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CONSTITUTIONAL LAW: QUALIFIED IMMUNITY AND "FACTUAL CORRESPONDENCE" IN NEW MEXICO: THE TENSION BETWEEN FORMALISM AND LEGAL REALISM

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I. INTRODUCTION

In a provocative opinion, the New Mexico Supreme Court recently applied the doctrine of qualified immunity in *Garcia-Montoya vs. State of New Mexico State Treasurer's Office*.[1] The court-derived doctrine permits a government official, who has violated a person's constitutional rights, to escape liability if his conduct was objectively reasonable in light of existing law.[2] The doctrine preserves the common law practice of protecting officials from "undue interference with their duties and...potentially disabling threats of liability."[3]

The policy underlying the doctrine of qualified immunity for elected officials starkly conflicts with the policy underlying Section 1983[4] remedies for constitutional violations.[5] Section 1983 is remedial legislation intended to compensate those citizens whose civil rights have been violated by government officials.[6] Justice Brennan articulated the objectives of the Section 1983 enactment in his opinion, *Owen v. City of Independence*.[7] Citing prior Supreme Court decisions, Justice Brennan wrote, "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[8] Such an aim contradicts the goal of shielding elected officials from unqualified liability; consequently, the courts conduct a balancing test to determine whether the need for protecting government officials' ability to perform their duties outweighs the importance of protecting people's constitutional rights.[9]

The balancing test is embodied in the doctrine of qualified immunity.[10] If an official's conduct is objectively reasonable in light of existing law, he is immune

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1. 2001-NMSC-003, __ N.M.__, 16 P.3d 1084.
2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").
3. *Id.* at 806.
4. 42 U.S.C. § 1983 (1994 & Supp. IV 1998):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. Owen v. City of Independence, 445 U.S. 622, 649-51 (1980).
6. *Id.*
7. 445 U.S. 622 (1980).
8. *Id.* at 650 (quoting Monroe v. Pape, 365 U.S. 167, 184 (1961)).
9. Anderson v. Creighton, 483 U.S. 635, 642 (1987).
10. *Id.*

from the liability of Section 1983.[11] If the official's conduct is not objectively reasonable in light of existing law, however, he is subject to Section 1983 liability.[12] The dispositive inquiry, then, considers what is "existing law." The Supreme Court instructs that existing law is comprised of the particular factual scenarios that have been resolved in precedent cases.[13] Thus, defining objectively reasonable conduct requires strict analogy between the factual circumstances in the case at bar with those in precedent cases.[14] Outcomes, however, will vary depending upon whether the court applies a formalist or realist approach.[15]

Garcia-Montoya stands for the proposition that the "factual correspondence" between a plaintiff's circumstances and precedent circumstances must be so similar that the force of Section 1983 remedies is substantially weakened. In that opinion, the New Mexico Supreme Court found that the State Treasurer, an elected official, clearly violated the plaintiff's constitutional rights to freedom of speech and political association when he transferred her from her position as director of administrative services to a "newly created" post.[16] Nonetheless, the court held that at the time of the violation, case law did not support a finding that the elected official should have known the transfer was unconstitutional.[17] Therefore, the State Treasurer was entitled to qualified immunity. Consequently, the plaintiff was deprived of her Section 1983 remedies and the State Treasurer escaped legal responsibility for his impermissible conduct.[18]

Although the doctrine of qualified immunity is intended to protect government officials from frivolous claims and interference with duties, its misapplication threatens one of our most basic democratic values—that constitutional rights should be protected, and if they are violated, victims should be compensated. By immunizing such a broad swath of behavior, *Garcia-Montoya* shifts the balance between these policies in favor of protecting public officials. More significantly, it discourages officials from vigilantly researching and understanding whether their actions are unconstitutional.

This Casenote first details the evolution of qualified immunity in the state of New Mexico and explains the controversy surrounding its application. Second, it examines the court's reasoning in *Garcia-Montoya* and illustrates how the doctrine was misapplied. Finally, this Casenote explains how the court's misapplication exposes its formalist and overly-selective approach to qualified immunity analyses.

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11. *Harlow*, 457 U.S. at 818-19.

12. *Id.* (stating that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct").

13. *Id.*

14. *Anderson*, 483 U.S. at 639.

15. *See generally* Elizabeth Fajans & Mary R. Falk, SCHOLARLY WRITING FOR LAW STUDENTS 22-24 (1995) (discussing the idea that

> [f]ormalists see law as a set of fixed general principles from which conclusions as to specific cases can be deduced. For a formalist judge, adjudication is largely a matter of deriving the appropriate rule from precedent and applying it without regard to morality or public policy....Legal realists see law and adjudication in social, political, historical, and economic contexts. Legal Realist judges tend to be willing to consider empirical evidence as well as precedent and often reach conclusions by balancing the equities.)

16. *Garcia-Montoya*, 2001-NMSC-003 ¶ 4, __ N.M. at __, 16 P.3d at 1087.

17. *Id.* ¶ 26, __ N.M. at __, 16 P.3d at 1093.

18. *Id.*

II. BACKGROUND

Statute 42 U.S.C. § 1983 establishes a cause of action for civil damages when state officials violate federal constitutional or statutory rights.[19] Victims are permitted to sue officials directly for alleged transgressions.[20] The Supreme Court developed the doctrine of qualified immunity as a compromise between common law absolute immunity for government officials and absolute liability for constitutional violations imposed by Section 1983.[21] The doctrine holds that officials are liable only in circumstances where they have violated "clearly established law."[22] Because governmental immunity is firmly rooted in the common law tradition, a plaintiff bears the burden of showing the official violated a right he should have known about and, thus, is not entitled to immunity.[23]

In meeting this burden, the plaintiff's most difficult hurdle is defining the violated "right." *Harlow* held that defining a right requires a plaintiff to persuade the court that the elected official's actions were objectively unreasonable in light of "clearly established law."[24] "Clearly established law" is necessarily bound up in the factual context of precedent. The established law may apply narrowly only to official conduct closely similar to the facts in precedent cases, or more broadly to generally analogous behavior. It is the courts' charge to determine the scope.[25]

The Supreme Court in *Anderson v. Creighton* attempted to clarify the "clearly established law" standard. The Court concluded that the "contours of the [victim's] right must be sufficiently clear that a reasonable official would understand...what he is doing violates the right."[26] Simply stated, if the official's conduct represents conduct that has previously been deemed unconstitutional, then there is "clearly established law." Thus, the official is not immune. The Court goes on, however, to hold that this standard does *not* require that precisely the same set of facts exist.[27] The official's conduct must merely approximate conduct that has previously been examined.[28]

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19. 42 U.S.C. § 1983 (1994 & Supp. IV 1998).
20. *Id.*
21. *See Anderson*, 483 U.S. at 642; *see also* Owen v. City of Independence, 445 U.S. 622 (1980).
22. *Harlow*, 457 U.S. at 818.
23. *See Anderson*, 483 U.S. at 642.
24. *Harlow*, 457 U.S. at 818-19; *see also Anderson*, 483 U.S. at 645 (holding that objective reasonableness is the critical consideration and the official's subjective belief about his action is irrelevant).
25. *Anderson*, 483 U.S. at 639.
26. *See id.* at 640.
27. *See id.*
28. *Id.*

New Mexico adopted this analysis of qualified immunity in 1994.[29] Relying on *Harlow* and *Anderson*, the court outlined its own interpretation of the test.[30] In order for a public official to be protected by qualified immunity, two issues must be resolved: (1) whether the alleged conduct violated a constitutional right that was clearly established at that time and (2) whether it was objectively reasonable for the official to believe his conduct was lawful.[31] The objectively reasonable standard requires the court to determine the degree of "factual correspondence" between the conduct considered in the precedent cases and the conduct in the case at bar.[32] If there is no reasonable nexus between the case at hand and the precedent facts, the official is immune. If the "factual correspondence" does support a logical analogy between the cases, however, qualified immunity does *not* apply.[33] Most significantly, the New Mexico Supreme Court adopted the Supreme Court's holding in *Anderson* that the facts do not have to be exactly the same.[34] The official's conduct must merely approximate conduct that has previously been held unconstitutional.[35]

In 2000, New Mexico courts again had the opportunity to consider qualified immunity in *Kennedy v. Dexter Consolidated Schools*.[36] The court of appeals found that precedent facts were not significantly analogous to the facts in question. Thus, there was no factual correspondence and the official was immune. Although courts have previously found it unconstitutional to strip-search students without suspicion of individual wrongdoing,[37] the appellate court did not find a sufficient analogy where school officials required a student to strip down to his undergarments during a general theft investigation.[38] The New Mexico Supreme Court reversed this decision concluding that "[a] strip search that ended with the otherwise naked student still clinging to his underpants" did violate the student's clearly established rights[39] and "[w]hile forcing the exposure of a child's genitals is more invasive than forcing the exposure of a child's chest, midriff, thighs, and underwear, we cannot

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29. Oldfield v. Benavidez, 116 N.M. 785, 867 P.2d 1167 (1994) (holding that because qualified immunity is a federal doctrine, state courts must apply federal interpretations); *see* Howlett v. Rose, 496 U.S. 356 (1990) (holding that state courts must apply immunities as developed by federal courts in Section 1983 cases); *see also* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 3, 622-23 n.7 (1993) (discussing that "[n]ormal principles of stare decisis would require that the dispositive decisions of the forum circuit would bind the district court notwithstanding the conflicting decisions of other federal circuit and district courts"). *See, e.g.*, Russell v. Coughlin, 910 F.2d 75, 78 (2d Cir. 1990)

> ("For a right to be clearly established, it is sufficient if decisions of the Supreme Court or of the appropriate circuit have defined the contours of the right with reasonable specificity....[w]here the forum circuit's decisions are relevant to, but not dispositive of, the qualified immunity question, the district court must decide what weight, if any, it should accord to the decisions of the other circuits.").

30. *Oldfield*, 116 N.M. at 790, 867 P.2d at 1172.
31. *See id.*
32. Garcia By Garcia v. Miera, 817 F.2d 650, 657 (10th Cir. 1987) (establishing the "objectively reasonable" standard embraced by the *Oldfield* court); *see also Anderson*, 483 U.S. at 635.
33. *See, e.g.*, *Garcia By Garcia*, 817 F.2d at 650.
34. *Anderson*, 483 U.S. at 531.
35. *Id.*
36. 2000-NMSC-25 ¶ 1, 129 N.M. 436-39, 10 P.3d 115, 118.
37. *See id.* ¶ 11, 129 N.M. at 441, 10 P.3d at 120 (citing Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980)).
38. *See id.*
39. *See id.* (citing Kennedy v. Dexter Consolidated Sch., 124 N.M. 764, 778, 955 P.2d 693, 707 (1998)).

accept that this distinction marked the outer boundary of the breadth of the clearly established Fourth Amendment rights in 1992."[40]

Kennedy epitomizes the concept that inherent in the judicial discretion involved in a qualified immunity analysis is the high risk of the doctrine's misapplication. If courts limit the definition of a clearly established right to the precise facts in a previous case, and do not instead analogize facts before them to facts in precedent cases, the rules from the cases lose all precedential value. It is rare that a court will be faced with precisely the same fact pattern time and time again. This rarity and the concomitant necessity for engaging in analogies is an underlying presumption of stare decisis.[41]

III. STATEMENT OF THE CASE

In *Garcia-Montoya v. State of New Mexico State Treasurer's Office*,[42] an employee of the State Treasurer's Office, Garcia-Montoya, sued the State Treasurer, Montoya, alleging several violations of both statutory and constitutional rights.[43] In addition to her allegations of sex discrimination and tort claims,[44] Garcia-Montoya sued Montoya, his Deputy State Treasurer, Andermann, and the director of the State Personnel Office, Hooper, under 42 U.S.C. § 1983, for violations of her constitutional rights to freedom of speech and political association.[45]

Garcia-Montoya served as the deputy director of administrative services under former State Treasurer David King.[46] Garcia-Montoya worked on his re-election campaign, although King was ultimately defeated and replaced by Montoya in the 1994 election.[47] After Montoya took office, Garcia-Montoya served as director of administrative services.[48]

Garcia-Montoya supported her constitutional claims against Montoya by describing his politically motivated conduct directed toward her.[49] A week prior to taking office, Montoya requested that Garcia-Montoya call in sick in an effort to obstruct King's last minute appointments.[50] Garcia-Montoya refused. Montoya subsequently threatened Garcia-Montoya, stating that if she refused to support him,

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40. *Id.* ¶ 15, 129 N.M. at 442, 10 P.3d at 121.

41. *See generally* 28 NY JUR COURTS AND JUDGES § 207:

> The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision. The rule of stare decisis is simply an expression of the policy of the courts to stand by precedents and not disturb settled points. Under the doctrine, precedent is entitled to initial respect, however wrong it may seem to the present viewer, so long as it results from a reasoned and painstaking analysis, and a court should not depart from its prior holdings unless impelled by most cogent reasons.

42. 2001-NMSC-003, __ NM__, 16 P.3d 1084.

43. *Id.* ¶ 1, __ N.M. at __, 16 P.3d at 1087.

44. *Id.* ¶ 5, __ N.M. at __, 16 P.3d at 1088. Garcia-Montoya alleged violations of both the New Mexico Human Rights Act and Tort Claims Act. These causes of action are not the subject of this Note.

45. *Id.* ¶ 5, __ N.M. at __, 16 P.3d at 1087.

46. *Id.* ¶ 2, __ N.M. at __, 16 P.3d at 1087.

47. *See id.*

48. *See id.*

49. *See id.*

50. *Id.* ¶ 3, __ N.M. at __, 16 P.3d at 1087.

she would regret his "wrath."[51] Most significantly, Montoya told Garcia-Montoya that he intended to "get his people in."[52] Garcia-Montoya believed Montoya's intent was the premise for several employment decisions, which Garcia-Montoya believed were violations of personnel rules.[53] Shortly after Garcia-Montoya voiced her concerns to both Montoya and Andermann, she was transferred from her post to a "newly-created" position with "less responsibility in a previously nonexistent division."[54] Not only was Garcia-Montoya supervised by a subordinate as she packed her personal belongings, but Montoya and Andermann refused to respond when she questioned them about the transfer.[55]

In response to Garcia-Montoya's Section 1983 allegations, Montoya, Andermann, and Hooper filed Motions for Summary Judgment based on qualified immunity.[56] The trial court found all three defendants immune from liability and dismissed Garcia-Montoya's retaliation claims.[57] Garcia-Montoya appealed the Section 1983 dismissals for the claims against Montoya and Andermann.[58]

After meticulously analyzing plaintiff's Section 1983 claims, the New Mexico Supreme Court determined that there had, indeed, been unequivocal violations of her constitutional rights.[59] Nonetheless, the court affirmed the defendants' immunity from civil liability, holding that the contours of Garcia-Montoya's constitutional rights were not sufficiently established at the time of the violations.[60]

IV. RATIONALE

The court analyzed Garcia-Montoya's First Amendment claims separately, beginning with the political association piece. As is required by the *Elrod/Branti* test for an exception to political patronage,[61] the court analyzed the nature of Garcia-Montoya's position by examining her job duties.[62] The test requires a comparison

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51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.*
55. *Id.* ¶ 4, __ N.M. at __, 16 P.3d at 1087.
56. *Id.* ¶ 6, __ N.M. at __, 16 P.3d at 1088.
57. *See id.*
58. *See id.* The claims against Hooper were dismissed based on qualified immunity and Garcia-Montoya did not appeal from that judgment. *Id.* ¶ 5 n.1, __ N.M. at __ n.__, 16 P.3d at 1089 n.1.
59. *See id.* ¶ 37, __ N.M. at __, 16 P.3d at 1098.
60. *Id.* ¶ 9, __ N.M. at __, 16 P.3d at 1089.
61. Branti v. Finkel, 445 U.S. 507, 517 (1980) (defining political patronage as the principle that, contrary to the First Amendment prohibition, political "party affiliation may be an acceptable requirement for some types of government employment...if an employee's private political beliefs would interfere with the discharge of his public duties"). The *Elrod/Branti* test is the name for the court's inquiry into whether or not it is acceptable for a government official to require a subordinate's political alignment with the party in power. *Id.* While courts once held that the issue turns on whether an employee holds a policymaking or confidential position, Justice Stevens articulated that the relevant question is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518 (discussing the doctrine of stare decisis). The *Garcia-Montoya* majority explained that this determination necessarily requires an investigation into the exact nature of the government post at issue. *Garcia-Montoya*, 2001-NMSC-003 ¶ 13, __ N.M. at __, 16 P.3d at 1090. Applying this technique, at least one circuit has found that an employee, who is "responsible for duties that are measured solely by strictly technical or professional criteria," does not satisfy Justice Steven's guidelines and, therefore, does not hold the type of post properly subject to a political patronage requirement. Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255, 1258 (1st Cir. 1987).
62. *Garcia-Montoya*, 2001-NMSC-003 ¶ 13, __ N.M. at __, 16 P.3d at 1090 (discussing that "[i]n evaluating

between a specific employee's responsibilities and those duties that have, in precedent, subjected an employee's position to political patronage.[63] Although it is well resolved that New Mexico is bound only by Tenth Circuit precedent,[64] the court considered ten cases from six other circuits for guidance.[65] Notably, the court did conclude that Garcia-Montoya's right to freely associate had been violated.[66] The court further noted, however, that this conclusion resulted from analogy with cases decided *after* 1995.[67] The court found that *pre-1995* case law would not support that conclusion.[68] Thus, because Montoya and Andermann acted *during* 1995,[69] the correlation between Garcia-Montoya's particular circumstances and pre-1995 cases did not sufficiently support a finding that the defendants had violated "clearly established" law at the time of the violation.[70] The court concluded that the "factual correspondence" was not close enough and the defendants' confusion about the constitutionality of plaintiff's transfer was reasonable. Consequently, although Montoya and Andermann had empirically violated Garcia-Montoya's First Amendment right to free political association, they were nonetheless immune from liability.

The court next considered the free speech claim, concluding that qualified immunity again shielded the defendants from liability for an otherwise clear First Amendment violation. Garcia-Montoya contended that she had been transferred because she had voiced concerns that some of Montoya's politically motivated personnel actions were illegal.[71] As is required by the *Pickering* test for a free speech violation,[72] the court conducted an analysis of "the content, form, and context" of

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whether a particular position is subject to employment action, such as a transfer, based on political patronage, we examine the inherent duties of the position") (citing Sanders v. Montoya, 127 N.M. 465, 982 P.2d 1064 (1999)).

63. *Id.*

64. *Supra* note 41.

65. *Garcia-Montoya*, 2001-NMSC-003 ¶¶ 13-28, __ N.M. at __, 16 P.3d at 1090-94 (citing cases from the First, Second, Third, Sixth, Seventh, and Ninth Circuits including Flynn v. City of Boston, 140 F.3d 42 (1st Cir. 1998); Gordon v. County of Rockland, 110 F.3d 886 (2d Cir. 1997); Assaf v. Fields, 178 F.3d 170 (3d Cir. 1999) *cert. denied*, 528 U.S. 951 (1999); Boyle v. County of Allegheny, 139 F.3d 386 (3d Cir. 1998); Peters v. Del. River Port. Auth., 16 F.3d 1346 (3d Cir. 1994); Faughender v. City of North Olmsted, 927 F.2d 909 (6th Cir. 1991); Feeney v. Shipley, 164 F.3d 311 (6th Cir. 1999); Bicanic v. McDermott, 867 F.2d 391 (7th Cir. 1989); Milazzo v. O'Connell, 108 F.3d 129 (7th Cir. 1997); Fazio v. City of San Francisco, 125 F.3d 386, (9th Cir. 1998)).

66. *Id.* ¶ 23, __ N.M. at __, 16 P.3d at 1093.

67. *Id.* (finding that Garcia-Montoya's job duties did not involve the "authority to establish any *policy* decisions concerning personnel, budget or budget allocations, [but instead, involved *overseeing*] the budget area, personnel, telecommunications, and information systems." (emphasis added)). *Id.* "For the most part, Montoya and Andermann relied on Garcia-Montoya's description of her duties." *Id.* ¶ 17, __ N.M. at __, 16 P.3d at 1091.

> [A]nd the [undisputed] facts could support Garcia-Montoya's contention that [her position] does not have meaningful input into the substantive policy decisions for the Treasurer, does not serve as an important communicator on behalf of the [State Treasurer's Office], and is not privy to confidential information to such an extent as to require political loyalty.

Id. ¶ 23, __ N.M. at __, 16 P.3d at 1093.

68. *Id.* ¶ 26, __ N.M. at __, 16 P.3d at 1094.

69. *Id.* ¶ 4, __ N.M. at __, 16 P.3d at 1087.

70. *Id.* ¶ 13, __ N.M. at __, 16 P.3d at 1090.

71. *Id.* ¶ 27, __ N.M. at __, 16 P.3d at 1094.

72. *Id.* ¶ 28, __ N.M. at __, 16 P.3d at 1095. The *Pickering* balancing test analyzes "whether a public employer has unconstitutionally abridged an employee's freedom of speech." The four-part test was established in 1968 and considers

> (1) whether the speech forming the basis of the employment action involves a matter of public concern; (2) if so, whether the interests of the employee in speaking on the matter outweigh the

Garcia-Montoya's words. Just as they had with the political association claim, the court found the defendants had violated the plaintiff's constitutional right.[73] As with the political association claim, the court found qualified immunity protected the defendants from liability.[74]

Once again, the court held that the absence of sufficiently analogous case law at the time of trial supported the defendants' confusion. Specifically, the court noted that in 1995 there existed the following legal presumption: "the determination that an individual serves in a position subject to political patronage dismissal under *Elrod* and *Branti* renders the *Pickering* balancing test inapplicable to a 1983 claim based on freedom of speech."[75] Thus, the annulment of Garcia-Montoya's political association claim—as an effect of qualified immunity—automatically invalidated her free speech claim as well.[76]

Although the court began with its earlier determination that Garcia-Montoya's position was not the type for which a government official could require political loyalty, it also restated that at the time of the trial in 1995 the applicable case law was less than resolute.[77] Therefore, the defendants were protected by qualified immunity because it was objectively reasonable for them to believe they could require Garcia-Montoya to be politically affiliated with them. Because of the legal presumption articulated in *Biggs*, the court explained that it was also objectively reasonable for the defendants to believe that Garcia-Montoya's speech reflecting opposing political views would not be protected. Defendants' reliance on that particular interpretation of the *Branti/Elrod* and *Pickering* tests rendered them immune from liability and Garcia-Montoya could not recover damages.[78]

In her dissent, Justice Minzner disagreed that pre-1995 precedent supported the defendants' immunity.[79] Her critique explained that there are strict limitations on the instances in which political patronage is required. Citing that it applies only to "certain high-level employees,"[80] Justice Minzner further reasoned that the

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> interests of the employer in maintaining and promoting efficiency in the performance of its responsibilities to the public; (3) if so, whether the employee is able to show that the speech was a substantial factor in the employment decision; and (4) if so, whether the employer is able to rebut the employee's evidence by showing that it would have instituted the employment action regardless of the protected speech.

Id. (quoting Martinez v. City of Grants, 122 N.M. 507, 514 (1996)).

73. *Garcia-Montoya*, 2001-NMSC-003 ¶ 37, __ N.M. at __, 16 P.3d at 1098 (stating that "viewing the facts on summary judgment in a light most favorable to the nonmovant, we conclude that the Pickering balance weighs in favor of Garcia-Montoya").

74. *Id.*

75. *Id.* (quoting Biggs v. Best, Best & Krieger, 189 F.3d 989, 995-96 (9th Cir. 1999). Thus, if a court determines a public employer *can* require an employee's political loyalty, then a companion free speech claim is rendered groundless because the employee's "disloyal" speech was improper in the first place. In Garcia-Montoya's case, she expressed her belief that the defendant's politically motivated personnel decisions were illegal. She was subsequently dismissed because she was not politically aligned with the defendant. According to the *Biggs* model, the dispositive question is whether or not Garcia-Montoya *should have been* politically aligned with the defendant employer. If she *should have been*, or it was reasonable that the defendant *believed* she should have been, her companion free speech claim is meaningless because it was spoken out of political disloyalty.

76. *Id.*

77. *Id.* ¶ 38, __ N.M. at __, 16 P.3d at 1098-99.

78. *Id.*

79. *Id.* ¶ 60, __ N.M. at __, 16 P.3d at 1104.

80. *Id.*

exception is narrow and should be resolved in favor of the employee.[81] She also argued that the majority's "factual correspondence" requirement was too strict. Quoting *Kennedy*, Justice Minzner wrote, "relying on *Anderson*, this court recently emphasized that we should not require too specific a correlation between the misconduct and the established law."[82] Ultimately, the dissent implied that, at the very minimum, it should have occurred to the defendants that their actions *might* infringe upon Garcia-Montoya's constitutional rights.[83]

V. ANALYSIS AND IMPLICATIONS

In its qualified immunity analysis, the court required too strict a "factual correspondence" between Garcia-Montoya's circumstances in 1995 and precedent fact patterns considered before then.[84] Perhaps this was the effect of the court employing too formalist an interpretation of Supreme Court guidelines established in *Harlow*[85] and *Anderson*.[86] *Harlow* instituted the standard of measurement for constitutional violations by government officials: if the official's conduct is objectively reasonable in light of clearly established law, he is immune from liability.[87] Presumably, this is because the court is valuing predictability of the law for government officials.[88] *Anderson* clarified this standard by holding that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right."[89] This rule increases the likelihood that officials will know the boundaries for constitutional behavior – thereby, further increasing the predictive value of the law. *Anderson* narrowed this rule, nevertheless, by also stipulating that "this is not to say that an official action is protected by qualified immunity unless the *very action in question has previously been held unlawful*."[90] By ensuring that government officials do not have automatic immunity every time they act, this statement establishes a safeguard that precludes the possible development of

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81. *Id.*
82. *Id.* ¶ 56, __ N.M. at __, 16 P.3d. at 1103.
83. *See id.*
84. *Id.* ¶ 60, __ N.M. at __, 16 P.3d at 1104 (Minzner, J., dissenting).
85. 457 U.S. 800.
86. 483 U.S. 635.
87. 457 U.S. 800 (reasoning that

> [b]y defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences").

Id. at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

88. *Supra* note 41 (discussing the doctrine of stare decisis).
89. *Anderson*, 483 U.S. at 639.
90. *Id.* (citing Mitchell v. Forsyth, 472 U.S. 511, 528 (1985)).

unrestricted qualified immunity. It also tends to encourage elected officials to know the law.

In *Kennedy*, Justice Franchini reiterated the general rule that "immunity will not be granted to officials who should have known that their conduct violated the law."[91] He seemed to embrace the spirit of *Harlow* and *Anderson* by also indicating that "common sense" is required when considering the nexus between conduct involved in the case at bar and conduct previously deemed unlawful.[92] In *Kennedy*, the court applied a "common sense" realist approach when it determined that strip-to-undergarments searches were sufficiently analogous to illegal strip-to-nude searches.[93] Presumably, this was true because the consequences of both practices are the same—to humiliate and belittle potentially innocent people.[94] By likening the similar circumstances and subsequent impacts, the court evinced its realist approach to the qualified analysis inquiry.

Just one year later, however, the New Mexico Supreme Court applied a strict formalist analysis in *Garcia-Montoya*. Although it could have found there was sufficient case law to shape the contours of the plaintiff's rights, the court, instead, found that the defendants were immune from liability.[95] This holding appears to nullify the court's realist approach in Kennedy. Where the *Kennedy* court chose to equate very similar circumstances, *Garcia-Montoya* is apparently requiring the exact same set of facts.

In its opinion, the *Garcia-Montoya* court employed the *Elrod/Branti* test to assess whether, in 1995, the defendants violated the plaintiff's political affiliation and free speech rights.[96] The test evolved from several Supreme Court cases decided by 1990.[97] These cases established that unless a government official convinces the court that an employee *must* be politically aligned with his party,[98] transferring that employee (against the employee's wishes and without explanation) violates political association and free speech rights.[99] The test requires an inquiry into the employee's specific duties and responsibilities, as well as a determination of whether adverse

91. 2000-NMSC-25 ¶ 10, 129 N.M. at 440, 10 P.3d at 119.

92. *Id.* (holding that

> [t]he same common sense that compels the conclusion that a school official cannot strip a child naked without having some individualized basis to suspect that child of wrongdoing, also mandates that a child cannot be stripped to his boxer shorts by officials who have no reason to suspect him individually)

Id. at ¶ 15, 129 N.M. at 442, 10 P.3d at 121.

93. *Supra* note 37; *see also Anderson*, 483 U.S. at 639 (stating, "this is not to say that an official action is protected by qualified immunity unless the *very action in question has previously been held unlawful*").

94. *Kennedy*, 2000-NMSC-25 ¶ 14, 129 N.M. at 441, 10 P.3d at 120 (discussing that "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude") (quoting Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980)).

95. *Garcia-Montoya*, 2001-NMSC-003 ¶ 26, __ N.M. at __, 16 P.3d at 1094.

96. *Id.* ¶ 11, __ N.M. at __, 16 P.3d at 1089.

97. *See* Elrod v. Burns, 427 U.S. 347 (1976); *see also Branti*, 445 U.S. 507; Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

98. *See Elrod*, 427 U.S. at 372 (holding that dismissals based on political affiliation "can be fully satisfied by limiting [them] to policymaking positions"); *see also Branti*, 445 U.S. at 518; *Rutan*, 497 U.S. at 73-74 (holding that the *Elrod* rule not only extends to dismissals, but also to transfers; also holding that only "certain high-level employees" are subject to the exception); *but see Elrod*, 427 U.S. at 364-68.

99. *See* U.S. CONST. amend. I.; *see also Elrod*, 427 U.S. at 356-57; *Branti*, 445 U.S. at 518; *Rutan*, 497 U.S. at 79.

political affiliation would affect competent performance of the job.[100] There is an abundance of case law that defines the boundaries for positions that require political patronage.[101] Pre-1995 cases support a finding that Montoya and Andermann should have known their conduct was unconstitutional.[102] Perhaps the most dispositive rule, though, may be the pre-1995 Tenth Circuit holding in *Dickeson* that "close cases should be resolved in favor of the public employee."[103]

Justice Minzner's dissent appeared to embrace the *Dickeson* perspective. She, too, discussed the *Elrod/Branti* test and subsequent Supreme Court decisions that defined the boundaries of the political patronage requirements. In her discussion of *Anderson*, however, she instructed that policy considerations underlying both Section 1983 and the qualified immunity doctrine should be weighed so that "[t]he level of generality used to define the [plaintiff's] right reflects a balancing of [those] competing interests."[104] Justice Minzner's sound argument opposing the majority opinion asserted that the rules from *Elrod*,[105] *Branti*,[106] *Rutan*,[107] and *Anderson*,[108] paired with Circuit decisions *Burns v. County of Cambria*[109] and *Dickeson v. Quarburg*,[110] were sufficiently clear enough to pertain to Garcia-Montoya's position as the deputy administrator of the State Treasurer's Office.[111] The majority, nonetheless, rejected this perspective.

Further, the *Garcia-Montoya* majority appeared to be overly-selective when it concluded that there was an absence of sufficiently analogous precedent. For instance, the court cited a 1994 Third Circuit opinion, *Peters v. Delaware River Port Authority*.[112] It relied upon general language that "[p]reparing budgets and promoting projects are duties which count in favor of finding that the exception to Branti-Elrod applies...[and] affiliation is unquestionably significant to the...duties of maintaining good public relations and acting as a liaison with public officials."[113]

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100. *See Elrod*, 427 U.S. 347; *see also Branti*, 445 U.S. 507; *Rutan*, 497 U.S. 62; Mendez-Palou v. Rohena-Betancourt, 813 F.2d 1255 (1st Cir. 1987) (holding that duties involving strictly technical or professional criteria does not subject the position to political patronage).

101. *Elrod*, 427 U.S. at 347 (stating that patronage dismissals should be limited to policymaking positions); *Branti*, 445 U.S. at 518 (holding that dismissals are constitutional only if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved").

102. *Supra* note 65.

103. *See* Dickeson v. Quarberg, 844 F.2d 1435, 1441-42 (10th Cir. 1988) (holding that the public employer "must bear the burden of proof on the issue of whether political affiliation [is] an appropriate requirement for the effective performance of the public office involved").

104. *Garcia-Montoya*, 2001-NMSC-003 ¶ 56, __ N.M. at __, 16 P.3d at 1103.

105. 427 U.S. 347.

106. 497 U.S. at 79 (holding that the rule of *Branti* "extends to promotion, transfer, recall and hiring decisions based on party affiliation and support...").

107. 497 U.S. 62.

108. 483 U.S. 635.

109. 971 F.2d 1015, 1023 (3d Cir. 1992) (holding that the political patronage exception is "narrow").

110. 844 F.2d 1435, 1442 (10th Cir. 1988) (holding that "doubt should be resolved in favor of the public employee").

111. *Garcia-Montoya*, 2001-NMSC-003 ¶¶ 53-65, __ N.M. at __-__, 16 P.3d at 1103-05 (Minzner, J., dissenting).

112. *Id.* ¶ 18, __ N.M. at __, 16 P.3d at 1091 (citing Peters v. Delaware River Port Authority, 16 F.3d 1346 (3d Cir. 1994) (holding that political affiliation for positions involving budget preparation is more logical than it is for positions involving budget implementation, and that budget preparation, alone, does not render a position subject to political patronage)).

113. *Id.*

The court determined that this case supported the defendants' belief that Garcia-Montoya should be politically aligned with them.

As Justice Minzner noted, however, the majority did not address whether a sufficient and conclusive factual analogy could be drawn between *Peters* and *Garcia-Montoya*.[114] The dissent's realist analysis concluded that the circumstances in the two cases were sufficiently analogous—and the *Peters* rule sufficiently clear—such that an official *would* know Garcia-Montoya's was not a position appropriate for political patronage.[115]

The dissent's discussion of *Peters* reveals the majority's restricted examination of the same. Where the majority cited one of the case's general propositions, it ignored a significant distinction drawn by the court between policy-making and policy-implementing job duties. In that case, the *Peters* court found that the plaintiff's position was subject to political patronage, because she clearly held a policy-making position, had extensive involvement in budgetary matters, and was responsible for some public relations.[116] Garcia-Montoya, however, attested that she did not have any authority or responsibility for policy decisions "concerning personnel, budget or budget allocations, for the State Treasurer's Office."[117] It was also undisputed that her involvement with the budget was limited to "basically seeing the office budget stayed on track,"[118] and "paying the bills and filing personnel matters and adding up the hours for everybody to get them their paycheck."[119] The court acknowledged the undisputed ministerial nature of Garcia-Montoya's budget involvement, yet rejected the proposition that her position sat in stark contrast to the high level of budget policymaking required by the 1994 *Peters* case. The court appears to have selectively undervalued cases that were the most unfavorable to the defendants.

Relevant to *Garcia-Montoya* is *Mendez-Palou v. Santos*,[120] a First Circuit case from 1987—a case relied upon by the plaintiff,[121] yet completely disregarded by the majority. In that case, several government employees were dismissed because of their political affiliation. One employee held the position of Director of Administration for the Puerto Rico Environmental Quality Board. Another was the Assistant Secretary for Special Services in the Department of Agriculture.

The court found that a government position in which the duties are measured solely by technical or professional criteria is beyond the reach of the patronage exception. The scope of the duties or position in the governmental hierarchy is

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114. *Id.* ¶ 62, __ N.M. at __, 16 P.3d at 1105.

115. *Id.* (drawing a distinction between Garcia-Montoya's budget *implementation* duty and the budget *preparation* duty that the *Peters* court found subjected the Secretary of the Delaware River Port Authority to political patronage).

116. 16 F.3d 1346. (finding the position of Secretary of the Delaware River Port Authority was subject to political patronage where the Secretary was involved in policymaking, interpreting and executing on several different levels, was responsible for some public relations, and was involved with budget preparation).

117. *Garcia-Montoya*, 2001-NMSC-003 ¶ 15, __ N.M. at __, 16 P.3d at 1091. (explaining that both the defendants and the court relied upon Garcia-Montoya's own description of her job duties).

118. *Id.*

119. *Id.* ¶ 20, __ N.M. at __, 16 P.3d at 1092.

120. 813 F.2d 1255 (1st Cir. 1987).

121. Brief for Appellant at 16, Garcia-Montoya v. State of New Mexico State Treasurer's Office, 2001-NMSC-003, __ N.M. __, 16 P.3d 1084 (No. 25,688).

irrelevant in determining whether the position is subject to political patronage.[122] The important consideration is whether the position involves "decisionmaking on issues where there is room for political disagreements on goals or their implementation"[123] and "[a]lthough government employees may have differing views concerning an important technical or operational matter—for instance, the proper method of accounting to be employed...—such a disagreement...is not the sort of 'policy' dispute recognized as relevant by *Elrod* and *Branti*."[124]

The *Garcia-Montoya* majority found that plaintiff's position did not afford her the opportunity to meaningfully participate in policymaking activities.[125] Although the 1987 *Mendez-Palou* addresses the very same issues considered in the 1995 *Garcia-Montoya* case, *Garcia-Montoya* held that Garcia-Montoya's rights were not clearly established.[126] Perhaps what is most perplexing about the majority's disregard of *Mendez-Palou* is the fact that the court *itself*—while categorically unbound by non-Tenth Circuit opinions—relied upon ten outside circuit opinions for guidance, *including* another First Circuit opinion.[127] Again, the majority appeared to selectively disregard cases that were most unfavorable to the defendants.

The implications of this decision are clear. The court is employing a formalist interpretation of the *Harlow* and *Anderson* rules. It is also overly-selective in its consideration of persuasive authority. Unfortunately, it also renders the protections of Section 1983 inert by requiring such a strict "factual correspondence" between conduct at issue and conduct previously held unlawful that a plaintiff will almost never be able to meet his burden. Additionally, this approach does not reflect the spirit of qualified immunity as a balancing test proposed by *Owen*,[128] *Anderson*,[129] and *Mendez-Palou*.[130] It engenders inattention to the constitution by allowing a government official to argue that he did not know his conduct was unacceptable even when it is clear the conduct violates constitutional rights. This perspective contradicts the essence of the First Amendment protections and undermines the objectives of Section 1983 as both a remedial provision and a deterrent for future violations. In sum, the court's methodology in *Garcia-Montoya* suggests its bias in favor of finding qualified immunity—the effect of which both results in an unfairly heavy burden on plaintiffs to substantiate a constitutional violation claim and engenders inattention by elected officials to the Constitution itself.

VI. CONCLUSION

In *Garcia-Montoya*, the New Mexico court espoused an overly-rigid interpretation of the guidelines for application of qualified immunity set forth by the Supreme Court. By limiting a plaintiff's ability to prove his case using only precedential facts almost identical to his own circumstances, the court undermined

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122. *Mendez-Palou*, 813 F.2d at 1258.
123. *Id.* (quoting Jimenez Fuentes v. Torres Gaztambide, 803 F.2d 1, 6 (1st Cir. 1986) (en banc)).
124. *Id.*
125. *Garcia-Montoya*, 2001-NMSC-003 ¶ 22, __ N.M. at __, 16 P.3d at 1092.
126. *Id.*
127. *Supra* note 65.
128. 445 U.S. 622.
129. 483 U.S. 635.
130. 813 F.2d 1255.

the important policy goals addressed by Section 1983 remedial provisions. The court's decision is likely to both inhibit victims of constitutional violations from seeking redress and promote inattention to constitutional guidelines for governmental conduct in the State of New Mexico. The protection of government officials from "undue interference with their duties and...potentially disabling threats of liability" is admittedly an important policy goal borne of common law tradition. The First Amendment, however, is a safeguard of surpassing importance intended to protect citizens from the evils that have arisen out of the very same tradition. Hopefully, the court will revisit the discussions from *Owen* and *Anderson* and, consequently, reconsider its position.