Constitutional Law - Third Circuit Sets Forth Balancing Test for Evaluating Jus Terth Standing in First Amendment Context

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CONSTITUTIONAL LAW—THIRD CIRCUIT SETS FORTH BALANCING TEST FOR EVALUATING JUS TERTII STANDING IN FIRST AMENDMENT CONTEXT

Amato v. Wilents (1991)

I. Introduction

The range of rights and immunities that a litigant has standing to assert is limited by the United States Constitution and by traditional common law principles. Specifically, "in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties."

Throughout the past several decades, however, the United States Supreme Court has substantially eroded this bias against third party, or jus tertii, standing.

1. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991); see Gladstone v. Village of Bellwood, 441 U.S. 91, 100 (1979) (noting that "a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part"); Eisenstadt v. Baird, 405 U.S. 438, 444 (1972) (recognizing that "a litigant may assert only his own constitutional rights or immunities") (quoting United States v. Raines, 362 U.S. 17, 22 (1960)); see also Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 277 (1984) (noting that a litigant may challenge a statute "only in the terms in which it is applied to him; and, in the application process, courts have broad power to construe the relevant statutory language so as to avoid constitutional difficulties"); Marc Rohr, Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in Federal Courts, 35 U. Miami L. Rev. 393, 394 (1981) (noting that "a litigant may not argue that the governmental conduct that causes him harm should be enjoined or declared illegal simply because the conduct infringes on the rights of a third party").

2. Powers, 111 S. Ct. at 1372 (concluding that criminal defendant had standing to raise constitutional rights of juror excluded in voir dire on racial grounds); United States Dep't of Labor v. Triplett, 494 U.S. 715, 720-21 (1990) (holding that attorney had standing to raise client's constitutional rights relating to fee restrictions); Caplin & Drysdale v. United States, 491 U.S. 617, 623 n.3 (1989) (concluding that attorney had standing to raise constitutional claims of criminal defendant client); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978) (holding that citizens living near site of proposed nuclear power plant had standing to bring declaratory judgment action); Craig v. Boren, 429 U.S. 190, 195 (1976) (finding that vendor had standing to assert rights of potential vendees seeking access to vendor's market); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (concluding that physicians had standing to challenge constitutionality of abortion statute); Singleton v. Wulff, 428 U.S. 106, 117-18 (1976) (holding that physicians had standing to raise constitutional claims of patients who were denied medical funding for abortions); Eisenstadt, 405 U.S. at 443-46 (holding that distributor of contraceptives had standing to raise constitutional rights of unmarried distributees); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (holding that physician and medical clinic had standing to raise constitutional right of married people to use contraceptives); Rohr, supra note 1, at 468 (arguing that federal courts should grant third-party standing to any litigant who appears reasonably likely to give adequate representation to the interests of the right holder).
In *Amato v. Wilentz*, the United States Court of Appeals for the Third Circuit addressed the issue of whether Essex County, New Jersey had standing to assert First Amendment rights on behalf of Warner Brothers, a movie studio that was denied access to county courthouses to film movie scenes. The Third Circuit denied the county third party standing to raise claims of violations of the movie studio’s First Amendment rights, and dismissed the county’s lawsuit. In reaching this conclusion, the Third Circuit enunciated the various factors that must be balanced in evaluating jus tertii standing cases, and arranged these factors into a cohesive framework to be used when approaching cases presenting jus tertii standing issues. In doing so, the Third Circuit discussed the unique jus tertii standing considerations raised in the context of First Amendment litigation, but concluded that these considerations did not mandate a finding of jus tertii standing.

The terms “third party standing” and “jus tertii standing” are used interchangeably in case law and academic commentary. See *Valley Forge Christians College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 492-93 n.4 (1982) (Brennan, J., dissenting) (noting that the Court “generally permit[s] persons to press federal suits even when the injury complained of is not obviously within the realm of injuries that a particular statutory or constitutional provision was designed to guard against” and that this “circumstance [is] one of ‘third-party standing’”); see generally *Robert Allen Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 600 (1962) (using expression “jus tertii standing”); *Rohr, supra* note 1 at 394 (using expression “third-party standing”).

The term “jus tertii standing” is also used to describe First Amendment overbreadth standing. See *Note, Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-44 (1974) [hereinafter *Standing*]. In differentiating jus tertii standing from overbreadth standing, commentators have focused on the relationship between the litigant and the third party. *Id.* at 424. Specifically, in a jus tertii standing case, the litigant seeks to raise the rights of an existing third party with whom the litigant has an established relationship. *Standing, supra*, at 424. In an overbreadth standing case, by contrast, the litigant is permitted to raise the claim of a hypothetical third party. *Id.*

3. 952 F.2d 742 (3d Cir. 1991).
4. *Id.* at 743.
5. *Id.* at 755.
6. *Id.* at 749-55.
7. *Id.* at 753-54.
8. *Amato*, 953 F.2d at 754-55. In *Amato*, Essex County and the Essex County Executive brought action against the Chief Justice of the New Jersey Supreme Court, individually and in his capacity as Administrative Head of the New Jersey Judiciary System. *Id.* at 743. For discussions of the propriety of federal court involvement in intrastate-governmental disputes, see *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1932) (holding that municipality, as creation of state, may not invoke constitutional privileges or immunities against its creator); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (holding that “[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Four-
This Casebrief first surveys the historical development of the concept of jus tertii standing in United States Supreme Court decisions. Next, this Casebrief sets forth the facts precipitating the county's lawsuit asserting the movie studio's constitutional rights. This Casebrief then examines the Third Circuit's analysis and balancing of the various factors relevant in jus tertii standing cases. Finally, this Casebrief concludes that the Amato decision provides useful guidance for courts in addressing questions of jus tertii standing.

II. BACKGROUND

The longstanding principle that a litigant only has standing to raise his or her own rights is deeply rooted in traditional common law. The United States Supreme Court relied on this principle as early as 1900 in Tyler v. Judges of the Court of Registration. In Tyler, the Court denied standing, holding that "[t]he prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued." The Court explained that, except in a few instances, the plaintiff "is bound to show an interest in the suit personal to himself." The Supreme Court still adheres to this historical bias against third party standing.

This general disfavor of third party standing is not mandated by the

13. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958) ("To limit the breadth of issues which must be dealt with... this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves."); Barrows v. Jackson, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."); Buchanan v. Warley, 245 U.S. 60, 72 (1917) ("[A]tacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question.").

14. 179 U.S. 405 (1900). In Tyler, the plaintiff attempted to challenge the Land Registration Act of Massachusetts, on the ground that it "deprive[d] persons of property without due process of law." Id. at 409. The Court, however, held that the plaintiff was not affected by the Act because he had the "requisite notice," and thus, lacked standing to sue. Id. at 410.

15. Id. at 406, 410.

16. Id. at 406. Four justices dissented on the narrower basis that the litigant showed a sufficient personal interest in the litigation. Id. at 414.

17. See Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and can-

9. For a detailed discussion of the historical development of jus tertii standing, see infra notes 13-39 and accompanying text.
10. For a full discussion of the facts of Amato, see infra notes 41-53 and accompanying text.
11. For a detailed discussion of the Amato Court's reasoning and analysis underlying its holding, see infra notes 54-95 and accompanying text.
12. For a full discussion of the usefulness of the Amato framework, see infra notes 96-101 and accompanying text.

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Article III "case and controversy" requirement of the United States Constitution, but rather is a "prudential limitation" applied by the Court in addition to constitutional standing requirements. The bias against third party standing serves two judicial policies. First, the rule provides courts with the opportunity to exercise judicial restraint. Courts may invoke the rule in order to avoid hearing unnecessary and undesirable cases in which third parties do not wish to assert their rights. Second, the rule allows courts to avoid ruling on hypothetical or abstract grievances. The theory underlying judicial reluctance to allow a litigant to vicariously assert the rights of others is that the injured party will be the best advocate for his or her position, and that a plaintiff may be in a self-interested or even conflicting position to the third party whose rights the plaintiff purports to assert.

The prudential rule against jus tertii standing is not without exceptions. As early as 1915, the Supreme Court began to relax its traditional
suspicion of third party standing. For example, in *Truax v. Raich*, the Court permitted an employee to raise the Equal Protection rights of his employer. Ten years later, in *Pierce v. Society of Sisters*, schools were permitted to raise the Fourteenth Amendment rights of prospective pupils and their parents. The Supreme Court did not decide these early cases based on the modern concept of jus tertii standing. Rather, the Court decided these cases based upon the idea that interference with the rights of third parties directly and immediately impaired the rights of the plaintiffs.

The series of modern cases specifically establishing jus tertii standing as a distinct legal principle began with *Barrows v. Jackson* in 1953. In *Barrows*, the Court permitted a white vendor to assert the rights of a black vendee as a defense in a suit charging the vendor with breach of a

23. 239 U.S. 33 (1915) (granting employee standing to challenge statute based on employer's Equal Protection rights).
24. Id. at 38-39. In *Truax*, Arizona enacted a statute that was designed “to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona.” Id. at 35. The statute required employers of more than five workers to employ “not less than eighty (80) per cent qualified electors or native-born citizens of the United States.” Id. Subsequent to the enactment of the statute, the plaintiff, who was not a qualified elector, was discharged. Id. at 36.
25. 268 U.S. 510 (1925) (granting standing to schools to raise Fourteenth Amendment rights of prospective pupils and their parents).
26. Id. at 535-36; see *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (noting that statute prohibiting teachers from teaching foreign languages interfered with rights of pupils and their parents); *Bartels v. Iowa*, 262 U.S. 404, 411 (1923) (same).

In *Pierce*, the plaintiffs claimed that the Compulsory Education Act of Oregon, which required every parent of a child between the ages of eight and sixteen to send the child “to a public school for the period of time a public school shall be held during the current year,” was a violation of their Fourteenth Amendment right to liberty. *Pierce*, 268 U.S. at 530.
27. *Truax*, 239 U.S. at 38-39. In upholding the right of employees to raise the rights of their employer, the *Truax* Court adopted a “first party standing” approach. Id. The Court reasoned that the interference with the employers’ rights “operate[d] directly” on the rights of the employees. Id. at 38. Therefore, the employees’ claim could be heard by the Court. Id. at 39. The *Pierce* Court adopted the reasoning of *Truax*. *Pierce*, 268 U.S. at 536. Specifically, the Court analogized the interrelation of interests between businesses and patrons to that of schools and pupils. Id. at 536. In granting relief, the Court relied upon the “many . . . cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.” Id.
Thus, the *Pierce* Court reasoned that the schools’ interest in the rights of prospective students and their parents was “clear and immediate.” Id.

Most of the cases where such challenges were sustained were based upon the concept of non-severability. The basic concept of non-severability is that a party has standing to challenge a statute if he or she can show that a statute is non-severable or that “an attempt to sever would leave standing a statute that would be incapable of giving fair notice of its prohibitions.” *Sedler*, *supra* note 2, at 608. For a more detailed discussion of the concept of non-severability, see *Sedler*, *supra* note 2, at 601-12.

racially restrictive covenant. 29 Barrows was the first case in which the Supreme Court expressly recognized a litigant's standing to assert the constitutional rights of third parties. 30 The Barrows court stated that "[u]nder the peculiar circumstances . . . the reasons which underlie [the] rule denying standing to raise another's rights . . . are outweighed by the need to protect the fundamental rights which would be denied." 31 Since the Barrows decision, the Supreme Court has consistently recognized jus tertii standing to be appropriate when the policies underlying the restrictions on such standing are not furthered. 32

Supreme Court decisions addressing the appropriateness of jus tertii standing have provided federal courts with guidance in determining the relevant factors for evaluating jus tertii standing. 33 First, the litigant must have suffered a concrete, redressable injury in fact. 34 Second, the court must consider whether prudential considerations should prevent

29. Id. at 257 (stating that "the reasons which underlie our rule denying standing to raise another's rights . . . are outweighed by the need to protect the fundamental rights which would be denied").
30. Id. at 255-59.
31. Id. at 257.
32. See, e.g., Secretary of State of Maryland v. Munson, 467 U.S. 947, 956 (1984). The Munson Court recognized that in "situations where competing considerations outweigh any prudential rationale against third-party standing . . . [the Supreme Court] has relaxed the prudential-standi ng limitation." Id. Specifically, the Court noted that "[w]here practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of jus tertii standing." Id.; see United States Dept. Labor v. Triplett, 494 U.S. 715, 721 (1990) (holding attorney had jus tertii standing to bring action based on client who was deprived of legal representation, due to obstacles preventing client from asserting his own rights); Singleton v. Wulff, 428 U.S. 106, 114-15 (1976) (holding physicians had third party standing to raise claims of patients who were denied medical funding for abortions based on obstacles precluding patients from asserting own rights, while recognizing that the rule against third party standing "should not be applied where its underlying justifications are absent"); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958) (holding that nexus of association was sufficient to give NAACP jus tertii standing to assert constitutional rights of its members).

33. See Sedler, supra note 2, at 626-28. This commentator notes that federal courts most often assess: 1) the interest of the third party asserting jus tertii standing; 2) the nature of the right asserted; 3) the relationship between the party asserting standing and the rightholders; and 4) the feasibility of the rightholders asserting their own rights in an independent action. Id.; see Standing, supra note 2, at 425.
34. See Caplin & Drysdale v. United States, 491 U.S. 617, 623 n.3 (1989). If the plaintiff can allege sufficient concrete injury, the Article III case-and-controversy requirement is satisfied. Id.
the plaintiff from advancing the claim.\footnote{35} In assessing prudential considerations, the court must examine the following three factors: (1) the relationship between the litigant and the third party; (2) the ability of the third party to advance his own interests; and (3) the impact of potential litigation by the third party.\footnote{36}

The Supreme Court has, however, left undecided the issue of the exact role these three factors play in evaluating jus tertii standing.\footnote{37} In some cases, the Court appears to take the position that none of the factors are actual prerequisites to standing, and that these factors must instead be balanced.\footnote{38} In other decisions, however, the Court appears to require that third party claimants meet each of the three factors before it will allow jus tertii standing.\footnote{39} Against the background of this equivocal Supreme Court precedent, the Third Circuit arranged the prudential limitation factors into a cohesive framework for evaluating jus tertii standing questions in Amato v. Wilentz.\footnote{40}

### III. FACTS AND PROCEDURAL HISTORY

In 1988, the New Jersey state judiciary adopted a formal policy governing the use of state courthouses for commercial filmmaking.\footnote{41} This policy required all judges to seek approval of the Chief Justice of the New Jersey Supreme Court before consenting to any commercial use of...

Later that month, Warner Brothers sought to film a riot scene for the movie in the federal courthouse in Newark. The Chief Justice denied the request on the basis that the scene depicted blacks “in the worst possible stereotype,” as “acting in a riotous, lawless and life-threatening manner.” Warner Brothers then contacted Essex County officials and agreed to donate $250,000 to the Essex County Courthouse Restoration Fund for the right to film the riot scene at the courthouse. Nonetheless, the Chief Justice again rejected Warner Brothers’ request.

On May 16, 1990, Essex County brought an action against Chief Justice Wilentz in the District Court for the District of New Jersey. The county claimed that the Chief Justice had violated the First Amendment rights of Warner Brothers by denying them access to film in New Jersey. Warner Brothers then contacted several other New Jersey courthouses about filming the scene but, in each instance, the Chief Justice turned down the requests. The Chief Justice based his denial of these filming requests on his belief that the proposed scene would “seriously undermine” the black community’s “already vulnerable” confidence in the state judiciary. In the *Bonfire* scene, a predominantly black audience rioted in the courtroom after the dismissal of an indictment of an upper-middle class white man accused of running over a young black man with a car.

Chief Justice Wilentz also directed that an injunction be issued to prevent filming of the *Bonfire* scene in the Essex County Courthouse. The injunction “proved unnecessary,” however, because Warner Brothers decided to film the *Bonfire* scene in New York instead. The county thereafter obtained a hearing on the injunction before Judge Humphreys. Despite Essex County’s argument that the Chief Justice’s actions were “capable of repetition, yet would evade review,” Judge Humphreys found the injunction issue moot. Following a public uproar, and complaints to the press from county executives, the Chief Justice issued a public statement defending his actions. Warner Brothers then requested to film another *Bonfire* scene in the Essex County Courthouse in which the main character and the judge escape the rioting mob. The Chief Justice directed Warner Brothers that they could only film the non-riotous parts of the escape scene in the Essex County Courthouse.

The plaintiffs filed suit under 42 U.S.C. § 1983, seeking declaratory or injunctive relief against Chief Justice Wilentz. Chief Justice Wilentz also directed that an injunction be issued to prevent filming of the *Bonfire* scene in the Essex County Courthouse. The injunction “proved unnecessary,” however, because Warner Brothers decided to film the *Bonfire* scene in New York instead. The county thereafter obtained a hearing on the injunction before Judge Humphreys. Despite Essex County’s argument that the Chief Justice’s actions were “capable of repetition, yet would evade review,” Judge Humphreys found the injunction issue moot. Following a public uproar, and complaints to the press from county executives, the Chief Justice issued a public statement defending his actions. Warner Brothers then requested to film another *Bonfire* scene in the Essex County Courthouse in which the main character and the judge escape the rioting mob. The Chief Justice directed Warner Brothers that they could only film the non-riotous parts of the escape scene in the Essex County Courthouse.

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Jersey courthouses. In October 1990, the county moved for summary judgment, and the Chief Justice cross-moved claiming *inter alia* that the County lacked standing to raise its claims. In December 1990, the district court ruled that Essex County had jus tertii standing to assert Warner Brothers' First Amendment rights and entered a declaratory judgment in favor of the county. However, the district court found the Chief Justice immune from any damage award, and the Chief Justice "suspended all further commercial filmmaking in state courthouses." The Chief Justice and the county each filed cross-appeals to the Third Circuit.

### IV. Discussion

On appeal to the Third Circuit, Chief Justice Wilentz contended that Essex County lacked standing to raise its claims. Specifically, the

Amato, 952 F.2d at 746. The day after this action was filed, the Chief Justice created an advisory committee, who recommended that the state judiciary be removed from the decisionmaking process in filming requests. Following the advisory committee's recommendations, the Chief Justice instituted a statewide nonjudicial committee to respond to filming requests. The new process included content guidelines which instructed the permit committee to deny access to film in New Jersey Courthouses.

Id. The Chief Justice also asserted that the county's damages claim "was barred by the Eleventh Amendment and by immunity doctrines under 42 U.S.C. § 1983 (1988)," and that the county's declaratory and injunctive claims were moot because filming of the movie was complete. The Chief Justice claimed in the alternative that his actions were not violative of the First Amendment.

Id. The district court also ruled that the county's claims were not moot because they were "capable of repetition, yet evading review," Id. at 551-52. The district court proceeded to hold on the merits that the Chief Justice violated Warner Brothers' First Amendment rights because the Essex County Courthouse was a "designated public forum" and the Chief Justice's "content-based" restrictions were not necessary to further a compelling state interest. Id. at 555-59. The district court further concluded even if the courthouse was a non-public forum, the Chief Justice's actions were still unconstitutional because they constituted viewpoint discrimination. Id. at 559-60. Finally, the district court concluded that because the Chief Justice had not violated "clearly established law," he was entitled to qualified immunity from damages. Id. at 562.

Amato, 952 F.2d at 747.

Id. at 747. In their appeals, the Chief Justice restated his claims before the district court while the county argued that the district court erred in finding the Chief Justice immune from an award of damages. In his first appeal, the Chief Justice argued that qualified immunity and the Eleventh Amendment barred the award of $41,000 in attorney's fees that the county sought. Id. Nonetheless, the district court approved the county's request in an unpublished opinion. Id. The Chief Justice's second appeal was consolidated with the earlier appeals.

Id. The Chief Justice based this assertion on the prudential limitations on standing, and not upon any failure to meet Article III constitutional requirements for standing. Id. The county clearly met Article III requirements because it 1) "allege[d] actual and threatened injury (loss of revenue)"; 2) "that is fairly
Chief Justice argued that the only injury alleged by the county was a violation of the First Amendment rights of Warner Brothers, who was not a party to the case.55

In resolving this issue, the Third Circuit began with the premise that jus tertii standing is exceptional, with the burden upon plaintiffs to establish standing.56 The Third Circuit then decided, based upon its interpretation of Supreme Court precedent, that "an overall balance of factors [is] dispositive" in evaluating jus tertii standing.57 Specifically, the court concluded that it must evaluate four predominant factors: (1) obstacles to Warner Brothers' own suit; (2) the relationship between Warner Brothers and Essex County and the consistency of their interests; (3) chilling effects unique to First Amendment litigation; and (4) federalism concerns in the county versus state nature of the suit.58

Upon balancing these factors, the Third Circuit held that Essex County's interests were insufficient to overcome the initial bias against jus tertii standing and thus held that the county lacked standing to assert Warner Brothers' First Amendment rights.59

A. Obstacles to Warner Brothers' Own Suit

The Third Circuit first examined "whether obstacles blocked Warner Brothers' own suit."60 The court preliminarily recognized that the existence of an obstacle such as "a legal or physical inability to bring suit" is a crucial factor in evaluating jus tertii standing.61 However, the Third Circuit noted that "an impossibility of suit" is not necessary; on traceable to the defendant's action”; and 3) "could be redressed by a favorable decision on the merits." Id. For a discussion of the Article III constitutional standing requirements, see Warth v. Seldin, 422 U.S. 490, 498-502 (1975). Counsel for Essex County described its basis for Article III standing as follows: If Warner Brothers had not been deprived of its First Amendment right to make this picture or scenes therefrom in the Old Essex County Courthouse, the county treasury would have been enriched by something in excess of a quarter of a million dollars. That is our standing.

We want the money. Amato, 952 F.2d at 747 n.5.

55. Amato, 952 F.2d at 747-48.
56. Id. at 750.
57. Id.
58. Id. at 750-55. For a discussion of the first factor, see infra notes 60-65 and accompanying text. For a discussion of the second factor, see infra notes 66-80 and accompanying text. For a discussion of the third factor, see infra notes 81-88 and accompanying text. For a discussion of the fourth factor, see infra notes 89-95 and accompanying text.

59. Amato, 952 F.2d at 755.
60. Id. at 750.
61. Id.; see, e.g., Hodel v. Irving, 481 U.S. 704, 711-12 (1987) (holding that Indian plaintiffs had standing to assert their decedents' rights because of physical inability as obstacle to decedent's suit). The Amato court recognized that in Hodel, the "dead certainly could not assert their own rights." Amato, 952 F.2d at 750.
the contrary, an "affirmative impediment" or perhaps even a mere "practical disincentive to sue" might suffice to weigh in favor of confer-
ring standing.62 After deciding that there was "no legal impediment" to
Warner Brothers' suit, the Third Circuit addressed whether Warner
Brothers faced "practical disincentives to sue."63 The court considered
as disincentives the time constraints faced by Warner Brothers in ob-
taining a filming location, and Warner Brothers' potential fear of a suit
resulting in a legal precedent that would deny filming requests based on
objectionable content of the scenes to be filmed.64 The Third Circuit
concluded, however, that while Warner Brothers may have had "limited
practical incentive to sue," this factor was not strong enough to "weigh
significantly in favor" of conferring jus tertii standing upon Essex
County.65

B. The Relationship And Consistency of Interests Between Warner Brothers
and Essex County

The Third Circuit next considered whether the rights and interests
of Warner Brothers and Essex County were sufficiently consistent to
warrant jus tertii standing for the county.66 According to the court, re-
quiring a relationship between the parties assurqs that the plaintiff will
be an effective advocate of the right being asserted.67 The court also

62. Amato, 952 F.2d at 750; see, e.g., Powers v. Ohio, 111 S. Ct. 1364, 1373
(1991). In Powers, the Court granted a litigant jus tertii standing to raise the
claims of a juror who was unconstitutionally excluded from a venire. Id. at 1373.
The Court indicated that the practical disincentives to the juror bringing his or
her own suit were "daunting," because the violation was not likely to recur and
because the juror's financial stake in the litigation was small relative to the costs
of the litigation. Id. The Powers Court thus opined that partly because the juror
"possess[es] little incentive to set in motion the arduous process needed to vin-
dicate his own rights," a litigant would have jus tertii standing to assert the juror's
rights. Id.

63. Amato, 952 F.2d at 751.

64. Id. The Third Circuit recognized that the time restraints might consti-
tute a disincentive to sue, and that the potential for adverse precedent to be
established may have been "a strategic reason not to sue." Id. at 751 n.9.

65. Id. at 751.

66. Id.

relationship between the litigant and the third party may be such that the former
is fully, or very nearly, as effective a proponent of the right as the latter" in
doctor-patient context); Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991) (same in
litigant-juror context); Caplin & Drysdale v. United States, 491 U.S. 617, 624 n.3
(noting that "the attorney-client relationship . . . is one of special
consequence").
recognized that a close relationship of interests between the parties ensures that the parties share the same goals and that the third party's rights will be adequately advanced. Notwithstanding these observations, the Third Circuit adopted the position that the "intimacy of the relationship" is not determinative in granting jus tertii standing. The court instead held that the essential components of this relationship factor are "a common link to the right asserted, consistency of the parties' interests, and effective advocacy—not the intimacy of the relationship per se." 

The Third Circuit then examined the Supreme Court's application of the relationship factor in "market access" cases involving the vendor-vendee relationship. The Third Circuit noted that vendors have often been granted third party standing to raise the rights of vendees who have been denied access to the vendors' markets. The Third Circuit further recognized that the vendor-vendee relationships in the "market access" cases were analogous to the "licensor-licensee" relationship be-

68. Amato, 952 F.2d at 751; see Frissell v. Rizzo, 597 F.2d 840, 849 (3d Cir. 1979) ("[Intimate relationships] provide strong circumstantial guarantees of community of interest."), cert. denied, 444 U.S. 841 (1979).

69. Amato, 952 F.2d at 752 (determining that "the relationship between the third party and the plaintiff only counts insofar as it is linked to the right asserted").

70. Id.; see Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991). In Powers, the Supreme Court held that a litigant had standing to raise the rights of an excluded juror, even though the two had no personal or intimate relationship. Id. at 1372-73. The Court reasoned that voir dire establishes a trust between the juror and the litigant, and that the "common interest in eliminating racial discrimination" from the judicial system was sufficient to weigh in favor of jus tertii standing. Id.

71. Amato, 952 F.2d at 752.

72. Id.; see United States Dept. of Labor v. Triplett, 494 U.S. 715, 721 (1991) (granting attorney standing to bring action based on rights of client who was deprived of legal representation); Craig v. Boren, 429 U.S. 190, 193 (1976) (granting beer vendor standing to challenge statute prohibiting sale of beer to males under age 21 and females under age 18); Singleton v. Wulff, 428 U.S. 106, 118 (1976) (granting physicians standing to raise claims of patients who were denied medical funding for abortions); Eisenstadt v. Baird, 405 U.S. 438, 446 (1972) (granting distributor of contraceptives standing to raise rights of unmarried couple denied access to contraceptives).

In Amato, the Third Circuit stated that the vendee third party's "right to buy" being asserted by the plaintiff is "inseparably linked with the vendor-vendee market relationship." Amato, 952 F.2d at 752. The Third Circuit also acknowledged the identity of interests between the vendor and the would-be vendee, as well as the likelihood that the potential monetary benefit to the vendor from suing would ensure effective advocacy of the vendee's rights. Id. Consequently, the Third Circuit recognized that "[w]hen . . . enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third party standing has been held to exist." Id. (quoting United States Dept. of Labor v. Triplett, 494 U.S. 715, 720 (1990)).
tween Essex County and Warner Brothers." Nevertheless, the Third Circuit took the position that the market access cases were inapposite because no requisite identity of interests existed between Warner Brothers and Essex County, which is a "critical assumption" underlying grants of jus tertii standing in market access cases. According to the Third Circuit, Warner Brothers' and Essex County's interests "diverged . . . in important ways." Specifically, from the County's point of view, the potential $250,000 award from winning the suit was worth the risk of losing the suit, which would result in a ban on all future courthouse filming. From Warner Brothers' perspective, by contrast, the potential establishment of a legal precedent banning filming from a loss, combined with the likelihood of damaging the movie studio's already tenuous relationship with the New Jersey Judiciary, outweighed any benefits of bringing the suit. The Third Circuit suggested that these differing perspectives amounted to a potential conflict of interest, which weighed strongly against granting jus tertii standing.

The Third Circuit concluded that while Essex County would have been an effective and vigorous advocate of its own interests, it would not have served adequately Warner Brothers' interests. Consequently, the Third Circuit held that the relationship and consistency of interests factor did not balance in favor of a finding of jus tertii standing.

C. First Amendment "Chilling Effect" Considerations

The Third Circuit next focused on factors unique to First Amendment litigation. The court preliminarily recognized that when First Amendment issues are concerned, the Supreme Court "rather freely" grants jus tertii standing to a party to challenge a statute on overbreadth grounds. Accordingly, the Third Circuit considered the county's ar-

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73. Amato, 952 F.2d at 752.
74. Id.
75. Id. at 753. The Third Circuit did concede, however, that Warner Brothers' ultimate goal of unlimited access to filming in courthouses was consistent with the county's interest in maximizing revenue through courthouse filming. Id.
76. Id.
77. Id. The Third Circuit added that Warner Brothers' decision not to sue may not have been based only upon these limited incentives, but also upon skepticism about the legal merits or concerns about the costs and risks of litigation. Id.
78. Id.; see Polaroid Corp. v. Disney, 862 F.2d 987, 1000 (3d Cir. 1988) (holding that existence of true conflict of interest "weighs heavily against" granting jus tertii standing); Frissell v. Rizzo, 597 F.2d 840, 848-49 (3d Cir. 1979) (recognizing that risk of conflict of interest is crucial factor weighing against jus tertii standing), cert. denied, 444 U.S. 841 (1979).
79. Amato, 952 F.2d at 753.
80. Id.
81. Id.
82. Id.; see, e.g., Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392-
argument that the Chief Justice's decision would have a chilling effect on other filmmakers considering filming similar controversial scenes in courthouses in the future. 83

The Third Circuit ultimately rejected this argument, deciding that the jus tertii standing principles in First Amendment overbreadth cases were not controlling. 84 The Third Circuit first noted that the county was not challenging a statute or regulation as in First Amendment overbreadth challenges, but rather a specific ruling by the Chief Justice. 85 The Third Circuit then focused on the fact that the county was not seeking to protect the rights of filmmakers in general, but rather was seeking to raise the rights of a single third party—Warner Brothers. 86 Because of these considerations, the Third Circuit deemed it fair to consider the relationship, consistency of interests, and obstacle factors that may otherwise be overlooked in First Amendment cases. 87 Thus, the Third Circuit concluded that while significant First Amendment issues existed, they were not properly raised by the county's complaint, and therefore were insufficient to weigh in favor of overriding the presumption against jus tertii standing. 88

93 (1988) (holding that booksellers association had standing to bring action based on First Amendment rights of potential purchasers); Secretary of State of Maryland v. Munson, 467 U.S. 947, 956-59 (1984) (finding no prudential reasons to deny standing to professional fundraiser seeking to raise the First Amendment rights of its charitable clients). Grants of jus tertii standing in these cases have been based upon the possibility that an overbroad statute will have a "chilling effect" on the First Amendment rights of persons not before the court. Amato, 952 F.2d at 753; see generally, Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844, 853 (1970) (noting that overbreadth doctrine "emphasizes the need to eliminate an overbroad law's... 'chilling effect'"). Denying third party standing in such cases "would have an intolerable, inhibitory effect on freedom of speech." Eisenstadt v. Baird, 405 U.S. 438, 445 n.5 (1972).

83. Amato, 952 F.2d at 754. Essex County conceded that this chilling effect would be "geographically limited" to courthouses in New Jersey. Id. The county noted, however, that from the time of the Chief Justice's decision, no filmmakers sought permission to film scenes in New Jersey courthouses. Id. Thus, the County argued that the chilling effect was "not merely theoretical, but actually demonstrated," and that even limited-range chilling would "pose[] too much of a threat to free expression." Id.

84. Id.

85. Id. Subsequent to this litigation, Chief Justice Wilentz had instituted a committee permit system containing policies that were subject to challenge on First Amendment grounds, but the county chose not to object to this system. Id. For a detailed discussion of this committee permit system, see supra note 49.

86. Amato, 952 F.2d at 754.

87. Id. For a further discussion of the relative weight of the prudential factors in First Amendment cases, see supra notes 33-36 and accompanying text.

88. Amato, 952 F.2d at 754. The Third Circuit stated that "if Essex or another county (or better, a filmmaker) had brought a challenge to the permit committee system, the overbreadth cases might well counsel in favor of according third party standing." Id. (emphasis in original).
The Third Circuit concluded its analysis by considering the federalism concerns raised by the “county versus state” nature of the suit.\footnote{Id.} The Chief Justice asserted that federal courts have traditionally been reluctant to interfere in intrastate-government disputes and that a county “is among the least appropriate” of all state representatives to bring action against a state officer.\footnote{Id.; see, e.g., Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 40 (1932) (holding that counties, municipalities, and other subdivisions cannot bring constitutional claims against their own state governments); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 660-61 (1819) (same); City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231, 233 (9th Cir. 1980) (same), cert. denied, 449 U.S. 1039 (1980); City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1973) (same), cert. denied, 412 U.S. 950 (1973).} While the Third Circuit recognized that this judicial reluctance “may be waning with time,”\footnote{Amato, 952 F.2d at 755; see, e.g., Rogers v. Brockett, 588 F.2d 1057, 1067-71 (5th Cir. 1979) (holding that school district was not precluded from bringing action against state that created it), cert. denied, 444 U.S. 827 (1979).} the court noted that this common-law rule still controls absent a state waiver.\footnote{Id.}

The Third Circuit noted that this federalism rule, which would deny Essex County standing if it attempted to raise its own First Amendment rights, was equally relevant to tip the “prudential balance” in jus tertii standing cases against granting standing.\footnote{Id.} The Third Circuit thus emphasized that while it was “not endorsing a policy of federal court abstention from all suits between state governmental actors,” it refused to “wade into such frays enthusiastically,” and “adjudicate them unnecessarily.”\footnote{Id.}

Upon evaluating the overall balance of the factors involved—the minor obstacles facing Warner Brothers in bringing its own suit, the potential conflicts of interest between Warner Brothers and Essex County, the inapplicability of special First Amendment considerations, the federalism concerns in discouraging intrastate governmental lawsuits, and the exceptional status of third party standing, the Third Circuit concluded that Essex County lacked jus tertii standing to raise Warner Brothers’ First Amendment rights.\footnote{Id.}

V. Conclusion

While a strong judicial policy against third party standing once existed, federal courts have slowly yet consistently abrogated that bias.\footnote{For a discussion of the origin and growing tendency of courts to grant jus tertii standing, see supra notes 13-32 and accompanying text.}
However, courts have faced considerable uncertainty in Supreme Court precedent as to the precise identity and weight of prudential limitation factors that may be relevant or necessary in deciding whether to grant jus tertii standing.  

In Amato v. Wilentz, the Third Circuit resolved this confusion by definitively establishing the constitutional standards to be applied when evaluating jus tertii standing problems. Undoubtedly, the Amato court's analysis provides a useful and cohesive framework for determining the propriety of jus tertii standing. First, the Amato court emphasized that third party standing is exceptional and that the burden of proof is on the party seeking to establish standing. Second, the Third Circuit identified the various factors relevant in evaluating jus tertii standing and stated that an overall balancing of the factors is the appropriate approach. Finally, the Amato court provided a detailed demonstration of how these factors should be balanced in a case involving both First Amendment and federalism issues.

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97. For a discussion of the factors deemed relevant by courts in granting jus tertii standing, see supra notes 33-39 and accompanying text.
98. For a discussion of the factors balanced by the Third Circuit, see supra notes 57-95 and accompanying text.
99. Amato, 952 F.2d at 750.
100. For a discussion of the Third Circuit's analysis, see supra notes 57-95 and accompanying text.
101. For a discussion of the First Amendment and federalism factors involved in the case, see supra notes 81-95 and accompanying text.