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 OF AMICUS CURIAE NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Amicus curiae the National Association of Government Employees (SEIU/NAGE) is a labor organization with thousands of members throughout the United States. SEIU/NAGE is affiliated with the Service Employees International Union. SEIU/NAGE represents public and private workers at every level of government—federal, state, county, and municipal—across a range of professions, including police officers, firefighters, correctional officers, nurses, paramedics, emergency medical technicians, office workers, and professional workers.

SUMMARY OF ARGUMENT

A longstanding principle in the American legal system is that the law should be clear. Clarity is a cornerstone of our legal system because individuals need fair notice of what is prohibited so they can appropriately conform their conduct to the requirements of the law. Courts have repeatedly

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[1] Each party has consented to the filing of this brief by lodging blanket written consents with the Clerk of the Court. Pursuant to this Court's Rule 37.6, Amicus states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than Amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

applied this principle to penal laws, civil laws, regulations, and judicially created doctrines.

Where the government is acting as employer, the rules dictating what conduct can result in adverse employment actions should likewise be clear to provide notice to public employees of how to avoid such penalty. The rule adopted by the Third Circuit, which allows a government employer to take adverse employment actions against a public employee based on the employer's misperception of the employee's political association, fails to provide the clarity necessary to allow public employees to properly conform their conduct. Thus, the Third Circuit rule contradicts the long-standing principle requiring clarity in the law prior to adverse government action and should be rejected by this Court.

Clarity is also an essential requirement for rules implicating First Amendment freedoms as unclear rules chill protected speech and activities. When the boundaries of a rule are unclear, regulated individuals will avoid conduct well outside of the actual scope of the rule in order to avoid penalty. The Third Circuit rule has such a chilling effect on public employees' conduct. The lack of clarity leaves public employees guessing as to which activities could cause a supervisor to

misperceive their political associations, and leaves them without a remedy for any resulting adverse employment actions. This uncertainty pushes public employees to curtail protected conduct and thus impermissibly chills protected activities.

In addition, the lack of clarity in the Third Circuit rule reduces government efficiency because the rule encourages mistrust and insecurity in the government workplace. Well-documented research shows that employees who are more secure in their jobs perform better at work. Under the Third Circuit rule, the government workplace is less productive because public employees fear supervisors' perceptions of their political associations and potential adverse actions that may flow from these misperceptions. Thus, the decision below threatens the government's ability to efficiently administer public services.

ARGUMENT

I. The Third Circuit Rule Runs Counter to Our Judicial System's Long-Standing Preference for Clarity.

Our judicial system has long insisted on clarity in the law in order to "give the person of ordinary intelligence a reasonable opportunity to

know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Clarity in the law both provides fair warning to regulated individuals and safeguards them against arbitrary or discriminatory enforcement. *Id.* at 108–09.

This Court has often applied this principle in the criminal context as the need for clarity in laws that mete out punishment is "the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Accordingly, this Court has struck down numerous penal statutes for failing to provide adequate notice of their scope. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Further, the insistence on clarity in the law extends beyond criminal law and has been applied in many different circumstances, from reviewing indecent broadcasting regulations, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012), to rules governing attorney conduct, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991).[2] Taken together, these cases establish a

[2] A review of case law in lower courts further reveals the myriad contexts in which clarity in the law has been enforced. *See, e.g.*, *Cunney v. Bd. of Trs. of Grand View*, 660 F.3d 612, 621 (2d Cir. 2011) (striking down a zoning statute as unclear); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) (striking down a municipal parade ordinance as unclear); *Cement Kiln Recycling Coal. v. EPA*,

clear principle: in order for the government to take lawful adverse action against an individual, the rules demarcating what actions may result in a penalty must be clearly ascertainable.

This principle should apply with equal force in the public employment context. Public employees should not be subject to the risk of punishment based on a rule that does not apprise the employees of what conduct is protected. Thus, the Court's concern for preventing adverse government action under unclear rules is pertinent in determining when government employers may take adverse employment action against public employees.

Well-established precedent from this Court dictates that a government employer may not retaliate against a public employee on the basis of that employee's political affiliation. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).[3] The

493 F.3d 207, 222–24 (D.C. Cir. 2007) (upholding a hazardous waste permit regulation as clear); *Slavin v. United States*, 403 F.3d 522, 523–24 (8th Cir. 2005) (upholding a prohibition on interstate transportation of fighting birds as clear); *Families Achieving Indep. & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1415–16 (8th Cir. 1997) (upholding a policy regarding access to public benefits office lobbies as clear); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 81 (D.D.C. 2001) (striking down a regulation of library patrons as unclear).

[3] Of course, there is an exception for certain positions where "party affiliation is . . . an appropriate requirement," *see*

rule adopted by the Third Circuit below, however, permits such retaliation when driven by the employer's misperception of an employee's political affiliation. As a result, the Third Circuit rule fails to provide adequate notice to regulated individuals—both employers and employees—concerning what conduct is protected. Government employers are hard-pressed to know what actions are actually proscribed under this rule because, by definition, employers do not know when they are mistaken.[4] Likewise, public employees are left guessing as to how any one action will be perceived by an employer and, as a result, whether such action is protected. Thus, the Third Circuit rule is impermissibly unclear.

Furthermore, as is particularly relevant in this case, this Court has explicitly identified the importance of clarity in the law as it relates to First Amendment freedoms. As this Court explained in *Grayned*, "where a vague statute 'abuts upon sensitive areas of basic First Amendment

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Rutan, 497 U.S. at 64, but such an exception is not at issue in this case.

[4] This Court has previously acknowledged that, where the government acts as employer, the most efficient rule to apply when analyzing potentially retaliatory actions is one which focuses on what the employer "reasonably believes" to be the situation. *Waters v. Churchill*, 511 U.S. 661, 682 (1994) (Souter, J., concurring).

freedoms,' it 'operates to inhibit the exercise of those freedoms.'" 408 U.S. at 109 (internal brackets omitted) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) and *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961)). Thus, "rigorous adherence to th[e] requirements" for constitutionally sound clarity is particularly necessary where the First Amendment is implicated. *Fox*, 132 S. Ct. at 2317. The pervasiveness of the long-standing constitutional principle of clarity in the law—and its amplified importance in the First Amendment context—illustrates why the Third Circuit's unclear rule should not stand.[5]

II. The Lack of Clarity in the Third Circuit Rule Chills Public Employees' First Amendment Associational Rights.

Lack of clarity in the law chills protected activity and fails to allow First Amendment rights the "breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). This is because, when

[5] That the majority of this Court's decisions discussing clarity in the law involve interpreting statutes or regulations is of no moment. Whether it is congressionally legislated statutes or judicially decided opinions, the effect on regulated individuals is the same: unclear rules explaining the scope of the law prevent fair warning and can chill First Amendment freedoms.

individuals are faced with unclear rules, they inevitably "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," *Grayned*, 408 U.S. at 109 (internal quotation mark and ellipsis omitted), in order to ensure their compliance with the law. Therefore, speech is chilled because of the speaker's concern that such speech may result in negative consequences—even when the speech is protected and such a concern is ultimately unfounded. This chilling effect runs counter to the purpose of the First Amendment. *Fox*, 132 S. Ct. at 2317 ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–79 (1964).

Rules implicating First Amendment freedoms are required to meet a heightened standard of clarity exactly because of the concern that a lack of clarity in the law will chill protected speech. *Fox*, 132 S. Ct. at 2317; *Smith v. Goguen*, 415 U.S. 566, 573 (1974). First Amendment rights are "delicate and vulnerable, as well as supremely precious in our society." *Button*, 371 U.S. at 433. Therefore, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly

inform . . . what is being proscribed." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967).[6]

The need for clarity in rules implicating the First Amendment is equally important in the context of public employment. Public employees who are unsure of whether particular speech or actions are protected will be motivated to stifle their own conduct in order to avoid adverse employment actions that may result from unprotected speech. The speech and association of public employees will therefore be impermissibly chilled as employees may avoid large swathes of protected First Amendment activity out of fear that it falls within the wide "danger zone" of an unclear employment rule. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

The concern that an unclear rule would impermissibly chill public employees' exercise of their First Amendment rights was the animating principle behind this Court's decision in *Keyishian v. Board of Regents*. There, after refusing to sign

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[6] Concern for protecting First Amendment freedoms has also prompted this Court to carve out an exception to its usual preference for abstaining from ruling on state laws' constitutionality before state courts have interpreted them, explaining that delay in waiting for a state court to interpret a statute poses too great a threat to First Amendment freedoms. *E.g.*, *City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987).

loyalty oaths, three university faculty members and one employee faced dismissal under a New York statute allowing removal of public officials for "treasonable or seditious act[s]." *Keyishian*, 385 U.S. at 591–93. In invalidating the statutory scheme as insufficiently clear, this Court emphasized that the law did not reasonably apprise teachers of what speech or activities could expose them to dismissal. *Id.* at 599 ("The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."). As a result, the Court was concerned that such uncertainty would impermissibly chill speech, as "[w]hen one must guess what conduct or utterance may lose him his position," he will avoid engaging in behavior well outside the prohibition's actual scope. *Id.* at 604. Thus, the Court held that the statutory scheme's "extraordinary ambiguity" unconstitutionally chilled First Amendment freedoms. *See id.* Moreover, the lack of clarity was dispositive despite New York's recognized compelling interest in preventing subversion. *Id.* at 602.

Under the Third Circuit rule, public employees are compelled to engage in the same guessing game as the public employees in *Keyishian*. Any employee action that might possibly be misperceived as indicating a political association

carries the risk that an employer may take an adverse employment action against that employee. Public employees are left to theorize which seemingly innocuous activities could prompt an adverse employment action, were such activities to be misinterpreted by a supervisor as counter to their own political associations. For employees faced with this dilemma, silence is the only practical solution.

This effect is especially burdensome for employees whose views on specific issues diverge from their political affiliation. For instance, a lifelong Democrat is likely to hide her pin that reads, "Climate change is a hoax," worried that her supervisor might misperceive her as a Republican and demote her on that basis. She could not be demoted for her protected speech of wearing the pin or for her actual political affiliation as a Democrat, *Rutan*, 497 U.S. at 73–76, but the Third Circuit rule leaves open the possibility that her demotion for her misperceived political affiliation as a Republican is lawful. Such employees are caught in a catch-22: if the lifelong Democrat's views on climate change become known, she risks being misperceived as a Republican; on the other hand, if her affiliation with the Democratic Party becomes known, she risks being misperceived as supporting positions that she may strongly oppose. In either

case, her views could be misperceived as supporting a political position she does not actually maintain. A public employee in this position is pressured to stifle any expression of political views in order to avoid such a predicament.

Beyond the workplace, the Third Circuit rule also has the potential to chill even private speech and behavior. Under the Third Circuit rule, anything a public employee says or does outside of the workplace that is witnessed by a coworker or supervisor could be misperceived as behavior indicative of a political association. *Cf. Keyishian*, 385 U.S. at 599 ("Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy?"). Indeed, that is what happened to Petitioner. Private conduct within public employees' homes in the presence of guests could produce the same result. A public employee is therefore motivated to stifle his or her speech in practically all arenas of his or her life to avoid creating the impression (correct or not) of political associations that could subject the employee to adverse employment actions. Such chilling of private speech is offensive to the First Amendment. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 532–33 (2001) (stating the chilling of private speech implicated important constitutional concerns).

The chilling of public employees' private conduct is particularly concerning in light of this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Garcetti*, this Court held that although a public employee's speech in his official capacity did not enjoy First Amendment protection, his speech as a private citizen was protected. *Id.* at 421–23. The Court found that the protection of such private speech was in the public interest, as it ensured the public would "receiv[e] the well-informed views of government employees engaging in civic discussion." *Id.* at 419. Here, even though Petitioner was off-duty and outside of the workplace when he picked up the campaign sign for his mother, this action nonetheless led his employer to misperceive that he supported a political candidate. In holding that Petitioner's employer acted lawfully in demoting him on the basis of false perceptions, the Third Circuit rule compels public employees to curtail associative behavior even when they are away from the workplace, as employees are unsure what behaviors will be protected. [7]

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[7] The lack of clarity in the decision below could also have the effect of coercing disclosure. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding compelled speech to violate the First Amendment). To avoid risking misperceptions, public employees possessing political beliefs similar to their supervisors might feel pressured to

The lack of clarity in the Third Circuit rule also harms open-minded and undecided public employees because it discourages them from gathering political information. A curious public employee caught watching a political party's primary debate or reading a particular periodical in the breakroom risks a supervisor's misperception of that employee's political association. When merely educating oneself could result in punishment, a public employee is less likely to self-inform. Rules that discourage information gathering, such as the Third Circuit rule at issue here, chill the First Amendment right to read and receive information and, in the process, weaken the electorate. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 866–68 (1982); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

In sum, the lack of clarity in the Third Circuit rule chills an array of public employees' associative behavior, including workplace conduct, private behavior outside of the workplace, and political information gathering. Without clarity regarding which behaviors and speech are

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preemptively disclose their political associations in order to preclude misperception and potential adverse action. In such workplaces, silence may not be a viable option. Thus, the lack of clarity in the Third Circuit rule might also impermissibly intrude on an employee's fundamental "right to refrain from speaking at all." *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

protected, public employees will reasonably choose silence. A rule with such corrosive influence on the speech of public employees flies in the face of the axiom that "First Amendment freedoms need breathing space to survive." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007). The Third Circuit rule allows for no such breathing space.[8]

III. The Lack of Clarity in the Third Circuit Rule Promotes Inefficiency in the Government Workplace.

The Third Circuit rule works to the detriment of both public employers and employees by negatively affecting the workplace. Unclear and unpredictable employment rules promote employee insecurity, thereby decreasing workplace efficiency and hampering employers' efforts to foster productive work environments. Adopting a clear rule protecting employees from retaliation based on either actual or misperceived association will prevent this inefficiency.

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[8] In fact, the District Court concluded as much in granting summary judgment to Respondents in this case. *See Heffernan v. City of Paterson*, 2 F. Supp. 3d 563, 583 (D.N.J. 2014) ("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 [contrary Sixth Circuit] approach seems designed to afford the First Amendment breathing space.").

This Court has repeatedly recognized the value of efficiency in the administration of public services. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In particular, when evaluating whether a restriction on the speech of public employees is constitutionally sound, this Court analyzes whether the restraint "arrive[s] at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of . . . public services . . . ." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465–66 (1995) (internal brackets omitted). Unsurprisingly, work environments are more productive when employees feel that their employment is secure; a strong sense of security is an important positive factor in employees' trust in management, which in turn is an important component of productivity. *See* Rachel Clapp-Smith, Gretchen R. Vogelgesang & James B. Avey, *Authentic Leadership and Positive Psychological Capital: The Mediating Role of Trust at the Group Level of Analysis*, 15 J. Leadership & Organizational Stud. 227, 231 (2009) (examining the role that high levels of trust in management plays in improving employees' psychological capital and work performance). Conversely, workplaces with insecure employees fall short of their optimal levels of productivity. *See id.* Insecurity also leads

to workplaces with disengaged employees, while engaged employees are more productive and perform comparatively well across a variety of metrics. *See, e.g.*, James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. Applied Psychol. 268 (2002).

The lack of clarity in the Third Circuit rule erodes public employees' sense of security and trust because employees are concerned about how their actions will be perceived by supervisors and whether such perceptions will result in detrimental consequences. *See supra* Part II. Thus, the Third Circuit rule will lead to less productive government workplaces and a less efficient administration of public services from those workplaces.[9] Furthermore, unlike cases concerning a balancing of public employees' right to free speech with government efficiency, *see, e.g.*, *Nat'l Treasury Emps. Union*, 513 U.S. at 465–66; *Pickering*, 391 U.S. at 568, there is no balancing to be done here; the Third Circuit rule both curtails public employees' freedom of association *and* results in

[9] This reduction in trust and security could also lead to other costs for government employers, such as increased turnover or additional investment in employment retention programs, further compounding the resulting inefficiency by diverting resources from administration of public services.

less efficient administration of public services. Accordingly, the lack of clarity in the Third Circuit rule leads to a workplace that is both undesirable for employees and unproductive for employers.

CONCLUSION

This Court should reject the Third Circuit rule because it contradicts our judicial system's age-old principle of providing regulated persons with clear notice of prohibited conduct. Under the Third Circuit rule, public employees are unsure which activities could result in adverse employment action because they cannot reasonably anticipate how a supervisor may perceive the political motivations of a particular activity. This uncertainty pressures public employees to self-censor both inside and outside the workplace. The lack of clarity in the Third Circuit rule not only chills First Amendment freedoms of public employees, it also lessens public employees' sense of security in their employment, leading to decreased trust in management and, ultimately, diminished efficiency in government workplaces. These consequences for public employees and government workplaces warrant a clear rule which prohibits all politically motivated workplace reprisals. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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