and Marine Services, Inc. v. Puerto Rico Ports Authority*, 2009 W.L. 564163 (D.P.R. March 5, 2009).

99 *Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon*, 162 F. Supp. 2d 1 (D.P.R. 2001), *aff'd on other grounds*, 310 F.3d 1, 5 (1st Cir. 2002).

[100] *Del Valle Group*, 756 F.Supp.2d 169 (D.P.R. 2010).

[101] *Id.* at 172.

[102] *Id.*

[103] *Id.* at 173.

[104] *Id.* at 179-81.

[105] *Id.* at 181 (citing *Oscar Renda*, 463 F.3d 378 (5th Cir. 2006)).

Del Valle Group is conspicuous not just for what it did, but for what it did not do. Judge Gelpí went directly to the novel question of whether DVG could make a claim as a first-time bidder, failing to first analyze whether the firm actually qualified for protection by virtue of a "pre-existing commercial relationship" under *Umbehr* and *Northlake*. The decision, in other words, avoids the question on which the Third and Eighth Circuits divided in *McClintock* and *Heritage Constructors*. Under *Heritage Constructors*, where the Eighth Circuit held that a "previous" commercial relationship—even one that expired years prior—constituted a "pre-existing" one, DVG would have qualified for protection within the four corners of *Umbehr*. It would not have qualified, however, under *McClintock*'s "ongoing relationship" standard.

Though *Del Valle Group* arguably skips a step of constitutional analysis, its result is surely correct. Starting with *Pickering* and *Elrod*, the Supreme Court has steadily expanded First Amendment retaliation protections to public employees, then to applicants for public employment in *Rutan*, and most recently, to independent contractors with pre-existing commercial relationships in *Umbehr* and *Northlake*. There does not appear to be much ideological disagreement over the "next area of contest" – the First Amendment's application to bidding contractors without a pre-existing commercial relationship. While courts that apply the First Amendment to first-time bidding contractors reason that *Rutan* inescapably requires such an extension, courts that hold otherwise give no reason other than the Supreme Court's silence on this very specific question. Their nominal adherence to precedent reflects more prudence than principle.