No. 07-

IN THE

Supreme Court of the United States

MARY LOU SMITH,

Petitioner,

v.

HONORABLE ANDREW N. FRYE, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was fired from her state government position because her supervisor, the Chief Judge, was angry that her son had filed to run against the incumbent circuit clerk in the primary election and because he believed that Ms. Smith supported her son's candidacy rather than that of the incumbent. The Fourth Circuit held that this type of political firing was not protected by the First Amendment.

1. Whether the First Amendment protection recognized from political firings first articulated in *Elrod v. Burns*, 427 U.S. 347 (1976), is limited to political firings that either [a] occur during post-election "housecleaning" or [b] are effected by the candidate himself, rather than by his political ally?

2. Whether a public employee's right to be free from politically-motivated termination was sufficiently "clearly established" to overcome a supervisor's qualified immunity defense where the public employee was fired for supporting a challenger to an incumbent office holding in the primary election and where there was no judicial decision that specifically addressed whether the specific job, West Virginia magistrate court clerk, was non-political?

3. Whether the First Amendment and F.R.C.P. Rule 12(b)(6) permit a federal court to dismiss a complaint that unambiguously alleges that public employment was terminated for political reasons, based on the court's belief that the employer may have been acting for other, constitutionally permissible reasons?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Mary Lou Smith. Greg Smith was also a party to the proceedings below, but he is not seeking a writ of certiorari. The respondent is Andrew N. Frye, Jr., a judge of the Circuit Court of Mineral County, West Virginia.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner states that she has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mary Lou Smith, a former clerk of the Magistrate Court of Mineral County, West Virginia, was fired by her employer, the Chief Judge of the Circuit Court of Mineral County and the respondent herein, in retaliation for her son's candidacy opposing the incumbent circuit clerk in the Republican primary election and his belief that she supported her son's candidacy rather than that of the incumbent. She seeks review of the Fourth Circuit Court of Appeals' decision upholding the dismissal of her political firing case based on its conclusion that political firings are not prohibited by the First Amendment unless the employee was either terminated by a candidate in the heat of a campaign or as part of a post-election house-cleaning. By restricting the First Amendment's prohibition on political firings exclusively to these two categories, the Fourth Circuit's holding conflicts with well-established legal principles articulated by this Court and other federal appellate courts over the past thirty years.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007). Appendix ("App.") A, 1a-25a. The Fourth Circuit's denial of the petition for rehearing and rehearing *en banc* is unreported. App. B, 26a. The unpublished opinion of the district court is reported at *Smith v. Frye*, 2006 U.S. Dist. LEXIS 39909 (N.D. W. Va. Jun. 14, 2006). App. C, 27a-46a.

JURISDICTION

The court of appeals denied the petition for rehearing and rehearing *en banc* on June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

The statute under which Ms. Smith brought her claim, 42 U.S.C. § 1983, reads, in relevant part:

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

STATEMENT OF THE CASE

A. Ms. Smith's Termination

This case involves the political firing of petitioner, Mary Lou Smith, an at-will state judicial employee.[1] Ms. Smith was

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[1]The Complaint included the claims of both Ms. Smith and her son, Greg Smith. App. D, 47a-54a. The Fourth Circuit

fired by Andrew N. Frye, Jr., a state court judge, from her position as magistrate court clerk because her son had filed to run for office in the 2004 primary election against the incumbent circuit clerk and because Judge Frye believed that Ms. Smith supported her son's candidacy against the incumbent.[2] App. 48a-49a, (Compl. ¶¶ 8, 10-13). Judge Frye announced his intent to fire Ms. Smith to his judicial colleague, Judge Phillip B. Jordan, Jr., on the very same day that her son, Greg Smith, filed his candidacy papers. App. 48a-49a (Compl. ¶¶ 10, 12-13).[3] Judge Frye was angry at Ms. Smith and expressly told Judge Jordan that he was going to fire Ms. Smith because of her son's candidacy. App. 50a (Compl. ¶ 24).

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dismissed both claims pursuant to the Respondent's Motion to Dismiss under Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, only Ms. Smith petitions this Court for a writ of certiorari.

[2]The circuit clerk does not have any supervision over or other direct employment relationship with the magistrate clerk. App. 48a (Compl. ¶ 11).

[3]This case involves a dismissal based on a Rule 12(b)(6) motion to dismiss. Thus, the allegations in the Complaint are to be taken as true. The Fourth Circuit majority opinion incorrectly states that Judge Frye did not tell Judge Jordan that he intended to fire Ms. Smith because of her son's candidacy until several days later. App. 3a. *See* App. 48a-49a (Compl. ¶ 12-13) (alleging "On January 30, 2004, shortly after learning that Greg Smith had filed to run for circuit clerk, the defendant, Judge Frye, told Judge Philip B. Jordan, Jr., the other judge of the 21st Judicial Circuit, that he wanted to fire Ms. Smith because her son had filed to run for circuit clerk. At the time that the defendant told Judge Jordan of his intent to fire Ms. Smith, the defendant, according to Judge Jordan, was angry at Ms. Smith because of her son's candidacy for the position of circuit clerk.").

Despite Judge Jordan's efforts to dissuade Judge Frye from his intended course of action, Judge Frye went ahead and fired Ms. Smith less than one week later because he believed that she supported her son's candidacy and not that of the incumbent circuit clerk. App. 49a (Compl. ¶¶ 16-18). Prior to her termination, no one, including Judge Frye, had complained about Ms. Smith or her work and she was widely respected by everyone with whom she worked. App. 49a (Compl. ¶¶ 14-15).

After she was fired, Ms. Smith filed for a personnel hearing under the administrative appeal procedures of the West Virginia judicial system.[4] Instead of offering an explanation at the hearing for his decision to fire Ms. Smith, Judge Frye refused to identify a reason for his decision, insisting that he did not have any reason or motive for firing her. App. 50a (Compl. ¶ 26).[5] He further testified, untruthfully, that he had been planning to fire Ms. Smith before he learned of her son's candidacy. He sought to support this assertion by stating that he had requested a model termination letter from the

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[4]The administrative appeal was filed pursuant to the personnel policies of the West Virginia Supreme Court of Appeals for judicial employees. App. 49a-50a (Compl. ¶¶ 19-22).Ms. Smith's federal claims are not precluded by the doctrines of *res judicata* and collateral estoppel because this was an internal proceeding administered by the West Virginia Supreme Court of Appeals in its capacity as an employer, not within its judicial capacity. App. 51a-52a (Compl. ¶¶ 36, 38).

[5]In its statement of the pertinent facts of the case, the Fourth Circuit speculated that: "Judge Frye expressed concerns over potential conflicts of interest and the proper functioning of the local judicial system created by the combination of Ms. Smith's employment and her son's candidacy." App. 3a. However, at no point in this case has Judge Frye, himself, sought to justify his decision to terminate Ms. Smith on these grounds.

Administrative Office of the West Virginia Supreme Court of Appeals three to four weeks before he fired Ms. Smith. App. 50a (Compl. ¶ 27). However, James Albert, Interim Director of the Administrative Office, contradicted this assertion and testified at the hearing that, according to his records, Judge Frye did not contact him until five days after Greg Smith filed his candidacy papers and one day before Judge Frye fired Ms. Smith. App. 50a-51a (Compl. ¶ 28). Although the hearing officer, a senior status judge, concluded that Ms Smith would not have been discharged had her son not become a candidate for the office of circuit clerk, he incorrectly concluded that Ms. Smith's termination did not violate state or federal law. App. 51a (Compl. ¶ ¶ 29-30).

B. Proceedings before the District Court

Ms. Smith filed suit against Judge Frye in the United States District Court for the Northern District of West Virginia, pursuant to 42 U.S.C. § 1983, seeking damages for her wrongful termination.[6] She contended, in relevant part, that Judge Frye had fired her, in violation of her rights under the First and Fourteenth Amendments, because her son, Greg Smith, had filed to run against the incumbent circuit clerk in the Republican Party primary and because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk. App. 49a, 53a (Complaint ¶ ¶ 18, 45).

Judge Frye moved to dismiss Ms. Smith's claims, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that she had failed to plead a claim upon which relief can be granted. The district court dismissed Ms. Smith's federal claims because, in the court's words, she failed

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[6]For reasons not at issue here, Ms. Smith chose not to seek injunctive relief against the state judiciary.

to allege that "she took any action to support her son's candidacy, or that she exercised rights granted to her under the United States Constitution whatsoever" and such failure was fatal to her claims. App. 39a. Thus, rather than following the teaching of *Branti v. Finkel*, 445 U.S. 507 (1980), that the First Amendment protects a public employee's rights of belief and association, the district court ignored Ms. Smith's freedom of association claim and analyzed her claim solely as a freedom of speech case. As a result, the court mistakenly concluded that her case could not go forward in the absence of an allegation that she had engaged in active support for her son's candidacy prior to her termination.[7]

C. Proceedings before the Fourth Circuit Court of Appeals.

Ms. Smith appealed to the Fourth Circuit, contending that the district court had erred in holding that, under 42 U.S.C. § 1983, she was required to show she had engaged in overt action supporting her son's candidacy in order to survive the respondent's motion to dismiss. The Fourth Circuit acknowledged that the district court had failed to consider Ms. Smith's First Amendment freedom of association claim. App.

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[7]Although Ms. Smith did not engage in any activity demonstrating her support for her son's candidacy before she was fired, Ms. Smith alleged that Judge Frye had told a fellow judge that he was going to fire her because her son had filed to run for the office of circuit clerk. App. 48a-50a (Compl. ¶ 12-13, 24). Judge Frye knew that Greg Smith was her son and, consequently, assumed that she was affiliated with and supported his candidacy. Accordingly, Ms. Smith also alleged that Judge Frye fired her because he believed that she supported her son's candidacy. App. 48a-49a (Compl. ¶¶ 10-13, 18).

6a.[8] However, it then upheld the district court's decision on grounds that were neither addressed by the parties in their briefs nor at oral argument. In dismissing Ms. Smith's association claim under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), and their progeny, the panel majority (Judges Duncan and Niemeyer) articulated a novel and narrow interpretation of the prohibition against political firings afforded by the First Amendment by restricting its application to *only* two categories of political firings: discharges during a "victory housecleaning" and discharges by a candidate himself "in the heat of his own campaign." App. 14a-15a. Judge Motz dissented from this ruling, although she concurred in the judgment on the grounds of qualified immunity.

Specifically, the panel majority concluded that the constitutional principle articulated in *Elrod* and *Branti* only applied to two specific situations. In reaching this conclusion, the Court first noted that *Elrod* cases fell within two categories:

> In this circuit, *Elrod* cases have fallen into two primary archetypes: (1) cases in which the person being fired is actively associated with a political party or faction (or actively chooses not to be so associated) and the individual making the firing decision is a person seeking office; or (2) cases in which newly elected or appointed officials fire supporters of their rivals during a political transition.

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[8]The Fourth Circuit accuses Ms. Smith of having "vague," "evolving" and "mutating" legal theories, suggesting that she did not rely on her right to freedom of association in the district court. *See* App. 4a, 7a n.2. To the contrary, Ms. Smith had argued that her First Amendment claim was based on her freedom of association before the district court but the district court failed to address this issue in its decision.

App. 9a (internal citations omitted). The Fourth Circuit then decided that these "archtypes" were the *only* political firings prohibited by the First Amendment, concluding that Ms. Smith cannot prevail because "Judge Frye was not himself seeking office and terminating those who did not support his candidacy" "[n]or was Judge Frye cleaning house after an electoral victory." App. 13a.

In reaching its conclusion that political firings other than those that fell within the two identified categories were not prohibited by the Constitution, the opinion failed to explain how or why *Elrod* or *Branti* mandated this restrictive approach to First Amendment rights of political association and affiliation. The opinion also failed to explain why the First Amendment prohibits firing a public employee *after* an election for supporting a disfavored candidate but does not prohibit firing the same employee for the same reason *before* the election. Nor did the opinion offer any explanation as to why it thought that *Elrod* or *Branti* prohibited a candidate for political office from firing a public employee in the midst of his campaign because the employee failed to support him, but permitted the candidate's government colleagues to fire a public employee for the identical reason.

Although the opinion sought to characterize Ms. Smith's claim as leading the court far afield because she had not alleged that she actively supported her son's candidacy, it ignored the fact that Ms. Smith had specifically alleged Judge Frye told one of his colleagues that he intended to fire Ms. Smith *because he believed that she supported that candidacy.*[9] App. 12a. Thus,

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[9]Ms. Smith's allegations were not based on inferences from unsupported facts but were based on actual testimony in the personnel hearing. Moreover, when given the opportunity to disagree with Ms. Smith's contention that she was fired because

Ms. Smith's claim lies at the very heart of the constitutional prohibition on political firings.

Judge Motz dissented from the panel majority's constitutional ruling.[10] She faulted the majority for failing to properly credit the allegations in the complaint. As she explained in her opinion, concurring in the result, Ms. Smith's allegations that Judge Frye terminated her employment because her son had filed to run against the incumbent Circuit Clerk in the Republican primary and because Judge Frye believed that she supported her son and not the incumbent circuit clerk, when

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Judge Frye believed that she supported her son's candidacy, Judge Frye refused to provide an alternative reason or, for that matter, any reason at all, insisting that he fired Ms. Smith for no reason. *See* App. 50a (Compl. ¶ 24-26) ("At the administrative hearing, Judge Jordan, who was called as a witness by Ms. Smith, testified that the defendant said that he was going to fire Ms. Smith because her son had filed to run in the primary election against the incumbent Circuit Clerk. The defendant did not disagree with Judge Jordan's testimony about what he, the defendant, had said. Instead, the defendant testified that he did not recall the details of his conversations with Judge Jordan. When the defendant was asked why he fired Ms. Smith, he did not provide a reason for his decision, insisting, instead, that he did not have a reason or a motive for his decision to fire her.").

[10] Unlike her fellow panelists, Judge Motz concluded that Ms. Smith had alleged facts sufficient to state a claim against Judge Frye for his violation of her First Amendment rights. App. 19a-24a. However, Judge Motz concurred in the judgment because she further concluded that the applicability of the First Amendment to facts like those alleged was not clearly established at the time that Judge Frye fired Ms. Smith and, thus, he would be entitled to qualified immunity. App. 24a-25a.

properly viewed in the light most favorable to the plaintiff, set forth a strong First Amendment claim. App. 21a.

> When read in the best light for Ms. Smith, her complaint alleges that Judge Frye used the power of the state to punish Ms. Smith for her political affiliation and/or views. Rather than being "attenuated," this claim sounds in the heart of the First Amendment. *See West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642, 62 S.Ct. 1178, 87 L. Ed. 1628 (1943) ("If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion . . . .").

App. 22a-23a, n.*.

The Fourth Circuit's ruling takes two common fact patterns in which public employees are fired in violation of their constitutional right to freedom of association and holds that they are the exclusive fact patterns entitled to protection under *Elrod* and *Branti*.[11] App. 14a-15a. Yet, it never explains *why* the First Amendment's protection of political freedom should be so artificially limited. As Judge Motz recognized, this is constitutional error.

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[11]This error in analysis also led the court to err in its analysis of the qualified immunity issue. Instead of focusing on whether Judge Frye should reasonably have understood that, as a public official, he could not fire an employee because he disapproved of the candidate she supported, the majority and concurring opinion inquire whether there was a previous case that specifically dealt with such a pre election firing. Yet, the issue is not whether there was a previous case directly on point, but whether a reasonable public employee, let alone a judge, should have known that firing someone solely for political reasons was prohibited by the First Amendment.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary because the Fourth Circuit's decision limiting the constitutional protections against political firings is inconsistent with over thirty years of First Amendment jurisprudence developed by the federal courts since *Elrod v. Burns*, 427 U.S. 347 (1976). Through *Elrod*, *Branti* and their progeny, the courts have developed a commonly understood rule that the firing of public employees for purely political reasons is prohibited by the First and Fourteenth Amendments unless political loyalty, compatibility or affiliation is an appropriate requirement for the position.[12]

Contrary to the suggestion in the Fourth Circuit's opinion, Ms Smith is not attempting to extend the principles of *Elrod* to a new type of case. Rather, her case involves a classic political firing. She was fired because a public official disapproved of her son's candidacy and believed that she supported her son rather than the incumbent. Although this fact pattern may not conform to the "archetypes" identified by the Fourth Circuit, nothing in *Elrod* or in the reasoning of the cases

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[12]Judge Frye never contended that political loyalty, compatibility or affiliation was an appropriate requirement for Ms. Smith's position at the time he fired her, at the personnel hearing or in his Motion to Dismiss. At this point in the litigation, there is no basis in the record to support a conclusion that the position of magistrate court clerk was an exception to the general rule against political firings. *See Caudill v. Hollan*, 431 F.3d 900, 908 (6th Cir. 2005) (noting that after a plaintiff has made a prima facie case that he was discharged because of his political affiliation, the burden shifts to the defendant to demonstrate that the plaintiff's job was one for which political affiliation was an appropriate requirement).

following it suggests that *Elrod* rights are limited to those types of political firings that are statistically the most common. No other appellate circuit has sought to restrict a non-policymaking public employee's First Amendment associational rights in this way. Nor does the Fourth Circuit point to any principle that would justify restricting political firing cases to those fact patterns that most commonly result in litigation.

The Fourth Circuit has now effectively authorized undisguised political firings within its jurisdiction so long as they are made before the election and by someone who is not running for office at the time. In the Fourth Circuit, public employees who choose not to support the primary or general election candidates favored by their supervisors or who support or are perceived to support rival disfavored candidates will no longer enjoy the protections provided by *Elrod* and its progeny. As a result, the Fourth Circuit's ruling significantly weakens the protections of the First Amendment by allowing political allies of a candidate to fire public employees who do not support that candidate prior to an election.

A. The Court Should Grant Review to Resolve the Conflict Created by the Fourth Circuit's Decision and to Clarify the Prohibition on Political Firings.

1. The Fourth Circuit's Decision Conflicts with Well-established First Amendment Jurisprudence in this Court and in Other Circuits.

Mary Lou Smith does not seek an extension of established law. To the contrary, although the exact pattern of this case has not been reported in other cases, the language and analysis of other courts indicate that her claims would have been allowed to proceed other circuits. Neither this Court nor any other circuit court of appeals known to the plaintiff has ever

adopted the restrictive view of *Elrod* that is now the law in the Fourth Circuit.

The right of ordinary public employees to associate with the party or faction of their choice as well as the right to support the candidate of their choice is a well recognized constitutional right and a commonly understood principle of our political culture. In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court first recognized that the termination of a public employee violates the First Amendment if the termination is based on the employee's political affiliation or non-affiliation. Subsequently, in *Branti v. Finkel,* this Court elaborated on the protections extended to public employees under the First Amendment, stating:

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate an overriding interest of vital importance, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

445 U.S. 507, 515-516 (1980) (internal citations to *Elrod* omitted).

A decade later, in *Rutan v. Republican Party*, this Court held that the principles developed in *Elrod* and *Branti* also applied to promotion, transfer, recall, and hiring decisions based on party affiliation and support. 497 U.S. 62 (1990). Finally, this Court extended the First Amendment protection afforded public employees to independent contractors. *O'Hare Truck Serv. v. City of Northlake,* 518 U.S. 712, 714-15 (1996) ("Although the government has broad discretion in formulating

its contracting policies, we hold that the protections of *Elrod* and *Branti* extend to an instance like the one before us, where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.").

Although *Elrod* and *Branti* addressed political patronage systems, the language and logic of the opinions and subsequent decisions in the circuit courts of appeal have developed the law on political firings, holding that the principles articulated in these cases apply where a public employee is fired for supporting or failing to support a particular candidate in an election. *See, e.g., Sowards v. Loudon County*, 203 F.3d 426 (6th Cir. 2000) (holding that firing a jailer for supporting her husband's campaign for sheriff violated her right of political association and her right to intimate association with her husband); *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560 (10th Cir. 1993) (upholding jury verdict on school employee's claim that she was terminated in retaliation for supporting rival candidate for the Board of Education); *Snyder v. City of Moab*, 354 F.3d 1179, 1184-85 (10th Cir. 2003) (noting that the First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or non-affiliation and that "[t]his protection is violated, and a valid § 1983 claim may be asserted, where a public employee is discharged because of his or her position regarding a particular candidate for office except where the public employee is in a position requiring political allegiance.").

The prohibition on political firings is no different when the firing results from the failure to support a particular faction within the same political party or from an employee's support or non-support of a particular candidate in a primary election. *See, e.g., Curinga v. City of Clairton*, 357 F.3d 305, 311 (3d Cir. 2004) (noting that "[p]rimary election fights can be famously

brutal, sometimes more so than contests in the general election"); *Padilla-Garcia v. Rodriguez,* 212 F.3d 69, 76 (1st Cir. 2000) ("Clearly factions within one party can represent different political philosophies. Thus, the underlying principle, freedom to express political beliefs, is very much still at stake. In a case such as this one, where there is a heated battle during the primary, the risk of retaliation against an employee who supported the opposition is just as high as in any other election."); *Robertson v. Fiore*, 62 F.3d 596, 600 (3d Cir. 1995) (explaining that "[b]ecause of the dominance of one political party in some locations, intraparty battles will sometimes overshadow interparty battles"); *id.* ("The danger that employees will abandon the expression or exercise of their political beliefs to appease their supervisors is not diminished because a supervisor supports a different identifiable faction within a party as compared to a different party altogether."); *Tomczak v. Chicago*, 765 F.2d 633, 640 (7th Cir. 1985) (concluding that the reasoning of *Branti* "applies with equal force to patronage dismissals when one faction of a party replaces another faction of the same party."); *Barnes v. Bosley*, 745 F.2d 501, 506 (8th Cir. 1984) (agreeing with district court that political motives prompted dismissal even though litigants were members of same party).

Moreover, the First Amendment protects the right of a public employee to remain politically neutral as well as to support a particular candidate or party. *See, e.g., Galli v. N.J. Meadowlands Comm'n,* 490 F.3d 265, 276 (3d Cir. 2007) ("We hold that the First Amendment protects politically neutral or apolitical government employees from political patronage discrimination."). Nor does it matter whether the employee's political belief is privately held or publicly expressed. *See, e.g., Bass v. Richards*, 308 F.3d 1081, 1090 (10th Cir. 2002) ("It is also clearly established that the First Amendment prohibits the

dismissal of an employee because of his privately held political beliefs.").

Thus, consistent with *Elrod* and *Branti*, the federal courts have held that firings and other retaliatory employment actions are prohibited where the employer's action is based upon the employee's political affiliation and/or support or non-support for a particular candidate. Moreover, a public employee is not required to affirmatively support a candidate in order to be protected from political retaliation because, as set forth in *Branti*, an employee's private political beliefs fall within the protection of the First Amendment. 445 U.S. at 516-17 (stating that "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs").

Therefore, the Fourth Circuit's decision in this case, construing the *Elrod* doctrine as limited strictly to two specific factual applications, is in conflict with the understanding of that doctrine articulated by other circuits. Prior to the decision in this case, no court, to petitioner's knowledge, has ever concluded that the First Amendment jurisprudence of *Elrod, Branti* and *Rutan* would not apply where a public official fires an employee because he believes she supports the opponent of one of the official's political colleagues in an election. Nor has any court suggested that the protection from being fired for political association, political affiliation or political belief is somehow limited to post-election firings. Nor have other courts concluded that an employee is protected from a political firing *only* if the person doing the firing is the candidate himself. It is hard to imagine any principle that would justify such distinctions. Nonetheless, those are precisely the distinctions made by the Fourth Circuit in this case.

The Fourth Circuit's decision, therefore, creates a precedent that undermines decades of First and Fourteenth

Amendment jurisprudence and effectively creates a play book of judicially approved political firings. Under this decision a public official can summarily discharge any public employee who refused to support the official's favored candidate or slate of candidates so long as this is done before an election. Similarly, a public official can summarily order the firing of any public employee whose family member– or business associate, or friend – has the temerity to run for political office against one of the public officials's political associates or friends.[13]

Consequently, this decision will inevitably have a chilling effect on public employees whose political preferences and/or choice of candidate differs from their public employer. The decision creates a political patronage regime in the Fourth Circuit that is contrary to the decisions of this Court and inconsistent with the decisions of the other federal circuits.

2. The Fourth Circuit's Reasons for its Decision Are Inconsistent with the Reasoning of the Applicable Precedents.

As noted above, Ms. Smith has not sought to extend the scope of *Elrod's* protection. To the contrary, the Fourth Circuit has artificially restricted that protection and, in doing so, invited public officials to engage in political firings so long as those firings occur before election day and are ordered by someone other than the candidate himself. Most importantly, the Fourth Circuit did not reach this conclusion by analyzing the constitutional principles of the *Elrod* line of cases. Instead, as noted above, it simply looked at the common fact patterns of

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[13] Although this case involves a retaliatory political firing by a state judge, the holding in the panel majority's decision will apply equally to officials within the executive and legislative branches of government.

previous cases and then concluded, without any basis in First Amendment jurisprudence, that First Amendment protections are somehow limited to situations that fit those fact patterns.

In turning a survey of prior cases into a restriction on First Amendment rights, the court failed to consider that Ms. Smith's case alleges an egregious violation of First Amendment associational rights. There is no ambiguity in the case alleged in her complaint. She was fired intentionally for the specific reason that her employer disapproved of her presumed support for a candidate who opposed one of his local government colleagues in a primary election. The fact that a similar firing has not previously resulted in a reported case in the Fourth Circuit does not make the firing constitutional. Nor is there any reason to believe that the cases which most frequently find their way into reported opinions represent the most egregious affronts to the First Amendment. In fact, the most egregious cases are more likely to settle early and never wind up in an appellate opinion. In any case, the right at issue is not based on the number of identical fact patterns that have been litigated in the past. It is based on the logic of the First Amendment which, since *Elrod*, prohibits political firings.

In fact, Ms. Smith's firing is, if anything, more clearly in violation of *Elrod* and *Branti* than many of the reported cases. She was singled out because her employer believed she supported the wrong candidate in a primary election. No public official should need a case on point to tell him that such a firing is unconstitutional. Further, it is difficult to conceive of a logical reason why any public official, let alone a judge, would have thought it was lawful to fire an employee because he disagreed with her choice of candidate so long as he did it before election day.

The panel majority's decision is illogical for another reason. A victory housecleaning occurs when challengers successfully oust the incumbent party or faction in an election and gain the right to hire and fire. Incumbents, however, do not need to wait for an electoral victory to reward supporters and punish those who fail to support their approved candidates. Thus, by limiting *Elrod*'s protections to only those terminations that occur during a "victory housecleaning" and by the candidate himself "in the heat of his own campaign," the Fourth Circuit effectively sanctions retaliatory firings and other retaliatory employment actions by an incumbent party or political faction to enforce support for their candidates or slate of candidates so long as those retaliatory actions occur prior to the election.

Moreover, the fact that Judge Frye was not running for political office is irrelevant to the analysis. *Elrod* addressed the problem of political firings in the context of political machines. Where a political machine has power, the individual who enforces political conformity among employees is not necessarily the candidate himself. The dangers that *Elrod* and *Branti* addressed involve invasions of political freedoms by the employer regardless of whether the employer himself is actually running for political office.

Finally, the Fourth Circuit reasons that "[e]xtending *Elrod* to Ms. Smith's claim would require courts to undertake subjective factfinding inquiries into government officials' actual motivations in making at-will employment decisions to a greater extent than and in contexts in which this court has never ventured." App. 14a. However, courts have regularly engaged in "inquiries into governmental officials' actual motivations" in many contexts for many years. *See, e.g., Knight v. Vernon*, 214 F.3d 544, 551-552 (4th Cir. 2000) (rejecting summary judgment and remanding case for trial on plaintiff's claim that she had been fired for political reasons); *Peacock v. Duval*, 694 F.2d 644,

646 (9th Cir. 1982) (stating, in a First Amendment retaliation claim, that "[w]ithout a searching inquiry into these motives [for the employment decision], those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations."). The potential difficulty of factfinding in some future case is not a reason to avoid applying the First Amendment in this case where the facts are clear.

B. The Fourth Circuit's Conclusions Regarding Qualified Immunity Are Inconsistent With the Law as Developed in this Court and Other Circuit Courts and Will Unnecessarily Increase the Litigation of Qualified Immunity Issues in Political Firing Cases.

1. The Fourth Circuit Erred in Holding That Judge Frye Was Entitled to Qualified Immunity.

This is not a case where the constitutional error is harmless. The Fourth Circuit has held that it is lawful to fire a public employee because the employer disapproves of the candidate he believes she supports. In reaching that clearly erroneous conclusion, the Fourth Circuit has not only sanctioned political firings, but also expanded the use of qualified immunity for conduct that, prior to this decision, reasonable public officials would have understood to violate *Elrod* and *Branti*.

The Fourth Circuit repeats the same mistake it made in analyzing the scope of protection under *Elrod* and then compounds that problem by adopting an overly restrictive approach to qualified immunity in cases of this type. Thus, although Judge Frye was on fair notice that firing a public employee for political reasons violated a clearly established constitutional right, the Court nonetheless concluded that he was

entitled to qualified immunity because there was no prior case that specifically addressed the exact facts presented in this case. App. 12a.[14] However, the Fourth Circuit's qualified immunity analysis is inconsistent with the analysis applied by this Court and the other federal circuits and, as discussed below, undermines the First Amendment protections articulated in *Elrod* and its progeny.

The doctrine of qualified immunity is not intended to require a plaintiff to demonstrate that the exact conduct at issue has been identified as unconstitutional in a prior case. Rather, public officials are expected to interpret the contours of the right at issue reasonably. As this Court stated in *Anderson v. Creighton*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. 635, 640 (1987) (omitting internal citation) (emphasis added). *See also Hope v. Pelzer*, 536 U.S. 730 (2002) (noting that where the constitutional violation was 'obvious' that there need not be a materially similar case for the right to be clearly established).

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[14]Although Judge Motz concurred in the judgment on the grounds that Judge Frye would be entitled to qualified immunity, she offered no legal analysis for her conclusion. App. 25a.

Moreover, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.,* at 741. As the Sixth Circuit has noted,

> Were this court to require position-specific findings before it found that the law was clearly established, *we would be, in effect, requiring a previous finding on the constitutionality of patronage dismissals for every government position before holding that the law was clearly established for that position.* Such a finding could lead to the result that similarly situated county officials could engage in political patronage dismissals at least once with impunity, unless and until a court ruled on the constitutionality of political patronage for that particular position. Such a result is not warranted by logic or precedent.

Caudill v. Hollan, 431 F.3d 900, 913-14 (6th Cir. 2005) (emphasis added). Thus, the pertinent legal inquiry is whether the law "is sufficiently defined so as to provide public officials with 'fair notice' that the conduct alleged is prohibited." *Epps v. Watson,* 492 F.3d 1240 (11th Cir. 2007) (citation omitted).

In the present case, other circuit courts of appeal would likely have concluded that Judge Frye was, in fact, on "fair notice" that firing Ms. Smith because he thought she supported her son against the incumbent circuit clerk was unlawful. As alleged in the complaint, Judge Frye specifically intended to fire Ms. Smith because he believed she supported her son instead of the incumbent circuit clerk. In light of *Elrod, Branti, Rutan,* and other political firing cases, no reasonable official could conclude that such a firing was permissible under the First Amendment because the exact fact pattern had not been litigated in a reported case. Nor could a public official, knowing that it was unlawful to fire a public employee for her support of a disfavored

candidate in a post-election house-cleaning, reasonably believe that it was legal to do the same thing in a pre-election purge. Nor could a public official knowing that the incumbent circuit clerk could not fire her subordinates if they did not support her reelection efforts reasonably believe that he could fire his own subordinates if they failed to support his political colleague.

Moreover, the facts of this case indicate that, contrary to the Fourth Circuit's speculation, Judge Frye himself understood quite well that his conduct was illegal. As discussed above, when given the opportunity to provide a lawful, non-retaliatory reason for firing Ms. Smith at the personnel hearing, Judge Frye disingenuously insisted that he had no reason for firing her at all. App. 50a (Compl. ¶ 26).

Finally, the panel majority states that Judge Frye is also entitled to qualified immunity because it was not clearly established "that Ms. Smith's position is a protected one, rather than one for which political affiliation is a legitimate job requirement." App. 14a-15a n.6.[15] However, such a ruling was premature as this case was decided on a motion to dismiss based upon the pleadings. Furthermore, qualified immunity is an affirmative defense and, thus, it was not plaintiff's burden to introduce, in the pleadings, all of the facts relevant to this issue.

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[15] *See Branti*, 445 U.S. at 517 (affirming that although patronage dismissals are, in general, unconstitutional, "party affiliation may be an acceptable requirement for some types of government employment"); *Caudill*, 431 F.3d at 908 (discussing *Branti*'s clarification that, although patronage dismissals are generally unconstitutional, "party affiliation may be an acceptable requirement for some types of government employment."); *Jenkins v. Medford*, 119 F.3d 1156, 1161-65 (4th Cir. 1997) (explaining that *Branti* modified the test in *Elrod* by asking if "there is a rational connection between shared ideology and job performance").

Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant."). The motion to dismiss was filed at the beginning of the case before Judge Frye filed his answer. The record had not yet been developed and, thus, the plaintiff was entitled to the reasonable inference that her position did not fall into the *Branti* exception.[16] Moreover, this defense would make more sense if Judge Frye had actually claimed that he thought he could fire Ms. Smith because she was a confidential employee but he conspicuously failed to do so when he was asked, under oath, about the reasons for his decisions.

2. The Fourth Circuit's Decision Sanctions Qualified Immunity Defenses in Cases Involving Clearly Unlawful Political Firings.

Prior to the Fourth Circuit's decision in this case, no public official would have thought to defend a political firing case on the grounds that the firing took place before the election or the that the public employee was fired by a political ally of the candidate rather than by the candidate himself. To the contrary, until now the rule was clear that political firings are prohibited unless the employee is a confidential or policy-making employee. *See* discussion in preceding section.

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[16]The panel majority has criticized the "paltry record on appeal" and the failure to include the filings of either party before the district court. App. 7a n.2]. However, the record was limited because Judge Frye moved to dismiss the case less than a month after the complaint was filed. Further, the appellate rules discourage parties from including legal memoranda filed before the district court in the appendix on appeal unless they have independent relevance and the parties agreed that the briefs on the motion to dismiss did not have independent legal relevance. F.R.A.P., Rule 30(a)(2).

The decision below, therefore, is likely both to increase the number of political firings and the claims of qualified immunity in political discharge cases. Under the court of appeals' analysis, a public official can successfully assert qualified immunity if he can distinguish the facts and circumstances of the political firing at hand from the specific facts and circumstances of *Elrod, Branti* and *Rutan*. Thus, instead of a reliable, common sense recognition that employment decisions cannot be based on a public employee's support or non-support for a given political candidate or political faction, each case will turn on the public official's ability to draw some distinction between the circumstances surrounding his politically-retaliatory conduct and the facts of the controlling cases previously decided.

Moreover, the absence of cases holding that pre-election firings are unconstitutional does not mean that public officials believe that political firings before election day are lawful. To the contrary, the absence of such cases suggests that public officials have recognized the legacy of *Elrod, Branti* and *Rutan:* political firings as well as other politically-motivated employment decisions are, with the exception of certain confidential and policy-making employees, no longer a part of our nation's political culture. The present case invites the use of qualified immunity to avoid liability for every politically-motivated employment action by decision-makers claiming that they could not have known that their particular acts were illegal because there were no prior controlling cases in which a firing occurred in the exact manner that it occurred in their case.

C. The Fourth Circuit Ignored The Standards Applicable to a Motion to Dismiss Under Rule 12(b)(6).

The principle grounds for reviewing the Fourth Circuit's decision is to address the appropriate scope of protection for public employees under the First and Fourteenth Amendments and the qualified immunity analysis applicable in political firing cases. However, the Fourth Circuit also erred in failing to accept as true the factual allegations in the complaint in considering the motion to dismiss. *Erickson v. Pardus*, __ U.S. __, 127 S. Ct. 2197, 2200 (2007) ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."). Although the Fourth Circuit acknowledged this principle, it did not follow it in deciding this case. App. 5a (citing to *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)).

For example, the panel majority speculated that perhaps Judge Frye had a legitimate reason for terminating Ms. Smith's employment in that his belief that Ms. Smith supported her son's candidacy "might have lead Judge Frye to conclude that, in a small office in which Ms. Smith was working with the incumbent circuit clerk, the potential conflict of interest would hinder the efficient administration of the judicial system." App. 14a. It based this speculation upon its assertion that "[i]t is undisputed that Judge Frye's colleague testified in the state administrative proceedings that Judge Frye expressed those very concerns to him. In the context of at-will employment, such a belief is more than an adequate reason to dismiss an employee." App. 14a.[17]

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[17]However, the record included only the administrative decision and not the transcript of the personnel hearing. The Fourth

There are several problems with the Fourth Circuit's conjecture about Judge Frye's motives. First, conjecture as to what "might have led Judge Frye to conclude that" there was a potential conflict of interest has no place in a decision on a motion to dismiss where the issue is whether the plaintiff has stated a cause of action for a political firing, not what the defendant might or might not later prove in his defense.[18]

Second, it was inappropriate for the panel majority to posit a lawful motive for Judge Frye's firing decision at this stage of the proceedings when Judge Frye declined to offer that motive himself when given the opportunity, under oath, in a personnel hearing. At that hearing, Judge Frye refused to provide a reason for his action, insisting instead that he did not have *any* reason or motive for firing Ms. Smith. App. 50a (Compl. ¶ 26). In fact, Judge Frye went further and specifically denied that Greg Smith's candidacy had anything to do with his decision, claiming, albeit untruthfully, that he had planned to fire Ms. Smith before he learned that her son was running for public office. App. 50a-51a (Compl. ¶¶ 27-28).

Third, Judge Frye did not argue that this was the reason he fired Ms. Smith in his motion to dismiss or in any of the other briefs he presented to the District Court or Fourth Circuit. It would have been improper for the court of appeals to credit Judge Frye's *actual* testimony when it conflicted with the allegations in the complaint. It was at least equally improper for

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Circuit apparently adopted this erroneous "fact" from the administrative hearing examiner's decision in which the hearing officer took a piece of Judge Jordan's testimony about his conversations with Judge Frye out of context.

[18]Assertions, such as those attributed to Judge Frye by the panel majority, may also be pretextual.

the court of appeals to proffer an affirmative defense for Judge Frye that he has not put forward himself.

Judge Motz recognized the Court's error, criticizing the panel majority's failure to follow the correct standard applicable to a Rule 12(b)(6) motion, noting that "[a]lthough the majority insists that it reads Ms. Smith's complaint 'liberally,' *ante* at 6 n.2, it clearly fails to do so." App. 22a, n.*. Judge Motz then cataloged the ways in which the panel majority failed to treat Ms. Smith's allegations as true in reaching its decision:

> Thus the majority contends that the complaint fails because it does not allege "what Ms. Smith's views or affiliation are or were." In fact, as noted above, the complaint alleges that Judge Frye discharged Ms. Smith "because [he] believed that [she] supported her son, not the incumbent circuit clerk." Read in the light most favorable to Ms. Smith, that allegation asserts both a "view" (that her son should be elected) and an "affiliation" (with her son's candidacy). The majority also faults the complaint for its failure to allege that "Judge Frye was aware of [Ms. Smith's] beliefs or affiliation." But surely Ms. Smith's allegation that Judge Frye fired her *because* of what he "believed" her views and affiliation to be suffices. Judge Frye may have been wrong about Ms. Smith's beliefs or affiliation; but if he fired her for an unconstitutional reason she would still have a cause of action. "[A]lleged discrimination is no less malevolent because it was based on an erroneous assumption." And even if Ms. Smith had to demonstrate that she actually did support her son, surely that fact "could be prove[n] consistent with the allegations" in the complaint.

App. 22a, n* (internal citations omitted).

The panel majority's failure to accept as true all of the factual allegations contained in the complaint in determining whether Ms. Smith had stated a cause of action sufficient to survive a motion to dismiss, further justifies granting Ms. Smith's petition for review.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

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