No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

V.

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

Respondents.

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

BRIEF FOR PETITIONER

STUART BANNER
EUGENE VOLOKH
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

FRED A. ROWLEY, JR.
GRANT A. DAVIS-DENNY
ANDREW G. PROUT
ERIC C. TUNG
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th fl.
Los Angeles, CA 90071

MARK B. FROST
Counsel of Record
RYAN M. LOCKMAN
Mark B. Frost & Associates
7 N. Columbus Blvd., 2d fl.
Philadelphia, PA 19106
(215) 351-3333
mfrost@mfrostlaw.com

QUESTION PRESENTED

Whether the First Amendment bars the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITY

BRIEF FOR PETITIONER

Petitioner Jeffrey J. Heffernan respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Third Circuit is published at 777 F.3d 147 (3d Cir. 2015) and appears at Pet. App. 1a. The opinion of the U.S. District Court for the District of New Jersey is published at 2 F. Supp. 3d 563 (D.N.J. 2014) and appears at Pet. App. 14a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Third Circuit was entered on January 22, 2015. The Court of Appeals denied a timely petition for rehearing en banc on February 13, 2015. Pet. App. 72a. The petition for certiorari was filed on April 22, 2015. This Court granted certiorari on October 1, 2015. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

It has been hornbook First Amendment law for decades that a public employer may not retaliate against nonpolitical employees for taking sides in an election. In this case, however, the Third Circuit allowed a mayor and a police chief to demote a police officer because they thought he supported the mayor's opponent in an upcoming election.

1. Petitioner Jeffrey Heffernan has been a police officer with the Paterson, New Jersey, Police Department since 1985. Pet. App. 2a. He began working as a patrol officer, and after receiving various commendations for his work, he was promoted to detective in 2005, and assigned to the office of respondent James Wittig, the Chief of Police. Pet. App. 2a.

Paterson held a mayoral election in 2006. One candidate was respondent Jose Torres, the incumbent mayor. Pet. App. 3a. Torres was supported by Chief Wittig—who had been appointed by Mayor Torres—and by Lieutenant Patrick Papagni, Wittig's Executive Officer. Lieutenant Papagni was Heffernan's direct supervisor and Chief Wittig was Heffernan's ultimate supervisor.

The other candidate was Lawrence Spagnola, a former Paterson police chief. Heffernan is a close personal friend of Spagnola's. Pet. App. 2a-3a. The two have known each other for decades. During the mayoral campaign, Heffernan spoke with Spagnola on the phone two or three times a week. JA 39-40. Heffernan wanted Spagnola to win the election, but he did not work on Spagnola's campaign, and he

could not vote for Spagnola because he did not live in Paterson. Pet. App. 3a, 17a. Heffernan's supervisors were well aware that he was friends with Spagnola. JA 114.

Shortly before the election, Heffernan's bedridden mother, a Spagnola supporter, asked Heffernan to drive into Paterson to obtain for her a large Spagnola campaign yard sign. Pet. App. 3a. She wanted the sign to replace a smaller sign that had been stolen from her yard. Pet. App. 3a. Early in the afternoon of April 13, 2006, while he was off duty, Heffernan drove to a distribution point where campaign workers were giving out signs. Pet. App. 3a, 16a. Assembled were Spagnola supporters and Spagnola's campaign manager, Paterson City Councilmember Aslon Goow. Pet. App. 16a. Heffernan spoke briefly with Goow and took a campaign sign, which he later delivered to his mother's house, so it could be posted in her yard. Pet. App. 3a.

Arsenio Sanchez, a Paterson police officer assigned to Mayor Torres's security staff, happened to be driving by on patrol while Heffernan was picking up the campaign sign at the Spagnola campaign gathering. Pet. App. 3a. Sanchez saw Heffernan speaking with Goow and holding the sign. Pet. App. 16a. Heffernan and Goow saw Sanchez watching them. Goow predicted that Heffernan's "helping" with the campaign would lead to him being "targeted" in the Police Department, and that there would "political ramifications" for supporting Spagnola. JA 49-50.

Goow's prediction was correct. Sanchez immediately called Police Chief Wittig. Pet. App. 16a. It was not long before Mayor Torres also knew of Sanchez's report. JA 117. Later that afternoon, when Heffernan spoke on the phone with Detective John Maes, a friend who worked in Wittig's office, Maes told Heffernan he had heard that Heffernan was putting up campaign signs for Spagnola, and that as a result, "all hell is breaking loose" in the Police Chief's office. JA 120.

The very next day, Heffernan was demoted from detective to patrol officer and assigned to a walking patrol post, as a punishment. Pet. App. 3a, 16a-17a. His supervisors told him he was being transferred because of his support for Spagnola. Pet. App. 17a. The Deputy Police Chief told Heffernan "that he was being demoted to walking patrol because of his political involvement with Spagnola." Pet. App. 17a. Wittig himself admitted that Heffernan was demoted because of his "overt[ ] involvement in a political election," Pet. App. 3a, and that that "political involvement … was the cause of [Heffernan's] demotion." Pet. App. 17a.

Heffernan's supervisors never asked him why he was holding a Spagnola campaign sign. Heffernan first heard of their reaction when he spoke with Detective Maes on the phone, approximately two hours after being observed with the sign. He was formally informed of his demotion by Lieutenant Papagni the next day. All of this took place before Heffernan had an opportunity to speak with the department about his conduct or to explain his intent in picking up the lawn sign. Heffernan's supervisors simply assumed

he was campaigning for Spagnola, and they demoted him for that reason.

On August 17, 2006, Heffernan filed this § 1983 suit for retaliatory demotion in violation of his freedom of speech and of association. Pet. App. 3a. The District Court denied respondents' motion for summary judgment on the eve of trial and permitted Heffernan's freedom of association claim to proceed to a jury. Pet. App. 4a.

2. The jury found in Heffernan's favor. The jury awarded compensatory damages of $75,000—$37,500 each from Chief Wittig and Mayor Torres—and an additional $30,000 in punitive damages, half from Wittig and half from Torres. Pet. App. 4a, 18a. After trial, however, the District Judge retroactively recused himself based on what he believed to be a conflict of interest. Pet. App. 4a. The verdict was vacated and the case was reassigned to a different judge, who granted summary judgment for the respondents. Pet. App. 66a. That decision was reversed by the Third Circuit on procedural grounds, because the District Judge had improperly prohibited Heffernan from filing a brief in opposition to the motion for summary judgment. Pet. App. 57a. On remand, the case was reassigned to yet another District Judge. There was then a full round of briefing on the parties' cross-motions for summary judgment. Pet. App. 21a.

3. The District Court granted respondents' motion for summary judgment. Pet. App. 14a-54a.

The District Court held that Heffernan had no cause of action based on his *actual* speech or association, because he had not actually campaigned for Spagnola. Pet. App. 24a-33a, 43a-45a. The District Court also held that Heffernan could not state a cause of action based on his supervisors' incorrect perception of his *speech*, because Third Circuit precedent did not allow recovery on such a theory. Pet. App. 33a-35a.

The District Court also determined that Third Circuit precedent foreclosed a First Amendment retaliation claim based on a perceived-association theory—i.e., based on an employer's mistaken belief as to an employee's political association. Pet. App. 46a (citing *Ambrose v. Twp. of Robinson*, 303 F.3d 488 (3d Cir. 2002)). The District Court observed that the law was precisely the opposite in the Sixth Circuit, which "has clearly endorsed a perceived-support theory as a basis for a freedom-of-association retaliation claim." Pet. App. 47a (citing *Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012)). The District Court noted that in *Dye* the Sixth Circuit had "explicitly disapproved the reasoning of the Third Circuit." Pet. App. 48a. The District Court acknowledged:

> There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom-of-association claim to be made. If State Employer B does the same thing, with the same unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* fa-

> vorable position? Might the Third Circuit approach permit employers to intimidate employees into avoiding anything that might even be *mis* construed as political speech or affiliation? The *Dye* approach seems designed to afford the First Amendment some breathing space.

Pet. App. 51a-52a (footnote omitted).

4. The Court of Appeals for the Third Circuit affirmed. Pet. App. 1a-13a.

The Third Circuit concluded that Heffernan could not bring a First Amendment claim based on his actual speech. In the court's view, such a claim requires "an intent to convey a particularized message," Pet. App. 9a (citation and internal quotation marks omitted), but "no room exists for a jury to find that Heffernan intended to convey a political message when he picked up the sign at issue." Pet. App. 10a.

The Third Circuit next determined that Heffernan could not bring a First Amendment claim based on his actual political association. In the court's view, such a claim has three elements: "(1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." Pet. App. 10a (citation and internal quotation marks omitted). The Third Circuit noted that "[t]he first and third elements are plainly

established on the record before us." Pet. App. 10a. But the Third Circuit determined that Heffernan could not establish the second element, "affiliation with a political party," because Heffernan "did not have any affiliation with the campaign," Pet. App. 10.

The Third Circuit also rejected Heffernan's claim based on *perceived* speech and association. The Third Circuit held that a retaliatory demotion violates the First Amendment only where it is based on an employee's *actual* speech or political affiliation. Pet. App. 12a-13a. This was so, the court reasoned, because "a traditional element of a First Amendment retaliation claim" is "the requirement that the plaintiff in fact exercised a First Amendment right." Pet. App. 11a. The Third Circuit determined that Heffernan had not exercised such a right. As the court put it, "a First Amendment claim depends on First Amendment protected conduct, and there was none in this case." Pet. App. 13a (brackets and citation omitted). In the Third Circuit's view, the First Amendment protects only employees who were "retaliated against for taking a stand," not employees who were retaliated against "on a factually incorrect basis." Pet. App. 13a. The Third Circuit concluded that "it is not 'a violation of the Constitution for a government employer to [discipline] an employee based on substantively incorrect information.'" Pet. App. 13a (quoting *Waters v. Churchill*, 511 U.S. 661, 679 (1994).

The Third Circuit denied rehearing en banc. Pet. App. 72a.

SUMMARY OF ARGUMENT

It is well established that the First Amendment bars public employers from politically-motivated retaliation against nonpolitical employees such as police officers. Respondents retaliated against Heffernan because they thought he was campaigning for Spagnola. Respondents' factual mistake did not cure their constitutional mistake.

A. A First Amendment retaliation claim is predicated on the employer's perception of the employee's speech or association, and the employer's decision to fire or demote the employee because of that perception. *Waters v. Churchill*, 511 U.S. 661 (1994), and *Rankin v. McPherson*, 483 U.S. 378 (1987), both make clear that where a public employee is retaliated against due to a supervisor's misperception of what the employee said or did, it is the employer's perception that matters. In the cases involving politically-motivated retaliation against government employees, the Court has thus consistently focused on the employer's *perception* of the employee's political affiliation, and on the employer's decision to retaliate *motivated by that perception*, rather than on whether the employee was actually coerced to change his or her political affiliation. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

The Court's focus on the employer's perception is consistent with other areas of First Amendment doctrine, in which the Court has likewise been careful to protect speech and association from being punished based on the misperception of government officials. The Court's focus on the employer's perception also

provides a simple rule for courts to administer, unlike the Third Circuit's view, which would require highly fact-intensive inquiries into the intent of employees and the accuracy with which employers perceived that intent.

The Third Circuit believed that because Heffernan had not actually engaged in any political association, his employers could not have infringed any First Amendment right. But it is the government's perception of Heffernan's actions, and the government's motive for retaliating against Heffernan—not Heffernan's intent in performing those actions—that triggers First Amendment protection. Indeed, the successful plaintiffs in the Court's prior cases were no more politically active than Heffernan. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66-67 (1990); *Branti*, 445 U.S. at 508; *Elrod v. Burns*, 427 U.S. 347, 351 (1976). Political patronage is an unconstitutional motive for retaliating against a nonpolitical employee, whether or not the employee is politically active.

B. The Third Circuit's contrary view would yield absurd results. For example, the Third Circuit's view would allow a newly elected mayor to fire *all* municipal employees, on the factually incorrect ground that by serving under the previous mayor they had shown that they were politically disloyal. The Third Circuit's view would allow the government to retaliate against employees for their speech on matters of public concern, so long as their supervisors misunderstood what the employees said. The Third Circuit's view would allow the government to fire employees based on a supervisor's misperception of the

employees' race or religion. The sheer absurdity of these outcomes suggests that the Third Circuit's view cannot be right.

The Third Circuit believed that its erroneous view was commanded by a single sentence in *Waters*, 511 U.S. at 679: "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." But the Third Circuit took this sentence out of context. It appears in a paragraph about the Due Process Clause, not the First Amendment, and it simply states that an innocent mistake of fact does not amount to a due process violation. *Waters* certainly does not suggest that an employer who makes a factual mistake is thereby given a free pass to violate other parts of the Constitution.

C. The Third Circuit's view would chill an enormous amount of political association. If a police officer can constitutionally be demoted because his supervisor incorrectly believes that the officer supports a candidate for mayor, then any public employee could be demoted or even fired because her supervisor incorrectly believes that she is a Democrat or a Republican. Employees would have to worry about everything they say or do at the office, for fear of leaving the boss with the wrong impression.

As a practical matter, public employees such as police officers are often inundated with requests from local campaigns and political parties to make contributions, attend fundraisers, and assist campaigns. These requests often come from incumbent candidates, who wield considerable power over mu-

nicipal personnel decisions. If these employees cannot be reasonably confident that they will be protected from retaliation if their employer perceives an insufficient level of support, the First Amendment protections described in *Rutan*, *Branti*, and *Elrod* will be toothless.

The Third Circuit's view makes no practical sense. It rewards the careless, politically-motivated supervisor, who has license to make kneejerk disciplinary decisions without any factual investigation. Meanwhile, the careful supervisor, who takes the trouble to learn whether his perception of an employee's political affiliation is actually correct, has no such license. The First Amendment can hardly permit careless supervisors to punish employees where conscientious supervisors could not.

ARGUMENT

Respondents violated the First Amendment by demoting Heffernan because they perceived that he supported the mayor's opponent in the upcoming election.

The police chief demoted Jeffrey Heffernan because he mistakenly believed that Heffernan was "overtly involved" in Spagnola's campaign. Pet. App. 17a. But demotions "based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990). Nonpolitical employees such as police officers—employees holding positions for which political affiliation is not "an appropriate requirement for the ef-

fective performance of the public office involved," *Branti v. Finkel*, 445 U.S. 507, 518 (1980)—are free to support one candidate or another, or indeed neither, without fear of being disciplined. As the Court has made clear, "[t]he denial of a public benefit" such as employment "may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly." *Elrod v. Burns*, 427 U.S. 347, 361 (1976) (plurality opinion).

The Court has explained several times that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." *Connick v. Myers*, 461 U.S. 138, 149 (1983). Political patronage is an unconstitutional basis for retaliating against nonpolitical public employees, because "government may not make public employment subject to the express condition of political beliefs." *O'Hare Truck Serv., Inc., v. City of Northlake*, 518 U.S. 712, 717 (1996). The government cannot punish a citizen for failing to adopt an official's preferred political affiliation, and "a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

Respondents thought Heffernan was campaigning for Spagnola. Demoting him on that ground violated the First Amendment. Had Heffernan obtained the lawn sign to show his support for Spagnola, he un-

questionably would have been protected by the First Amendment. Respondents' factual mistake did not cure their constitutional mistake.

A. A First Amendment retaliation claim is predicated on the perception and motivation of the employer.

A First Amendment retaliation claim is predicated on the employer's perception of the employee's speech or association, and the employer's decision to fire or demote the employee because of that perception. Precedent and common sense both indicate that a government employer who is wrong may not demote an employee for a reason that would be off-limits to an employer who is right.

Where a public employee is fired due to a supervisor's misperception of what the employee said or did, it is the supervisor's perception that matters. In *Waters v. Churchill*, 511 U.S. 661 (1994), for example, the supervisor thought the employee was "knocking the department" and saying "what a bad place [it was] to work." *Id.* at 665. The employee insisted she had said nothing of the kind, and had merely expressed an opinion about staffing policies. *Id.* at 666. The question in *Waters* was whether a court should apply the First Amendment standard "to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?" *Id.* at 668. A plurality of four Justices held that the constitutionality of a retaliatory employment decision should be evaluated based on what the employer "really did believe," rather than on what the employee actually said. *Id.* at 679-80. Three Justices con-

curring in the judgment agreed that it is the employer's perception that matters; they disagreed only with the plurality's view as to the sort of investigation the employer must undertake. *Id.* at 686 (Scalia, J., concurring in the judgment).

Likewise, in *Rankin v. McPherson*, 483 U.S. 378 (1987), a clerk in the county constable's office was fired for saying, in response to the news of an attempted assassination of the President, "if they go for him again, I hope they get him." *Id.* at 381. The clerk later clarified that she "didn't mean anything by it." *Id.* at 382. But the constable fired her, because he "believed that she 'meant it.'" *Id.* at 390. The Court held that the First Amendment prohibited the constable from retaliating against the clerk for her statement, regardless of whether the constable correctly perceived that that the clerk was exercising her First Amendment right to favor the assassination of the President. The important thing was the constable's perception of the clerk's speech, not the clerk's intent in speaking. The Court explained: "We cannot believe that every employee in Constable Rankin's office … is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency." *Id.* at 391.

In the cases involving politically-motivated retaliation against government employees, the Court has thus consistently focused on the employer's *perception* of the employee's political affiliation, and on the employer's decision to retaliate *motivated by that perception*, rather than on whether the employee

was actually coerced to change his or her political affiliation. In *Branti*, for example, the Court rejected the argument that "so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidates, he may be dismissed with impunity." *Branti*, 445 U.S. at 516. The Court explained that "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Id.* at 517. The Court focused on the perception and motivation of the employer rather than on the conduct or intent of the employee, and concluded that "it was sufficient … for respondents to prove that they were discharged 'solely *for the reason* that they were not affiliated with or sponsored by the Democratic Party.'" *Id.* (quoting *Elrod*, 427 U.S. at 350) (emphasis added).

In his concurring opinion in *Rutan*, Justice Stevens likewise focused on the lawfulness of the employer's motivation rather than on the employee's conduct or intent. "What is at issue in these cases," he observed, "is not whether an employee is actually coerced or merely influenced, but whether the *attempt* to obtain his or her support through 'party discipline' is legitimate." *Rutan*, 497 U.S. at 89 n.6 (Stevens, J., concurring) (emphasis added). *See also Hartman v. Moore*, 547 U.S. 250, 260 (2006) (describing retaliation for the exercise of First Amendment rights as an "unconstitutional motive"); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (same).

As one commentator has observed,

> In cases involving executive action, the Court routinely speaks in terms of motive. For example, in addressing a First Amendment challenge brought by a discharged employee of the government, the Court will ask whether the government fired the employee because it disapproved of her expression. See, for example, *Connick v Myers*, 461 US 138, 143-46 (1983). The Court apparently sees the examination of motive in such cases as different in kind from—and less problematic than—the examination of the motives underlying legislation.

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 427 n.43 (1996). As the Court said of Title VII, in the employment context the First Amendment "prohibits certain *motives*, regardless of the state of the actor's knowledge." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

These cases all point in the same direction: First Amendment retaliation claims are inherently based on the government employer's perception and how the employer responds to what he or she perceives. The essence of a retaliation claim is that the employer perceives something he or she does not like and takes adverse action because of it. The claim is premised on the perception and response of the employer, not the conduct or intent of the employee. This perspective is consistent with the purpose of the First Amendment, "to protect unpopular individuals from retaliation" by the government. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). As

Jeffrey Heffernan could attest, whether a person is unpopular with government officials is a matter of how those officials perceive him.

In other areas of First Amendment doctrine the Court has likewise been careful to protect speech and association from being punished based on the misperception of government officials. The Court has found loyalty oath requirements inconsistent with the First Amendment, in large part because of the danger that otherwise public employees would be punished because their employers mistakenly perceive them to favor the overthrow of the government. *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589, 606-07 (1967). Restrictions on the expenses associated with charitable solicitation are inconsistent with the First Amendment, in large part because of the danger that otherwise government officials would misperceive high overhead costs as evidence of fraud. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 793-94 (1988). A ban on cross-burning is inconsistent with the First Amendment, because of the danger that otherwise government officials would misperceive a benign cross-burning as one done with the intent to intimidate. *Virginia v. Black*, 538 U.S. 343, 365-66 (2003) (plurality opinion).

The Court's consistent focus on the employer's perception provides a simple rule for courts to administer, unlike the Third Circuit's view, which would require highly fact-intensive inquiries into the intent of employees and the accuracy with which employers perceived that intent. On the Third Circuit's view, whether respondents could lawfully de-

mote Heffernan, for example, would turn on (1) Heffernan's intent at the moment Sanchez observed him holding the Spagnola campaign sign (i.e., whether he was holding the sign with the intent to advance the Spagnola campaign or with the intent to do a favor for his mother), and (2) whether Wittig and Torres correctly perceived Heffernan's intent. The Court's cases in this area avoid these difficult fact-finding and line-drawing exercises, in favor of a bright-line rule forbidding employers from retaliating for improper motives.

The irony in the Third Circuit's holding is that had Heffernan not testified about his intent, he would clearly have been protected by the First Amendment, since all the other evidence—including the beliefs of Chief Wittig, Officer Sanchez, and even Aslon Goow, Spagnola's campaign manager—overwhelmingly supported the proposition that Heffernan picked up the sign with the intent to campaign for Spagnola. The Third Circuit's view hardly encourages employees to describe their intentions honestly.

The Third Circuit believed that because Heffernan had not actually engaged in any political association, there was nothing for his supervisors to retaliate against, and thus that his supervisors could not have abridged his freedom of association by punishing him. Pet. App. 13a. This view misunderstands the nature of the right being protected. It is the government's perception of Heffernan's actions—not Heffernan's intent in performing those actions—that triggers the First Amendment's protection. Police Chief Wittig believed that Heffernan was putting up

campaign signs for Spagnola, and he retaliated against Heffernan on that basis. From the perspective of, and in the perception of, government officials, Heffernan was engaging in political association.

Indeed, the successful plaintiffs in the Court's prior cases were no more politically active than Heffernan. Cynthia Rutan, for example, was a rehabilitation counselor who was denied promotions because she had not worked for the Republican Party. *Rutan*, 497 U.S. at 66-67. Her co-plaintiff Franklin Taylor operated road equipment for the state transportation department; he was denied a promotion for the same reason. *Id.* at 67. Co-plaintiff James Moore could not get a job as a prison guard because he did not have the support of Republican Party officials. *Id.* None of these public employees conveyed messages of any kind, much less "particularized" messages, Pet. App. 9a, and none was affiliated with a political campaign. Yet the Court found that these hiring decisions violated the First Amendment, which bars the government "from wielding its power to interfere with its employees' freedom to believe and association, or to not believe and not associate." *Id.* at 76.

The plaintiffs in *Branti* were not politically active either. They were public defenders who were fired, not for anything they said or for working on campaigns, but "solely because they were Republicans." *Branti*, 445 U.S. at 508. The Court held that this was enough to violate the First Amendment. *Id.* at 519. Nor did the *Elrod* plaintiffs speak out on political matters or work on political campaigns. They were employees of the sheriff's office, including a bailiff and a process server, who were fired "solely

because they did not support and were not members of the Democratic Party." *Elrod*, 427 U.S. at 351. The Court held that this was enough to violate the First Amendment. *Id.* at 373.

As these holdings indicate, political patronage is an unconstitutional motive for retaliating against a nonpolitical public employee, regardless of whether the employee is politically active. Whether or not an employee works on campaigns, "patronage does not justify the coercion of a person's political beliefs and associations." *O'Hare Truck Serv.*, 518 U.S. at 718. The mayor and police chief could not constitutionally punish Heffernan, because "[a]fter all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

Indeed, Heffernan engaged in more political activity than the plaintiffs in *Rutan*, *Branti*, and *Elrod*. He obtained a Spagnola campaign sign for his mother. Yard signs are the quintessential medium of political speech in local campaigns. They are "a venerable means of communication that is both unique and important." *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994). Yard signs are the most effective way to express a political preference that will "reach *neighbors*, an audience that could not be reached nearly as well by other means." *Id.* at 57. To demote a public employee, on the ground that he helped his mother obtain a yard sign declaring support for an opposing

candidate, is a clear example of unconstitutional political retaliation.

The First Amendment protects the *freedom* of association, not just the act of associating. "Freedom of association," the Court has explained, "plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The freedom of association is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Where the government is wrong as a constitutional matter, it is not off the hook because it also happens to be wrong as a factual matter. In such a case, officials "cannot demonstrate … any government interest that tips the balance in their favor," *Lane*, 134 S. Ct. at 2381, because the government has no interest whatsoever in making erroneous employment decisions. Two wrongs do not make a right.

B. The Third Circuit's contrary view yields absurd results.

The Third Circuit's contrary view would lead to absurd results in any number of cases. For example, if a newly elected, paranoid mayor were to fire *all* municipal employees, on the factually incorrect ground that by serving under the previous mayor they had shown that they were politically disloyal, the mayor's action would be a clear violation of the First Amendment. *See, e.g., Rutan*, 497 U.S. at 74 ("Unless … patronage practices are narrowly tailored to further vital government interests, we must

conclude that they impermissibly encroach on First Amendment freedoms."). Under the Third Circuit's view, however, the mayor would be allowed to fire all the employees, precisely because of the mayor's factual error concerning the employees' loyalty. After all, the employees had not actually exercised their First Amendment right to oppose the mayor.

Likewise, it would plainly violate the First Amendment for the state hospital to fire a nurse for giving speeches in her spare time in which she criticized American military policy. *See, e.g.*, *Garcetti*, 547 U.S. at 417-18 (emphasizing that the First Amendment protects the right of public employees to speak as citizens on matters of public concern unrelated to their jobs). But if it turns out that hospital officials were mistaken, and the nurse did not actually give any speeches about military policy, the state hospital would not be allowed to fire her on that ground. The state hospital would still have violated the First Amendment, because the motivation of hospital officials was based on their perception of the content of the nurse's speech. Under the Third Circuit's view, this case would come out the other way, because the nurse was not actually exercising her First Amendment right to criticize American military policy.

Similarly, it would be a clear constitutional violation for the Department of Motor Vehicles to fire a clerk because he is Muslim. But if it turns out that the clerk is in fact not Muslim, the Department does not thereby acquire the right to fire him on that ground. The officials who fired the clerk would still have violated the First and Fourteenth Amend-

ments, because their motivation was based on their perception of his religion. *Cf. Estate of Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001) (allowing Equal Protection claim for discrimination against Native Americans on behalf of decedent whom police officers incorrectly believed was Native American) ("alleged discrimination is no less malevolent because it was based upon an erroneous assumption"). Under the Third Circuit's view, this case would also come out the opposite way, because the clerk was not actually exercising his constitutional right to practice Islam.[1] The sheer absurdity of these outcomes suggests that the Third Circuit's view cannot be right.

Under the Third Circuit's view, if Heffernan and another police officer had both picked up Spagnola campaign signs at the same time, and the second officer intended to support the Spagnola campaign, re-

---

[1] The analogous question under Title VII has been more frequently litigated. *See, e.g.*, *EEOC Compliance Manual*, § 15-II, at 15-5 (2006), available at www.eeoc.gov/policy/docs/race-color.html ("Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong."); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc) ("[W]e focus on the alleged harasser's subjective perception of the victim. Thus, even an employer's wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim."); *Boutros v. Avis Rent a Car System*, 2013 WL 3834405, *7 (N.D. Ill. 2013) ("This argument is as offensive as it is incorrect. Avis cannot seriously contend that it was free to discriminate against Boutros on the basis of his perceived race—Arab—because it was unaware that he was actually ethnically Assyrian. Courts throughout the nation have considered and rejected this argument.").

spondents would have been allowed to fire Heffernan but not the second officer, solely because the two officers had different intents. The Third Circuit's focus "on the speaker's intent could lead to the bizarre result that identical [conduct] at the same time could be protected speech for one speaker, while leading to … penalties for another." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (rejecting a test based on the speaker's intent for determining the level of First Amendment protection for political advertisements). "First Amendment freedoms need breathing space to survive. An intent test provides none." *Id.* at 468-69 (citation and internal quotation marks omitted).

The Third Circuit believed, Pet. App. 13a, that its erroneous view was commanded by a single sentence in *Waters*, 511 U.S. at 679: "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." But the Third Circuit took this sentence out of context. The sentence appears in a paragraph that is about the Due Process Clause, not the First Amendment. The very next sentence in the paragraph reads: "Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure." *Id.* This paragraph of *Waters* simply states that an innocent mistake of fact does not by itself amount to a due process violation. *Waters* certainly does not suggest that an employer who makes a factual mistake is thereby given a free pass to violate other provisions of the Constitution.

C. The Third Circuit's view chills an enormous amount of political association and rewards politically vindictive supervisors.

The Third Circuit's view would have disastrous consequences for public employees. If a police officer can constitutionally be demoted because his supervisor incorrectly believes that the officer supports a candidate for mayor, then any public employee can constitutionally be fired because her supervisor incorrectly believes that she is a Democrat or a Republican. Employees would have to worry about saying the wrong thing at the office, for fear of leaving the boss with the wrong impression.

Indeed, they would have to worry about *anything* they might do, because there are so many ways of acting that can make coworkers suspect an affiliation with one party or the other. If the Third Circuit is right, it would be risky for a government employee to mention a story she saw on Fox News (for fear her boss might think she is a Republican) or a story she heard on NPR (for fear her boss might think she is a Democrat). The jokes employees tell at work, the hobbies they pursue, the kinds of music they listen to—all are fodder for dismissal by a politically-motivated boss, if the Third Circuit is correct that the First Amendment offers no protection. Every workday would bring a new challenge. Does an employee dare to drive a pickup truck, or a Prius? Does she let coworkers know she enjoys country music, or rap? Does she admit to being a member of the National Rifle Association, or the Sierra Club? The

Third Circuit's decision drastically curtails the First Amendment rights of public employees.

Such a workplace climate would also chill an enormous amount of *correctly*-perceived political affiliation. Even employees who are well-versed in First Amendment doctrine will realize their inability to predict the boss's perceptions with complete accuracy. And of course most public employees lack legal training. Without the knowledge necessary to identify when the boss is overstepping constitutional bounds, they will scarcely risk affiliating at all.

As a practical matter, public employees such as police officers are often inundated with requests from local campaigns and political parties to make contributions, attend fundraisers, and assist campaigns. These requests often come from incumbent candidates, who wield considerable power over municipal personnel decisions. If these employees cannot be reasonably confident that they will be protected from retaliation if their employer perceives an insufficient level of support, the pressures for political conformity will mount, and the First Amendment protections described in *Rutan*, *Branti*, and *Elrod* will be rendered toothless. *See, e.g.*, Ted Sherman, *Investigation Finds Elizabeth School Board Pressures Workers to Fill Campaign Coffers*, Newark Star-Ledger, May 22, 2011 (goo.gl/GF30Jp) ("Teachers and other employees, who kick in tens of thousands of dollars in donations, say they feel pressured by supervisors and board members to buy tickets to fundraisers. They say they are reminded that attending campaign events is in their best career interest."); Peter Schworm and Matt Carroll, *Fund-*

Raising from Employees Reveals Divide, Raises Ethical Questions, Boston Globe, Mar. 15, 2013 (goo.gl/QVe4Yx) ("When Plymouth County sheriff Joseph McDonald Jr. looks to raise money for his campaign fund, he often does not have to look far. Over the past five years, McDonald has raised about $123,000 in contributions from his 525 employees, almost $50,000 over the past two years alone."). *Cf. Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (noting the analogous pressure felt by lawyers to contribute to judicial campaigns).

In discerning the meaning of the First Amendment, the Court has always been concerned about "chilling the First Amendment rights of other parties not before the court." *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984). *See also Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (observing that this concern about chilling the speech of nonparties is the rationale for the overbreadth doctrine); *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion) (holding that the First Amendment protects lies, in part to avoid chilling truth-telling); *id.* at 2553 (Breyer, J., concurring in the judgment) (same). To allow Heffernan's supervisors to punish him for the purpose of deterring him from political participation will chill actual political participation on the part of countless other public employees on other occasions.

The decision below also creates a substantial disincentive for supervisors to learn and follow the law. Government officials in supervisory positions have an obligation to avoid basing personnel decisions on

unconstitutional criteria. But the more they can get away with, the less attention they will give to the constitutional limits on their authority. A supervisor given the green light to retaliate on factually-*incorrect* political grounds is hardly likely to be scrupulous about refraining from retaliating on factually-*correct* political grounds.

Moreover, the decision below makes no practical sense. The Third Circuit's view rewards the careless, politically-motivated supervisor, who is authorized to indulge his every whim concerning the political beliefs of his employees. The careless supervisor has license to make kneejerk disciplinary decisions without any factual investigation. Meanwhile the careful supervisor, who takes the trouble to learn whether his perception of an employee's political affiliation is actually correct, has no such license. The decision below perversely incentivizes government employers to make wild, baseless accusations about an employee's political beliefs, and then rewards them for being incorrect.

Public employees are not the only ones harmed by the decision below. The government itself is harmed, in part because the government has an interest in ensuring that officials in supervisory positions obey the Constitution, and in part because the government also has an interest in seeing that nonpolitical personnel decisions are based on merit rather than politics, for the obvious reason that decisions based on merit will yield better employees. And the public as a whole is harmed by the decision below, because ordinary citizens are the ultimate beneficiaries of merit-based public employment decisions. The public

has a substantial interest in better police officers, better teachers, better nurses, better firefighters—in short, better public servants.

The First Amendment can hardly permit careless, politically-motivated supervisors to punish employees where conscientious supervisors could not. When a public employee is demoted because his supervisor wrongly believes the employee has taken sides in an election, the supervisor is at fault just as much as he would have been if the employee actually had taken sides. The employee is harmed just as much. And the damage to all employees' First Amendment rights is at least as great, and likely greater, because of the dire consequences of giving the boss the wrong impression.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

STUART BANNER
EUGENE VOLOKH
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

FRED A. ROWLEY, JR.
GRANT A. DAVIS-DENNY
ANDREW G. PROUT
ERIC C. TUNG
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th fl.
Los Angeles, CA 90071

MARK B. FROST
Counsel of Record
RYAN M. LOCKMAN
Mark B. Frost & Associates
7 N. Columbus Blvd., 2d fl.
Philadelphia, PA 19106
(215) 351-3333
mfrost@mfrostlaw.com