Maryland Law Review

Volume 69 | Issue 3 Article 9

Fields v. Prater: the Fourth Circuit's Lost Opportunity to Further Define the Boundaries of Political Patronage in Public Employment

Joshua J. Miller

Recent Decisions

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FIELDS v. PRATER: THE FOURTH CIRCUIT'S LOST OPPORTUNITY TO FURTHER DEFINE THE BOUNDARIES OF POLITICAL PATRONAGE IN PUBLIC EMPLOYMENT

JOSHUA J. MILLER*

In *Fields v. Prater*,[1] the United States Court of Appeals for the Fourth Circuit considered whether it was constitutionally permissible for a governmental authority to consider the political affiliation of candidates when hiring a local director of social services and whether defendants in such cases are entitled to qualified immunity from civil liability.[2] The court held that political affiliation was not an appropriate consideration for a local director's position,[3] but because the law on this matter was unclear, the defendants were entitled to qualified immunity.[4] The court correctly found that considering political affiliation was unconstitutional in this case because the hiring authority could not demonstrate that such a consideration was necessary for effective job performance.[5] To reach that determination, the court properly applied Fourth Circuit precedent and evaluated the position at both a very high level of generality and at a more concrete level, but failed to enhance the applicable test and provide further guidance to lower courts by looking beyond circuit precedent.[6] Finally, the court properly granted the defendants qualified immunity because it was legally unclear at the time of hiring that they had violated the plain-

* Joshua J. Miller is a second-year student at the University of Maryland School of Law where he is a staff member for the *Maryland Law Review.* The author extends his thanks to Professor Gordon Young of the University of Maryland School of Law for helpful comments on the thesis. The author would also like to thank Notes & Comments Editor Rachel Witriol for her thorough, meticulous editing. Finally, the author would also like to extend his thanks to his mother, Barbara Hagy-Miller, for her continued love, support, and encouragement.

1. 566 F.3d 381 (4th Cir. 2009).
2. *Id.* at 383.
3. *Id.* at 386.
4. *Id.* at 389–90.
5. *See infra* Part IV.A.
6. *See infra* Part IV.B.

tiff's constitutional rights, but in so doing it failed to provide any substantial guidance on when defendants in future cases involving political affiliation and employment decisions should be entitled to that defense.[7]

I. THE CASE

In 2006, the position of Director for the Buchanan County, Virginia, Department of Social Services became available when the previous director retired.[8] Tammy R. Fields and six other applicants applied for the vacant position.[9] To interview the applicants, the Buchanan County Board of Supervisors selected an interviewing board, which ranked each candidate based on both their application and interview.[10] Fields ranked the highest, while candidate Judy Holland ranked the lowest.[11]

Following the interviews, the Board of Supervisors opted to create a new local administrative board for the county department of social services,[12] which assumed the duty of interviewing and hiring for the director's position.[13] The new board interviewed three candidates, including Fields and Holland, before hiring Holland as the new director.[14]

Fields, who had worked for the Buchanan County Department of Social Services since 1995,[15] protested, claiming that she had been passed over for the director's job because she was an active member of the Republican Party.[16] Fields maintained that the Board of Supervisors had intentionally appointed Democratic Party members to the new administrative board so that a Democratic candidate, such as Holland, would be hired instead.[17] Fields then brought suit against

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7. *See infra* Part IV.C.

8. Fields v. Justus, No. 1:07cv019, 2008 WL 570951, at *2 (W.D. Va. Feb. 28, 2008). The district judge noted that he largely omitted a discussion of the facts, as they were laid out in detail in the report and recommendation of the magistrate judge assigned to the case. Fields v. Justus, No. 1:07cv00019, 2008 WL 863723, at *1 n.4 (W.D. Va. Mar. 31, 2008).

9. *Fields*, 2008 WL 570951, at *2.

10. *Id.*

11. *Id.*

12. *Id.* Under Virginia law, a locality such as a county may appoint a local administrative board to run the county's social services department or, alternatively, may designate the local director as the local board. *Fields*, 2008 WL 863723, at *4 n.8.

13. *Fields*, 2008 WL 570951, at *2.

14. *Id.*

15. *Id.* Fields began her career with the department as a social worker in 1995 and was promoted to Office Manager in 1997. *Id.*

16. *Id.*

17. *Id.*

Buchanan County, Judy Holland, the members of the Board of Supervisors, and the members of the local administrative board, alleging that she was passed over for the director's position because of her political affiliation in violation of the First Amendment to the United States Constitution.[18]

Each group of defendants filed a motion to dismiss, claiming that they were entitled to qualified immunity.[19] In October 2007, Fields filed a motion for partial summary judgment on the qualified immunity issue.[20] On January 30, 2008, the still-pending motions to dismiss and the motion for partial summary judgment were referred to a magistrate judge for report and recommendation.[21]

The magistrate judge recommended that the court deny the defendants' motions to dismiss and motion for summary judgment on the qualified immunity issue.[22] He used a two-part test to determine if qualified immunity applied—first, the facts alleged, taken in a light most favorable to the plaintiff, must show that a constitutional right was violated; and second, if the first inquiry indicated a violation, the contours of the right must have been clearly established at the time of violation.[23] The magistrate judge reasoned that the defendants failed to demonstrate that partisan affiliation was a criterion relevant to the director's position; thus, he reasoned that the defendants had violated Fields's rights.[24] He then concluded that at the time Fields was denied the position, the defendants clearly knew or should have known that using partisan affiliation to hire a director was a violation of her constitutional rights, and thus the defendants were not entitled to qualified immunity.[25]

The United States District Court for the Western District of Virginia adopted the magistrate judge's recommended disposition on all the motions.[26] The district court judge agreed that party affiliation was not an appropriate factor on which to base the hiring decision for the director's position and that federal law clearly established that fact at the time Fields's promotion was considered.[27] Accordingly, he

18. *Id.* at *1.
19. *Id.*
20. *Id.*
21. Fields v. Justus, No. 1:07cv00019, 2008 WL 863723, at *1 (W.D. Va. Mar. 31, 2008).
22. *Fields*, 2008 WL 570951, at *8.
23. *Id.* at *4.
24. *Id.* at *4–6.
25. *Id.* at *6–8.
26. *Fields*, 2008 WL 863723, at *1.
27. *Id.* at *4–6. The district judge was unsure if a "threshold inquiry," used by the magistrate, was created by case law. *Id.* at *3–4. As such, he approached the qualified

granted Fields's motion for partial summary judgment on the issue of qualified immunity and denied the motions to dismiss from the members of the two boards.[28] On appeal, the United States Court of Appeals for the Fourth Circuit considered whether partisan affiliation may be constitutionally used as a hiring criterion for certain government positions, and when qualified immunity is applicable if partisan affiliation was wrongly considered in such a decision.[29]

II. LEGAL BACKGROUND

Several inquiries are required to determine whether partisan affiliation is appropriately considered in the hiring of a government employee or in other employment decisions involving such an employee. First, under Supreme Court precedent, the court must determine whether partisan affiliation is required for effective job performance.[30] Within this framework, lower courts have been left to develop their own approaches to political affiliation cases.[31] Many circuits formulated their own unique tests to determine whether partisan affiliation was properly considered in a given employment decision.[32] The Fourth Circuit, however, adopted the First Circuit's test, which involved a two-pronged examination of the nature of the position at issue, focusing first on the general issues surrounding a position and second on the specific duties of the position.[33] Simultaneously, a court must often consider whether the defendants are entitled to qualified immunity.[34] Broad federal precedents establish a presumption of qualified immunity for a defendant that may be overcome by showing that the plaintiff's constitutional rights were violated and that it was legally clear or should have been clear to the defendant that his or her actions entailed such a violation at the time of the action.[35] A court then examines circuit precedent to determine how the circuit

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immunity analysis in a different manner than the magistrate, but reached the same result. *Id.* at *4, *6.

28. *Id.* at *6. Buchanan County was dismissed as a defendant, as the magistrate judge concluded that the county could only be held liable if it had adopted an "official policy" mandating the consideration of party affiliation in hiring. *Id.*; *Fields*, 2008 WL 570951, at *10.

29. Fields v. Prater, 566 F.3d 381, 383 (4th Cir. 2009), *rev'g* Fields v. Justus, No. 1:07cv00019, 2008 WL 863723 (W.D. Va. Mar. 31, 2008).

30. *See infra* Part II.A.

31. *See infra* Part II.B.

32. *See infra* Part II.B.1.

33. *See infra* Part II.B.2.

34. *See infra* Part II.C.

35. *See infra* Part II.C.1.

treats the qualified immunity defense in political affiliation employment decision cases.[36]

A. *The Supreme Court Determines If Consideration of Political Affiliation Violates a Plaintiff's Constitutional Rights by Ascertaining Whether That Affiliation Is Necessary for Effective Job Performance*

Despite the historical entwinement of political affiliation and government employment, the United States Supreme Court did not truly begin to address the issue of when political affiliation could be appropriately used as a criterion in government employment decisions until about thirty years ago.[37] Prior to that time, the Court merely hinted that in some situations, political affiliation might not be an appropriate basis for hiring or refusing to hire an individual.[38]

Before the Court ever addressed this issue in the employment context, it laid down several relevant general principles on the freedom of political affiliation. In 1943, the Court held in *West Virginia State Board of Education v. Barnette*[39] that the State could not compel public school students to salute and pledge allegiance to the American flag.[40] Ordinary citizens, it said, could not be forced or otherwise coerced to follow the prescriptions of government officials "in politics, nationalism, religion, or other matters of opinion."[41] The Court later refined this pronouncement, finding that Americans have the right to associate with the political party of their choice, a right that it called "an integral part of . . . basic constitutional freedom."[42] Although these broad statements did not directly relate to the issue of political affiliation and government employment, they would nonetheless have a profound impact on the issue.[43]

Beginning in the early 1960s, the Court considered several cases that addressed employment decisions based on an employee's affilia-

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36. *See infra* Part II.C.2.

37. *E.g.*, Elrod v. Burns, 427 U.S. 347, 372–73 (1976) (plurality opinion) (finding the practice of patronage dismissals unconstitutional for non-policymaking government positions).

38. *See, e.g.*, Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 898 (1961) (stating in dicta that an individual could not constitutionally be kept from her employment as a contractor at a government facility based on her political or religious affiliation).

39. 319 U.S. 624 (1943).

40. *Id.* at 642.

41. *Id.*

42. Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973).

43. *See* Elrod v. Burns, 427 U.S. 347, 356–57 (1976) (plurality opinion) (relying on *Barnette* to find that government officials may not force public employees to relinquish their right to political association).

tion with certain political groups. In *Cafeteria & Restaurant Workers Union v. McElroy*,[44] the Court stated in dicta that an individual could not constitutionally be excluded from a job at a government facility if the "announced grounds for [the] exclusion had been patently arbitrary or discriminatory . . . [such as] because [the individual] was a Democrat or a Methodist."[45] Six years later in *Keyishian v. Board of Regents*,[46] the Court struck down as unconstitutional a series of New York statutes that barred members of the Communist Party from employment in the State's university system.[47]

Then, in 1972 in *Perry v. Sindermann*,[48] the Court considered the case of a college professor who claimed that his contract had not been renewed because he had been critical of the college's administration in his speech and activities.[49] The Court stated firmly that although the professor had no "right" to the valuable government benefit of employment and that such a benefit could be denied "for any number of reasons," there were nonetheless "some reasons upon which the government may not rely" when making employment decisions.[50] The government, the Court said, was barred from denying a benefit to an individual using any basis that infringes on constitutionally protected interests, such as the freedoms of speech and association.[51]

Just four years later, the Court applied the aforementioned principles and directly addressed the issue of political affiliation and government employment. In *Elrod v. Burns*,[52] several non-civil service employees of the Cook County, Illinois, sheriff's department alleged that they had been terminated from their positions because they were not members of the new sheriff's political party and had not sought

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44. 367 U.S. 886 (1961).

45. *Id.* at 898. The dissent also agreed with this point, noting that "if [the] petitioner['s] badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest . . . had been injured." *Id.* at 900 (Brennan, J., dissenting).

46. 385 U.S. 589 (1967).

47. *Id.* at 609–10 (determining that the prohibition's wide sweep, based on "mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party," rendered the prohibitive laws invalid).

48. 408 U.S. 593 (1972).

49. *Id.* at 595.

50. *Id.* at 597.

51. *Id.* The Court further stated that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* The Court upheld the judgment of the court of appeals, which had remanded the case to the district court. *Id.* at 603.

52. 427 U.S. 347 (1976).

support from or affiliation with his party.[53] A plurality led by Justice Brennan acknowledged the longstanding practice of political patronage in American politics,[54] but noted the sharp decline in the practice in "recent times," especially in the realm of public employment.[55] Ultimately, the plurality found that the practice of patronage "falls squarely within the prohibitions of *Keyishian* and *Perry*,"[56] and that "[t]he threat of dismissal for failure to provide . . . support [for the favored party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise."[57]

Nonetheless, the *Elrod* plurality noted that some encroachment on the First Amendment is permissible "for appropriate reasons."[58] The consideration of political affiliation, however, had to further a vital government interest in a manner that was least restrictive of the protected freedoms of belief and association, and the ultimate benefit had to outweigh the lost constitutional rights.[59] This balance could be achieved if patronage dismissals were limited to "policymaking positions."[60] The plurality reasoned that non-policymaking employees were "not in a position to thwart the goals of the in-party," and should be sheltered from partisan-based dismissal.[61] Because "[n]o clear line [could] be drawn between policymaking and non[-]policymaking positions," however, a close examination of the nature of the responsibilities of a position would be critical to future cases.[62]

In 1980, the Court revisited the *Elrod* "policymaking" standard. In *Branti v. Finkel*,[63] two assistant public defenders from Rockland County, New York, sought to prevent the county's new public de-

53. *Id.* at 350–51 (plurality opinion).

54. *Id.* at 353.

55. *Id.* at 353–54.

56. *Id.* at 359.

57. *Id.* The plurality also noted that "regardless of how evenhandedly these restraints may operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains." *Id.* at 360.

58. *Id.* at 360.

59. *Id.* at 363.

60. *Id.* at 367–68.

61. *Id.*

62. *Id.* In contrast to the plurality's reasoning, Justice Stewart did not believe that a wide-ranging examination of and judgment on the constitutionality of the patronage system was appropriate. *Id.* at 374 (Stewart, J., concurring in the judgment). According to Justice Stewart, the "single substantive question involved" was whether a non-policymaking, non-confidential government employee could be terminated from his or her job on the basis of political belief when his or her job performance was satisfactory. *Id.* at 375. He believed that the employee could not. *Id.*

63. 445 U.S. 507 (1980).

fender from discharging them solely because they were Republicans.[64] The lower courts held that they were not policymakers within the definition in *Elrod*, nor did they "occupy any confidential relationship to the policymaking process" and thus could not be terminated based on political affiliation.[65] The Court affirmed,[66] holding that "[t]o prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged" simply because they were not affiliated with or sponsored by their supervisor's political party.[67]

The *Branti* Court revised the *Elrod* standard. It grappled with the same problem that Justice Brennan's plurality opinion did four years earlier—exactly when political affiliation was a legitimate factor to be considered in patronage dismissals.[68] It noted that in some circumstances, a position could be political even though it was not a policymaking or confidential position, while in other circumstances, partisan affiliation would not necessarily be relevant to a policymaking or confidential position.[69] The Court thus jettisoned the "policymaking" distinction in favor of a more flexible inquiry.[70] After *Branti*, courts were not required to determine whether the labels of "policymaker" or "confidential"[71] fit the position that was the subject of litigation, but "whether the hiring authority [could] demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[72]

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64. *Id.* at 508.

65. *Id.* at 510–11.

66. *Id.* at 520.

67. *Id.* at 517. The Court rejected the arguments of the chief public defender that *Elrod* did not apply to the case at all because the plaintiffs had not been asked to seek the support of the new in-party or change their partisan affiliation like the plaintiffs in *Elrod*. *Id.* at 516. The Court noted that accepting this premise would repudiate entirely the conclusion of both the plurality and Justice Stewart in *Elrod*, which was that the First Amendment forbids the dismissal of a public employee on the sole basis of political beliefs. *Id.* at 516–17.

68. *Id.* at 518.

69. *Id.*

70. *See id.* (creating a new standard based on whether party affiliation reasonably affects job performance).

71. *See* Elrod v. Burns, 427 U.S. 347, 375 (1976) (Stewart, J., concurring in the judgment) (adding the descriptive term of "confidential" to the plurality's focus on "policymakers").

72. *Branti*, 445 U.S. at 518. Justice Stewart dissented, arguing that the assistant public defenders, as lawyers, were not non-confidential employees. *Id.* at 520–21 (Stewart, J., dissenting). He analogized to a private firm, stating, "I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association." *Id.* at 521.

The synthesized rule laid down in *Elrod* and *Branti* proved workable and it remained in use a decade later.[73] The Court, however, revisited the *Elrod-Branti* rule in 1990 due to its inherent limitations—the prohibition against the consideration of political affiliation in government jobs applied only to dismissals.[74] In *Rutan v. Republican Party of Illinois*,[75] the Court was asked to determine whether the *Elrod-Branti* line of cases applied to other employment decisions.[76]

In *Rutan*, the governor of Illinois was accused of operating a patronage system that limited state employment and its related benefits to members of the Republican Party through a statewide freeze on all government employment decisions.[77] Exceptions to the freeze could be made only with the governor's "express permission."[78] The Court reasoned that although government employees have no legal entitlement to promotion, transfer, or recall after layoff, if such an employee is adversely affected by any of these actions based solely on political affiliation, his or her constitutional rights have been violated.[79] The Court maintained that the same concerns that underlaid *Elrod* and *Branti* were present here—employees who refused to compromise their beliefs stood to lose out on substantial benefits and to incur significant penalties.[80] It separately considered the issue of political affiliation in relation to hiring for a government position and reached a similar conclusion.[81] As such, the *Elrod-Branti* rule governing political affiliation and dismissal was extended to cover those other types of decisions.[82]

B. Each Circuit Was Left to Develop Its Own Approach to Political Affiliation Cases Within the Broad Framework Laid Down by the Supreme Court

The *Elrod* and *Branti* decisions provided a general framework within which the district courts and circuit courts of appeals could

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73. *See* Rutan v. Republican Party of Illinois, 497 U.S. 62, 71–74, 76–79 (1990) (upholding the *Elrod-Branti* line of cases and expanding their application to promotions, transfers, recalls from layoff, and hiring).

74. *See id.* (revisiting the *Elrod-Branti* rule and acknowledging that it should apply more broadly); *see also Branti*, 445 U.S. at 520 (majority opinion) (affirming an injunction against a politically motivated termination of employment).

75. 497 U.S. 62.

76. *Id.* at 71–79.

77. *Id.* at 65–66.

78. *Id.*

79. *Id.* at 72–73.

80. *Id.* at 74.

81. *Id.* at 79.

82. *Id.*

operate.[83] The lower federal courts have since added considerably to the body of case law in a manner consistent with the course charted by the Supreme Court.[84] Several circuits have developed their own unique tests to determine when political affiliation is "an appropriate requirement for the effective performance of the public office"[85] that is at issue in a given case.[86] Other circuits, such as the Fourth Circuit, first developed their own standards within the *Elrod-Branti* framework, but later adopted another circuit's test.[87]

1. *The First, Second, and Sixth Circuits Developed Their Own Unique* Elrod-Branti *Tests*

Following the *Elrod* and *Branti* decisions, a number of circuits developed their own tests within the Supreme Court's broader framework.[88] Each used a case or a short series of cases on the issue of political affiliation and government employment to apply the *Elrod-Branti* rules in a manner that it believed best fit the Supreme Court's pronouncements.[89]

In the First Circuit case of *Jimenez Fuentes v. Torres Gaztambide*,[90] the two plaintiffs were removed from their positions as regional directors in a Puerto Rican urban development agency after their party was defeated at the polls.[91] The court used the case to create its own test within the *Elrod-Branti* framework.[92] It acknowledged that "[i]dentifying generic categories of positions where partisan selection and rejection are permissible has . . . proven to be an elusive and

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83. *See, e.g.*, Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 240 (1st Cir. 1986) (en banc) ("To the skeletal teachings of *Elrod* and *Branti* have been added a considerable body of case law from circuit courts of appeal and district courts.").

84. *Id.* at 240–41.

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

86. *See infra* Part II.B.1.

87. *See infra* Part II.B.2.

88. This Section focuses on the tests developed in three federal circuits—specifically, the First, Second, and Sixth Circuits—although others have developed their own unique approaches. *See, e.g.*, Boyle v. County of Allegheny, 139 F.3d 386, 396 (3d Cir. 1998) (eschewing a formal test because a "lack of explicit guidance . . . results in a greater flexibility on the part of lower courts to determine each case under its own facts and in its own context").

89. *E.g.*, Regan v. Boogertman, 984 F.2d 577, 580–81 (2d Cir. 1993) (listing several inquiries useful in deciding whether a position is one for which party loyalty is an appropriate criterion); Savage v. Gorski, 850 F.2d 64, 68–69 (2d Cir. 1988) (weighing various factors to determine whether political affiliation was an appropriate criterion for a termination without stating that those factors must be considered in all cases).

90. 807 F.2d 236 (1st Cir. 1986) (en banc).

91. *Id.* at 237–38.

92. *See id.* at 241–42 (analyzing the *Branti* framework and applying it to this case).

intractable task," but it believed that certain useful approaches became evident as more courts addressed the issue.[93]

First, the court noted that a general threshold inquiry into whether the position related at all to "'partisan political interests. . . . [or] concerns'" appeared appropriate based on the *Branti* decision.[94] The key to this inquiry was whether "the position involve[d] government decisionmaking on issues where there is room for political disagreement on goals or their implementation."[95] If the first inquiry was satisfied, the next step involved a more particularized examination of the responsibilities of the position at issue to determine if party affiliation appeared to be an appropriate requirement for the job.[96] This inquiry was meant to "focus on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office."[97] In the end, the court recognized that a case-by-case determination using this test would be necessary.[98]

The Second Circuit also developed its own test. In *Savage v. Gorski*,[99] the court sought to interpret the language of the *Branti* opinion.[100] It gleaned a general rule "that political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance."[101] Later cases refined this inquiry by focusing on the functions of the position to determine whether such a connection existed.[102] The court listed several factors to consider, including the following:

> [W]hether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.[103]

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93. *Id.* at 241.

94. *Id.* (alteration in original) (quoting Branti v. Finkel, 445 U.S. 507, 519 (1980)).

95. *Id.* at 241–42.

96. *Id.* at 242.

97. *Id.*

98. *See id.* (noting that in each case, the court must consider a list of relevant factors).

99. 850 F.2d 64 (2d Cir. 1988).

100. *Id.* at 68.

101. *Id.*

102. *E.g.*, Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994); Regan v. Boogertman, 984 F.2d 577, 580 (2d Cir. 1993).

103. *Vezzetti*, 22 F.3d at 486; *see also Regan*, 984 F.2d at 580 (outlining the factors that were explicitly adopted by the court in *Vezzetti* one year later).

The court said that all relevant factors should be assessed together, with none accorded dispositive weight.[104] It later found that in some situations, an analysis of only the eight factors listed could be sufficient and settled on their use as the starting point for an *Elrod-Branti* analysis.[105]

The Sixth Circuit, like others, noted that the Supreme Court "left it to subsequent courts to determine, on a case-by-case basis, whether political affiliation is an appropriate requirement for the effective performance of the public office."[106] The court found that the position in question must be closely examined with a particular focus on "the inherent duties of the position in question," rather than what duties the individual holding the position actually performed.[107] It reasoned that a position might appear to be a policymaking position, but the employee, through his work, could make it a largely ministerial position protected from patronage dismissal.[108] An additional inquiry was later added, looking into "the duties that the new holder of that position will perform."[109] Thus, even if an individual is dismissed from a position that is determined to be non-political, if his or her replacement is to be given new, political job duties, the dismissal may be constitutional.[110] The broader the responsibilities and the less defined they are, the more likely it is that political affiliation is an appropriate requirement for the position.[111] Finally, the court also attempted later to formulate broad categories of positions that fall within the *Elrod-Branti* exception to the general prohibition against patronage dismissal.[112]

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104. *Vezzetti*, 22 F.3d at 486.

105. Gordon v. County of Rockland, 110 F.3d 886, 889–90 (2d Cir. 1997).

106. Williams v. City of River Rouge, 909 F.2d 151, 153 (6th Cir. 1990) (internal quotation marks omitted) (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)).

107. *Id.* at 154.

108. *Id.* at 154–55.

109. Faughender v. City of North Olmsted, 927 F.2d 909, 913 (6th Cir. 1991).

110. *See id.* at 914 (finding that "[a] mayor could decide to transform any non-civil service position into a position for which political considerations are appropriate provided he acts with a good faith belief that such a transformation is necessary to implement his policies").

111. Rice v. Ohio Dept. of Transp., 14 F.3d 1133, 1142 n.9 (6th Cir. 1994).

112. McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996). The court's categories included the following:

> Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted; Category Two: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by

2. *The Fourth Circuit Devised Its Own* Elrod-Branti *Test Before Adopting the Approach of the First Circuit*

The Fourth Circuit approached the issue of political affiliation and job performance in a unique manner. In its first case implicating the *Elrod-Branti* standard, *Jones v. Dodson*,[113] the Fourth Circuit held that the job of deputy sheriff in any sheriff's department could not "be found to involve policymaking related to 'partisan political interests' [or] to involve access to confidential information 'bearing . . . on partisan political concerns.'"[114] In the end, however, the court reached this conclusion without making any factual inquiry into the inherent duties and responsibilities of the position, on which other circuits focused.[115] The court later eroded *Jones* when, in *Joyner v. Lancaster*,[116] it ruled that a deputy sheriff who had overtly campaigned for the sheriff's opponent in a primary election was properly dismissed.[117] It noted that as a high ranking subordinate of the sheriff, the deputy "had an important role to play in the implementation of the sheriff's policies, [that] he was an essential link between the sheriff and the deputies whom he supervised," and that his campaign activities had actually created a significant disruption within the office, justifying his termination.[118]

Later that same year, the Fourth Circuit considered *McConnell v. Adams*,[119] a case that called for a direct application of the *Elrod-Branti* principles. The court again declined to announce any clear guiding test or principles as it sought to determine if Virginia electoral boards could refuse to rehire electoral registrars based on their political affili-

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> category one positions in other jurisdictions; Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

Id. (footnote call numbers omitted).

113. 727 F.2d 1329 (4th Cir. 1984).

114. *Id.* at 1338 (alteration in original) (citing and quoting Branti v. Finkel, 445 U.S. 507, 519 (1980)).

115. *Id.* at 1337–39; *see supra* Part II.B.1.

116. 815 F.2d 20 (4th Cir. 1987).

117. *Id.* at 24.

118. *Id.* The court in *Joyner* did not consider the deputy's case within the context of *Elrod-Branti*, but applied the jurisprudence of a separate line of cases involving "[t]he legality of discipline imposed upon a public employee because of the employee's speech." *Id.* at 22–23.

119. 829 F.2d 1319 (4th Cir. 1987).

ation.[120] The court did, however, undertake a cursory examination of several state statutes with some bearing on the issue of political affiliation and job performance in government employment and determined they constituted additional evidence that partisan affiliation was not relevant to the performance of the position at issue.[121] Ultimately, though, the court failed to undertake a thorough examination of the position.[122]

Adrift in a sea of indecision of its own making, the Fourth Circuit eventually looked to its sister circuits for guidance on the *Elrod-Branti* framework and, in *Stott v. Haworth*,[123] settled on a test that it would apply in cases involving political affiliation and job performance in government employment.[124] The *Stott* court adopted the two-pronged test articulated by the First Circuit in *Jimenez Fuentes*[125] as the method "to properly render a decision on the propriety of a patronage dismissal."[126] Thereafter, in applying the test, courts within the Fourth Circuit were required to first examine the position at issue in a high degree of generality, and then to examine more closely the position's specific duties if the first prong indicated that the position might not be constitutionally protected from patronage dismissal.[127]

In 1993, the Fourth Circuit again considered a case involving political affiliation and job performance in *Akers v. Caperton*.[128] The ruling in *Akers* only once explicitly referenced the *Stott* decision, and did not note the two-pronged test that the court had adopted three years earlier, but it did apply the general principles embodied by *Stott*.[129] The court examined at both a broader level and a more specific level the duties of a West Virginia County Maintenance Superintendent and ultimately concluded that "there is no rational connection between shared ideology and the performance of this low-level job."[130]

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120. *Id.* at 1324. The court noted that "[c]ourts have treated failure to rehire as the equivalent of dismissal in applying *Branti* to patronage employment practices." *Id.*

121. *Id.*

122. *See id.* (providing only a cursory overview of the position).

123. 916 F.2d 134 (4th Cir. 1990).

124. *Id.* at 141.

125. Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241–42 (1st Cir. 1986) (en banc); *see also supra* text accompanying notes 90–98.

126. *Stott*, 916 F.2d at 141.

127. *See id.* at 141–42 (adopting the First Circuit's two-pronged test).

128. 998 F.2d 220 (4th Cir. 1993). Here, the employment decision at issue was a transfer, not a dismissal. *Id.* at 223.

129. *See id.* at 224–25 (applying the *Stott* principles without a citation to *Stott*).

130. *Id.* The opinion noted that political affiliation was not a requirement for the position's immediate superiors, so it was difficult to imagine that political affiliation should be a requirement for the position at issue. *Id.* at 225.

The Fourth Circuit soon became more diligent in its application of the *Stott* test. In 1997, the court, sitting en banc, applied the test to the position of deputy sheriff in *Jenkins v. Medford*.[131] The court concluded that, in the state of North Carolina, "the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable," based on the two-part examination of the office.[132] Recognizing the conflict with *Jones*, the court noted that it disagreed with that decision "to the extent it suggests that no deputy sheriff can ever be a policymaker" and instructed the district courts to apply *Stott* in the future.[133]

The Fourth Circuit has used this approach ever since.[134] As recently as 2008, in *Nader v. Blair*,[135] the court affirmed the *Stott* test as the Fourth Circuit's exclusive method for determining whether the performance of a government job relates sufficiently to partisan political interests, such that those interests become a criterion for the job.[136] The Fourth Circuit thus appears satisfied that it has adopted a worthwhile and durable test.[137]

C. *The Defense of Qualified Immunity Is Frequently Implicated in Political Affiliation Cases*

The idea that government officials should, in certain situations, be immune to civil liability for their actions has a long history in American jurisprudence.[138] Over time, the immunity granted primarily to judicial officers, elected officials, and, in some instances, police

131. 119 F.3d 1156, 1162–64 (4th Cir. 1997) (en banc).

132. *Id.* at 1164.

133. *Id.*

134. *See, e.g.*, Knight v. Vernon, 214 F.3d 544, 548–51 (4th Cir. 2000) (examining the job duties of a position and holding that a jailer's political allegiance to a sheriff was not an appropriate requirement for the performance of her job and that she was protected from dismissal for failing to support the sheriff in an election).

135. 549 F.3d 953 (4th Cir. 2008).

136. *Id.* at 958–60 (examining the nature of the responsibilities of an Assistant Director of the Baltimore City Department of Social Services and holding that the position was one for which partisan affiliation was an appropriate job criterion).

137. The Fourth Circuit has also noted that "state law cannot control the analysis" made within the *Elrod-Branti* framework, though pronouncements of state law on the relationship between a position and political affiliation can be considered. McCrerey v. Allen, 118 F.3d 242, 244–45 (4th Cir. 1997).

138. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (noting that immunity granted to certain government officials for their actions in their official capacity is given so they may exercise their functions in an independent manner without fear of consequences); Spalding v. Vilas, 161 U.S. 483, 498–99 (1896) (finding that immunity from civil liability extended to the heads of executive departments for actions taken while "exercising the functions of [their] office[s]"); Gregoire v. Biddle, 177 F.2d 579, 579–81 (2d Cir. 1949) (discussing the absolute immunity from civil liability of judicial officers and Justice Depart-

officers, expanded to cover other government employees, such as congressional aides.[139] The defense of qualified immunity, which permits defendant government officials to escape civil liability in some cases, is one variety of immunity that has developed from this general background.[140] This type of immunity has never been applied by the Supreme Court in the context of political affiliation and government employment decisions, but various federal circuits nonetheless have recognized its applicability in such cases.[141]

1. The Supreme Court Developed the Qualified Immunity Defense to Protect Defendant Government Officials from Civil Suits When Their Conduct Did Not Violate Clearly Established Constitutional Rights

The Supreme Court has long recognized that different levels and different types of immunity may be applicable to a government official depending on his or her position and on the circumstances that might give rise to legal action against that official.[142] The defense of qualified immunity arose from this line of reasoning and initially allowed a defendant government official to claim that his or her conduct "was justified by an objectively reasonable belief that it was lawful."[143]

The Court's seminal decision on the defense of qualified immunity came in 1982 in *Harlow v. Fitzgerald*.[144] In *Harlow*, the petitioners Bryce Harlow and Alexander Butterfield allegedly entered into a conspiracy "in their capacities as senior White House aides to former President Richard M. Nixon" to violate respondent A. Ernest Fitzgerald's constitutional and statutory rights.[145] The Court granted certiorari because it had "[n]ever . . . determined the immunity available to the senior aides and advisers of the President of the United States."[146] It noted that previous decisions consistently held that government offi-

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ment officials conducting their official duties so that they might conduct those duties without fear of burdensome and expensive litigation).

139. *See* Gravel v. United States, 408 U.S. 606, 621–22 (1972) (explaining that the immunity privilege granted to a congressional aide is viewed as the privilege of the legislator for whom he or she works, may be invoked only by the legislator or by the aide on the legislator's behalf, and "is confined to those services that would be immune legislative conduct if performed by the [legislator] himself").

140. *See infra* Part II.C.1.

141. *See infra* Part II.C.2.

142. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

143. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

144. 457 U.S. 800 (1982).

145. *Id.* at 802.

146. *Id.* at 806.

cials are entitled to, at a minimum, "some form of immunity from suits for damages," and that in cases involving executive officials, qualified immunity was generally "the norm."[147]

Examining the defense of qualified immunity in light of its earlier cases,[148] the Court found that "[q]ualified or 'good faith' immunity"[149] involved both an objective[150] and a subjective element.[151] The subjective element, however, often "proved incompatible with [the] admonition . . . that insubstantial claims should not proceed to trial."[152] The Court reformulated the standard for qualified immunity, concluding that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[153] It held 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."[154] It reasoned that by relying on a more objective standard, "measured by reference to clearly established law," any excessive disruption of government would be avoided as insubstantial claims could be resolved through summary judgment.[155]

The Court further clarified the standards announced in *Harlow* in *Anderson v. Creighton*.[156] In *Anderson*, the Court was faced with a suit against an FBI agent as a result of a warrantless search of the plaintiffs' home.[157] The agent claimed he was entitled to qualified immunity because he believed exigent circumstances permitted the search.[158]

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147. *Id.* at 806–07.

148. *Id.*; *see also Gomez*, 446 U.S. at 640 (stating that a government official can claim qualified immunity based on an objectively reasonable belief that his or her actions were lawful).

149. *Harlow*, 457 U.S. at 815.

150. The court stated that the "objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" *Id.* (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

151. The subjective element, in contrast, "refers to 'permissible intentions.'" *Id.* (quoting *Wood*, 420 U.S. at 322).

152. *Id.* at 815–16.

153. *Id.* at 817–18.

154. *Id.* at 818.

155. *Id.* The Court stated that by redefining qualified immunity in more objective terms, it was by no means providing a "license to lawless conduct." *Id.* at 819. The public interest in deterring unlawful conduct and in the compensation of victims remained protected since an official "could be expected to know that certain conduct would violate statutory or constitutional rights" and would thus hesitate to take such action. *Id.*

156. 483 U.S. 635 (1987).

157. *Id.* at 637.

158. *Id.*

The Court stated that for a constitutional right to be "clearly established," as *Harlow* called for, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right."[159] The Court was equally clear, however, that not every official action was protected.[160] Expressing an unwillingness to complicate the qualified immunity doctrine, the Court refused to tie the "scope or extent" of immunity to the nature of the defendant's official duties or to the character of the rights that had been violated.[161] As the Court saw it, "[a]n immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide."[162] As such, the agent was ultimately entitled to qualified immunity.[163]

The Court also made several pronouncements on the manner in which qualified immunity claims should be addressed. For example, it stated that when a court seeks to determine if a constitutional right asserted by a plaintiff was "clearly established" at the time the defendant acted, it must, as a legal matter, determine "whether the plaintiff has asserted a *violation* of a constitutional right at all."[164] If not, the suit can be "weed[ed] out" before any further analysis on the issue of qualified immunity is even required.[165]

In *Saucier v. Katz*,[166] the Court further explained that in light of *Anderson*, a qualified immunity claim must be evaluated using two inquiries: First, a court must determine "whether a constitutional right would have been violated on the facts alleged," and second, "assuming the violation is established, the question [of] whether the right was clearly established must be considered on a more specific level."[167] The Court feared that by skipping the first inquiry entirely, principles which might become the basis for a holding that the right was clearly established in the latter inquiry would be missed entirely.[168] Recently, however, a unanimous Court retreated from this position in the 2009

159. *Id.* at 640.

160. *Id.* ("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, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (citations omitted)).

161. *Id.* at 643.

162. *Id.*

163. *Id.* at 646.

164. Siegert v. Gilley, 500 U.S. 226, 232 (1991) (emphasis added).

165. *Id.*

166. 533 U.S. 194 (2001).

167. *Id.* at 200. The "more specific level" inquiry involved asking whether the right was "clearly established" as called for in *Harlow*. *Id.* at 201.

168. *Id.* at 201.

case of *Pearson v. Callahan*,[169] holding that while this approach was "often appropriate, it should no longer be regarded as mandatory."[170] Instead, the Court permitted the lower courts "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[171]

2. *The Fourth Circuit and Other Circuits Have Applied the Qualified Immunity Defense in Political Affiliation Employment Decision Cases*

None of the Supreme Court's decisions addressing political affiliation and its relationship to government employment mentions the defense of qualified immunity.[172] This does not mean, however, that the circuit courts of appeals have failed to employ the defense in that context: Both the Fourth Circuit[173] and others have applied qualified immunity to political affiliation cases.[174]

The circuit courts of appeals have not deviated from the prescriptions of the Supreme Court on qualified immunity.[175] In political affiliation cases generally, the courts have largely integrated their individual *Elrod-Branti* analyses into the qualified immunity defense, using those analyses to determine whether a plaintiff's constitutional rights were in fact violated.[176] Under the "clearly established" prong

169. 129 S. Ct. 808 (2009).

170. *Id.* at 818.

171. *Id.* The Court found that the "rigid" *Saucier* protocol sometimes caused "a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* The Court added that "[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id.*

172. *See, e.g.*, Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990) (extending the rule of *Elrod* and *Branti* to include promotion, transfer, recall, and hiring without any mention of whether defendants might be entitled to qualified immunity, even though *Elrod-Branti* never previously covered those employment decisions).

173. *See, e.g.*, Pike v. Osborne, 301 F.3d 182, 184–85 (4th Cir. 2002) (evaluating a sheriff's claim of qualified immunity and granting immunity after he failed to rehire two dispatchers who campaigned for his opponent).

174. *See, e.g.*, McCloud v. Testa, 97 F.3d 1536, 1560–62 (6th Cir. 1996) (refusing to grant qualified immunity to a county auditor who fired several individuals because uncertainty about the duties of their positions raised questions as to whether a constitutional right had been violated and granting qualified immunity to the auditor in the dismissal of an administrative assistant because that position was inherently political).

175. *See, e.g.*, *Pike*, 301 F.3d at 184–85 (citing *Saucier* and *Anderson* to resolve a qualified immunity issue).

176. *See, e.g.*, *McCloud*, 97 F.3d at 1560–62 (examining various positions from which the defendant, who claimed qualified immunity, dismissed various plaintiffs to determine if political affiliation was constitutionally considered in the dismissals).

of the qualified immunity analysis, the lower courts have rejected a universal application of immunity to all defendants in political affiliation cases despite a lack of bright line rules under the *Elrod-Branti* framework; the presence of such bright line rules would more likely make it appear that a plaintiff's rights were clearly established.[177] Echoing the Supreme Court in *Anderson*, the Third Circuit, for example, stated that it could not "[look] at the constitutional issue too abstractly."[178] While a right had to be "clearly established" in order to defeat an official's qualified immunity claim, a regime that always allowed immunity in political affiliation cases was untenable "because the lack of 'bright line' rules inherent in the doctrine [of *Elrod-Branti*] would continually provide cover for violations of constitutional rights."[179]

The Fourth Circuit has been no less diligent in its application of the Supreme Court's precedents when confronted with qualified immunity claims in political affiliation cases.[180] First, it is clear that the Fourth Circuit also uses its *Elrod-Branti* analysis to determine whether a plaintiff's constitutional rights have been violated under the first prong of the qualified immunity test.[181] As to the test's second prong, the court has firmly stated that "a strict factual nexus" between the actions of a defendant and the precedent case that established the right allegedly violated is not required.[182] Only when a "legitimate question" as to whether the principles previously announced extended to the new case or if the new case itself might create "an exception to those principles" was a court to sustain a qualified immunity defense.[183] As the court later stated, "Officials are not liable for bad

177. *See, e.g.*, Assaf v. Fields, 178 F.3d 170, 177 (3d Cir. 1999) (rejecting the appellee's argument that qualified immunity was best suited to cases where no bright line rule existed since such a regime would almost always allow defendants to escape liability in political affiliation cases).

178. *Id.*

179. *Id.*

180. The Fourth Circuit declines to conduct the entire qualified immunity analysis when it believes that its *Elrod-Branti* analysis makes such an analysis superfluous. *See, e.g.*, Nader v. Blair, 549 F.3d 953, 962 n.2 (4th Cir. 2008) ("The Defendants alternatively claimed that the decision of the district court should be affirmed on the grounds of qualified immunity. Because we find that the Defendants have committed no constitutional violation, we need not consider their claim of qualified immunity.").

181. *See id.* (declining to further consider the defendants' claim of qualified immunity because they committed no constitutional violation).

182. McConnell v. Adams, 829 F.2d 1319, 1325 (4th Cir. 1987) ("Public officials must consider the possible relevance of legal principles established in analogous factual contexts."); *see also supra* note 160.

183. *McConnell*, 829 F.2d at 1325.

guesses in gray areas; they are liable for transgressing bright lines."[184] The court believed that holding a government official liable because he or she did not predict the outcome of future litigation "'would work a miscarriage of justice.'"[185]

When the Supreme Court laid down its new guidelines for conducting a qualified immunity analysis in *Saucier*, the Fourth Circuit adopted the new test without question or complaint.[186] In fact, the court's first opportunity to apply this new rule was in a case involving an alleged dismissal from a government job based on political expression.[187] Given these precedents, it is clear that although the Supreme Court has not directly addressed the issue of qualified immunity in cases involving political affiliation and government employment actions, the federal circuits clearly recognize that it is a vital issue in this area.[188]

III. THE COURT'S REASONING

In *Fields v. Prater*,[189] the Fourth Circuit unanimously reversed the judgment of the United States District Court for the Western District of Virginia and held that although political affiliation was not a proper criterion on which to base a hiring decision for a local director of social services in Virginia, because that conclusion was not previously clearly established as unconstitutional, the defendants were enti-

184. Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992).

185. Akers v. Caperton, 998 F.2d 220, 227 (4th Cir. 1993) (quoting Swanson v. Powers, 937 F.2d 965, 967 (4th Cir. 1991)). The court recognized that, under *Harlow*, "the critical inquiry is the state of the law *at the time of the official's actions*, not the result reached after years of judicial pondering." *Id.*

186. *See* Pike v. Osborne, 301 F.3d 182, 184–85 (4th Cir. 2002) (resolving a qualified immunity issue using the order of inquiries prescribed in *Saucier*). It is unquestionably the duty of the court to follow the Supreme Court's pronouncements, but the Supreme Court acknowledged the extensive criticism of *Saucier*'s "rigid order of battle" protocol by many lower court judges when it retreated from *Saucier* in 2009. Pearson v. Callahan, 129 S. Ct. 808, 817 (2009).

187. *Pike*, 301 F.3d at 184–85.

188. The Supreme Court has also addressed another area that has clear implications for the relationship between political affiliation and government employment that the circuit courts of appeals are likely to encounter—the applicability of state administrative regulations as a method to overcome a qualified immunity defense. Davis v. Scherer, 468 U.S. 183, 193–97 (1984); *see also* Elder v. Holloway, 510 U.S. 510, 515 (1994) (noting that the Ninth Circuit failed to properly address whether qualified immunity applies to violations of state law). The *Elder* Court noted that, under *Davis*, an official's "clear violation" of a state administrative regulation does not allow a plaintiff to overcome the defense of qualified immunity put forth by the official. *Id.* The clearly established "right" alleged to have been violated must be a *federal* right on which a claim for relief is based. *Id.*

189. 566 F.3d 381 (4th Cir. 2009).

tled to qualified immunity.[190] Writing for the court, Judge Wilkinson explained that the key determination the court had to make was whether the position in question was one for which consideration of party affiliation was an "appropriate requirement."[191] He then explained that, if it were inappropriate to consider partisan affiliation, then a claim of qualified immunity could be defeated only if a defendant violated "clearly established" rights that a reasonable individual in his or her position would have recognized.[192] The court examined each of these issues in turn.

The court first focused on the appropriateness of using partisan affiliation as a factor in the hiring of government employees by asking whether the position at issue involved "policymaking."[193] It reasoned that such an examination, although not determinative, was nonetheless "helpful" because it could assist in demonstrating whether consideration of partisan affiliation was appropriate for a given position.[194] The court used the Fourth Circuit's two-part test to conduct the analysis.[195]

First, the court asked whether the position in question involved any decisionmaking on issues where there was "room for political disagreement on goals or their implementation."[196] Second, because the first inquiry was satisfied, the court focused on the particular position's responsibilities to determine if the position "resemble[d] a policymaker."[197] In the first prong of the analysis, the court concluded that at a very high level of generality, a local director of social services could be considered a policymaking position.[198] Upon a more "concrete analysis" under the second prong, however, it concluded that

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190. *Id.* at 383.

191. *Id.* at 386 (internal quotation marks omitted) (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)) (explaining that a court's inquiry does not involve particular labels, but is whether "'the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved'" (quoting *Branti*, 445 U.S. at 518)).

192. *Id.* at 389.

193. *Id.* at 386.

194. *Id.* The court noted Supreme Court precedent which explicitly stated that the label of "policymaker" was not determinative of whether partisan affiliation was an appropriate criterion in hiring decisions. *Id.* (citing *Branti*, 445 U.S. at 518).

195. *Id.*

196. *Id.* (internal quotation marks omitted) (quoting Stott v. Haworth, 916 F.2d 134, 141–42 (4th Cir. 1990)).

197. *Id.* (internal quotation marks omitted) (quoting *Stott*, 916 F.2d at 142). The court noted that the second prong of the analysis was to be undertaken only "[i]f this first inquiry is satisfied." *Id.* (internal quotation marks omitted) (quoting *Stott*, 916 F.2d at 141–42).

198. *Id.*

the particular position at issue was "not one for which political affiliation [was] an appropriate consideration."[199] The court noted that in Virginia, most social services policy is set at either the federal or the state level, while most residual policymaking authority resides with the local board.[200]

The court did note that the local director possesses some policymaking authority, but it is generally limited to the realm of office organization and supervision.[201] It reasoned that if this low-level authority were sufficient to exempt the position from the First Amendment protections sought by Fields, then "only the most low-level government employees would be protected from politically-based hiring and firing."[202] Ultimately, the court found that no rational connection existed between political ideology and job performance for a local director of social services in Virginia.[203]

The court also rejected the defendants' argument that because the local director dealt with "confidential" information, political affiliation was a relevant hiring criterion under the existing case law.[204] It reasoned that many social services workers also work with such information due to the nature of their jobs, but that partisan affiliation is not an appropriate criterion on which to judge their performance.[205] The court argued that this was simply an attempt by the defendants to fit the local director's position into the broad category of "confidential" without a sufficient explanation of how political affiliation was actually relevant to the position.[206]

The court also reasoned that Virginia's explicit designation of the position as "non-partisan" was a significant signal that partisan affiliation was not an appropriate criterion on which to base a hiring decision.[207] It recognized that the ultimate question was still one of federal, not state, law, but found that the State's decision to prohibit hiring decisions based on partisan affiliation was relevant to determining whether such affiliation is required for effective job performance.[208] The court explained that here, both state law and constitutional law were "pulling in the same direction," with the for-

199. *Id.*
200. *Id.* at 386–87.
201. *Id.* at 387.
202. *Id.*
203. *Id.*
204. *Id.* at 387–88.
205. *Id.* at 388.
206. *Id.*
207. *Id.*
208. *Id.*

mer protecting "professional merit in employment" while the latter guarded against retribution based on an individual's political beliefs.[209]

The court then considered whether the violated constitutional rights were clearly established at the time of the hiring decision to determine if the defendants were entitled to qualified immunity.[210] It noted that although the defendants should have known that state regulations forbade them from considering partisan affiliation when hiring a local director, the violation of a state administrative regulation did not overcome a qualified immunity claim.[211] Rather, the court elaborated, a "reasonable official" must have clearly understood that making such a hiring decision based on partisan affiliation "contravened the First Amendment."[212]

The court explained that, at the time of the hiring decision in Fields's case, the law was not clearly established in that regard.[213] It noted that the factors under consideration often required "particularized inquiries into specific positions in the context of specific systems," making it difficult to clearly demarcate those positions for which partisan affiliation could be considered and those for which it could not.[214] The court reasoned that the fact-intensive inquiries required in this and other cases indicated that no bright line rule existed about which the members of the two boards should have known.[215] Thus, because the court could not say with certainty that the defendants knew or should have known they were violating

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209. *Id.* The court stressed that its reasoning was consistent with the holding in *Nader v. Blair*, 549 F.3d 953 (4th Cir. 2008), in which the court concluded that an assistant director of a social services department in Maryland was a policymaking position, *Fields*, 566 F.3d at 388–89 (citing *Nader*, 549 F.3d 953). The court noted that Maryland law, unlike Virginia, gave local social services employees "significantly more power to shape local policy." *Id.* Furthermore, Maryland law permitted dismissal from such positions for any reason. *Id.* at 389.

210. *Fields*, 566 F.3d at 389–90.

211. *Id.* at 389.

212. *Id.*

213. *Id.*

214. *Id.* The closest analogue the court could find to *Fields* was *McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987), in which the hiring criteria for a Virginia county registrar was examined, *Fields*, 566 F.3d at 389–90 (citing *McConnell*, 829 F.2d 1319). The court reasoned that *McConnell*, which held that partisan affiliation was an inappropriate criterion to consider for a registrar's position, did not clearly put defendants in Fields's case on notice because a registrar "is even less involved in policy-making than is a local director." *Id.* at 390.

215. *Fields*, 566 F.3d at 390.

Fields's constitutional rights, it held that they were entitled to qualified immunity.[216]

IV. ANALYSIS

In *Fields v. Prater*, the Fourth Circuit held that the position of local director of social services in Virginia is one for which political affiliation may not constitutionally be used as a hiring criterion.[217] In so holding, the court appropriately sought to determine whether the hiring authority could demonstrate that party affiliation was an appropriate requirement for the performance of the position.[218] The court applied the two-pronged analysis adopted by the Fourth Circuit, but missed an opportunity to refine its test and to provide greater guidance to the district courts by looking to other circuits' tests on the issue.[219] Although the court's analysis found that a violation of constitutional rights occurred, it also held that because at the time of the hiring decision the law did not clearly establish that the consideration of political affiliation was unconstitutional, the defendants were entitled to qualified immunity.[220] In so holding, the court properly granted the defendants immunity, but failed to provide greater clarity to lower courts and future litigants on when a defendant should be entitled to that immunity.[221]

A. The Court Correctly Sought to Determine If the Hiring Authority Could Demonstrate that Political Affiliation Was an Appropriate Requirement for the Effective Performance of the Position

The court was first required to determine if the use of political affiliation was an appropriate requirement for the effective performance of the position of local director of social services, based on the Supreme Court's *Elrod-Branti* framework.[222] In *Fields*, the plaintiff alleged that her rights had been violated when the defendants conspired to prevent her hiring based on her political affiliation.[223] Recognizing that the case fell within the framework, the court ac-

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216. *Id.*
217. *Id.* at 391.
218. *See infra* Part IV.A.
219. *See infra* Part IV.B.
220. *Fields*, 566 F.3d at 391.
221. *See infra* Part IV.C.
222. *See* Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990) (holding that the rule in *Elrod* and *Branti* on dismissal based on political affiliation extends to promotions, transfers, recalls from layoff, and hiring decisions).
223. *Fields*, 566 F.3d at 385.

knowledged that its ultimate task was to determine whether the defendants could show that political affiliation would impact job performance.[224] If they could not show that, then Fields's constitutional rights had been violated.[225]

Fields, of course, had no right to the benefit of government employment and she could be denied that benefit for any number of reasons.[226] The court recognized, however, that political affiliation may not be one of those reasons.[227] Before the court could determine that the benefit had been improperly denied, it first needed to engage in the aforementioned analysis of the position within the *Elrod-Branti* framework.[228] The Supreme Court, however, had only provided basic guidance to the lower courts on this issue.[229] Thus, the court rightly turned to circuit precedent where the *Elrod-Branti* framework had been more thoroughly developed.[230]

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224. *Id.* at 386; *see also* Branti v. Finkel, 445 U.S. 507, 518 (1980) (stating that in these cases, defendants must "demonstrate that party affiliation [was] an appropriate requirement for the effective performance of the public office involved").

225. *Fields*, 566 F.3d at 385–86; *see also Branti*, 445 U.S. at 518–20 (evaluating the claims of two assistant public defenders under the new standard articulated by the Court and finding a violation of their rights had occurred).

226. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (stating that generally, no person has a right to a government benefit, but if the government offers benefits, there are simply some reasons upon which it may not rely in denying those benefits); Christopher V. Fenlon, Note, *The Spoils System in Check? Public Employees' Right to Political Affiliation & the Balkanized Policymaking Exception to § 1983 Liability for Wrongful Termination*, 30 CARDOZO L. REV. 2295, 2295 (2009) (explaining that, historically, "[a] government job was not viewed as a right but as a privilege; thus, employees had no property interest in their jobs, and no standing to challenge their dismissal").

227. *See Branti*, 445 U.S. at 515–16; Elrod v. Burns, 427 U.S. 347, 360–61 (1976) (plurality opinion); *Perry*, 408 U.S. at 597; *see also* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–10 (1967) (holding laws that barred employment within the state university system unconstitutional, insofar as they prohibited members of the Communist Party from gaining employment when they did not show specific intent to "further the unlawful aims" of the party).

228. *See, e.g.*, Rutan v. Republican Party of Illinois, 497 U.S. 62, 75–79 (1990) (applying the conclusions in *Elrod* and *Branti* to determine if promotions, transfers, and recalls from layoff based on political affiliation or support were an impermissible infringement on public employees' First Amendment rights).

229. *See id.* at 79 (remanding employment cases involving promotion, transfer, recall from layoff, and hiring decisions to a lower court for further proceedings after bringing those actions within the *Elrod-Branti* framework); *Branti*, 445 U.S. at 518–20 (refining the standard from *Elrod* without substantial specificity on how to apply it).

230. *See infra* Part IV.B.

B. The Court Properly Applied Fourth Circuit Precedent but Failed to Refine Its Test Further to Provide Greater Future Guidance to the District Courts in This Area

In an examination that harkened back to the original test laid out by a Supreme Court plurality in *Elrod v. Burns*,[231] the court sought to determine whether the position at issue was a "policymaking" position.[232] While the court implicitly acknowledged that this inquiry was not dispositive,[233] it noted that Fourth Circuit precedents that developed the *Elrod-Branti* framework considered it a worthwhile inquiry.[234] Ultimately, however, the court correctly applied the test adopted by the Fourth Circuit in *Stott v. Haworth*,[235] which governs cases in this area.

In applying the test, the court rightfully determined that, in a general sense, the position of a local director of social services is one in which "legitimate political disagreement over the goals or the implementation of social services programs"[236] might exist.[237] As such, the court moved on to a more thorough examination of the position of local director of social services that was at issue in the litigation.[238]

The court's findings under the second prong of the *Stott* test paid homage to a litany of Fourth Circuit precedents. It acknowledged, for instance, that the refined inquiry required by *Branti* was one of degree, and that even if the local director of social services had some low-level policymaking authority, the existence of such authority did

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231. 427 U.S. at 372.

232. Fields v. Prater, 566 F.3d 381, 386 (4th Cir. 2009).

233. *Id.*; *see also Branti*, 445 U.S. at 518 ("[T]he ultimate inquiry is not whether the label 'policymaker' . . . fits a particular position . . . ."); Susan Lorde Martin, *A Decade of* Branti *Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 22 (1989) ("The primary effect of *Branti*, then, is to change the categorical exceptions established in *Elrod*. No longer are the descriptions 'policymaker' or 'confidant' determinative in deciding whether an employee may constitutionally be dismissed because of political affiliation." (footnote call numbers omitted)).

234. *Fields*, 566 F.3d at 386; *see* Martin, *supra* note 233, at 22 ("[A]lthough the labels 'policymaker' and 'confidant' may be relevant to the inquiry, they do not mandate a conclusion." (footnote call number omitted)).

235. 916 F.2d 134, 141–42 (4th Cir. 1990); *see Fields*, 566 F.3d at 386–88 (applying *Stott*).

236. *Fields*, 566 F.3d at 386.

237. Social services can easily be categorized as a government service where the goals and implementation of the service are a point of contention between the major parties, with their "'goals or programs affect[ing] the direction, pace, or quality'" of the government services. *Stott*, 916 F.2d at 141–42 (quoting Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241–42 (1st Cir. 1986) (en banc)).

238. *Fields*, 566 F.3d at 386.

not necessarily mean that political affiliation related to the position.[239] The court also properly noted that although various Virginia laws designated the director's position as non-partisan, the state law's determination was not dispositive of the constitutional issue, which was "ultimately a question of federal law."[240] Despite the fact that these and other precedents form the bedrock of Fourth Circuit jurisprudence in this area, the court squandered an opportunity to reach outside of the confines of the circuit to refine its test.[241]

The need to improve the *Stott* test has become increasingly evident over time. The test's continued application by the Fourth Circuit has demonstrated that it is extremely useful for making case-by-case determinations as to whether a particular government position does or does not depend on partisan affiliation to function effectively.[242] The test, however, fails to provide clear guidance for the lower courts in the circuit because a *Stott* analysis of two or more extremely similar positions may reach very different conclusions about the appropriateness of considering political affiliation in various employment decisions.[243]

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239. *Id.* at 386–87; *see also* Akers v. Caperton, 998 F.2d 220, 225 (4th Cir. 1993) (finding that a low-level position with some characteristics of a position for which political affiliation is relevant is in fact protected from political considerations).

240. *See Fields*, 566 F.3d at 388 (internal quotation marks omitted) (quoting McCrerey v. Allen, 118 F.3d 242, 245 (4th Cir. 1997)).

241. The Fourth Circuit has historically been slow to move and adapt in this area of law. *See* Martin, *supra* note 233, at 24–42 (comparing the development of political patronage dismissal law in each federal circuit and finding little development in the Fourth Circuit as compared to several other circuits as of 1989). Before adopting the First Circuit's *Elrod-Branti* test in *Stott*, the Fourth Circuit had perhaps the least developed and least clear test of all the circuits in cases involving political affiliation and government employment. *See id.* (examining the development of the *Elrod-Branti* framework by each federal circuit and finding that the Fourth Circuit, compared to other circuits, provided virtually no clear standards by which political affiliation cases would be judged).

242. *See* Jenkins v. Medford, 119 F.3d 1156, 1162–64 (4th Cir. 1997) (en banc) (applying *Stott* and holding that the position of deputy sheriff in North Carolina was one for which political affiliation is an appropriate job requirement); *Stott*, 916 F.2d at 142–43 (adopting the First Circuit's test for political affiliation-based employment action cases and holding that various positions in North Carolina state government were exempt from civil service protection and that the occupants of those positions were properly dismissed). The principles behind the test, although the case is not specifically cited, also support the other post-*Stott* Fourth Circuit decisions. *See, e.g.*, Knight v. Vernon, 214 F.3d 544, 549–51 (4th Cir. 2000) (holding that a jailer's political allegiance to the sheriff was not an appropriate requirement for her job performance without citing *Stott*); *Akers*, 998 F.2d at 224–25 (applying largely the *Stott* principles without citing *Stott* and holding that the position of county highway maintenance superintendent in West Virginia was one for which political affiliation could not be a basis for dismissal).

243. *Compare Fields*, 566 F.3d at 386 (applying the *Stott* test and finding the position of local director of social services in Virginia was not one for which political affiliation could be considered relevant to job performance), *with* Nader v. Blair, 549 F.3d 953, 959–60 (4th

The *Fields* case presents a ready example of this problem. In *Nader v. Blair*,[244] the Fourth Circuit applied the *Stott* test and held that the position of assistant director of social services in Maryland was a position for which political affiliation was related to effective job performance.[245] Yet, only one year later, the Fourth Circuit in *Fields* reached the opposite conclusion for the similar and higher-ranking position of local director of social services in Virginia.[246] Although this demonstrates that the *Stott* test is useful for making position-specific determinations, it also suggests that virtually every government position in every individual state within the circuit could potentially be subject to close scrutiny through litigation.[247] Even a decision by the Fourth Circuit itself would only carry weight as it related to a position in a single state, a single county, or just a single municipality.[248] This is an invitation to waste judicial time and resources when a few modifications to the test would prevent unmeritorious cases from proceeding to trial or at least discourage appeals to the Fourth Circuit.[249]

Other circuits have adopted their own tests or look to certain factors in order to determine whether partisan affiliation is rationally related to the performance of a government position.[250] Some of these inquiries could feasibly be used to augment one or both prongs of the *Stott* test.[251] The Second Circuit, for instance, examines a position using a list of eight separate factors,[252] none of which is dispositive,[253] to

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Cir. 2008) (applying the *Stott* test and finding the position of assistant director of social services in Maryland was one for which political affiliation could be considered relevant to job performance).

244. 549 F.3d 953.

245. *Id.* at 959–61. The Fourth Circuit affirmed the district court's order granting summary judgment to the defendant in a lawsuit alleging politically motivated termination. *Id.* at 962.

246. *Fields*, 566 F.3d at 388–89.

247. *See Stott*, 916 F.2d at 141 (acknowledging that courts are bound to scrutinize patronage dismissals "after the fact" to determine which positions properly fall within the patronage system).

248. *See id.* at 144–45 (listing various government positions that courts across the country have found to be subject to removal based on political affiliation and other positions where the opposite is true).

249. *See* Fenlon, *supra* note 226, at 2298 (noting that uncertainties resulting from overly diverse, variable standards in *Elrod-Branti* cases can result in the unnecessary expenditure of government resources in the litigation of wrongful termination suits). The potentially unnecessary expenditure of resources also weighs heavily in qualified immunity analyses. *See infra* Part IV.C.

250. *See supra* Part II.B.1.

251. *See* Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994) (listing several factors, such as "exempt[ion] from civil service protection," "[perception] as a policymaker by the public," and "[responsiveness] to partisan politics and political leaders," that courts in the Second Circuit consider in cases involving political affiliation and employment actions).

252. *See supra* text accompanying note 103.

determine whether political affiliation has a bearing on job performance.[254] The Fourth Circuit, to date, has no consistent list of factors it considers when it examines a position in a political affiliation case.[255] Alternatively, the Fourth Circuit could follow the lead of the Sixth Circuit and create different "categories" of government positions in order to determine when political affiliation is or is not an appropriate requirement for the position.[256] This would create a significant presumption that political affiliation was or was not appropriate for a particular government job, since the Sixth Circuit's categories are broadly descriptive.[257] Given the evident variations between similarly titled government jobs across state lines,[258] however, the categories would likely be ineffective in resolving disputes early or altogether preventing unnecessary litigation since individualized examination would be necessary to properly categorize each particular position regardless of superficial similarities in titles or duties.[259]

Supplementing the *Stott* test with a formally adopted, explicit list of factors to consider would likely provide the greatest guidance to

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253. *Vezzetti*, 22 F.3d at 486.

254. *See* Regan v. Boogertman, 984 F.2d 577, 580 (2d Cir. 1993) ("We have interpreted the *Branti* test to mean 'that political affiliation is an appropriate requirement when there is a rational connection between shared ideology and job performance.' It is necessary to scrutinize the functions of the position to determine whether there is that connection." (citation omitted)).

255. *See* Nader v. Blair, 549 F.3d 953, 959–61 (4th Cir. 2008) (noting several factors various courts have considered in *Elrod-Branti* cases and subsequently evaluating an assistant director of social services's budget responsibilities, ability to shape policy and programs, and interactions with politicians, departments, and other agencies); Jenkins v. Medford, 119 F.3d 1156, 1162–64 (4th Cir. 1997) (en banc) (examining and considering the "specific political and social roles" of sheriff's deputies in North Carolina); Stott v. Haworth, 916 F.2d 134, 142 (4th Cir. 1990) (examining the rationale for creating positions exempt from civil service protection and concluding that when such a position is held it indicates a presumption at law that discharge or demotion was proper); *see also* Fenlon, *supra* note 226, at 2315 (noting that the use of several common factors is already "apparent" across several circuits, including the Fourth Circuit, even if the circuit has not formally adopted the use of the factors in its case law).

256. *See, e.g.*, McCloud v. Testa, 97 F.3d 1536, 1557–58 (6th Cir. 1996) (creating categories of government positions for consideration in patronage cases).

257. *See supra* note 112.

258. *Compare* Fields v. Prater, 566 F.3d 381, 386 (4th Cir. 2009) (holding that a local director of social services in Virginia was a position for which political affiliation could not be considered in hiring), *with Nader*, 549 F.3d at 960 (holding that an assistant director of social services in Maryland was a position for which political affiliation could be considered in dismissal).

259. *See McCloud*, 97 F.3d at 1558 (acknowledging that despite superficial appearances that may have placed certain positions into the categories devised by the court, a deeper factual inquiry into the responsibilities of each position was still necessary to properly categorize each one).

district court judges.[260] The circuit's recent decisions suggest that the designation of a position as "political" or "non-political" can vary substantially across state lines, even for ostensibly similar positions.[261] Such state-to-state variations, as well as potential differences at more local levels, create ambiguity and result in difficult cases.[262] Refinement is necessary so lower courts have a substantially better idea of what they are looking for when a government position's political (or non-political) nature is litigated.[263] Barring any further clarification of the *Elrod-Branti* framework by the Supreme Court,[264] since each government position must be considered individually, the Fourth Circuit should refine its test to encourage summary judgment decisions and discourage fruitless appeals.[265] Painting a clearer picture of the law can only serve to ultimately conserve resources, judicial or otherwise.[266]

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260. *But see* Fenlon, *supra* note 226, at 2327–29 (advocating the wider adoption of the categorical approach adopted by the Sixth Circuit and arguing that such an approach provides a "coherent, comprehensive framework" for decisions).

261. *See supra* note 258.

262. The *Fields* court, for example, acknowledged that this case was a "close question" due in part to the necessarily intensive factual inquiries required when a government position is subject to litigation in these cases. *Fields*, 566 F.3d at 390.

263. *See* Fenlon, *supra* note 226, at 2300 (advocating reform to the *Elrod-Branti* line of cases, but by the Supreme Court rather than the individual circuits because *Elrod* and *Branti* left this area of law an "unsettled field," making workable lower court application difficult).

264. *See* Martin, *supra* note 233, at 23–24 (noting that it is the lower courts that provide guidance as to when First Amendment protection exists for public employees and that those courts have necessarily attempted to craft objective criteria to make those determinations).

265. *See* Fenlon, *supra* note 226, at 2298 (noting that "under-developed and varying standards" under *Elrod-Branti* encourage wasteful litigation of wrongful termination suits); *see also* Robert C. Wigton, *The Supreme Court and Political Patronage: The* Rutan *Decision in Context*, 2 GEO. MASON U. CIV. RTS. L.J. 273, 281–82 (1992) (explaining that in the face of "limited definitional guidance" from the Supreme Court under *Elrod-Branti*, it is the federal circuits that individually refine the criteria used to determine when a position falls within the *Elrod-Branti* framework).

266. *See* Stott v. Haworth, 916 F.2d 134, 144–45 (4th Cir. 1990) (listing the "cases, plentiful in number," that had been considered across the country under the *Elrod-Branti* framework as of late 1990). In the Fourth Circuit alone, the list of positions considered under the framework has grown in the last twenty years. *See, e.g.*, Nader v. Blair, 549 F.3d 953, 956, 959 (4th Cir. 2008) (considering the position of Assistant Director of Business Management and Financial Services in the Baltimore City Department of Social Services); Knight v. Vernon, 214 F.3d 544, 545 (4th Cir. 2000) (considering the position of jailer in Rockingham County, North Carolina); Akers v. Caperton, 998 F.2d 220, 222–23 (4th Cir. 1993) (considering the position of County Maintenance Superintendent in West Virginia).

C. The Court Properly Granted the Defendants Qualified Immunity but Failed to Clarify When Constitutional Rights Are "Clearly Established" for Future Political Affiliation Cases

The court's final task in *Fields* was to determine if the defendants were entitled to qualified immunity. Using the *Stott* test, the court determined that under the first part of the qualified immunity analysis,[267] the local directors had violated Fields's constitutional rights.[268] The court then correctly recognized that the defendants did not know or should not have known that they were violating Fields's constitutional rights when they refused to hire her based on her political affiliation, and the court granted them qualified immunity.[269] Fourth Circuit precedent, in fact, provided a superficially strong indication that the position of local director of social services was one for which political affiliation could be a criterion in hiring.[270] Only a deeper, fact-intensive inquiry, one hardly suited to a non-lawyer, eventually revealed the stark differences that set this case apart from precedent.[271] Furthermore, the defendants could not have known that they were violating Fields's constitutional rights just because Virginia law and related state regulations forbade the consideration of political affiliation in hiring a local director.[272]

It is unlikely the defendants would have realized that a twenty year old case analyzing the position of county registrar would be considered the best guide for their actions,[273] as the court eventually

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267. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged . . . .").

268. Fields v. Prater, 566 F.3d 381, 389 (4th Cir. 2009). The *Fields* court did not deviate from the order of inquiries established in *Saucier* even though the Supreme Court held several months before *Fields* that lower courts could exercise their own discretion in the order of inquiries. *See* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

269. *Fields*, 566 F.3d at 390; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) ("We . . . hold 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." (citations omitted)).

270. *See Nader*, 549 F.3d at 959–62 (holding that a nearly identical position in the state of Maryland was subject to political affiliation considerations).

271. *See Fields*, 566 F.3d at 386–90 (conducting an intensive factual inquiry of the position at issue and ultimately awarding qualified immunity to the defendants based on factual distinctions from precedent cases).

272. *See* Elder v. Holloway, 510 U.S. 510, 515 (1994) (explaining that an official's violation of a state administrative regulation does not automatically permit the plaintiff in a 42 U.S.C. § 1983 action to overcome the official's qualified immunity).

273. *See* McConnell v. Adams, 829 F.2d 1319, 1323–24 (4th Cir. 1987) (holding that county registrars in Virginia may not be selected based on partisan affiliation because state statutes do not require it, party affiliation would detract from job performance, and such affiliation is otherwise unnecessary to the performance of the position).

found.[274] In the initial litigation, the district judge essentially sought to hold the defendants responsible for failing to predict the outcome of a court decision that had yet to occur;[275] thus, the court could not allow this result to stand.[276] Yet its decision does little to solve an ongoing confusion in the case law.[277] The court should have gone further and sought to bring greater clarity to the law and reduce the number of "gray areas"[278] within the Fourth Circuit.

A court's qualified immunity analysis is not meant to "turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."[279] Analogy to factually similar situations can be and often is essential in this analysis.[280] It is true that the court in *Fields* drew an analogy to a similar case, but drawing analogies in litigation that a government official cannot reasonably be expected to discover in the course of his work leads to a fatal flaw in the qualified immunity analysis.[281] If government officials responsible for various employment decisions involving government employees are not provided clear guidance, then the qualified immunity defense falls into the trap that the Supreme Court sought to avoid, namely having qualified immunity analyses turn on fact-specific situations.[282] The defense becomes a blanket shield for a multitude of actions, allowing defendant officials to escape both litigation and liability because immunity ends up turning on the nature of the duties of

274. *Fields*, 566 F.3d at 389–90; *see also* Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992) ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.").

275. *See* Fields v. Justus, No. 1:07cv00019, 2008 WL 863723, at *5–6 (W.D. Va. Mar. 31, 2008) (holding that the law in this area was clearly established based on a case involving electoral registrars and denying the defendants qualified immunity on that basis).

276. *Fields*, 566 F.3d at 390; *see* Akers v. Caperton, 998 F.2d 220, 227 (4th Cir. 1993) (opining that holding an official accountable for failing to predict the outcome of possible future litigation would be a "'miscarriage of justice'" (citation omitted)).

277. *See, e.g.*, Jenkins v. Medford, 119 F.3d 1156, 1160 (4th Cir. 1997) (en banc) (acknowledging that the case law issued by lower courts on the *Elrod-Branti* standard is "'conflicting and confusing'" at best (citation omitted)).

278. *Maciariello*, 973 F.2d at 298.

279. Anderson v. Creighton, 483 U.S. 635, 643 (1987).

280. *Id.* at 640; McConnell v. Adams, 829 F.2d 1319, 1325 (4th Cir. 1987).

281. *See Fields*, 566 F.3d at 389–90 (granting defendants qualified immunity only after an intensive factual analysis of the position at issue).

282. *See Anderson*, 483 U.S. at 643 ("[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated.").

the position at issue or of the rights violated.[283] Officials who might not otherwise deserve immunity may escape liability by claiming they did not know that they were violating a constitutionally protected right.[284]

The decision to grant the defendants qualified immunity in *Fields* ultimately provides a further indication of the need to reform the test used to determine whether a government position is one for which political affiliation may be properly considered.[285] The defendants in *Fields* perhaps should have known that they were violating Fields's constitutional rights, given the guidance provided by the numerous cases decided in the Supreme Court and the various courts of appeals around the country on so many different government positions.[286] The apparently clear dictates of such cases become muddled, however, since each one hinges so specifically on its own facts.[287]

All courts should seek to provide greater guidance so that an identical factual nexus need not be identified in order to defeat an official's claim of qualified immunity in every case.[288] By refining its test as outlined above, the Fourth Circuit could begin this process.[289] Judges, lawyers, and potential litigants alike would have a much better understanding of the applicable constitutional law if they knew what

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283. *Contra id.* (implying that such requirements might subject more officials, not less, to litigation since their actions would lack an "assurance of protection that it is the object" of the qualified immunity doctrine to provide).

284. *See* Assaf v. Fields, 178 F.3d 170, 177 (3d Cir. 1999) (warning that narrowly focused and individualized immunity rules allow officials "'one liability-free violation of a constitutional or statutory requirement'" (citation omitted)); *see also* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 668 (2009) ("If courts repeatedly hold that a particular right is not clearly established, without ever defining the contours of that right, then government actors may be able to repeatedly engage in unconstitutional conduct without ever incurring liability for their actions.").

285. *See supra* Part IV.B.

286. *See, e.g.*, Branti v. Finkel, 445 U.S. 507, 518–20 (1980) (holding that a government hiring authority bears the burden of demonstrating that partisan affiliation is an appropriate requirement for effective performance of the position at issue, and laying the groundwork for future cases on such issues); Nader v. Blair, 549 F.3d 953, 959–62 (4th Cir. 2008) (analyzing a state-level social services office under the *Stott* test to determine whether it was one for which political affiliation was an appropriate criterion in a dismissal action).

287. *See, e.g.*, *Nader*, 549 F.3d at 959–62 (making a determination after an intensive fact-based inquiry that an assistant director of social services in Maryland is subject to political affiliation considerations in employment actions).

288. *See Anderson*, 483 U.S. at 640 ("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 . . . ."); McConnell v. Adams, 829 F.2d 1319, 1325 (4th Cir. 1987) ("[P]ublic officers should not automatically receive qualified immunity simply because there is not a strict factual nexus between their actions and the precedent establishing the right allegedly violated.").

289. *See supra* Part IV.B.

specific factors a court needed to look for in political affiliation cases.[290] Unless every single position where partisan affiliation may or may not be an appropriate criterion for hiring, dismissal, promotion, transfer, or recall is going to be litigated in the near future, "I didn't know" cannot continue to be a valid excuse for the violation of an individual's rights.

V. CONCLUSION

In *Fields v. Prater*, the Fourth Circuit held that it was unconstitutional to consider political affiliation in hiring a local director of social services in Virginia.[291] The court further held that because the law was unclear on this matter at the time of the hiring decision at issue, the defendants were entitled to qualified immunity.[292] The court properly sought to determine whether political affiliation was relevant to the effective performance of the position at issue.[293] It also properly analyzed the position at both a broad level and a narrower, more specific level in line with circuit precedent, but failed to avail itself of the opportunity to further refine the circuit's test in order to provide greater guidance to lower courts.[294] Finally, the court properly found that the defendants were entitled to qualified immunity in this case, but again it forfeited an opportunity to provide greater clarity on the issue to judges, government officials, and potential litigants as to when it is clearly established that a given position is entitled to protection from the consideration of political affiliation in hiring, dismissal, and other employment decisions.[295] The Fourth Circuit must act soon to clarify the analyses used in cases such as *Fields* by providing government officials with less ambiguous criteria; the current lack of such clarity serves only to generate continuous litigation over numerous positions and transforms the defense of qualified immunity into a blanket protection for government officials that it was never intended to become.[296]

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290. *See* Assaf v. Fields, 178 F.3d 170, 177 (3d Cir. 1999) (opining that a "lack of 'bright line' rules" cannot "continually provide cover for violations of constitutional rights" by government officials); *see also* Leong, *supra* note 284, at 682 ("[I]f a particular constitutional principle is already 'clear,' then any government official who acted in contravention of that principle would already be unable to raise the defense of qualified immunity.").

291. Fields v. Prater, 566 F.3d 381, 386 (4th Cir. 2009).

292. *Id.* at 389.

293. *See supra* Part IV.A.

294. *See supra* Part IV.B.

295. *See supra* Part IV.C.

296. *See supra* Part IV.B–C.