No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

V.

CITY OF PATERSON, MAYOR JOSE TORRES, and POLICE CHIEF JAMES WITTIG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. This circuit conflict has been acknowledged by the courts on both sides and by all objective observers. 1

II. The conflict should be resolved as soon as possible. 5

III. This case is a perfect vehicle. 6

IV. The Third Circuit's bizarre rule rewards the worst supervisors and chills an enormous amount of political association. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Branti v. Finkel, 445 U.S. 507 (1980) 8
Dye v. Office of the Racing Comm'n, 702 F.3d 286 (6th Cir. 2012) 1, 3, 4
Gann v. Cline, 519 F.3d 1090 (10th Cir. 2008) 3, 4
Lock v. City of West Melbourne, 2015 WL 1880732 (M.D. Fla. 2015) 2
O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) 5
Waters v. Churchill, 511 U.S. 661 (1994) 8
Welch v. Ciampa, 542 F.3d 927 (1st Cir. 2008) 2, 3, 4

OTHER AUTHORITY

Nicholas A. Caselli, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. Chi. L. Rev. 1709 (2014) 2
Kaitlyn Poirier, *Constitutional Law—The First Amendment Retaliation Doctrine—A Public Employee's Rights Regarding Perceived Political Association Retaliation*, 81 Tenn. L. Rev. 367 (2014) 2

REPLY BRIEF FOR PETITIONER

Respondents deny the circuit split on the question presented, but the split has been acknowledged by the courts on both sides and by all objective observers. Respondents say it is too soon for this Court to resolve the split, but their only reason for waiting is to allow the circuits to weigh in on issues that are not even present in this case. Respondents conjure various procedural and factual obstacles that ostensibly make this case a poor vehicle, but these supposed obstacles are purely imaginary.

Finally, respondents defend the Third Circuit's decision on the merits. Here respondents are simply mistaken. Under the bizarre rule now in force in the Third Circuit, government employers are free to make baseless accusations of political disloyalty, and they are rewarded for being wrong.

This Court should grant certiorari and reverse.

I. This circuit conflict has been acknowledged by the courts on both sides and by all objective observers.

The split on the Question Presented has been recognized by the most recent courts to weigh in on both sides, the Third and Sixth Circuits. Pet. App. 12a ("we have no reason to believe that the holding of *Dye* can be reconciled with [Third Circuit precedent]—and nor did the Sixth Circuit"); *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 300 (6th Cir. 2012) ("we find the Third Circuit's conclusion unpersuasive"). The split was acknowledged by the District Court below. Pet. App. 47a ("I am bound to fol-

low [Third Circuit precedent]. That said, the United States Court of Appeals for the Sixth Circuit has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim.") (citing *Dye*). The split has also been recognized by all courts and commentators to address the issue after *Dye*. *See Lock v. City of West Melbourne*, 2015 WL 1880732, *13 n.13 (M.D. Fla. 2015) ("The Circuit Courts of Appeal [sic] have expressed differing views as to whether a plaintiff may pursue a First Amendment claim based on perceived political affiliation.") (contrasting the Sixth Circuit's decision in *Dye* with the Third Circuit's decision in the instant case); Nicholas A. Caselli, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. Chi. L. Rev. 1709, 1710 (2014) ("While the First, Sixth, and Tenth Circuits have permitted perceived-affiliation claims, the Third Circuit has barred such actions."); Kaitlyn Poirier, *Constitutional Law—The First Amendment Retaliation Doctrine—A Public Employee's Rights Regarding Perceived Political Association Retaliation*, 81 Tenn. L. Rev. 367, 377 (2014) (referring to the "circuit split on the issue of whether employer retaliation based on political non-association or perceived political association is a recognizable legal claim").

This consensus is correct. The First, Sixth, and Tenth Circuits have all rejected the notion that a public employee may be punished for his perceived political association. *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that

affiliation."); *Dye*, 702 F.3d at 300 ("we adopt the reasoning of the First and Tenth Circuits and hold that retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine"); *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) (holding that the employee's actual political affiliations are "irrelevant" because "our only relevant consideration is the impetus for the elected official's employment decision").

In *Welch* and *Gann*, the First and Tenth Circuits also held that neutrality between candidates is a position protected by the First Amendment. *Welch*, 542 F.3d at 939 ("[t]he freedom not to support a candidate or cause is integral to the freedom of association"); *Gann*, 519 F.3d at 1093 ("Discrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation."). Respondents seize on these passages (BIO 13-14) to claim that protection for neutrality is the *only* holding in both cases.

But this view is erroneous. In both cases, the plaintiffs alleged not just that they were neutral but that their employers mistakenly believed that they were political opponents. *Welch*, 542 F.3d at 934 ("His decision to remain neutral was regarded as a betrayal by Cachopa, who allegedly perceived those who did not publicly support the recall as being against it and, by extension, against him."); *Gann*, 519 F.3d at 1092 ("Ms. Gann alleges that Mr. Rinehart replaced her with Ms. Dyer because Ms. Dyer demonstrated her political loyalty to Mr. Rinehart by supporting his campaign while Ms. Gann failed to do so."). The First and Tenth Circuits agreed with the

plaintiffs on both points—that neutrality is a constitutionally protected position, and that the employees did not need to be actual political opponents to be protected by the First Amendment freedom of association. So long as their employers *perceived* them as political opponents and retaliated against them for that reason, the employees stated a First Amendment claim. *Welch*, 542 F.3d at 939; *Gann*, 519 F.3d at 1094.

In an effort to discount the conflict with the Sixth Circuit's decision in *Dye*, respondents fault the Sixth Circuit (BIO 16) for failing to mention a Third Circuit case that also recognizes neutrality as a position protected by the First Amendment. But the Sixth Circuit had no reason to do so, because that question was not at issue in *Dye*. The question presented in *Dye* was—as the court explained in the first paragraph of its opinion—"whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue." 702 F.3d at 292.

The Sixth Circuit's holding was as clear as it could be: When a government employer mistakenly attributes a political affiliation to an employee, "[a]n employer that acts upon such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty." *Id.* at 302. The Third Circuit reached exactly the opposite conclusion in this case.

II. The conflict should be resolved as soon as possible.

Respondents offer (BIO 18-21) two arguments for delay, but both arguments concern issues that are not even present in this case.

Respondents first urge the Court to wait until more circuits have discussed the distinction "between cases where a public employer retaliates against an employee because of his exercise of the First Amendment right to *not* associate and cases that do not involve the employee's exercise of the First Amendment right of association at all" (BIO 18). But our case involves neither of those questions. The question in our case is whether an employer can retaliate against an employee based on the employer's mistaken belief as to the employee's political affiliation. The Court will not receive any guidance by waiting for more circuits to weigh in on an extraneous issue.

The same is true of respondents' second argument (BIO 18-21), that the Court should wait for more circuits to consider whether retaliation for perceived *speech* is actionable under the First Amendment. This question is not present in our case either, so it is not clear why respondents believe the Court needs further guidance on it. Speech and association are governed by different doctrinal frameworks and different bodies of precedent. *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996). There is nothing to be gained from waiting for additional lower court decisions on speech.

Respondents suggest that no harm could come from delay, because it would be "fanciful" to suppose that a government employer would be so "fiendishly clever and clumsily foolish" as to retaliate against employees based on a mistaken view as to their political affiliations (BIO 21-22). There is considerable irony in this argument. In this very case, a jury found that respondents did precisely that. Pet. App. 4a.

Indeed, the longer the Third Circuit's absurd rule is allowed to fester, the greater its chilling effect will be. Government employees in the Third Circuit are well advised to avoid saying or doing anything that might give the boss the wrong impression, lest what happened to Jeffrey Heffernan happen to them.

III. This case is a perfect vehicle.

Respondents suggest (BIO 22-27) that this case is a poor vehicle because it is procedurally and factually unusual. But this suggestion is mistaken. While this case indeed has a lengthy procedural history, its procedural history has nothing to do with whether it is a good vehicle. And the factual circumstances of this case appear to be quite common.

The lengthy procedural history of this case is due to two facts. The District Judge who first heard the case recused himself retroactively after trial, which required that the verdict in Jeffrey Heffernan's favor be vacated and the case reassigned to a new judge to start all over again. Pet. App. 4a. Then after the second District Judge granted summary judgment for respondents, the Third Circuit reversed and re-

manded, and the case was reassigned yet again. Pet. App. 4a-5a. But that is all water under the bridge. It has no bearing on whether this would be an appropriate case in which to resolve the conflict among the circuits.

Respondents attempt to resuscitate (BIO 23) a nearly frivolous contention they made in the District Court below—that Heffernan's freedom of association claim was not adequately pled. This contention was rightly rejected by the District Court, who pointed out: "This case was, after all, tried and won before Judge Sheridan on a freedom-of-association theory." Pet. App. 42a. At oral argument before the first Third Circuit panel to hear this case, Judge Rakoff (who was sitting by designation) mocked this contention by observing that respondents had "unbelievably clear notice" of the freedom of association claim, in light of the jury's verdict against them on that claim. Pet. App. 42a & n.8. No doubt for this reason, respondents did not even raise this contention as an argument in Third Circuit briefing below, but referred to it only tangentially as part of their Statement of the Case. Resp. C.A. Br. 2, 4.

The procedural issues respondents pose as obstacles had thus been fully and completely resolved by the time the case reached the Third Circuit in 2014. The only issue before the Third Circuit was whether Heffernan's First Amendment claims are cognizable, and that remains the only issue here.

Respondents are simply incorrect in claiming (BIO 24-27) that the Question Presented rarely arises. *See* Pet. 18-19 (citing many recent cases in which

government employees have brought First Amendment claims based on perceived political association). Respondents' quotations from these cases (BIO 25-26 nn.2-3) show only that plaintiffs often raise actual-association and perceived-association claims in the same lawsuit.

IV. The Third Circuit's bizarre rule rewards the worst supervisors and chills an enormous amount of political association.

Finally, respondents' review of some of this Court's First Amendment retaliation cases (BIO 29-32) is beside the point, because the passages respondents cite merely show that the First Amendment bars retaliation for *actual* association. No one doubts that. The question that has divided the circuits is whether the same is true for *perceived* association, and that is a question this Court has never addressed.

The closest the Court has come to addressing the question was in *Waters v. Churchill*, 511 U.S. 661, 679-80 (1994), which held that where a public employee is fired due to a supervisor's misperception of what the employee said, it is the supervisor's perception that counts, not what a trier of fact ultimately determines to have taken place. The First Amendment inquiry thus focuses on the employer's *reason* for retaliating against the employee, not on whether the employer happened to be correct. *Cf. Branti v. Finkel*, 445 U.S. 507, 517 (1980) ("To prevail in this type of an action, it was sufficient … for respondents to prove that they were discharged solely for the rea-

son that they were not affiliated with or sponsored by the Democratic Party.") (citation and internal quotation marks omitted).

Any other conclusion would yield the strange and frightening rule adopted by the Third Circuit, which rewards the worst-behaving government supervisors with immunity from constitutional challenge, and which chills an enormous amount of political association. As the District Court wondered, if a state employer has an "unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a more favorable position? Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing room." Pet. App. 52a (footnote omitted).[1]

[1] Our certiorari petition erroneously named Michael Walker as a respondent. We have removed his name from the case caption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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