No. 14-1280

In The Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, MAYOR JOSE TORRES, POLICE CHIEF JAMES WITTIG, AND POLICE DIRECTOR MICHAEL WALKER,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

May a public employee prevail on a retaliation claim under 42 U.S.C. Section 1983 for a deprivation of his First Amendment right to freedom of political association even though he has not in fact exercised that First Amendment right?

LIST OF PARTIES

Although petitioner has not filed and served the written notice required by Rule 12.6, Michael Walker has no interest in the outcome of the petition, all claims against him having been voluntarily dismissed. Pet. App. 15a. Counsel of Record Victor A. Afanador has served as counsel to both the City of Paterson and Police Director Michael Walker since the Complaint was filed.

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The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 777 F.3d 147 (3d Cir. 2015). The opinion of the district court (Pet. App. 14a-54a) is reported at 2 F. Supp. 3d 563 (D.N.J. 2014).

A prior opinion of the district court (Pet. App. 66a-71a) is not published in the Federal Supplement but is available at 2011 WL 2115664 (D.N.J. 2011), and a prior opinion of the court of appeals (Pet. App. 57a-65a) is reported at 492 Fed. Appx. 225 (3d Cir. 2012).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2015, and a timely petition for rehearing was denied on February 13, 2015. The petition was filed on April 22, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, 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

In 2006, petitioner filed this 42 U.S.C. Section 1983 ("Section 1983") claim alleging that he was demoted in violation of his First Amendment rights. After a complicated and tortuous procedural history,

the district court granted summary judgment against the petitioner. Pet. App. 14a-56a. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner Jeffery Heffernan joined the City of Paterson, New Jersey, Police Department in 1985. He was assigned to work in the office of the Chief of Police James Wittig in 2005 as a detective. In April of 2006, a former Paterson police chief, Lawrence Spagnola, was running for mayor against the incumbent Jose Torres. Thus the election put Chief Wittig in a delicate position, with a former holder of his office challenging his current boss.

Heffernan did not live in Paterson, and therefore could not vote in the mayoral contest. His mother, however, lived in Paterson, supported Spagnola, and asked her son to bring her a Spagnola lawn sign. Heffernan did so merely as a favor to his mother, but not – he has repeatedly and forcefully insisted – as any kind of a political act showing support for Spagnola or affiliation with the Spagnola mayoral campaign. Pet. App. 43a-45a.

Chief Wittig viewed Heffernan's actions as overt involvement with the political campaign, and therefore both a breach of trust and a violation of office policy. Pet. App. 17a. As a result, Heffernan was transferred out of the Chief's office and assigned instead to walking patrol. Pet. App. 17a.

2. Heffernan brought suit against the City of Paterson, Mayor Jose Torres, Police Chief James Wittig, and Police Director Michael Walker. The

complaint can easily be read as alleging a Section 1983 claim for violation of Heffernan's right to freedom of speech. Pet. App. 38a; Complaint ¶¶ 40-41 (referring to "right to freedom of speech" and "right to free speech"); C.A. App. 107a. Understanding the case as a free speech case, the defendants conducted discovery and then moved for summary judgment on the ground that Heffernan had not engaged in any protected speech. Pet. App. 18a. Heffernan voluntarily dismissed the claim against Walker in conjunction with the final pre-trial order, and filed a motion in limine that the court of appeals later determined was more properly viewed a motion for partial summary judgment. Pet. App. 15a, 59a.

The district judge assigned to the case at that time, United States District Judge Peter G. Sheridan, denied the defendants' motion for summary judgment without receiving any brief in opposition from Heffernan. As Judge Sheridan saw it, Heffernan's claim more closely resembled a freedom of association claim. See C.A. App. 113a ("That's more like association rights as opposed to a speech right."). Despite the defendants' objection that they were surprised that a freedom of association claim was in the case, Judge Sheridan conducted a jury trial on the issue of whether Heffernan's right to freedom of association was violated. The jury returned a verdict in favor of the City of Paterson but against Mayor Torres and Chief Wittig, awarding $37,500 in compensatory damages against Torres, $37,000 in compensatory

damages against Wittig, and $15,000 in punitive damages against each. Pet. App. 18a; C.A. App. 125a.

3. After the entry of judgment, Heffernan moved for a new trial, contending that he should have been allowed to pursue his freedom of speech claim. The defendants appealed, contending that Heffernan should not have been allowed to pursue a freedom of association claim.

Judge Sheridan set aside the judgment and ordered a new trial, but not on the grounds argued by the parties. Instead, due to an apparent conflict of interest, he retroactively recused himself and decided that the only recourse was to set aside the verdict and permit a new trial before a different judge. Pet. App. 19a.

4. The case was reassigned to United States District Judge Dennis M. Cavanaugh. At first, Judge Cavanaugh told the parties that he would not consider any dispositive pretrial motions or revisit issues that had already been decided. When the parties objected to this plan, he permitted them to refile their earlier motions for summary judgment, but did not accept briefs in opposition. Pet. App. 19a; 60a.

In contrast to Judge Sheridan, who had denied the defendants' motion for summary judgment without even awaiting briefing by the plaintiff, and construed the plaintiff's claim as a freedom of association claim rather than a free speech claim, Judge Cavanaugh granted the defendants' motion for summary judgment on the grounds raised by that

motion. He ruled that Heffernan had not engaged in any protected speech, and therefore had no viable freedom of speech claim. Judge Cavanaugh said nothing about any freedom of association claim. Pet. App. 66a-71a; 19a; 60a.

In short, the first district judge (who later decided that he should never have heard the case in the first place) treated the case as if it raised only a freedom of association claim (that the defendants contended was never properly in the case) and proceeded to trial, while the second district judge treated the case as if it raised only a freedom of speech claim and granted summary judgment for the defendants.

5. The court of appeals reversed. Pet. App. 57a-65a.

The court of appeals described the procedural history of the case as "complicated and highly unusual." Pet. App. 59a. It concluded that the district court abused its discretion in refusing to allow briefs in opposition, noting that it "is extremely unusual in our experience for a District Court to deny permission to file opposition briefs, particularly on a dispositive motion." Pet. App. 61. It directed the district court to "permit the parties to re-file their summary judgment motions with updated statements of undisputed material fact and to allow full opposition and reply briefing." Pet. App. 63a.

The court of appeals also concluded that it was reversible error for the district court to fail to address Heffernan's freedom of association claim, leaving it to

the district court on remand to consider whether Heffernan adequately pled a freedom of association claim, the extent to which he prosecuted that claim, whether the defendants timely objected to trial of that claim, and the appropriate remedy, including dismissal of that claim, reopening of discovery, or proceeding to trial. Pet. App. 64a.

6. On remand, the case was assigned to a third district judge, United States District Judge Kevin McNulty. After accepting renewed motions for summary judgment, with full briefing, he granted summary judgment for the defendants. Pet. App. 14a-56a.

In a ruling not challenged here, the district court concluded that Heffernan could not prevail on a freedom of speech claim. Relying on Heffernan's own testimony, the court held that there was no genuine factual dispute as to whether Heffernan engaged in protected speech or expressive conduct: the record was clear that Heffernan did not do so. Accordingly, the district court granted summary judgment for the defendants on the freedom of speech claim. Pet. App. 24a-37a.

As for the freedom of association claim, the district court first carefully reviewed the complaint, Heffernan's trial brief, his motion in limine, and the final pretrial order to determine whether it was properly before the court. The district court found one allegation in the complaint that "however indefinitely, at least suggests a freedom-of-association claim," and a passage in Heffernan's trial brief that states that

defendants violated Heffernan's right to freedom of association, "but does not elaborate factually." Pet. App. 38a-39a. The court observed that Heffernan's motion in limine "alludes to a freedom-of-association claim, but in a confusing manner," and that the final pretrial order "invokes the First Amendment generally, but does not invoke freedom of association with specificity." Pet. App. 39a. Finding "some indications" that Heffernan's references to the First Amendment were intended to include both freedom of speech and freedom of association, the district court stated that Heffernan "could and should have been far clearer," and taken advantage of the generous opportunities to amend furnished by Federal Rule of Civil Procedure 15. Pet. App. 40a.

The district court acknowledged that "[i]f the tortuous procedural history of this matter were a film, we could freeze the frame at one point or another and find, from that viewpoint, that Defendants seem to have a valid procedural point." Pet. App. 41a. But the district court nevertheless decided to permit Heffernan to assert a freedom of association claim, invoking the spirit of Rule 1 and Rule 15. Pet. App. 41a.

Turning to the merits of that freedom of association claim, the district court found (in another ruling unchallenged here) that "Heffernan never pled or otherwise asserted that he had any political affiliation with Spagnola *in fact*." Pet. App. 43a (emphasis in original). Similarly, "Heffernan has never testified or otherwise asserted that he actually affiliated

himself with Spagnola's political organization." Pet. App. 44a. "Most importantly, *Heffernan himself* asserted that he had no political connection to Spagnola." Pet. App. 44a (emphasis in original).

As a result, Heffernan's only remaining theory – and the only one pressed in this Court – was that the defendants retaliated against him "because they mistakenly believed" that he was affiliated with the Spagnola campaign. Pet. App. 45a. The district court rejected this theory because "a First Amendment retaliation claim must be premised on an actual exercise of First Amendment rights." Pet. App. 53a.

7. The court of appeals affirmed. Pet. App. 1a-13a.

With regard to the free speech claim, the court of appeals pointed to Heffernan's "unambiguous testimony," testimony that left "no room" for "a jury to find that Heffernan intended to convey a political message when he picked up the sign." Pet. App. 9a-10a.

For the same reason – that is, Heffernan's own confirmation that "he did not have any affiliation with the campaign other than the cursory contact necessary to pick up the sign for his mother" – the court of appeals concluded that "the record is insufficient to allow a jury to return a verdict in Heffernan's favor on his claim of retaliation based on the actual exercise of his right to freedom of association." Pet. App. 10a-11a.

Like the district court, the court of appeals also rejected Heffernan's argument that he could recover based on the theory that the defendants mistakenly believed that he had exercised a First Amendment right. The court of appeals understood that Heffernan was asking it "to eliminate a traditional element of a First Amendment retaliation claim – namely, the requirement that the plaintiff in fact exercised a First Amendment right" – and declined to do so. Pet. App. 11a.

The court of appeals observed that its own binding precedent, as well as precedent from every other circuit to consider the issue, held that "a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." Pet. App. 11a (citing cases from the Fifth, Seventh, and Ninth Circuits as well as the Third). It saw no basis for distinguishing a First Amendment free speech claim from a First Amendment freedom of association claim with regard to this requirement. Pet. App. 13a.

It similarly saw nothing in *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012), to justify a departure from this fundamental principle that a Section 1983 First Amendment claim depends upon the exercise of a First Amendment right. The court of appeals found it particularly significant that *Dye* purported to adopt the reasoning of the First and Tenth Circuits in *Welch v. Ciampa*, 542 F.3d 927 (1st Cir. 2008) and *Gann v. Cline*, 519 F.3d 1090 (10th Cir.

2008). The court of appeals explained that *Welch* and *Gann* are "natural applications" of settled doctrine, recognized by the Third Circuit, see *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265 (3d Cir. 2007), that a public employer "may not discipline an employee based on the decision to remain politically neutral or silent." Thus it held that *Welch*, *Gann*, and *Galli* are fully consistent with the fundamental principle that a Section 1983 First Amendment retaliation claim depends upon the exercise of a First Amendment right, because the First Amendment protects not only the right to speak and to associate, both also the right to *not* speak and to *not* associate. Pet. App. 12a-13a.

The agreement of the court of appeals with *Welch*, *Gann*, and *Galli* did not benefit Heffernan, however, because he presented no evidence that "he was retaliated against for taking a stand of calculated neutrality," but rather contends that he was demoted "on a factually incorrect basis." And that, the court of appeals concluded, is simply not a violation of the Constitution. Pet. App. 13a.

ARGUMENT

I. There is no direct conflict in the courts of appeals.

Certiorari should be denied because there is no direct conflict in the courts of appeals. Petitioner's argument for this Court's intervention is a claimed

three to one split between the decision below by the Court of Appeals for the Third Circuit and decisions by the Courts of Appeals for the First, Sixth, and Tenth Circuits. Pet. 8-14. The decisions asserted to be in conflict with the decision below are *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012); *Welch v. Ciampa*, 542 F.3d 927 (1st Cir. 2008); and *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008).

As the Court of Appeals for the Third Circuit recognized, however, its decision in this case, as well as prior Third Circuit precedent, are fully in accord with *Gann* and *Welch*. In both *Gann* and *Welch*, the public employer took retaliatory action against employees who failed to support the employer's preferred candidate or party. Political neutrality was not enough for those employers; they insisted on loyal support. Such employers treated anyone who wasn't a friend as an enemy; in that sense the employers "perceived" an employee who did not affirmatively support their political side as affiliated with the other side – in effect, operating on the principle "if you're not with me, you're against me." As a result, employees who exercised their First Amendment rights to be neutral and to *not* associate with a political candidate or party suffered for their exercise of those rights. The employees in *Gann* and *Welch* would prevail in the Third Circuit, based not only on the decision below, but also based on a Third Circuit decision that predates both *Gann* and *Welch*, *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265 (3d Cir. 2007).

In *Gann*, the plaintiff alleged that the defendant replaced her with another woman because the other woman "demonstrated her political loyalty" by supporting the defendant's campaign while the plaintiff "failed to do so." *Gann v. Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008). The court of appeals rejected the argument that "political non-affiliation is not protected by the First Amendment," concluding instead that "[d]iscrimination based on political non-affiliation is just as actionable as discrimination based on political affiliation." *Id.* at 1093. It noted that "the Third Circuit reached the same conclusion on almost identical facts." *Id.* at 1094 (citing *Galli*).

In *Welch*, the plaintiff "decided not to participate in any campaign activities related to the recall" campaign at issue in that case. *Welch v. Ciampa*, 542 F.3d 927, 934 (1st Cir. 2008). "His decision to remain neutral was regarded as a betrayal by [the defendant], who allegedly perceived those who did not publically support the recall as being against it and, by extension, against him." *Id.* The court rejected the defendants' argument that the plaintiff's "decision to remain neutral during the recall campaign amounts to . . . the lack of any protected political activity," because the "freedom not to support a candidate or cause is integral to the freedom of association and freedom of expression that are protected by the First Amendment." *Id.* at 939.

After concluding that there is "no principled basis for holding that an employee who supports an opposition group is protected by the First Amendment but

one who chooses to remain neutral is vulnerable to retaliation," the court observed that Welch "adduced evidence that officers who did not support the recall election were perceived as opposing it. Whether Welch actually affiliated himself with the anti-recall camp is not dispositive since the pro-recall camp attributed to him that affiliation." In sum, the court "reject[ed] the defendants' argument that Welch's claim fails because he chose to remain neutral in the recall election." *Id*. Taken in context, it is plain that the references to what the employer "perceived" and "attributed" were focused on an employer who perceives neutrals as opponents and attributes to neutrals an affiliation with the enemy. Any doubt on this score is removed by the footnote attached to the passage, which states, "Our conclusion accords with recent decisions of the Third and Tenth Circuits in which those courts determined that political neutrality is protected by the First Amendment." *Id. at* 939 n.3 (citing *Gann* and *Galli*).

The Court of Appeals for the Second Circuit has also recognized the consistency of *Welch*, *Gann*, and *Galli*. In *Wrobel v. County of Erie*, it observed that the First Amendment is violated by "quintessential political patronage," such as firing Republicans, or promoting only Democrats, and then stated:

> The protection of these [patronage] cases has been extended to politically neutral employees who are treated less favorably than employees politically aligned with those in power.

692 F.3d 22, 27-28 (2d Cir. 2012). It cited three cases to support this sentence: *Welch*, *Gann*, and *Galli*.

It is only by wrenching a few words out of context that one can claim any sort of conflict between the Third Circuit and the First and Tenth Circuits. Thus there is scant reason to think that Heffernan would have prevailed in the First or Tenth Circuits, because *Welch* and *Gann* both involved employers who punished employees for exercising their First Amendment right to political neutrality – a far cry from this case in which Heffernan makes no such claim. (Far from punishing political neutrality, Chief Wittig, faced with a campaign between his boss and his predecessor, was trying to promote neutrality in the Chief's office.) This is not the stuff of which direct conflicts are made.

Nor is there a direct conflict between the decision below and *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012). The Court of Appeals for the Sixth Circuit in *Dye* decided to "adopt the reasoning of the First and Tenth Circuits" in *Welch* and *Gann*. *Id.* As we have seen, however, *Welch* and *Gann*, in turn, had noted their agreement with the Third Circuit decision in *Galli*.

And like *Galli*, *Welch*, and *Gann*, *Dye* involved an employer who insisted on political loyalty, thus leaving employees who exercised their First Amendment right to *not* affiliate politically open to adverse treatment. In the words of the *Dye* court, that case involved a Democrat who "retaliates and otherwise

treats poorly those who do not support her or then-Governor Granholm." 702 F.3d at 300. In evaluating the evidence in that case, it pointed to affidavits "detailing the political culture of the agency and [the defendant's] treatment of non-Democrats." 702 F.3d at 301.

Although the Sixth Circuit in *Dye* adopted the reasoning of the First and Tenth Circuit in *Welch* and *Gann*, and the First and Tenth Circuit in *Welch* and *Gann* had agreed the Third Circuit's decision in *Galli*, the Sixth Circuit never mentioned *Galli*. If it had done so, it might have acknowledged that there was no conflict between it and the Third Circuit. (The petitioner, for his part, also fails to mention *Galli*.)

But rather than seeing this agreement among the First, Third, Sixth, and Tenth Circuits, the *Dye* court instead voiced criticism of a different Third Circuit decision, *Ambrose v. Twp. of Robinson*, 303 F.3d 488 (3d Cir. 2002). *Dye*, 702 F.3d at 299. It quoted the requirement in *Ambrose* that plaintiffs "in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected," and characterized *Ambrose* as "reject[ing] a perceived support theory." *Dye*, 702 F.3d at 299 (quoting *Ambrose*, 303 F.3d at 495).

In targeting *Ambrose* for criticism, while ignoring *Galli* (and the agreement with *Galli* noted in *Welch* and *Gann*), the *Dye* court wrote more broadly than

the case required.[1] It did not distinguish between a case that involves a public employer who punishes employees because of their political neutrality (which, unless otherwise justified, undoubtedly penalizes the exercise of the First Amendment right to *not* politically affiliate) and a case like this one that does not. But given the facts of *Dye*, there was no need to consider the distinction drawn by the Court of Appeals for the Third Circuit in this case. Accordingly, as with *Welch* and *Gann*, there is no direct conflict between *Dye* and this case.

II. The conflict in approach is undeveloped, making this Court's intervention premature.

Certiorari should be denied because the courts of appeals have barely begun to address some issues (and have agreed concerning another issue) that the Court will likely need to address if certiorari is granted.

As explained above, the result of the decision below is fully consistent with the results in *Dye*,

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[1] The dissenting opinion in *Dye* states that the plaintiffs did not claim that the defendants were interfering with their right not to affiliate, *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 311 n.2 (6th Cir. 2012) (McKeague, J., dissenting), which may help to explain the overly-broad reasoning of the *Dye* court. See also *id*. at 314 (stating that because of other failures in plaintiffs' case, it was unnecessary to decide the issue regarding perceived affiliation).

Welch, and *Gann*. Some language in *Dye* can be read to sweep more broadly and suggest that an employee should be able to recover under a Section 1983 First Amendment freedom of association claim even where the employee has not exercised that First Amendment right. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 300 (6th Cir. 2012) (stating that "retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine").

The Court of Appeals for the Third Circuit, in the decision below, distinguished 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. But no other court of appeals, including the Court of Appeals for the Sixth Circuit, has considered that distinction. It is premature for this Court to resolve the correctness of that distinction until at least one (and probably more than one) other court of appeals considers and rejects the distinction. Before conclusively resolving that issue, this Court would benefit from the views of multiple courts of appeals.

There is a second, independent, reason why this Court's intervention would be premature. As the court below pointed out, every court of appeals to consider the question has held that "a free-speech retaliation claim is actionable under § 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise

of constitutional rights." Pet. App. 11a (citing cases from the Fifth, Seventh, and Ninth Circuits as well as the Third).

Perhaps because of the unanimity among the courts of appeals, petitioner does not challenge this determination, instead gesturing vaguely in a footnote toward a basis for treating First Amendment freedom of speech claims differently than First Amendment freedom of association claims. Pet. 17-18 n.2. But no court of appeals has found a basis for drawing such a distinction between the two kinds of First Amendment employment retaliation claims. Not the court below, which rejected any such distinction. Pet. App. 13a. Not the Court of Appeals for the Sixth Circuit, which explicitly declined to address the issue in *Dye*. *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 299 n.5 (6th Cir. 2012).

It is conceivable, one may suppose, that this Court could decide the First Amendment freedom of association issue without considering the First Amendment freedom of speech issue. Far more likely, however, is that this Court, before settling the freedom of association question for the nation, would at least want to take into account the closely connected question involving the freedom of speech. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (describing the "right of free association" as "a right closely allied to freedom of speech").

If so, in order for the petitioner to prevail in this case, the Court would have to decide either (1) that a

public employee may recover in a Section 1983 employment retaliation claim for deprivation of his free speech rights even though he did not exercise the right to freedom of speech or (2) that freedom of speech and freedom of association retaliation cases are properly treated differently with regard to the requirement of an actual exercise of the First Amendment right. The Court would thus be drawn into issues that are not themselves cert-worthy, and on which the petitioner does not seek certiorari, because neither has divided the courts of appeals.

The risk of being drawn into these non-cert-worthy issues is especially high in light of petitioner's basis (proffered in a footnote) for drawing a distinction between the two: that it is usually easier to make correct factual determinations about speech than about association. Pet. 17-18 n.2. Even assuming that this unsupported assertion is true as an empirical matter, it is far from clear which way it cuts. (Should an employer who makes a mistake on an easy question be in a better position than one who makes a mistake on a harder question?). More importantly, there is no reason to believe that this claimed difference in ease of proof should matter at all to the legal point. To the contrary, petitioner's legal theory – provided in the text of the very page containing that footnote – is that because the "First Amendment protects the *freedom* of association, not just the act of associating," he "had a First Amendment right to engage in the very conduct for which his supervisors demoted him, even if he did not engage in it. . . ." Pet.

17 (emphasis in original). That theory is by no means limited to the freedom of association, but applies as well (or as poorly) to the freedom of speech.

It is premature for this Court to decide the question presented in this case until at least one court of appeals creates a conflict by deciding either (1) that a public employee may recover in a Section 1983 employment retaliation claim for deprivation of her free speech rights even though he did not exercise the right to freedom of speech or (2) that freedom of speech and freedom of association retaliation cases are properly treated differently with regard to the requirement of an actual exercise of the First Amendment right. At the very least, this Court should wait until a second court of appeals addresses whether freedom of speech and freedom of association are properly treated differently in employment retaliation cases.

Awaiting further development in the courts of appeals is certainly tolerable. There is no debilitating uncertainty facing multi-state actors regarding their primary conduct, and no risk of forum shopping among circuits, because cases brought by public employees against public employers will be decided in courts located in (or embracing) the state of employment.

Petitioner relies on fanciful fears to support its contention that the issue is important enough to call for this Court's immediate intervention. Petitioner

imagines public employers who are – simultaneously – both fiendishly clever and clumsily foolish.

The public employer of petitioner's imagination is so determined to root out employees with any political difference from himself that he retaliates against employees at the slightest hint of difference, relying on his legal understanding that if he is wrong about the employees' politics and they prove to be completely consistent with his own, he will prevail in a First Amendment freedom of association case.

But this fiendishly clever employer is simultaneously clumsily foolish, because to the extent that he *correctly* targets those with political differences he will *lose* a First Amendment freedom of association case. The result would be a *less* politically congenial workforce, one purged of employees who in fact agree with the employer, but not of those who in fact disagree. Some public employers, no doubt, are fiendishly clever and some, no doubt, are clumsily foolish. But petitioner provides no reason to believe that many are simultaneously both, or (what may be even less likely) that public employees so perceive their bosses.

III. This case is a poor vehicle.

Certiorari should be denied because this particular case is a poor vehicle for considering the question presented. Procedurally, this case has been called "complicated and highly unusual" by the court of appeals and "tortuous" by the third district judge to hear it. Pet. App. 41a, 59a. Most significantly, the

issue presented to this Court was effectively injected into the case by a district judge who later concluded that he should never have been hearing the case in the first place. The issue was kept alive by a third district judge who acknowledged that the defendants "seem to have a valid procedural point" in objecting to its consideration. Pet. App. 41a. That is not the sort of cleanly-presented legal issue appropriate for this Court's consideration.

The respondents have repeatedly argued that the petitioner failed to sufficiently plead and pursue a freedom of association claim. See Pet. C.A. Reply Brief 1 (stating that "Defendants are once again raising the issue of whether a Freedom of Association claim was sufficiently plead by Plaintiff"). If the Court grants certiorari, respondents intend to press this point as an alternative ground for affirmance. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (stating that "a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals' ") (citing *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979)); *Greenlaw v. United States*, 554 U.S. 237, 250 n.5 (2008). Respondents make this intention clear both as a reason to deny certiorari and to forestall any suggestion of waiver. Cf., e.g., *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (deeming waived an alternative

ground for affirmance not raised in the brief in opposition to the petition for writ of certiorari).

Factually, the case is highly unusual. The petitioner seeks this Court's review of a legal issue involving the First Amendment right to freedom of political association. He seeks constitutional protections while emphatically arguing that in picking up a lawn sign for his mother he was engaged in nothing political at all, but merely doing his mother a favor. This was an act with no more First Amendment significance than picking up a quart of milk and loaf of bread for his mother. And he never claims that he was retaliated against because of his political neutrality.

There is no reason to think that this case is remotely typical of a First Amendment freedom of association retaliation case. With one possible exception, none of the cases cited by petitioner (see Pet. 18-19) to illustrate how frequently the issue arises involves a public employee who asserted that he did not exercise the right to political association (including the right to *not* engage in political association) but his employer mistakenly concluded that he had done so. Instead, this case appears to be highly idiosyncratic.

In most of the cited cases, it is clear that the plaintiff claimed an actual exercise of First Amendment rights.[2] In two of the cited cases, although the phrase "perceived political affiliation" appears in the opinion, there is simply nothing to suggest a factual mistake in that regard by the employer.[3]

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[2] See *Holsapple v. Miller*, 2014 WL 525391 at *2 (E.D. Mich. 2014) ("Holsapple testified that he told many of his co-workers that he supported Lee for Bay County Sheriff."); *Hein v. Kimrough*, 942 F. Supp. 2d 1308, 1311 n.1 (2013) (noting that defendants deny that they were aware of plaintiff's support of Hill); *Albino v. Municipality of Guayanilla*, 925 F. Supp. 2d 186 195 (D.P.R. 2013) (holding that "an inference may be drawn that defendant Mayor Arlequin was aware of plaintiff Ruiz's political affiliation because she at times appeared along-side her husband at his political events"); *Silverstein v. Lawrence Union Free School Dist*., 2011 WL 1261122 at *10 (E.D.N.Y. 2011) ("Silverstein adequately alleges that he was personally active in a group that was opposed to some or all of the defendant Board's decisions."); *Poindexter v. Bd. of Cnty. Comm'rs*, 548 F.3d 916, 918 (10th Cir. 2008) ("Poindexter expressed his full support for the incumbent . . . and refused to campaign or speak out against him," and when the incumbent resigned, "Poindexter ran an advertisement . . . indicating that he intended to run for Commissioner himself."); *Rebrovich v. Cnty. of Erie*, 544 F. Supp. 2d 159, 164-65 (W.D.N.Y. 2008) (indicating that plaintiff told defendant that he "was not politically active" and defendant responded that he was a close friend of the new county executive, that the new administration would eventually get their own people, and that plaintiff would have to "get onboard or pay the consequences"); *Harp v. DeStefano*, 2007 WL 2869831 at *7 (D. Conn. 2007) ("Here, the plaintiffs allege that the Board voted to terminate AECI's contract to retaliate against Harp [the sole owner of AECI] for publicly supporting Killins against DeStefano.").

[3] *Police and Fire Ret. Sys. of Detroit v. Watkins*, 2011 WL 5307594 at *1 (E.D. Mich. 2011) (noting that defendants allege

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The one possible exception is *Good v. Bd. of Cnty. Comm'rs*, 331 F. Supp. 2d 1315, 1325 (D. Kan. 2004), in which the plaintiff "asserted that adverse actions were taken against him because the defendants perceived that he was engaged in protected First Amendment activity," but "made no claim that the defendants discriminated against him on the basis of actual loyalty to a political party, political candidate or advocacy of ideas." Relying on the Third Circuit's decision in *Ambrose* for the proposition that there is no First Amendment retaliation claim where the "employee did not engage in . . . conduct" protected by First Amendment, even if the employer perceived otherwise, the court granted summary judgment for the defendants. *Id*. at 1325-26. It held that "the absence of any allegation that plaintiff was deprived of any association protected by the First Amendment is fatal to his claim." *Id*. at 1325. The Court of Appeals for the Tenth Circuit affirmed "for substantially the same reasons stated by the district court." *Good v. Hamilton*, 141 Fed. Appx. 742, 744 (10th Cir. 2005).

In short, the only case identified by the petitioner that resembles this one reached the same conclusion

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in their counterclaim that plaintiffs declared a default in retaliation for defendant's "'perceived political affiliation with and support of' former Detroit Mayor Kwame Kilpatrick" and turning to the pending motion in limine) (quoting the counterclaim); *Ramirez v. Arlequin*, 357 F. Supp. 2d 416, 424 (D.P.R. 2005) (holding that "Kortnight's professional services contract could legally be terminated due to her perceived political affiliation").

for the same reason – even citing the same Third Circuit opinion – thus further underscoring the absence of any conflict between the Third and Tenth Circuits.

IV. The court of appeals was correct.

Certiorari should be denied because the Court of Appeals for the Third Circuit properly decided this matter. The holding of the court of appeals was straightforward and correct: an employee cannot recover under Section 1983 on the theory that he was retaliated against for exercising a First Amendment right if he did not in fact exercise a First Amendment right.[4] Every court of appeals to consider this question

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[4] Petitioner criticizes the court of appeals for its reliance on the statement in *Waters v. Churchill*, 511 U.S. 661, 679 (1994) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information."), arguing that this statement is only about the Due Process Clause. Pet. 16. But this statement was not some one-off line about due process. It encapsulates the fundamental point that factual mistakes in public employment decisions are properly policed, not by federal judges wielding the Constitution, but by a host of other less lofty, but nevertheless quite important, mechanisms, such as contract, labor law, civil service regulations, and the demands of citizens for efficient government service. In that regard, the *Waters* sentence hardly stands alone. In *Connick*, for example, a free speech case, this Court said:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices,

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in the context of the First Amendment right to freedom of speech has reached this same straightforward and correct conclusion. *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 496 (3d Cir. 2002); *Jones v. Collins*, 132 F.3d 1048, 1054 (5th Cir. 1998); *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990); *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 662 (9th Cir. 2000). And there is no reason to think that a different result should follow in the context of the First Amendment right to freedom of association.

This commonsense result flows naturally from the text of both the Fourteenth Amendment, through which the First Amendment applies to the States, and Section 1983, the statute creating the right of action on which petitioner seeks recovery. The Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law," and Section 1983 creates a right of action against a state actor who "subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

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> without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

Connick v. Myers, 461 U.S. 138, 146-47 (1983).

any rights, privileges, or immunities secured by the Constitution and laws."

The traditional view, reflected in Justice Holmes' famous statement that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892), was rooted in the distinction between a right and a privilege. That traditional view gave way to an understanding that imposing a burden on someone for exercising a right – even by taking away something to which the person had no right, such as a public benefit or public employment – operates as a deprivation of that right equivalent to imposing a penalty for exercising that right. Summarizing the jurisprudential shift, this Court explained in 1972:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . .

> We have applied this general principle to denials of tax exemptions, unemployment benefits, and welfare payments. But, most often, we have applied the principle to denials of public employment.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citations omitted). Thus the theory of First Amendment employment retaliation cases is that an employee has been "deprived" of her First Amendment right if he is penalized (by means of an adverse employment action) because he exercised that First Amendment right. See, e.g., *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000) ("A First Amendment retaliation claim is not a wrongful termination claim. Rather, a First Amendment retaliation claim seeks to vindicate a public employee's exercise of free speech rights when she has suffered an adverse employment action in response to having spoken out publicly.")[5]

This understanding pervades this Court's First Amendment retaliation cases. For example, this Court has held that the employee must shoulder the burden of showing "that his conduct was constitutionally protected." *Mt. Healthy City Sch. Dist. Bd. of*

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[5] As *Wasson* notes, a litigant who brings a First Amendment retaliation claim without having exercised a First Amendment right appears to be seeking a form of third-party standing (that is, seeking to vindicate, not his own rights, but the rights of others) without meeting the legal requirements for third-party standing. *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000).

Educ. v. Doyle, 429 U.S. 274, 287 (1977); see also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (footnote omitted) ("absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). Similarly, a probationary employee who "could have been discharged for any reason or for no reason at all," may nonetheless prevail "if she was discharged for exercising her constitutional right to freedom of expression." *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987).

Perry, *Mt. Healthy*, *Pickering*, and *Rankin* are all freedom of speech cases, but the same understanding runs through this Court's freedom of association cases. In the seminal case of *Elrod v. Burns*, the plurality opinion quoted the passage from *Perry*: "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Elrod v. Burns*, 427 U.S. 347, 358-59 (1976) (Brennan, J.) (plurality opinion); see also *id.* at 374-75 (Stewart, J., concurring in the judgment) (citing that section of *Perry* as its only authority). The Court was unable to achieve a majority opinion in *Elrod*, but when it did so in *Branti*, it once again quoted this same passage from *Perry*, again demonstrating that these claims are premised on the employee being penalized because he exercised his First Amendment right to free speech or freedom of association. *Branti v. Finkel*, 445 U.S. 507, 515 (1980). Yet again in *Rutan*, it quoted the same

passage from *Perry*. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990).

The very language of this oft-repeated passage from *Perry* also illustrates that it applies equally to the First Amendment right to freedom of speech and the First Amendment freedom of association. See also *Branti v. Finkel*, 445 U.S. 507, 515 (1980) ("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.").

If an employee has not exercised a First Amendment right to freedom of speech or freedom of association at all, it is impossible to say that he has been penalized because of his exercise of those freedoms. The court of appeals was correct to bar such an employee from prevailing in a Section 1983 First Amendment retaliation case, and its decision leaves the courthouse doors fully open to vindicate the claims of those who do exercise their First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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