No. 16-1053

In The
Supreme Court of the United States

BRIAN C. MULLIGAN,

Petitioner,

v.

JAMES NICHOLS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Los Angeles Police Protective League, Tyler Izen and Eric Rose (collectively, "LAPPL") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Brian Mulligan ("Petitioner").

STATEMENT

In August 2012, Petitioner publicly accused two Los Angeles Police Department officers of falsifying an arrest report. Two months later, LAPPL defended its member officers with speech of its own, by releasing a recording of Petitioner's own words that rebutted his accusation against them. Petitioner then sued, claiming that LAPPL's speech violated the First Amendment, because it supposedly chilled his own speech. In other words, Petitioner argued that the same constitutional amendment that guaranteed his right to publicly accuse the officers of misconduct also gave him the right to silence anyone who might speak out in their defense.

The Ninth Circuit correctly rejected this unprecedented constitutional theory, holding that although the "First Amendment of the Constitution protects citizens from attempts by government officials to chill their speech," it does not require "those officials to remain silent when accused of misconduct, lest they risk liability for unlawful retaliation." Pet. App. 6a-7a. In other words, Petitioner could not use the First

Amendment to silence responsive speech by government officials, because those officials have First Amendment speech rights of their own.[1]

Petitioner presents two questions for review, but neither satisfies this Court's standards for exercise of certiorari jurisdiction. *See* Sup. Ct. R. 10. First, Petitioner contends that the Ninth Circuit erred by applying the "ordinary firmness" test to Petitioner's retaliation claim, instead of allowing that question to go to the jury. But Petitioner misreads the opinion below. The Ninth Circuit rejected his claim because the First Amendment protected LAPPL's speech, not because Petitioner failed to satisfy the "ordinary firmness" test. Accordingly, any decision by this Court regarding the "ordinary firmness" test would not affect the decision below, and therefore Petitioner's first question seeks nothing more than an impermissible advisory opinion.

Second, Petitioner contends that "Courts have split" over the standard to apply in speech-only retaliation suits (*i.e.*, suits where speech is the only retaliation alleged by the plaintiff). Pet. 25. Again, Petitioner misreads the cases. *Every* circuit to consider the question has joined the Ninth Circuit in concluding that government officials have First Amendment speech rights, and therefore that plaintiffs in speech-only retaliation suits must point to something more than

[1] Because LAPPL is a private actor, Petitioner's claim fails for this independent reason. *See* Section III.C *infra*. The Ninth Circuit did not reach this issue, because it held that Petitioner's claim would fail even if LAPPL *was* a government official or had acted in concert with one.

mere responsive speech to state a claim. Accordingly, there is no "split" to resolve.

Finally, even if the Court were to grant review, it would be required to grapple with several alternative grounds for affirmance, including one ground expressly adopted by the Ninth Circuit. Accordingly, the Petition should be denied.

1. On May 15, 2012, Petitioner was arrested by officers of the Los Angeles Police Department. Pet. App. 8a. Petitioner later alleged that the officers used excessive force during the arrest, and filed an administrative claim against the City. *Id.* This "attracted significant media attention," in part because Petitioner "was at the time an executive with Deutsche Bank and had formerly been chairman of Fox Television and co-chairman of Universal Pictures." *Id.* at 8a-9a.

2. Subsequently, the arrest "report was leaked to news outlets, which published stories that included the allegation that Mulligan was under the influence of drugs at the time of the incident." *Id.* at 9a. In response to the widespread coverage of his arrest report, and its reference to his drug use, Petitioner took to the press himself. He accused "the Officers of falsifying the arrest report to justify" their use of excessive force. *Id.* at 23a. Specifically, Petitioner took issue with the arrest report's claim that he discussed his drug use with the arresting officers, and "stated to the media that the Officers concocted this story to justify their use of excessive and deadly force." *Id.* at 29a. In substance, Petitioner used the media to accuse the arresting officers

of lying in the arrest report about his admitted drug use, and strongly suggested that the officers had lied in other parts of the arrest report as well.

Notably, the Petition fails to mention these public accusations, notwithstanding their importance to the decision below. *See, e.g.*, *id.* at 6a-7a (Ninth Circuit identifying the "question presented by this case" as whether the First Amendment requires government officials to "remain silent when *accused* of misconduct") (emphasis added).

3. Weeks later, LAPPL issued a press release casting doubt on Petitioner's public accusation that the officers lied in the arrest report. "The press release included a leaked tape of a conversation between Mulligan and an officer of the Glendale Police Department that took place on May 13, two days before" the arrest. *Id.* at 9a. In the recording, "Mulligan admitted to having used bath salts approximately twenty times." *Id.* As the Ninth Circuit explained, "'[b]ath salts' is the popular term for a type of synthetic stimulant with similar effects to amphetamines and cocaine." *Id.* at 9a n.2.

The Petition asserts that the recording "had no relevance to the police's investigation of the encounter between its officers and Mulligan." Pet. 28. Yet the relevance is obvious: Petitioner claimed that he never admitted to the officers that he used bath salts, and that the arrest report's discussion of that admission was an outlandish lie designed to give cover to the officer's conduct, while the recording showed Petitioner

making the same admission to another uniformed officer just two days before the arrest. Indeed, the Petition's assertion that the recording "had no relevance" is raised in this Court for the first time, as the obvious relevance was not seriously contested below. Pet. App. 27a (noting that "Plaintiff does not argue, nor is there evidentiary support, that information contained in the Mulligan Press Release and attached Audio Recording were irrelevant to the subject matter of Plaintiff's public allegations"), *see also id.* at 6a-7a (noting that the case concerns speech made in *response* to Petitioner's public accusations of misconduct).

In any event, "[b]ecause of the press release and associated negative media coverage," Petitioner alleged, he subsequently "lost his job at Deutsche Bank." *Id.* at 9a.

3. Petitioner subsequently filed this suit against LAPPL, contending that it "had retaliated against him for exercising his First Amendment right to file an administrative claim against the City," in violation of 42 U.S.C. § 1983 ("Section 1983"). *Id.* at 9a-10a. "The district court granted summary judgment to [LAPPL] on the retaliation claim, concluding that Mulligan had not demonstrated the existence of retaliatory intent." *Id.*[2]

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[2] Petitioner also sued the officers, the City and in a second suit, Eric Rose, LAPPL's media consultant. The district court dismissed the suit against Rose on collateral estoppel grounds. *See* Pet. App. 11a n.4.

4. Petitioner appealed. The Ninth Circuit began its analysis by noting that Petitioner's legal theory was unusual. Although retaliation cases normally allege abuses of "governmental power that are regulatory, proscriptive, or compulsory in nature and have the effect of punishing someone for his or her speech," that was "not the situation here." *Id.* at 12a. Instead, Petitioner claimed that LAPPL "chilled his right to speak freely by engaging in speech of their own that significantly damaged his reputation and ultimately caused him to lose his job." *Id.* Because Petitioner's retaliation claims involved "government speech," the Ninth Circuit held, they "warrant a cautious approach by courts." *Id.* That "cautious approach" was warranted because restricting government speech "ignores the competing First Amendment rights of the officials themselves." *Id.*

"In accordance with these principles," the Ninth Circuit held, courts set "a high bar when analyzing whether speech by government officials is sufficiently adverse to give rise to a First Amendment retaliation claim." *Id.* at 13a. One manifestation of that "high bar" is the rule that speech "by government officials was insufficient to create a right to a remedy under the First Amendment in the absence of state action affecting a plaintiff's rights, benefits, relationship or status with the state." *Id.* (quotations omitted).

Applying these principles to the case at bar, the Ninth Circuit concluded that "the accusations and media leaks by the LAPPL and its leadership are not enough to demonstrate a constitutional violation." *Id.*

LAPPL did not "make any decision or take any state action affecting [Petitioner's] rights, benefits, relationship or status with the state" or otherwise deprive him of "a valuable governmental benefit or privilege." *Id.* (quotations omitted).

In short, the Ninth Circuit concluded that the First Amendment does not require government "officials to remain silent when accused of misconduct, lest they risk liability for unlawful retaliation." *Id.* at 6a-7a. It "would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation." *Id.* at 13a (*quoting Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998)).

5. The Ninth Circuit denied Petitioner's request for rehearing or rehearing *en banc* on December 1, 2016. *Id.* at 2a. Denial of the petition for panel rehearing was unanimous, and no circuit judge requested a vote on the *en banc* request. *Id.*

REASONS FOR DENYING THE PETITION

I. The First Question Presented Seeks An Impermissible Advisory Opinion Because The Decision Below Did Not Turn On The Application Of The Ordinary Firmness Test

Petitioner contends that the Ninth Circuit "found against Mulligan because it did not believe that

[LAPPL's speech was][3] severe enough to deter a person of 'ordinary firmness' from exercising their constitutional rights." Pet. 13. Petitioner contends that this "ordinary firmness" test is a jury question, which the Ninth Circuit usurped when it rejected his claim. Petitioner misreads the opinion: the decision below did not turn on application of the "ordinary firmness" test, and therefore any decision by this Court concerning that test would not affect the decision below. In other words, Petitioner seeks an impermissible advisory opinion.

It is axiomatic that this Court should not grant certiorari on questions that raise no Case or Controversy within the meaning of Article III of the Constitution. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("Article III demands that an 'actual controversy' persist throughout all stages of litigation"). Accordingly, the Court should reject a petition which raises "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm," *Alvarez v. Smith*, 558 U.S. 87, 93 (2009), or which involves only "abstract propositions . . . which cannot affect the result . . . in the case before it," *People of State of California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893).

Petitioner's first question raises such an abstract question, because the Ninth Circuit's decision did not

[3] The Petition refers here to "coordinated leaks and negative press campaign," but these colorful phrases are merely synonyms for "speech" under this Court's precedents. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (publication of a recording is speech).

turn on the "ordinary firmness" test. Instead, the Ninth Circuit focused on the "competing First Amendment rights of the officials themselves." Pet. App. 12a. Because of those rights, the Ninth Circuit imposed a "high bar when analyzing" speech-only retaliation suits. *Id.*

The Ninth Circuit then identified several ways in which a plaintiff might clear this "high bar." For example, the Ninth Circuit observed that speech "affecting [a plaintiff's] rights, benefits, relationship or status with the state," or causing "the loss of 'a valuable governmental benefit or privilege,'" could satisfy this "high bar." *Id.* at 13a-15a. The court of appeals also cited the Fourth Circuit's decision in *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000), which held that a plaintiff alleging a "threat, coercion, or intimidation" by the defendant government official might state a claim in speech-only retaliation suits. *Id.* at 15a (*quoting Suarez*). Finally, the Ninth Circuit cited *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), and suggested without deciding that retaliatory speech disclosing "highly personal and extremely humiliating details of a rape at a public press conference" might satisfy the "high bar." *Id.* at 16a.

The Ninth Circuit noted, however, that Petitioner could not meet any of these criteria. He alleged no change to his rights, benefits, or privileges with the state. *Id.* at 13a-14a. Nor did he claim any threat, coercion, or intimidation. *Id.* at 14a-15a. And, despite Petitioner's suggestion that his conversation with the Glendale police officer was confidential, the Ninth

Circuit determined that publication of his "statements made as part of a conversation voluntarily entered into with a police officer, without any promise of confidentiality, [is] not of the same degree of constitutional magnitude as the retaliatory conduct in *Bloch*." *Id.* at 16a.

In short, Petitioner's claim failed because the only "retaliation" was LAPPL's exercise of its own First Amendment rights – not because Petitioner failed to satisfy the "ordinary firmness" test. Thus, any decision by this Court that the "ordinary firmness" test is (or is not) a jury question would have no impact on the outcome below. Such a decision by this Court would be an "abstract proposition . . . which cannot affect the result" below, and therefore the Petition's first question seeks an impermissible advisory opinion. *San Pablo*, 149 U.S. at 314.

II. The Second Question Presented Fails To Identify Any Circuit Conflict On The "High Bar" Applied By The Ninth Circuit

The Petition also asks the Court to address a second question: "whether a plaintiff must meet a heightened standard to state a claim when the government retaliates against a private citizen through speech." Pet. 22. Petitioner contends that "Courts have split over this special 'retaliatory speech' rule." *Id.* at 25. Not true. Rather, *every* circuit to consider the issue has agreed with the Ninth Circuit that government officials have First Amendment rights of their own, and as a result, each of those circuits has applied a rule akin

to the Ninth Circuit's "high bar" in speech-only retaliation suits.

A. Every Circuit To Address The Issue Has Applied A Heightened Standard To Speech-Only Retaliation Suits

1. The Petition admits that Courts in the Second, Third, Fourth, Seventh, and Tenth Circuits join the Ninth Circuit in requiring "that speech-based retaliation claims clear a high bar to state a claim." Pet. 25 (*citing Lynch v. Ackley*, 811 F.3d 569, 580-81 (2d Cir. 2016); *Municipal Revenue Servs., Inc. v. McBlain*, 347 F. App'x 817, 824-25 (3d Cir. 2009); *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006); *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir. 2016); *Evans v. Fogarty*, 241 F. App'x 542, 558-60 (10th Cir. 2007)).

Notably, each of the foregoing Circuits reached this conclusion after recognizing that the defendant government officials had a First Amendment right to respond to the plaintiff's speech. *See Lynch*, 811 F.3d at 580 (the "allegedly retaliatory conduct, however, consisted of Ackley's exercise of her own core First Amendment rights in a public forum about a matter of public importance . . . [i]t is hard to see why in this context Ackley has any less entitlement to First Amendment protection than Lynch"); *McBlain*, 347 F. App'x at 824 (where retaliation is "speech by a public official on a matter of public concern [the] public official's own

First Amendment speech rights are implicated"); *Ehrlich*, 437 F.3d at 417 (this "limitation on the retaliation cause of action based on government speech is necessary to balance the government's speech interests with the plaintiff's speech interests"); *Novoselsky*, 822 F.3d at 356 ("the First Amendment gives wide berth for vigorous debate, and especially for statements by public officials"); *see also Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000) ("the government may not restrict, or infringe, an individual's free speech rights, [but] it may interject its own voice into public discourse").

2. Although not mentioned in the Petition, the remaining appellate courts to consider speech-only retaliation suits are also in accord with the decision below. For example, in *Goldstein v. Galvin*, 719 F.3d 16, 30-31 (1st Cir. 2013), the First Circuit rejected a retaliation claim arising out of a government official's publication of the plaintiff's name on a website announcing recent enforcement proceedings. Even though the defendant government official "bore him a grudge," the plaintiff's claim failed because he could not identify any retaliation apart from speech. And, as the Ninth Circuit did below, the First Circuit reached this conclusion because "public officials have free speech rights" of their own, as well as "an obligation to speak out about matters of public concern." *Id.*

Similarly, in *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005), a criminal defense attorney filed multiple motions accusing a prosecutor of impropriety, and the

prosecutor "retaliated" by publicly disparaging the defense attorney. The Sixth Circuit rejected the defense attorney's retaliation suit, finding that it "would be inconsistent with core First Amendment principles and basic notions of fairness not to allow [the prosecutor] to respond to these allegations to the extent his out-of-court comments were not defamatory, even if that response was (quite naturally) prompted by constitutionally protected speech by [defense counsel]." *Id.* at 722.

Likewise, in *Dixon v. Burke Cty., Ga.*, 303 F.3d 1271, 1275 (11th Cir. 2002), the Eleventh Circuit rejected a Section 1983 claim against a district attorney who recommended that a county limit its candidate search for a board of education position to white males. Although not a retaliation case, the Eleventh Circuit relied on *Suarez* in holding that "the imposition of civil liability in this case would necessarily mean that the government is punishing [the district attorney] for nothing more than voicing an opinion or recommendation." *Id.* at 1275. Accordingly, the Eleventh Circuit rejected the plaintiff's claim, because, "as our sister Circuits have acknowledged in other constitutional tort cases, [the district attorney's] own First Amendment rights are implicated." *Id.*

B. This Court Has Also Held That Government Officials Have First Amendment Rights

This Court's precedents confirm that government officials have First Amendment rights of their own, as

noted in the decision below. *See* Pet. App. 12a-13a. For example, the Ninth Circuit cited this Court's decision in *Bond v. Floyd*, 385 U.S. 116, 136 (1966), which reversed an effort by the Georgia House of Representatives to disqualify a legislator who had criticized the Vietnam War. *Bond* rejected the same argument that Petitioner makes here: that "the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government" and not to the government official. *Id.* at 136. As the Ninth Circuit observed, *Bond* rejected that contention because the "interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to" public officials. *Id.*

The Ninth Circuit also cited this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410, 423-24 (2006), which held unequivocally that "public employees do not surrender all their First Amendment rights by reason of their employment." 547 U.S. at 417. "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* Tellingly, the Petition says nothing about the Ninth Circuit's reliance on *Bond* or *Garcetti*, notwithstanding the integral role they played in the decision below.

C. Circuits Have Not Split Over The "High Bar" Imposed In The Decision Below

Petitioner offers a handful of citations that supposedly contradict the foregoing authorities and therefore give rise to a circuit split. However, none support Petitioner's contention.

1. The Petition points to *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997), which Petitioner characterizes as involving a defendant state judge who had attacked a disgruntled litigant in the press. Pet. 24. The Petition correctly notes that *Barrett* did not discuss whether the speech-only retaliation claim in that case must clear a "high bar" – but the Petition fails to note that the Sixth Circuit did not consider the defendant's First Amendment rights in that case *at all*. In other words, the Petition purports to find a circuit split in what *Barrett* did *not* say. Whatever Petitioner might infer from *Barrett*'s silence, there is no doubt that the Sixth Circuit's later decision in *Mezibov*, discussed above, is in accord with the Ninth Circuit in concluding that government officials have First Amendment rights, and therefore that a plaintiff must allege more than mere speech to state a retaliation claim. *See Mezibov*, 411 F.3d at 722.

2. Next, the Petition claims that *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) rejected the "threat, coercion, or intimidation" standard articulated in the *Suarez* decision, which the Ninth Circuit cited favorably below. Pet. 25, Pet. App. 15a (*citing Suarez*, 202 F.3d at 687). But Petitioner misreads the case. *Brodheim*

never mentions *Suarez*, and does not reject its "threat, coercion or intimidation" test. Rather, *Brodheim* stands only for the limited proposition that the threat need not be *explicit*. *Brodheim*, 584 F.3d at 1270 (test is whether the defendant's statements could be interpreted "as intimating that some form of punishment or adverse regulatory action would follow"). Nothing in the case holds that a public official's responsive speech can give rise to a retaliation claim if it contains *no threat at all*. Thus, *Brodheim* is wholly consonant with the Ninth Circuit's decision below.

3. The Petition also relies on a *concurring* opinion in *Hutchins v. Clarke*, 661 F.3d 947, 956-57 (7th Cir. 2011) as proof of a conflict among the circuits. Pet. 25. This reliance is misplaced for two reasons. First, the *majority* opinion in *Hutchins* is wholly in accord with the decision below. In *Hutchins*, a deputy called into a radio show to complain about the sheriff, and the sheriff "retaliated" by calling the same radio show and disclosing the deputy's prior disciplinary problems. The Seventh Circuit rejected the deputy's First Amendment retaliation claim, holding that the court "cannot afford one party [the deputy] his right to free speech while discounting the rights of the other party [the sheriff]." *Id.* at 956. Second, as admitted elsewhere in the Petition, the Seventh Circuit's more recent decision in *Novoselsky*, 822 F.3d at 356, is in accord with the Ninth Circuit's "high bar" rule. Pet. 25 (correctly noting that *Novoselsky* requires "speech-based retaliation claims [to] clear a high bar"). Thus, regardless of what might be inferred from the *Hutchins* concurrence, the

Seventh Circuit has clearly joined the Ninth Circuit in protecting the First Amendment rights of government officials in speech-only retaliation suits.

4. Finally, the Petition cites a pair of cases allegedly holding that a "campaign of harassment" can give rise to retaliation liability. Pet. 26 (*citing Mazzeo v. Young*, 510 F. App'x 646 (9th Cir. 2013); *Bennett v. Hendrix*, 423 F.3d 1247, 1254-55 (11th Cir. 2005)). Even if accurately described, these cases are beside the point, because Petitioner does not allege any such "campaign" here. But more importantly, *Mazzeo* is wholly consonant with the decision below, because it held that "speech-based actions may not, *alone*, be sufficient to constitute adverse action, particularly in light of [the defendant's] own First Amendment rights." *Mazzeo*, 510 F. App'x at 648 (emphasis added). And *Bennett*, like many of the authorities cited in the Petition, is not a speech-only retaliation suit. Instead, the *Bennett* defendants "took down license tag numbers of cars at a forum in support of the referendum, surveilled the plaintiffs' homes and businesses, set up roadblocks near their homes, stopped their cars without reason and issued false traffic citations, accessed government databases to obtain confidential information on the plaintiffs, [and] attempted to obtain a warrant for their arrest on trumped-up environmental charges," among other retaliatory acts. *Bennett*, 423 F.3d at 1249. Thus, neither case supports Petitioner's claim of a circuit split on the standard governing speech-only retaliation suits.

In short, the Petition's suggestion of a circuit split is demonstrably false. Every circuit to consider the question is in accord with the Ninth Circuit's conclusion that government officials have free speech rights, and therefore that the plaintiff in a speech-only retaliation suit must clear a "high bar" to state a claim. Accordingly, review of the Petition's second question presented should be denied.[4] *See* Sup. Ct. R. 10(a).

III. Alternative Grounds Require The Same Outcome Reached By The Court Of Appeals

If this Court granted review, it would also be confronted with three alternative grounds for affirming the result below: (A) that Petitioner fails to allege a constitutional injury under Section 1983, (B) that LAPPL had a First Amendment right to publish the content of a public record and (C) that LAPPL is not a public actor. Each is independently fatal to Petitioner's claim.

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[4] The Petition also offers this "Court a chance to decide whether there is a difference between speaking and petitioning for purposes of a private citizen's retaliation claim." Pet. 29. But Petitioner does not explain how that difference would have any impact on the decision below. Nor can he: regardless of the legal theory pursued by Petitioner, LAPPL had a First Amendment right to defend the arresting officers against his public accusations. Thus, this "chance" seeks another impermissible advisory opinion.

A. Petitioner Cannot Recover For Reputational Injury Under Section 1983

The Ninth Circuit rejected Petitioner's claim below for the independent reason that he failed to assert a constitutional injury. The court held that although Petitioner's "reputation was undoubtedly damaged by the increased media attention, which eventually resulted in the loss of his job, such reputational harm is not actionable under § 1983 unless it is accompanied by some more tangible interests." Pet. App. 14a (quotes and citations omitted).

This decision was undoubtedly correct under this Court's precedents, which hold that Section 1983 does not permit recovery for reputational injury resulting from speech. *Paul v. Davis*, 424 U.S. 693, 712 (1976) (an "interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"); *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6-7 (2003) (same); *Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991) (harsh letter written by plaintiff's supervisor "would undoubtedly damage the reputation of one in his position, and impair his future employment prospects," but did not violate "any constitutional right at all"). Thus, even if the Court were to grant review, Petitioner's retaliation claim would still fail for this independent reason.

B. LAPPL Had A First Amendment Right To Publish The Contents Of A Public Record

Petitioner's claim also fails because LAPPL had an independent right, under the First Amendment, to publish the contents of a public record. Although the courts below did not reach this argument, it is another independent ground for rejecting Petitioner's claim.

"Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Accordingly, "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496; *see also Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308, 310-11 (1977) (once truthful information was "publicly revealed" or "in the public domain" the state cannot restrain its dissemination).

As a matter of state law, the Glendale recording published by LAPPL was a public record. Under the California Public Records Act, public records include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov. Code § 6252(e). In turn, the term "writing" includes every means of recording communications, including sounds. Cal. Gov. Code § 6252(g). Finally, "every person has a

right to inspect any public record." Cal. Gov. Code § 6253(a).

Petitioner has never disputed that the recording was retained in the Glendale Police Department computer system, and therefore was a public record under state law. Instead, he asserts that the recording was confidential because a *copy* of the recording was added to a confidential investigative file held by the Los Angeles Police Department. *See, e.g.*, Pet. at 8. But whatever the LAPD's views on the confidentiality of its investigative file, placing a *copy* of the recording in the file cannot change the legal status of the *original*, which remained in Glendale. And as the Ninth Circuit held, the circumstances of the recording were hardly confidential, as the statements were "made as part of a conversation voluntarily entered into with a police officer, without any promise of confidentiality." Pet. App. 16a.

Because the recording was plainly a public record under state law, any citizen – including LAPPL – had a statutory right to inspect it at any time. As a result, the First Amendment protects LAPPL's publication of that record. *See Cox*, 420 U.S. at 496. Thus, even if the Court were to grant review, Petitioner's retaliation claim would still fail for this independent reason.

C. LAPPL Is A Private Actor, Not A Joint Actor With The City

Finally, Petitioner's claim fails because LAPPL is a private actor. The courts below declined to rule on

this issue, finding that Petitioner's claim failed even assuming LAPPL was a joint actor with the City of Los Angeles. Pet. App. 16a n.6 and 26a. Nevertheless, LAPPL's status as a private actor is fatal to Petitioner's claim.

"[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citations and quotes omitted). Thus, to state a claim under Section 1983, Petitioner must identify "unconstitutional conduct [that] is fairly attributable to the State." *Id.* That process "begins by identifying the specific conduct of which the plaintiff complains." *Id.* at 51 (citations and quotes omitted). Then, Petitioner must establish that the "private actor operates as a willful participant in joint activity with the State or its agents." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quotes and citations omitted).

Here, the Petition alleged a single constitutional violation by LAPPL: the publication of the recording. Pet. at 7-10. But the undisputed evidence below established that the City and LAPPL were at cross-purposes regarding that publication. As the Petition admits, when Corey Brente, the Assistant City Attorney in charge of police litigation, provided the recording to LAPPL, he also offered "advice about how to use it." Pet. 8. Critically, the Petition admits that Brente advised LAPPL to *not* publish the recording. *Id.* (alleging that Brente suggested this strategy so that Petitioner

would not think that the City had the recording). But LAPPL rejected Brente's advice and published the recording anyway. *Id.* Because there can be no joint action where the state actor and the private actor disagree on the challenged course of conduct, Petitioner cannot satisfy Section 1983's state action requirement.

CONCLUSION

Petitioner embodies Churchill's aphorism that "some people's idea of free speech is that they are free to say what they like, but if anyone says anything back, that is an outrage." The Churchill Spirit – In His Own Words, N. Y. Times, Aug. 2, 1964 (alterations omitted). By exercising his own First Amendment rights, and publicly accusing two police officers of falsifying a police report, Petitioner invited a public response. LAPPL accepted that invitation and responded with speech of its own. The Ninth Circuit correctly concluded that LAPPL's public response was no outrage. It was instead free speech, entitled to the same First Amendment protections as Petitioner's public accusation.

Nothing in the Petition casts any doubt on that result, or offers even a shred of support to Petitioner's disconcerting effort to remake the First Amendment into a tool for censoring his critics. Because the Ninth Circuit's decision below was in keeping with the law

of every other circuit to consider the issue, as well as the precedents of this Court, the Petition should be denied.

Respectfully submitted,

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