

SPEECH, SPOUSES, AND STANDING: IS THERE STANDING TO SUE WHEN SANCTIONS THREATENED AGAINST ONE'S SPOUSE CHILL PROTECTED EXPRESSION?

Abstract: When a public employee's spouse forgoes expression protected by the First Amendment for fear of direct, employment-related sanctions against the public employee, the spouse has suffered a chilling injury. Courts are split on whether such injuries constitute injuries in fact sufficient for standing, however. This Note explores chilling injuries as a basis for standing and suggests that the tests courts employ to determine whether chilling injuries are injuries in fact are inconsistently applied and inadequately protect First Amendment rights. This Note argues that courts should focus on the choice at the heart of any chilling injury: the choice between forgoing protected expression or suffering consequences. One should have standing to sue when government action forces one to make an intolerably difficult choice of whether to engage in protected expression.

INTRODUCTION

Alma Mendez-Thompson was politically active and had participated in a number of political campaigns.¹ After moving to Missouri, however, she resisted getting involved in local politics out of fear that her political activities would endanger her husband's career.² A provision in the city charter prohibited Ms. Mendez-Thompson's husband, a city employee, from engaging directly or indirectly in local politics.³ Ms. Mendez-Thompson and her husband sued to challenge the provision.⁴

The U.S. District Court for the Eastern District of Missouri in *International Ass'n of Firefighters, Local 2665 v. City of Ferguson*, denied Ms. Mendez-Thompson standing.⁵ The district court concluded that because Ms. Mendez-Thompson could not be personally subject to direct disciplinary action, she failed to allege an injury in fact required

¹ *Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 972 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (mem.).

² *Id.*

³ *Id.* at 971.

⁴ *Id.*

⁵ *See id.* at 972.

for standing.⁶ The district court concluded that because disciplinary action against Mr. Thompson would only indirectly affect Ms. Mendez-Thompson, she could raise only, derivatively, the same claims as Mr. Thompson.⁷ Because the district court upheld the challenged provision as applied to Mr. Thompson, Ms. Mendez-Thompson's claim likewise failed.⁸

In March 2002, the U.S. Court of Appeals for the Eighth Circuit reversed and granted standing to Ms. Mendez-Thompson.⁹ Although directly applicable only to the state employee, the court found that the prohibitions injured Ms. Mendez-Thompson by deterring her exercise of First Amendment rights.¹⁰ By holding this injury in fact sufficient for standing, the Eighth Circuit split with the Fourth, Ninth, and Tenth Circuit Courts of Appeal, which had denied standing in very similar circumstances.¹¹ Such disagreements over standing issues are not uncommon; standing doctrine is widely acknowledged to be inconsistently and unpredictably applied.¹²

Although the application of standing doctrine may be confused, its requirements are easily stated.¹³ To bring a case in federal court, a plaintiff must show that the actions of the defendant inflicted an injury in fact that a court could redress by a favorable ruling.¹⁴ Despite this simple formulation, where injuries alleged are novel or indirect, inconsistent case law provides little concrete guidance.¹⁵

The difficulty of determining exactly what sorts of injuries constitute injuries in fact is particularly acute when a plaintiff alleges injury due to a chilling effect.¹⁶ A chilling effect occurs when government

⁶ See *Int'l Ass'n of Firefighters*, 283 F.3d at 972.

⁷ See *id.* at 975.

⁸ See *id.*

⁹ *Id.* at 975-76.

¹⁰ *Id.* at 975.

¹¹ *Int'l Ass'n of Firefighters*, 283 F.3d at 975 (disagreeing expressly and "with a firm conviction" with the conclusions reached by the Fourth, Ninth, and Tenth Circuit Courts of Appeals); see *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 998 (9th Cir. 1999); *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1279 (10th Cir. 1998); *English v. Powell*, 592 F.2d 727, 730 (4th Cir. 1979).

¹² ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 2.5.1, at 60 (2d ed. 1985).

¹³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

¹⁴ *Id.*

¹⁵ See Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 302-04 (2002).

¹⁶ The few U.S. Supreme Court cases to consider the issue have left many unanswered questions. See *Meese v. Keene*, 481 U.S. 465, 473 (1987) (leaving unanswered the question of what evidence is sufficient to make an alleged chill objective); *Socialist Workers Party v.*

actions or regulations discourage expression protected by the First Amendment without directly regulating it.¹⁷ Because chilling injuries are, by nature, indirect, courts may find them insufficient to meet the injury in fact required for standing in the federal courts.¹⁸ Case law provides few clear answers as to which chilling injuries a court should find sufficient for standing.¹⁹

This Note examines barriers to standing faced by spouses of public employees who allege chilling injuries due to abridgements of public employee speech.²⁰ In particular, it considers the different approaches taken by the Fourth, Eighth, Ninth, and Tenth Circuit Courts of Appeal.²¹ Part I examines chilling injuries generally.²² Part II addresses standing doctrine generally, its requirements, and the rationales behind them.²³ Part III discusses the application of standing doctrine to chilling injuries in the U.S. Supreme Court.²⁴ Part IV discusses chilling injuries as a basis for standing in lower federal courts.²⁵ Part V addresses the issue dividing the Eighth from the Fourth, Ninth, and Tenth Circuit Courts of Appeals, namely, whether fear that one's protected speech will result in disciplinary action against one's spouse constitutes a chilling injury sufficient for standing.²⁶ Finally, Part VI proposes that standing should be granted to plaintiffs able to show that government action forced an objectively difficult choice between forgoing protected rights and triggering harm.²⁷

I. CHILLING EFFECTS GENERALLY

Government sanctions imposed on a public employee do not directly subject the public employee's spouse to government regulation

Attorney Gen., 419 U.S. 1314, 1319 (1974) (leaving unanswered what would be required for standing in other circumstances); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (leaving unanswered whether objective chills are sufficient for standing); *infra* notes 65-124 and accompanying text.

¹⁷ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 693 (1978).

¹⁸ See, e.g., *Biggs*, 189 F.3d at 998; *Horstkoetter*, 159 F.3d at 1279; *English*, 592 F.2d at 730.

¹⁹ See *infra* notes 65-124 and accompanying text.

²⁰ See *infra* notes 125-173 and accompanying text.

²¹ See *infra* notes 125-173 and accompanying text.

²² See *infra* notes 28-37 and accompanying text.

²³ See *infra* notes 38-64 and accompanying text.

²⁴ See *infra* notes 65-92 and accompanying text.

²⁵ See *infra* notes 93-124 and accompanying text.

²⁶ See *infra* notes 125-173 and accompanying text.

²⁷ See *infra* notes 174-250 and accompanying text.

or action.²⁸ Nevertheless, sanctions against public employees triggered by their spouses' exercise of protected expression may deter the spouses' expression.²⁹ To obtain standing, the spouse must show that this deterrent or chilling effect was an injury in fact.³⁰

The concept of a First Amendment chill first emerged in Justice Felix Frankfurter's concurrence in *Wieman v. Updegraff*.³¹ A chilling effect occurs when government action or regulation deters expression protected by the First Amendment, while not directly prohibiting it.³² For example, fear that engaging in the protected activity will subject one's spouse to employment-related sanctions may result in a chilling effect.³³ Although most cases of chilling effects may result from government regulation, a chilling effect may also occur as a result of non-regulatory government action such as surveillance.³⁴

The recognition of chilling effects indicates the high value placed on expression protected by the First Amendment.³⁵ The U.S. Supreme Court has emphasized that free expression is "supremely precious" but "delicate and vulnerable."³⁶ The concept of First Amendment chill reflects the high societal value placed on free expression by recognizing that even indirect effects of government regulation or action may abridge expression.³⁷

²⁸ *Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 972 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (stating that provisions applicable only to city employees clearly do not apply to their spouses).

²⁹ *Id.* at 972, 975 (wife of firefighter deterred from political involvement because of fear of employment sanctions against her husband); *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 997-98 (9th Cir. 1999) (husband and daughter of associate in publicly-employed law firm deterred from political campaigning by government's threat to fire the firm unless the husband and daughter were "silenced"); *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1269 (10th Cir. 1998) (wives of state troopers deterred from displaying political signs by threats of disciplinary action against their husbands).

³⁰ See *Int'l Ass'n of Firefighters*, 283 F.3d at 973.

³¹ 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

³² Schauer, *supra* note 17, at 693.

³³ See *Int'l Ass'n of Firefighters*, 283 F.3d at 972, 975; *Biggs*, 189 F.3d at 997-98; *Horstkoetter*, 159 F.3d at 1269.

³⁴ See, e.g., *Socialist Workers Party v. Attorney Gen.*, 419 U.S. 1314, 1316, 1319 (1974) (plaintiffs alleged that FBI surveillance of a political convention chilled attendance and free debate); *Laird v. Tatum*, 408 U.S. 1, 2-3 (1972) (plaintiffs alleged that Army surveillance chilled their exercise of civilian political activity).

³⁵ See Schauer, *supra* note 17, at 688.

³⁶ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

³⁷ See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867-68 (1991).

II. STANDING DOCTRINE GENERALLY

Understanding the hurdles faced by litigants seeking standing to sue for chilling injuries requires a general knowledge of standing doctrine, its requirements, and its rationales.³⁸ Whether a public employee's spouse has standing to challenge a regulation imposing sanctions on the public employee for the spouse's speech hinges on whether the spouse has suffered an injury in fact.³⁹ This discussion therefore focuses on standing doctrine's injury-in-fact requirement.⁴⁰

Standing is a threshold issue.⁴¹ Before a federal court can hear a case on the merits, litigants must show that they are the proper parties to bring suit.⁴² Courts derive current standing doctrine from Article III of the U.S. Constitution, which grants the federal judiciary the power to hear "cases and controversies," and, by implication, nothing else.⁴³ Where a plaintiff alleges merely hypothetical injuries, no genuine controversy exists between adverse parties and, therefore, a federal court would overstep its constitutional bounds if it entertained the plaintiff's complaint.⁴⁴ Because such overreaching implicates separation-of-powers concerns, the U.S. Supreme Court grounds its current standing doctrine in the concept of separation of powers.⁴⁵ By limiting access solely to litigants alleging concrete, personal harms, the Court avoids interfering with the political branches.⁴⁶ To prevent such interference, the U.S. Supreme Court has established three constitutional requirements for standing: (1) the plaintiff must have suffered an injury in fact; (2) the defendant's actions must have caused this injury in fact; and (3) a court could redress the injury were the plaintiff successful on the merits.⁴⁷

³⁸ See Jonathan R. Siegel, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 910 (1989).

³⁹ See Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson, 283 F.3d 969, 973 (8th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

⁴⁰ See *infra* notes 41–60 and accompanying text.

⁴¹ *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1278–79 (10th Cir. 1998); *English v. Powell*, 592 F.2d 727, 730 (4th Cir. 1979); see *CHEMERINSKY*, *supra* note 12, § 2.5.1, at 60.

⁴² *Horstkoetter*, 159 F.3d at 1278–79; *English*, 592 F.2d at 730; see *CHEMERINSKY*, *supra* note 12, § 2.5.1, at 60.

⁴³ U.S. CONST. art. III, § 2; see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁴⁴ See *Lujan*, 504 U.S. at 560, 564–67 & n.2.

⁴⁵ *Allen v. Wright*, 468 U.S. 737, 752 (1984) (stating that "[t]he law of Art. III standing is built on a single basic idea—the idea of separation of powers").

⁴⁶ See *id.*

⁴⁷ *Lujan*, 504 U.S. at 560–61. In addition to the above-mentioned constitutional standing requirements, the U.S. Supreme Court has identified prudential requirements: (a)

The injury-in-fact requirement is the central issue in determining whether an alleged chilling injury is sufficient for standing.⁴⁸ The U.S. Supreme Court defines an injury in fact as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."⁴⁹ A particularized injury is one that has a personal, individualized impact on the plaintiff.⁵⁰

For example, in 1972, the U.S. Supreme Court in *Sierra Club v. Morton* denied standing to the Sierra Club because it failed to allege that any of its members actually used the land threatened by challenged development.⁵¹ Because they did not use the land, the Sierra Club's members could not have been personally and individually affected by construction on the land.⁵² The construction thus did not cause an injury in fact.⁵³ In contrast, the Sierra Club was granted standing on remand after amending its complaint to include allegations that its members did use the land and would be affected by the construction.⁵⁴ For an alleged injury to be an injury in fact, therefore, the injury must affect the party in an individual way, a way different from its effects on others.⁵⁵

Although standing requires concrete injuries that are neither conjectural nor hypothetical, in one oft-criticized decision the U.S. Supreme Court found injury in fact despite an attenuated connection to the contested activity.⁵⁶ In 1990, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the U.S. Supreme Court granted standing to a student group that alleged that the Interstate Commerce Commission degraded its members' use of city parks by increasing rates for shipping freight by rail.⁵⁷ The students reasoned that because the rate hike would make it more costly to ship recycled

parties may raise only their own claims and not those of non-parties and (b) the claim must fall within the "zone of interests" protected by the statute or constitutional provision at issue. CHEMERINSKY, *supra* note 12, § 2.5.1, at 62-63. Because these are prudential rather than constitutional requirements, they can be waived. *Id.*

⁴⁸ See *Int'l Ass'n of Firefighters*, 283 F.3d at 973.

⁴⁹ *Lujan*, 504 U.S. at 560 (citations and internal quotations omitted).

⁵⁰ *Id.* at 560 n.1.

⁵¹ 405 U.S. 727, 735, 741 (1972).

⁵² *Id.* at 735.

⁵³ See *id.*

⁵⁴ See CHEMERINSKY, *supra* note 12, § 2.5.2, at 64.

⁵⁵ See *Sierra Club*, 405 U.S. at 735-36.

⁵⁶ See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-90 (1990).

⁵⁷ *Id.*

goods, recycling would decline.⁵⁸ This would, in turn, result in more litter in parks, thereby lessening the students' personal aesthetic enjoyment of the parks.⁵⁹ The *SCRAP* decision suggests that, at least in some cases, the Court places greater emphasis on whether the alleged injury is particularized and individual than on whether it is conjectural or hypothetical.⁶⁰

Chilling effects are particularly relevant to standing's overbreadth doctrine.⁶¹ Unique to First Amendment jurisprudence, the overbreadth doctrine provides an exception to the rule that parties do not have standing to assert the injuries of parties not before the court.⁶² Under the overbreadth doctrine, a party to whom a law has been constitutionally applied may nevertheless challenge the law on the grounds that it could be unconstitutionally applied to a hypothetical third party.⁶³ Given this preference to err on the side of protecting speech, commentators have noted that the procedural barriers currently faced by a litigant alleging chilling injuries can be surprisingly difficult to surmount.⁶⁴

III. CHILLING EFFECTS AND STANDING IN THE U.S. SUPREME COURT

The U.S. Supreme Court has specifically addressed the issue of whether chilling injuries are sufficient for standing in three cases.⁶⁵ First, in 1972, in *Laird v. Tatum*, the U.S. Supreme Court denied standing to plaintiffs who alleged that Army surveillance of their political activities impermissibly chilled their exercise of First Amendment rights.⁶⁶ Although noting that even indirect effects on First Amendment rights can be sufficient for standing, the Court held subjective chills inadequate for standing.⁶⁷ The Court left unanswered the ques-

⁵⁸ *Id.* at 688.

⁵⁹ *Id.*

⁶⁰ *See id.* at 688-90.

⁶¹ *See Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) ("The doctrine [of overbreadth] is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions.").

⁶² *Id.*; *see* CHEMERINSKY, *supra* note 12, § 2.5.4, at 86.

⁶³ Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-24 (1974).

⁶⁴ *See, e.g.,* Michael N. Dolich, *Alleging a First Amendment "Chilling Effect" to Create a Plaintiff's Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 176 (1994).

⁶⁵ *Meese v. Keene*, 481 U.S. 465 (1987); *Socialist Workers Party v. Attorney Gen.*, 419 U.S. 1314 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972).

⁶⁶ 408 U.S. at 3.

⁶⁷ *Id.* at 12-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

tion of whether objective chills are sufficient and provided no explicit means to distinguish objective from subjective chills.⁶⁸

Although *Laird* left these important questions unanswered, it does offer guidance as to what kinds of chilling injuries do not qualify as injuries in fact.⁶⁹ In *Laird*, the fears that allegedly chilled plaintiffs' expression resulted from the plaintiffs' unsupported speculation that the Army could conceivably misuse the intelligence information to the plaintiffs' detriment in the future.⁷⁰ The Court thus looked not only at the existence of an alleged chill but also at its cause.⁷¹ Because the feared harm from misuse of intelligence information was merely speculative, the plaintiffs' fear was subjective and thus insufficient for standing.⁷² Therefore, *Laird* indicates that speculative fears are not alone sufficient for standing.⁷³

In 1974, in *Socialist Workers Party v. Attorney General*, the U.S. Supreme Court next considered chilling injuries as a basis for standing.⁷⁴ Like the plaintiffs in *Laird*, the plaintiffs in this case sought to contest government surveillance.⁷⁵ The plaintiffs, however, did more than simply allege chill based on unsupported fears of future harm from conceivable government misuse of intelligence information.⁷⁶ In addition to alleging a chilling effect, the plaintiffs in *Socialist Workers* asserted that the government's investigation would discourage attendance at a political convention, prevent active participation in the convention, and adversely affect the employment of those in attendance.⁷⁷ The Court held these alleged harms sufficient for standing.⁷⁸ The plaintiffs' chill resulted from fear that surveillance would lead to actual and imminent harm, rather than the speculative fear of injury at some undetermined time in the future held insufficient in *Laird*.⁷⁹ In other words, the plaintiffs had objective reasons to fear expressing themselves freely.⁸⁰ Accordingly, the Court granted standing.⁸¹

⁶⁸ See *id.*; Dolich, *supra* note 64, at 179-80.

⁶⁹ See 408 U.S. at 13-14; Dolich, *supra* note 64, at 179.

⁷⁰ 408 U.S. at 13.

⁷¹ See *id.*

⁷² See *id.* at 13-14.

⁷³ See *id.*

⁷⁴ 419 U.S. at 1317-19.

⁷⁵ *Id.* at 1314-15.

⁷⁶ *Id.* at 1319.

⁷⁷ *Id.* at 1316, 1319.

⁷⁸ *Id.* at 1319.

⁷⁹ See *Socialist Workers*, 419 U.S. at 1319.

⁸⁰ See *id.*

⁸¹ *Id.*

Most recently, in 1987, the U.S. Supreme Court addressed the issue of standing based on chilling effects in *Meese v. Keene*.⁸² *Meese* involved a California State Senator, Barry Keene, who alleged that the labeling of three Canadian films as political propaganda chilled his First Amendment rights by deterring him from exhibiting the films.⁸³ The Court noted that merely alleging a chilling effect without more would be insufficient for standing under *Laird*.⁸⁴

In addition to alleging a chilling effect, however, Keene provided objective evidence legitimizing his fear that exhibiting films categorized as propaganda would result in harm to his career by damaging his reputation and consequently reducing the likelihood of his reelection.⁸⁵ This evidence included results of an opinion poll and statements of a political analyst suggesting that Keene's reputation in the community and chances of reelection would suffer from exhibiting films the Department of Justice listed as political propaganda.⁸⁶ Because Keene's fear was supported by objective evidence, in contrast to the merely speculative fears in *Laird*, the chilling effect he alleged was more than a subjective chill; therefore, it satisfied Article III's injury-in-fact requirement.⁸⁷

Taken together, the U.S. Supreme Court's decisions on whether chilling injuries constitute injuries in fact sufficient for standing indicate that plaintiffs must show that the exercise of First Amendment rights will result in harm.⁸⁸ Further, this harm must not be merely conjectural or hypothetical.⁸⁹ Rather, the injury must be objectively supported in some way by evidence that engaging in the protected activity will result in harm.⁹⁰ The Court has recognized objectively supported harms such as damage to one's career, job prospects, reputation, or to a convention's success.⁹¹ Lower courts have questioned whether the harm supported by objective evidence must itself be independently sufficient for standing.⁹²

⁸² 481 U.S. at 472-77.

⁸³ See *id.* at 468-69.

⁸⁴ *Id.* at 473.

⁸⁵ *Id.* at 473-74.

⁸⁶ *Id.*

⁸⁷ *Meese*, 481 U.S. at 473-74.

⁸⁸ See *id.* at 472; *Socialist Workers*, 419 U.S. at 1318-19; *Laird*, 408 U.S. at 13-14.

⁸⁹ See *Meese*, 481 U.S. at 472; *Socialist Workers*, 419 U.S. at 1318-19; *Laird*, 408 U.S. at 13-14.

⁹⁰ See *Meese*, 481 U.S. at 472; *Socialist Workers*, 419 U.S. at 1318-19; *Laird*, 408 U.S. at 13-14.

⁹¹ See *Meese*, 481 U.S. at 473-74 (damage to reputation and prospects of reelection); *Socialist Workers*, 419 U.S. at 1316, 1319 (reduced attendance and participation in a political rally, and career-related repercussions).

⁹² See *infra* notes 93-124 and accompanying text.

IV. CHILLING EFFECTS AS A BASIS FOR STANDING IN LOWER FEDERAL COURTS

Laird v. Tatum's requirement that allegations of chill be accompanied by other evidence of harm led to two general interpretations among the lower courts: (1) evidence of harm must be sufficient as an injury in fact independent of any allegation of chill and (2) alleged chill and evidence of harm may become an injury in fact in combination where the evidence of harm indicates that the chill is objectively reasonable.⁹³

For example, in 1984, in *United Presbyterian Church in the U.S.A. v. Reagan*, the District of Columbia Court of Appeals stated that the existence of chilling effects is irrelevant to standing analysis.⁹⁴ In then-Judge Scalia's words, a chilling effect is the "reason why the governmental imposition is invalid rather than . . . the harm which entitles the plaintiff to challenge it."⁹⁵ Drawing no distinction between subjective and objective chills, the court concluded that *Laird* dictated that standing requires concrete harm separate from the chilling effect itself.⁹⁶ The plaintiffs in *United Presbyterian Church* simply alleged that intelligence procedures outlined in an executive order chilled their constitutionally protected activities without providing evidence of other harm.⁹⁷ Therefore, the court held that the plaintiffs' complaint failed to allege an injury in fact and consequently denied standing.⁹⁸

Similarly, in 1983, in *Gordon v. Warren Consolidated Board of Education*, the U.S. Court of Appeals for the Sixth Circuit found the chilling effects resulting from an undercover police surveillance operation in high school classrooms insufficient for standing.⁹⁹ Although the plaintiffs alleged harms in addition to chilling effects—they alleged that the surveillance had degraded teacher-student relationships, caused reputational harm, and damaged future employment prospects—the

⁹³ See, e.g., *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999) (stating that chilling injuries are sufficient for standing if based on objectively reasonable fear of prosecution); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984) (stating that chilling effect is irrelevant to standing except as a rationale for the First Amendment doctrine of overbreadth).

⁹⁴ 738 F.2d at 1379 (Then-Judge Scalia acknowledged, however, that chilling effects were relevant to standing analysis in one respect: as a rationale for First Amendment overbreadth doctrine.).

⁹⁵ *Id.* at 1378.

⁹⁶ *Id.* at 1378-79.

⁹⁷ *Id.* at 1377.

⁹⁸ *Id.* at 1378-81.

⁹⁹ 706 F.2d 778, 781 (6th Cir. 1983).

court rejected these allegations finding them insufficient as an independent basis for standing.¹⁰⁰ Although potentially at odds with the U.S. Supreme Court's 1987 decision in *Meese v. Keene*, the view that chilling effects are irrelevant to whether there has been an injury in fact has continued support.¹⁰¹

In 1991, in *Bordell v. General Electric Co.*, the U.S. Court of Appeals for the Second Circuit adopted the second interpretation—that a chilling effect can constitute an injury in fact sufficient for standing if evidence shows that the chilling effect stems from objectively reasonable fears.¹⁰² Under this interpretation, plaintiffs must substantiate alleged chilling injuries with objective evidence.¹⁰³

Applying this interpretation, the *Bordell* court denied a federal laboratory employee standing to contest a security policy requiring formal approval before making public statements.¹⁰⁴ The plaintiff failed to provide evidence that the policy had actually deterred him from making public statements.¹⁰⁵ In fact, the plaintiff had made numerous public statements despite the policy.¹⁰⁶ Further, the court determined that the plaintiff had no reasonable expectation that his employer would ever punish him under the policy, which the employer had subsequently amended to permit certain public statements.¹⁰⁷ Because the plaintiff did not support his fears of future injury by evidence making them objectively reasonable, he alleged a purely subjective chill insufficient for standing under *Laird*.¹⁰⁸

In 1999, in *Latino Officers Ass'n v. Safir*, the U.S. Court of Appeals for the Second Circuit applied the same reasoning to grant standing to police officers who sued to contest a department policy restricting public statements by officers.¹⁰⁹ The plaintiffs provided evidence that they had turned down speaking requests because of the department's refusal to allow plaintiffs to speak and threatened enforcement of the

¹⁰⁰ *Id.* at 780–81.

¹⁰¹ See *Fraternal Order of Police v. Rubin*, 26 F. Supp. 2d 133, 141 (D.D.C. 1998) (noting that being deterred from exercising First Amendment rights “should be distinguished from the actual or threatened harm that supports standing”).

¹⁰² See 922 F.2d 1057, 1061 (2d Cir. 1991).

¹⁰³ *Id.* (“A plaintiff must proffer some objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity.”).

¹⁰⁴ *Id.* at 1058–59, 1061.

¹⁰⁵ *Id.* at 1061.

¹⁰⁶ *Id.*

¹⁰⁷ *Bordell*, 922 F.2d at 1060.

¹⁰⁸ *Id.* at 1061.

¹⁰⁹ 170 F.3d 167, 170–71 (2d Cir. 1999).

policy.¹¹⁰ The court held this evidence sufficient to objectively support plaintiffs' claims of chilling injuries.¹¹¹ Thus, plaintiffs had objectively reasonable chilling injuries sufficient for standing.¹¹²

Similarly, in 1999, in *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, the U.S. Court of Appeals for the First Circuit granted standing to realtors who established a credible threat that they would be sanctioned for using public records to solicit new members (an activity protected by the First Amendment).¹¹³ The court stated that plaintiffs must establish that alleged chills resulted from objectively reasonable fears.¹¹⁴ Determining which fears are objectively reasonable requires consideration of the totality of the circumstances.¹¹⁵

Following this reasoning, the court weighed the totality of the circumstances and concluded that they supported an objectively reasonable fear of prosecution.¹¹⁶ Specifically, the court found: (1) an intention to engage in protected expression and (2) that doing so would result in a credible threat of sanctions.¹¹⁷ The existence of an objectively reasonable fear of prosecution raised the plaintiff's allegations of chill to the level of an injury in fact.¹¹⁸ Accordingly, the court granted standing.¹¹⁹

Finally, in January 2003, in *Mangual v. Rotger-Sabat*, the U.S. Court of Appeals for the First Circuit supported the view that allegations of chill constitute injuries in fact if objectively reasonable.¹²⁰ *Mangual* involved a journalist threatened by the prospect of criminal libel prosecution as retribution for revealing police corruption.¹²¹ The court concluded that recent prosecutions of journalists under the challenged statute and polls showing that journalist association members strongly feared prosecution under the statute established a credible threat of prosecution.¹²² In the plaintiff's words, the threat of prosecution put him "in a catch-22 situation, damned if I do, damned if I don't. Clearly, the alternative to not living under the risk of prose-

¹¹⁰ *Id.* at 170.

¹¹¹ *Id.* at 170-71.

¹¹² *See id.*

¹¹³ 199 F.3d at 30-33.

¹¹⁴ *Id.* at 31.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 31-33.

¹¹⁷ *Id.* at 31.

¹¹⁸ *See R.I. Ass'n of Realtors*, 199 F.3d at 31-33.

¹¹⁹ *Id.* at 33.

¹²⁰ *See* 317 F.3d 45, 57 (1st Cir. 2003).

¹²¹ *Id.* at 51.

¹²² *Id.* at 58-59.

cution for libel . . . is not to publish. But is this not a 'chilling effect?'¹²³ The First Circuit Court of Appeals agreed that the credible threat of prosecution and resultant chilling effect constituted an injury in fact sufficient for standing.¹²⁴

V. CHILLING INJURIES BASED ON FEAR OF INJURY TO ONE'S SPOUSE

This Part considers the narrower issue of whether chill resulting from fear that one's protected speech will trigger state sanctions against one's spouse constitutes an injury in fact sufficient for standing.¹²⁵ Four federal appellate courts have considered the issue.¹²⁶ The Fourth, Ninth, and Tenth Circuit Courts of Appeals have concluded that chilling injuries based on fear of injury to one's spouse were too indirect to constitute injuries in fact.¹²⁷ Most recently, however, the Eighth Circuit Court of Appeals reached the opposite conclusion.¹²⁸

In 1979, in *English v. Powell*, the first case to address chilling injuries based on fear for one's spouse, the U.S. Court of Appeals for the Fourth Circuit denied standing to the wife of a public employee.¹²⁹ The wife alleged that her protected speech resulted in her husband's demotion.¹³⁰ The court concluded, however, that any harm she experienced was too indirect to constitute an injury in fact.¹³¹

In *English*, E.A. Shands was promoted to a management position with the county Alcoholic Beverage Control Board.¹³² The promotion resulted from a reorganization plan recommended by the County Composite Board, on which his wife, Vera Shands, sat as vice-chair.¹³³ After the reorganization, W. D. Powell was appointed as Mr. Shands's supervisor over Mr. Shands's vehement objections.¹³⁴ Despite Powell's command to Mr. Shands not to voice complaints to the board, Mrs.

¹²³ *Id.* at 55.

¹²⁴ *Id.* at 59.

¹²⁵ See *infra* notes 126–173 and accompanying text.

¹²⁶ The Fourth, Eighth, Ninth, and Tenth Circuit Courts of Appeals have considered the issue. *Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 972 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 998 (9th Cir. 1999); *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1278–79 (10th Cir. 1998); *English v. Powell*, 592 F.2d 727, 730 (4th Cir. 1979).

¹²⁷ *Biggs*, 189 F.3d at 998; *Horstkoetter*, 159 F.3d at 1278–79; *English*, 592 F.2d at 730.

¹²⁸ *Int'l Ass'n of Firefighters*, 283 F.3d at 972.

¹²⁹ 592 F.2d at 730.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 729.

¹³³ *Id.*

¹³⁴ *English*, 592 F.2d at 729.

Shands angrily complained about Powell to several board members.¹³⁵ Powell told Mr. Shands that further complaints by Mr. Shands or his wife would result in Mr. Shands's immediate dismissal, and, three days later, he demoted Mr. Shands.¹³⁶

Concluding that his speech was not constitutionally protected, the court dismissed Mr. Shands's suit to contest his demotion.¹³⁷ Mrs. Shands had also sought standing to sue on her own behalf, alleging an infringement of her First Amendment rights.¹³⁸ Mrs. Shands argued that Powell's threat that he would fire Mr. Shands if Mrs. Shands made complaints caused a subjective chill of her First Amendment rights.¹³⁹ She argued further that this subjective chill, when combined with the "present objective harm" caused by Mr. Shands's demotion and consequent decrease in the family income (which forced Mrs. Shands to take a job) constituted an injury in fact sufficient for standing.¹⁴⁰ The court disagreed, finding Mrs. Shands's injuries too indirect and speculative to constitute the injury in fact required for standing.¹⁴¹ The court rejected Mrs. Shands's attempt to gain standing by combining her subjective chill with present objective harm to her husband's career.¹⁴²

The Court of Appeals for the Tenth Circuit reached a similar conclusion in 1998, in *Horstkoetter v. Department of Public Safety*.¹⁴³ *Horstkoetter* involved a suit by highway patrol troopers and their wives contesting an order to remove political campaign signs from their yards.¹⁴⁴ Finding any threatened injury to the troopers' wives too indirect to support standing for the wives' independent claims, the court granted summary judgment, dismissing the wives' claims.¹⁴⁵

In *Horstkoetter*, the wives of two troopers erected political signs supporting a candidate for county sheriff in their yards.¹⁴⁶ Pursuant to a policy forbidding troopers from publicly displaying political mate-

¹³⁵ *Id.* at 730.

¹³⁶ *Id.* The morning after his wife complained to a board member, Mr. Shands, fearing that he would be fired, requested reassignment as a liquor store manager or, alternatively, a liquor store clerk.

¹³⁷ *Id.* at 731.

¹³⁸ *Id.* at 730.

¹³⁹ *English*, 592 F.2d at 730.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 159 F.3d at 1278-80.

¹⁴⁴ *Id.* at 1269.

¹⁴⁵ *Id.* at 1279-80.

¹⁴⁶ *Id.* at 1269.

rial, supervisors threatened the troopers with discipline or termination unless the signs were removed, regardless of who erected them.¹⁴⁷ Consequently, the wives removed the signs.¹⁴⁸ After an exchange of letters with the highway patrol regarding the policy, the troopers and their wives sued.¹⁴⁹

The Tenth Circuit affirmed the district court's conclusion that the highway patrol policy constitutionally restricted the troopers' speech and denied the troopers' spouses standing to pursue claims independent of the troopers' claims.¹⁵⁰ The court held that the wives were harmed only indirectly because they could not have been directly subject to disciplinary action.¹⁵¹ The wives' chilling injuries, coupled with direct harm to their husbands and indirect harm to themselves, did not constitute injuries in fact required for standing.¹⁵²

Next, in 1999, in *Biggs v. Best, Best & Kreiger*, the Ninth Circuit Court of Appeals denied standing to the husband and daughter of a city attorney fired as a result of the husband's and daughter's political activities.¹⁵³ Julie Biggs was an employee of a private law firm that acted as city attorney for Redlands, California.¹⁵⁴ Her husband and daughter were active in local politics and had campaigned for the recall of the mayor of Redlands.¹⁵⁵ As a result of the husband's and daughter's political activities, a city councilman demanded that the Biggs family be "silenced in Redlands community politics" or the city would fire the law firm.¹⁵⁶ As a result, the firm told Julie Biggs to limit her family's political involvement and informed her that she was now out of consideration for partnership at the firm.¹⁵⁷ The family then sued the city council.¹⁵⁸ The firm fired Julie Biggs.¹⁵⁹

The Ninth Circuit acknowledged that fear of negative repercussions to Biggs's career restrained the political activities of Biggs's husband and daughter.¹⁶⁰ Employment-related sanctions threatened

¹⁴⁷ *Id.*

¹⁴⁸ *Horsthoetter*, 159 F.3d at 1269.

¹⁴⁹ *Id.* at 1269-70.

¹⁵⁰ *Id.* at 1279-80.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 189 F.3d at 998-99.

¹⁵⁴ *Id.* at 992.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Biggs*, 189 F.3d at 992.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 997-98.

against Julie Biggs forced her husband and daughter to make a difficult choice.¹⁶¹ They had to choose between jeopardizing Biggs's position, which financially benefited the entire family, and engaging in protected political speech.¹⁶²

Nevertheless, the Ninth Circuit court denied the husband and daughter standing to assert First Amendment claims of their own.¹⁶³ The court found that because the husband and daughter were not directly threatened with sanctions, their injuries were indirect.¹⁶⁴ These indirect injuries were sufficient only to allow claims derivative of Julie Biggs's claim.¹⁶⁵ Because Julie Biggs's claims failed, so did those of her family.¹⁶⁶

In contrast, in 2002, in *International Ass'n of Firefighters, Local 2665 v. City of Ferguson*, the Court of Appeals for the Eighth Circuit granted standing to assert chilling injuries to the spouse of a public employee.¹⁶⁷ *International Ass'n of Firefighters* involved First Amendment challenges brought by a public employee and his wife against a provision in the town charter that prohibited the public employee from engaging, even indirectly, in local political campaigns.¹⁶⁸ The Eighth Circuit upheld the constitutionality of the provision as applied to the employee.¹⁶⁹ In contrast to the Fourth, Ninth, and Tenth Circuits, however, the court concluded that the employee's wife had standing to independently challenge the provision.¹⁷⁰ The court noted that if the wife's political activities resulted in the state firing or disciplining her husband, the resultant decrease in income would have a negative economic effect on her.¹⁷¹ Further, the wife was injured by forgoing or hesitating to engage in protected speech to avoid these financial consequences.¹⁷² The court then determined that this was a "real and

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *Biggs*, 189 F.3d at 998–99.

¹⁶⁴ *See id.* at 998.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 999.

¹⁶⁷ 283 F.3d at 975.

¹⁶⁸ *Id.* at 971.

¹⁶⁹ *Id.* at 972.

¹⁷⁰ *Id.* at 975.

¹⁷¹ *Id.* at 973.

¹⁷² *Int'l Ass'n of Firefighters*, 283 F.3d at 973. In the court's words, the wife "is herself injured by having to give up, or hesitating to exercise, her First Amendment rights, and by the consequent loss of her husband's ability to provide the mutual support that the law imposes as a duty on both spouses." *Id.*

tangible" injury and thus constituted an injury in fact sufficient for standing.¹⁷³

VI. ANALYSIS

When the spouse of a public employee forgoes or hesitates to engage in protected speech out of fear that doing so will result in direct, employment-related sanctions against the public employee, the spouse has suffered an injury to rights protected by the First Amendment.¹⁷⁴ The U.S. Courts of Appeals for the Fourth, Eighth, Ninth, and Tenth Circuits have disagreed, however, as to whether and under what circumstances this injury is sufficient for standing.¹⁷⁵ This disagreement is due to inconsistent case law on chilling injuries as a basis for standing.¹⁷⁶

Conflicting interpretations of the few U.S. Supreme Court decisions to address whether chilling injuries constitute injuries in fact sufficient for standing have resulted in two competing tests.¹⁷⁷ The first, referred to herein as the independent injury test, requires evidence of injury independently sufficient for standing; the existence of chill is irrelevant.¹⁷⁸ The second, referred to herein as the objectively reasonable test, recognizes chilling injuries as injuries in fact only if based on objectively reasonable fears.¹⁷⁹ Parts VI.A and VI.B analyze each of these two tests in turn and argue that neither is entirely satisfactory.¹⁸⁰ Part VI.C proposes an alternative, the choice test, which focuses on the choice the challenged government action forced the plaintiff to make.¹⁸¹ The choice test provides appropriate and necessary safeguards of First Amendment rights while denying standing on the basis of the mere subjective chills held insufficient for standing by the U.S. Supreme Court in *Laird v. Tatum*.¹⁸²

¹⁷³ *Id.* at 975.

¹⁷⁴ *Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 973 (8th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

¹⁷⁵ *See id.*; *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 998 (9th Cir. 1999); *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1278-79 (10th Cir. 1998); *English v. Powell*, 592 F.2d 727, 730 (4th Cir. 1979).

¹⁷⁶ *See supra* notes 65-173 and accompanying text.

¹⁷⁷ *See supra* notes 93-124 and accompanying text.

¹⁷⁸ This view is best described in *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984); *see also supra* notes 94-98 and accompanying text.

¹⁷⁹ *See, e.g., R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 30-33 (1st Cir. 1999); *see also supra* notes 102-124 and accompanying text.

¹⁸⁰ *See infra* notes 183-220 and accompanying text.

¹⁸¹ *See infra* notes 221-250 and accompanying text.

¹⁸² *See infra* notes 221-250 and accompanying text.

A. *The Independent Injury Test Inadequately Protects First Amendment Rights and Is Inconsistent with the Overbreadth Doctrine*

The view favored by then-Judge Scalia in *United Presbyterian Church in the U.S.A. v. Reagan*, that chill is irrelevant to standing analysis except as part of the First Amendment doctrine of overbreadth, is flawed.¹⁸³ The requirement of an injury in fact independent of chill is inconsistent with the rationale for the overbreadth doctrine and fails to adequately protect the precious and vulnerable right to free speech guaranteed by the First Amendment.¹⁸⁴ The free flow of ideas, and political speech in particular, are essential elements of the Framers' constitutional vision.¹⁸⁵ Recognizing that First Amendment rights are precious but vulnerable, courts have established unique safeguards for them.¹⁸⁶ Ignoring the presence of chilling injuries for standing purposes is inconsistent with the existence of these safeguards because deterrents as well as direct abridgements can equally impair the free flow of ideas.¹⁸⁷

One of these safeguards is the First Amendment doctrine of overbreadth.¹⁸⁸ This doctrine enables litigants whose speech is permissibly abridged to contest the constitutionality of government action on the basis that it may impermissibly chill the rights of hypothetical third parties.¹⁸⁹ By allowing an exception to normal requirements for standing, overbreadth doctrine recognizes that chilling injuries present a serious danger to First Amendment freedoms.¹⁹⁰ It would be inconsistent, however, to grant strangers standing to raise the chilling injuries of parties not before the court under overbreadth doctrine, while simultaneously denying standing to plaintiffs alleging their own chilling injuries.¹⁹¹ But that is exactly what the independent injury test does.¹⁹² The independent injury test denies standing to parties chilled by government action unless they can show some independent injury in fact apart from the chilling injury.¹⁹³ In contrast, the overbreadth doctrine grants strangers standing to raise the same

¹⁸³ See 738 F.2d at 1378-79.

¹⁸⁴ See *id.*

¹⁸⁵ See Schauer, *supra* note 17, at 693-94.

¹⁸⁶ See Fallon, *supra* note 37, at 867-68.

¹⁸⁷ See Schauer, *supra* note 17, at 693-94.

¹⁸⁸ See *supra* notes 61-64 and accompanying text.

¹⁸⁹ See *supra* notes 61-64 and accompanying text.

¹⁹⁰ See Fallon, *supra* note 37, at 867-68.

¹⁹¹ See *id.*

¹⁹² See *United Presbyterian Church*, 738 F.2d at 1378-79.

¹⁹³ *Id.*

chilling injuries found insufficient for standing when raised by chilled parties themselves.¹⁹⁴

Because the overbreadth doctrine presupposes that the chill of First Amendment rights is itself a serious injury, courts should recognize that chilling injuries alone can constitute injuries in fact.¹⁹⁵ Therefore, victims of chilling injuries should have standing to challenge government action without depending on the possibility that other parties may challenge them on the basis of overbreadth.¹⁹⁶ It is unlikely that the Framers intended to leave protection of such a precious and vulnerable right as free expression to the fortuity that a stranger would take up one's cause.¹⁹⁷ They most likely intended chilled parties to be able to defend their own rights.¹⁹⁸

*B. The Objectively Reasonable Test Yields Inconsistent Results
Because It Focuses on the Harm Threatened Rather
Than the Resultant Chilling Effect*

The theory that chilling effects can be injuries in fact—and thus sufficient for standing—if caused by objectively reasonable fears recognizes that deterring protected speech can inflict injury.¹⁹⁹ By focusing on evidence of objective harm rather than on the chill itself, however, this test distracts courts from the effect of the deterrent on the chilled party.²⁰⁰ As a consequence, the objectively reasonable test has yielded inconsistent results.²⁰¹

For example, the plaintiffs in *Horstkoetter v. Department of Public Safety*, *Biggs v. Best*, *Best & Kreiger*, and *International Ass'n of Firefighters, Local 2665 v. City of Ferguson* all provided evidence of objectively reasonable fears of employment-related sanctions against their spouses.²⁰² Yet, the courts in *Horstkoetter* and *Biggs* denied standing.²⁰³

¹⁹⁴ See *id.*

¹⁹⁵ See Siegel, *supra* note 38, at 918–20.

¹⁹⁶ See *id.* at 920.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *R.I. Ass'n of Realtors*, 199 F.3d at 30–33.

²⁰⁰ See *Biggs*, 189 F.3d at 998 (focusing on directness of harm instead of looking to see if fear of harm was objectively reasonable); *Horstkoetter*, 159 F.3d at 1279 (same); *English*, 592 F.2d at 730 (same).

²⁰¹ See *Int'l Ass'n of Firefighters*, 283 F.3d at 972–73; *Biggs*, 189 F.3d at 998; *Horstkoetter*, 159 F.3d at 1279; *English*, 592 F.2d at 730.

²⁰² See *Int'l Ass'n of Firefighters*, 283 F.3d at 972–73; *Biggs*, 189 F.3d at 992; *Horstkoetter*, 159 F.3d at 1269–70.

²⁰³ *Biggs*, 189 F.3d at 992; *Horstkoetter*, 159 F.3d at 1271–72.

In *Horstkoetter*, the troopers' wives established that, pursuant to high-way patrol policy, erecting political signs could trigger employment-related sanctions against their husbands.²⁰⁴ Moreover, the supervisors' threats to discipline the husbands or terminate their employment indicated that the husbands' supervisors intended to enforce the policy.²⁰⁵ This evidence of threatened sanctions established that the wives' fears were objectively reasonable.²⁰⁶ Therefore, the resulting chilling injuries should have been sufficient for standing.²⁰⁷ The court reached the wrong conclusion because it focused on whether the sanctions threatened the wives directly or indirectly rather than on the effect of the deterrent and the extent of the resultant chill on the wives' desired expression.²⁰⁸

Similarly, in *Biggs*, the husband and daughter established that a city councilman intended to silence them by threatening to terminate the city's business with Julie Biggs's employer.²⁰⁹ They further established that these threats resulted in damage to Julie Biggs's career and to her eventual termination.²¹⁰ The husband and daughter thus showed that objectively reasonable fears chilled their expression and the court should have granted standing.²¹¹ Like the court in *Horstkoetter*, however, the *Biggs* court focused on whether the sanctions affected the husband and daughter directly or indirectly rather than on the deterrent effect on their protected expression.²¹²

What the courts in *Biggs* and *Horstkoetter* failed to recognize is that chilling injuries are indirect by definition.²¹³ A chilling injury results from government action or regulation that deters speech without directly regulating it.²¹⁴ A direct chilling injury is a contradiction in terms.²¹⁵ Requiring direct chilling injury for standing purposes thus

²⁰⁴ 159 F.3d at 1269-70.

²⁰⁵ *Id.* at 1269.

²⁰⁶ *See id.* at 1269-70.

²⁰⁷ *See R.I. Ass'n of Realtors*, 199 F.3d at 31.

²⁰⁸ *See Horstkoetter*, 159 F.3d at 1279.

²⁰⁹ 189 F.3d at 992.

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² *Id.* at 998.

²¹³ Schauer, *supra* note 17, at 693 (stating that "a chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity").

²¹⁴ *Id.*

²¹⁵ *See id.*

closes the courts to victims of chilling injuries and eviscerates the concept of First Amendment chill.²¹⁶

In addition, the tendency of courts to focus on the directness or indirectness of the threatened harm distracts courts from considering the strength of the deterrent and the resultant chilling effect.²¹⁷ Indirect threatened harms can exert a strong deterrent effect resulting in injury to one's First Amendment rights.²¹⁸ To appropriately protect these rights, the central inquiry should not be the directness or indirectness of the deterrent, but its effects.²¹⁹ Under the objectively reasonable test, the degree of indirectness of the threatened harm is relevant to whether the fear causing the chill is objectively reasonable, but the inquiry should focus on whether, and how strongly, the harm threatened deters speech or coerces silence.²²⁰

C. *The Choice Test Most Appropriately Protects First Amendment Rights*

To determine whether an alleged chilling injury is an injury in fact required for standing, courts should consider the choice forced by the challenged government action: the choice of whether to forego the right to protected speech or to suffer consequences from exercising the right.²²¹ This choice lies at the heart of every chilling injury and an analysis of it provides a workable framework for deciding what chilling injuries are injuries in fact sufficient for standing.²²²

Because a chilling injury involves a choice between two alternatives—to forego speech or suffer consequences—evaluating the choice requires considering both.²²³ Analyzing the choice thus involves consideration of objective factors relevant to each alternative: (a) factors relating to the desired expression and (b) factors relating to the deterrent.²²⁴ Factors relating to the desired expression include the nature and social value of the expression and evidence of the plaintiff's desire

²¹⁶ See *id.*

²¹⁷ See, e.g., *Biggs*, 189 F.3d at 998.

²¹⁸ See, e.g., *Int'l Ass'n of Firefighters*, 283 F.3d at 972–73 (wife deterred from engaging in local politics out of fear that doing so would cause employment-related sanctions against her publicly employed spouse).

²¹⁹ See Schauer, *supra* note 17, at 693–94.

²²⁰ See *R.I. Ass'n of Realtors*, 199 F.3d at 31 (noting that a court should look at the totality of the circumstances when determining whether a chilling effect results from an objectively reasonable fear).

²²¹ See *Mangual v. Rotger-Sabat*, 317 F.3d 45, 55 (1st Cir. 2003).

²²² See *id.*

²²³ See *id.*

²²⁴ See *id.*

to engage in it.²²⁵ Factors relating to the deterrent include the likelihood, severity, and directness of the threatened consequences.²²⁶

Evaluation of the choice at the heart of the alleged chill would appropriately safeguard First Amendment rights by recognizing that deterrents other than direct government regulation or action may cause abridgement.²²⁷ Focusing on the choice imposed would also prevent courts from becoming distracted by questions of whether the threatened consequences are direct or indirect.²²⁸ The directness of the consequences is relevant but only inasmuch as it impacts the difficulty of the choice imposed by the deterrent.²²⁹ In addition, because the existence of the deterrent must be objectively shown, the choice test will, consistent with *Laird*, deny standing on the basis of subjective, unsupported allegations of chilling effects.²³⁰

Although no court has explicitly used the choice test to determine whether a plaintiff alleging chilling injuries has standing, courts have recognized that chilling injuries involve a choice between the consequences of exercising protected expression and self-censorship.²³¹ For example, the majority in the U.S. Supreme Court decision in *Meese v. Keene* noted that the contested provision forced Keene to make "the Hobson's choice" between forgoing protected, political speech, on the one hand, and suffering injury to his reputation and diminished chances of reelection, on the other.²³² Similarly, in *Mangual v. Rotger-Sabat*, the U.S. Court of Appeals for the First Circuit recognized that plaintiffs should not be forced to make impossible choices.²³³

Applied to cases involving chilling effects alleged by spouses of public employees, the choice test reveals that the Eighth Circuit Court of Appeals appropriately granted standing to Alma Mendez-

²²⁵ See *R.I. Ass'n of Realtors*, 199 F.3d at 30-31; Schauer, *supra* note 17, at 691-92 (noting that a chilling effect "is most invidious where the underlying constitutionally protected activity is positively advantageous").

²²⁶ See *R.I. Ass'n of Realtors*, 199 F.3d at 30-31.

²²⁷ See Siegel, *supra* note 38, at 908.

²²⁸ See *Biggs*, 189 F.3d at 998; *Horsikotter*, 159 F.3d at 1279; *English*, 592 F.2d at 730.

²²⁹ See *Meese v. Keene*, 481 U.S. 465, 473-74 (1987); *Mangual*, 317 F.3d at 58; *R.I. Ass'n of Realtors*, 199 F.3d at 31.

²³⁰ See 408 U.S. 1, 13-14 (1972).

²³¹ See, e.g., *Meese*, 481 U.S. at 473-74; *Mangual*, 317 F.3d at 58; *R.I. Ass'n of Realtors*, 199 F.3d at 31.

²³² 481 U.S. at 474.

²³³ 317 F.3d at 57 ("Plaintiffs need not place themselves 'between the Scylla of intentionally flouting state law and the Charybdis of forgoing ... constitutionally protected activity.'") (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)).

Thompson in *International Ass'n of Firefighters*.²³⁴ The Fourth, Ninth, and Tenth Circuit Courts of Appeals, in contrast, inappropriately denied standing in similar circumstances.²³⁵

In *International Ass'n of Firefighters*, Ms. Mendez-Thompson had to choose whether to (a) forego her desire to engage in local politics or (b) jeopardize her husband's career, and the income it provided to their family.²³⁶ Framed this way, it matters little that the sanction was threatened against Mr. Thompson.²³⁷ The threat of sanctions against her husband as a result of her desired expression forced an intolerable decision on Ms. Mendez-Thompson.²³⁸ Like the plaintiff in *Mangual*, Ms. Mendez-Thompson was in a catch-22.²³⁹ Being forced to make this intolerable decision was an injury in fact and thus sufficient as a basis for standing.²⁴⁰

In *Biggs*, Mr. Biggs and his daughter were forced to choose between (a) curtailing their protected political activities and (b) causing Mrs. Biggs's termination and loss of her substantial salary.²⁴¹ As in *International Ass'n of Firefighters*, this was an impossible choice.²⁴² By being forced to make this choice, Mr. Biggs and his daughter were injured-in-fact and thus should have been granted standing.²⁴³

Horstkoetter involved a similarly difficult choice.²⁴⁴ Highway patrol policy forced the troopers' wives to choose between (a) abstaining from political expression by removing campaign signs from their property and (b) the risk that their husbands would be disciplined, demoted, or terminated as a result of leaving the signs standing.²⁴⁵ Again, being forced to make an impossible choice was itself an injury in fact and accordingly the wives should have been granted standing.²⁴⁶

English v. Powell is perhaps a closer case.²⁴⁷ There, Mrs. Shands had to choose whether to (a) voice her displeasure about her husband's supervisor or (b) withhold her comments to avoid risking

²³⁴ See 283 F.3d at 975.

²³⁵ See *Biggs*, 189 F.3d at 998; *Horstkoetter*, 159 F.3d at 1279-80; *English*, 592 F.2d at 730.

²³⁶ See 283 F.3d at 974-75.

²³⁷ See *id.*

²³⁸ See *id.* at 974.

²³⁹ See *Mangual*, 317 F.3d at 55; *Int'l Ass'n of Firefighters*, 283 F.3d at 974-75.

²⁴⁰ See *Int'l Ass'n of Firefighters*, 283 F.3d at 976.

²⁴¹ See 189 F.3d at 998.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See 159 F.3d at 1279.

²⁴⁵ See *id.*

²⁴⁶ See *id.*

²⁴⁷ See 592 F.2d at 730.

harm to her husband's position.²⁴⁸ The speech Mrs. Shands engaged in was not political and thus was less valuable than the speech chilled in *International Ass'n of Firefighters, Biggs*, and *Horstkoetter*.²⁴⁹ As a result, her choice seems much less difficult and therefore would likely be insufficient for standing.²⁵⁰

CONCLUSION

The few U.S. Supreme Court decisions to address whether chilling injuries can be injuries in fact required for standing have left important questions unanswered. As a result, lower federal courts have developed two incompatible tests to determine when chilling injuries are sufficient for standing. Neither appropriately protects precious and fragile First Amendment rights. The first, the independent injury test, requires a plaintiff to show injury in fact apart from the chill; chilling injuries are irrelevant except as part of the overbreadth doctrine. This test is inconsistent because it grants standing to raise the claims of hypothetical third-party victims of chill under the overbreadth doctrine while denying standing to actual victims of chill. The second test, the objectively reasonable test, better protects First Amendment rights because it recognizes that chilling injuries can constitute injuries in fact. This test's focus on the threatened harm, however, distracts courts' attention to auxiliary issues such as the directness or indirectness of the harm threatened. As a result, courts have improperly denied standing to plaintiffs able to demonstrate that their speech was chilled by objectively reasonable fears.

The alternative proposed in this Note, the choice test, would protect valuable First Amendment rights while yielding more consistent results than the objectively reasonable test. The choice test recognizes that at the root of every chilling injury lies a choice between self-censorship and the threatened consequences of exercising First Amendment rights. Focusing on the difficulty of that choice based on objective factors will best enable a court to discern what chills are injuries in fact sufficient for standing. When plaintiffs can show that the challenged government action forced an intolerable decision, they should be granted standing. The choice test would grant standing when government action forces plaintiffs to decide between forgoing protected speech and causing employment-related sanctions against

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See *id.*

their publicly employed spouses. Applying the choice test would thus resolve the split between the Fourth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

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