No. 14-1280

IN THE

Supreme Court of the United States

JEFFREY J. HEFFERNAN,

Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a person can establish a First Amendment claim pursuant to 42 U.S.C. § 1983—a statute that requires the plaintiff to show he suffered a "deprivation" of a constitutional right—when the person admits he did not engage in any First Amendment-protected activity and, thus, did not suffer any deprivation of his First Amendment rights.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the New Jersey State League of Municipalities (the "League"). The League is a nonprofit, unincorporated association created in 1915 pursuant to N.J. Stat. § 40:48-22. For a century, the League has promoted the general welfare of its members through the study and advocacy of legislation affecting local government. The League's executive staff routinely testifies before the New Jersey Legislature on issues ranging from public employment to affordable housing. Also, each month, the League publishes its award-winning magazine, *New Jersey Municipalities*, which provides cutting-edge analysis of proposed federal and state laws, as well as recent news on municipal affairs. Where appropriate, the League institutes legal proceedings to further the interests of its members, and also participates as *amicus curiae* in select cases. As a whole, the League offers counsel, advocacy, and educational programs to more than 13,000 elected and appointed municipal officials in New Jersey, including over 560 mayors.

The League has a keen interest in this case because it significantly impacts the relationship between municipalities and their employees. New Jersey offers robust, comprehensive protections for public employees. These protections allow public employees to challenge

1. Both parties consented to the filing of this brief by filing blanket written consents with the Clerk of the Court. Pursuant to Rule 37.6, the League 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 the League or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

adverse employment decisions, including decisions they believe are motivated by political considerations. As part of their remedies, they may obtain reinstatement, back pay, and even counsel fees, all while minimizing the acrimony and expense that litigation entails. Expanding the First Amendment to protect individuals not engaged in any First Amendment-protected activity, such as Petitioner Jeffrey Heffernan, not only departs from the Court's First Amendment jurisprudence, but also unnecessarily displaces these state law remedies in favor of expensive, taxpayer-funded litigation in the federal courts. The League and its members have a strong interest in avoiding such a result.

SUMMARY OF ARGUMENT

The First Amendment protects an individual's right to engage in "political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 411 (2000)("The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information." (Thomas, J. dissenting)). This protection reflects the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association[.]" *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). When an individual believes government has run afoul of this protection, he may institute an action pursuant to 42 U.S.C. § 1983. "The terms of § 1983 make plain two elements that are necessary for recovery." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). First, plaintiff must show that "the defendant has deprived him" of a

constitutional right. *Id.* Second, plaintiff must show that "the defendant deprived him of this constitutional right" under color of law. *Id.* This requirement of "deprivation" is rooted in the statute's text. *See* 42 U.S.C. § 1983.

Mr. Heffernan now asks this Court to extend First Amendment protections to those, such as himself, who admittedly do not engage in any First Amendment-protected activity and, thus, were never deprived of any First Amendment right. Mr. Heffernan contends the Third Circuit's approach—which is faithful to both the First Amendment's purpose and § 1983's plain language—invites chaos, leaving public employees without any protection from vindictive employers. Pet'r's Br. 22-29. This contention is without merit.

Mr. Heffernan complains he was "demoted" from detective to patrolman in light of his supervisor's (mis)perception that he supported mayoral candidate Lawrence Spagnola. Pet'r's Br. 2, 4. Had Mr. Heffernan invoked any of his two remedies under the Civil Service Act (CSA), N.J. Stat. §§ 11A:1-1 *et seq.*, we would not be here. The CSA expressly prohibits political retaliation, and provides a procedure by which career service employees in civil service jurisdictions, such as Mr. Heffernan, may challenge any such perceived action. *See* N.J.A.C. § 4A:2-5.1.

If he found that remedy unpalatable, and because he considered his reassignment a "demotion," Mr. Heffernan could have resorted to the CSA's provision concerning demotions. That provision limits the bases upon which civil service employers may discipline classified employees. *See* N.J.A.C. § 4A:2-2.3(a). Unsurprisingly, the list of

acceptable bases does not include political affiliation. Under either provision, Mr. Heffernan could have received reinstatement, any lost wages, and counsel fees. These types of protections and remedies are not limited to civil service jurisdictions. As discussed below, New Jersey's tenure and collective bargaining laws extend similar, if not identical, protections to non-civil service employees.

The only remedy unavailable to Mr. Heffernan was monetary damages for mental anguish, humiliation, and pain and suffering. But that is as it should be. The purpose of damages under § 1983 is to "compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 254 (1978). The First Amendment right to associate freely is the only one at issue here. And Mr. Heffernan admittedly did not suffer any deprivation of that right—he readily admits he never tried to associate with Mr. Spagnola's campaign. Rather, what Mr. Heffernan lost was a coveted position in the Chief of Police's office. And to compensate for that loss, Mr. Heffernan had available to him state law remedies, which he unfortunately ignored. He now asks the Court to expand the First Amendment's reach to alleviate the consequence of that decision. This Court should decline and accordingly affirm the Third Circuit's decision.

ARGUMENT

I. New Jersey Law Already Provides Sufficient Remedies To Public Employees Complaining Of Political Retaliation.

A. Mr. Heffernan Could Have Used The Civil Service Act To Overturn His Reassignment.

For over 100 years, New Jersey has afforded protections to public employees and shielded them from adverse employment decisions rooted in political influences. In 1908, New Jersey adopted the first iteration of the CSA, which covered classified employees at both the state and local level. *West New York v. Bock*, 186 A.2d 97, 105 (N.J. 1962). The "primary emphasis" was to ensure "appointments to the public service solely on the basis of merit," while reserving the employer's right "to separate employees for disciplinary reasons or because of inefficiency or incompetency." *Id.* Though initially limited in its protective sweep, even in 1908, the CSA "prohibit[ed] removal or demotion for religious or political reasons." *Mason v. Civil Serv. Comm'n*, 238 A.2d 161, 164 (N.J. 1968).

Today, after several employee-friendly revisions, the CSA stands as a monument to New Jersey's commitment to public employees. "[T]he Act seeks to put civil service positions beyond political control, partisanship, and personal favoritism." *Communications Workers v. N.J. Dep't of Pers.*, 711 A.2d 890, 892 (N.J. 1998). The Legislature was unequivocal in this commitment, formally declaring it "the public policy of this State to select and advance employees on the basis of their relative

knowledge, skills and abilities . . . [and] protect career public employees from political coercion[.]"N.J. Stat. § 11A:1-2.

Except for policymakers and certain confidential positions, *see* N.J. Stat. § 11A:3-5 (listing confidential positions), the CSA governs the appointment, promotion, demotion, and discipline of all employees, including police officers, in a civil service jurisdiction. *Walsh v. Dep't of Civil Serv.*, 107 A.2d 722, 724-25 (NJ. Sup. Ct. App. Div. 1985); *Jersey City v. Babula*, 153 A.2d 712 (N.J. Super. Ct. App. Div. 1959). While the CSA does not require municipalities to become civil service jurisdictions, *see* N.J. Stat. § 11A:9-1, more than 380 municipalities and municipal agencies, including the City of Paterson, have opted into the scheme. N.J. Civil Serv. Comm'n, Civil Service Jurisdictions, http://www.nj.gov/csc/about/divisions/slo/jurisdiction.html (last visited December 6, 2015). Once a municipality elects to become a civil service jurisdiction, it accedes to all of the obligations and benefits of the CSA and its implementing regulations. *Headen v. Jersey City Bd. of Educ.*, 55 A.3d 65, 70 (N.J. 2012).

Under the CSA, Mr. Heffernan had available two independent bases by which to challenge his reassignment from detective to patrolman: 1) political retaliation, and 2) disciplinary demotions.

1. The CSA Prohibits Political Retaliation.

The CSA states: "[a]n appointing authority[2] shall not take or threaten to take any action against an employee in the career service . . . based on the employee's permissible political activities or affiliations." N.J.A.C. § 4A:2-5.1(b). If the employee suspects a violation of this rule, he may appeal the adverse employment action to the Civil Service Commission (the "Commission"). N.J.A.C. § 4A:2-5.2(a). After an investigation, the Commission will render a decision, either on the written record or after an appropriate proceeding. N.J.A.C. § 4A:2-5.2(c)-(d). The Commission's review is *de novo*. *Grasso v. Borough Council of Glassboro*, 500 A.2d 10, 14 (N.J. Super. Ct. App. Div. 1985).

Where the appointing authority has acted improperly, the Commission "shall provide appropriate protections and remedies to the employee." N.J.A.C. § 4A:2-5.2(e). These remedies include reinstatement, *In re Appeal of Lembo*, 376 A.2d 971, 972-73 (N.J. Super. Ct. App. Div. 1977), as well as "back pay, benefits, seniority, and reasonable attorney fees[.]" *Oches v. Twp. of Middletown Police Dep't*, 713 A.2d 993, 994 (N.J. 1998). Any party dissatisfied with the Commission's decision may seek appellate review. *State Farm Mut. Auto. Ins. Co. v. State*, 545 A.2d 823, 839 (N.J. Super. Ct. App. Div. 1988)(citing N.J. Ct. C.P.R. 2:2-3(a)(2) and noting "appeals may be taken as of right to the Appellate Division 'to review final decisions or actions of any state administrative agency or officer.'").

2. An "appointing authority" is any "person or group of persons having power of appointment or removal," N.J.A.C. § 4A:1-1.3, and includes participating municipalities that opt into the civil service scheme.

Public employees have invoked these protections for decades. *See*, *e.g.*, *Weaver v. N.J. Dep't of Civil Serv.*, 79 A.2d 305 (N.J. 1951)(challenging removal and alleging political retaliation); *Amodio v. Civil Serv. Comm'n of Dep't of Civil Serv.*, 194 A.2d 512 (N.J. Sup. Ct. App. Div. 1963)(challenging abolishment of position and alleging, *inter alia*, political retaliation); *In re Crowley*, 473 A.2d 90 (N.J. Sup. Ct. App. Div. 1984)(challenging denial of promotion and alleging bias against union activities, which "are encompassed within the category of 'political opinions or affiliations'" and, thus, entitled to protection).

The regulation prohibiting political retaliation, N.J.A.C. § 4A:2-5.1, is devastatingly simple in its thrust. Mr. Heffernan needed only to invoke it. Had he done so, he would have largely obtained what he seeks—reinstatement, return of any lost wages, and even attorney fees. For reasons unexplained, Mr. Heffernan voluntarily abandoned these remedies in favor of a First Amendment claim—even though he admits he engaged in no First Amendment-protected activity. Worse, this is merely one provision of the CSA that Mr. Heffernan chose to ignore.

2. The CSA Permits Demotions Only On The Basis Of Certain Enumerated Acts, And Even Then, The Employer Must Provide Due Process.

Mr. Heffernan insists his reassignment constituted a "demotion." Pet'r's Br., pp. 2, 4, 5, 12, 13, 21, 26. If the Court agrees, then it should also know that Mr. Heffernan had an additional avenue for relief available under the CSA.

Under the CSA, a public employer "may suspend or take other disciplinary action against" a career service employee "only for neglect of duty or other good cause." *Scouler v. City of Camden*, 752 A.2d 828, 830 (N.J. Super. Ct. App. Div. 2000). What constitutes "good cause" for discipline[3] is defined by N.J.A.C. § 4A:2-2.3(a). It permits public employers to impose discipline for, *inter alia*, incompetency, insubordination, excessive absenteeism, misuse of property, violating the anti-discrimination policy, or conviction of a crime. N.J.A.C. § 4A:2-2.3(a). Discipline cannot be imposed where it would intrude upon the employee's First Amendment rights. *See Karins v. Atl.City*, 706 A.2d 706, 713 (N.J. 1998)(recognizing that discipline cannot be imposed where it would violate the First Amendment, but ultimately holding that firefighter's use of a racial slur was not protected by the First Amendment).

Moreover, the CSA mandates that discipline be imposed consistent with due process. This includes notice, N.J.A.C. § 4A:2-2.5(a); a right to a departmental hearing during which the employee may be represented by counsel, N.J.A.C. § 4A:2-2.6(b); a right to review evidence, and present and cross-examine witnesses at the hearing, N.J.A.C. § 4A:2-2.6(c); a right to appeal any adverse decision to the Commission, and convene a *de novo* hearing before an administrative law judge, N.J.A.C. §§ 4A:2-2.8; 4A:2-2.9(b); and the right to seek appellate review of the Commission's final decision. *State Farm Mut. Auto. Ins. Co.*, 545 A.2d at 839; N.J. Ct. C.P.R. 2:2-3(a)(2); N.J. Ct. C.P.R. 2:12-3.

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3. "Discipline" includes not only terminations and suspensions, but also "disciplinary demotions," N.J.A.C. § 4A:2-2.2, which is what Mr. Heffernan claims he suffered.

Where the employer takes disciplinary action, but fails to provide notice or an opportunity for a departmental hearing consistent with the prescribed procedures, the employee may appeal the disciplinary action directly to the Commission and seek a stay. N.J.A.C. § 4A:2-2.5(e). If the employee succeeds on his appeal, the Commission has the power to reinstate the employee, *see In re Appeal of Lembo*, 376 A.2d at 972-73, and award back pay, seniority, restitution of any fine, as well as attorney fees. N.J.A.C. §§ 4A:2-2.10; 4A:2-2.11; 4A:2-2.12.

If Mr. Heffernan sincerely believed his reassignment constituted a demotion, his ability to successfully challenge it appears to be a foregone conclusion under the CSA's discipline provisions. Perceiving, accurately or otherwise, that an employee is engaged in political activity is not a permissible basis for a demotion. *See* N.J.A.C. § 4A:2-2.3(a). Thus, if the reassignment is construed as a demotion, Mr. Heffernan's challenge, had he attempted one, would have likely resulted in his employer quickly reversing course.

Mr. Heffernan also had available the CSA's procedural protections. Mr. Heffernan received his so-called demotion on April 14, 2006, just one day after he was spotted talking to Aslon Goow, Mr. Spagnola's campaign manager. Pet. App. 3a, 16a-17a. It is plain then that he never received notice of any disciplinary charges, a hearing, or any of the other procedural protections guaranteed to him by the CSA. These procedural irregularities would warrant vacatur of the "demotion." *Nicoletta v. North Jersey Dist. Water Supply Com.*, 390 A.2d 90, 99 (N.J. 1978)(vacating dismissal of employee where employer failed to provide adequate notice of the charges). Again, had Mr. Heffernan

succeeded under this provision, he would have been reinstated, reimbursed for any lost wages, and awarded counsel fees. Despite this, he chose to vindicate a First Amendment right which he never exercised and of which he was never deprived.

B. Police Officers In Non-Civil Service Jurisdictions Have Similar Protections Under The Tenure Of Office Act.

Police officers employed in non-civil service jurisdictions are afforded protections similar to their civil service counterparts. Specifically, the Tenure of Office Act, N.J. Stat. § 40A:14-147, limits the bases upon which police officers can be disciplined or removed, and provides protection to those officers not employed in a civil service jurisdiction.[4] N.J. Stat. § 40A:14-147 explicitly states:

> Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided . . .

4. The Tenure of Office Act covers police officers in both civil service and non-civil service jurisdictions. However, it is largely duplicative of the protections offered officers under the CSA. *Compare* N.J.A.C. § 4A:2-2.3(a) with N.J. Stat. § 40A:14-147.

"According to the plain language of the statutory scheme . . . a police officer cannot 'be suspended, removed, fined or reduced in rank' without 'just cause.'" *Ruroede v. Borough of Hasbrouck Heights*, 70 A.3d 497, 506 (N.J. 2013) (citing N.J. Stat. § 40A:14-147). The reasons constituting "just cause" are limited to "incapacity, misconduct, or disobedience of [departmental] rules and regulations[.]" N.J. Stat. § 40A:14-147. The statute explicitly states that "[a]n officer cannot be removed 'for political reasons[.]'" *Id.* (citing N.J. Stat. § 40A:14-147). The provision covers county and municipal police officers. *See Perrapato v. Rose*, 199 A.2d 385, 388 (N.J. Super. Ct. App. Div. 1964).

The employer must serve written notice of any charges, and provide a hearing within thirty (30) days. N.J. Stat. § 40A:14-147. "[T]he burden of proving the charges is on the police officer's employer." *Ruroede*, 70 A.3d at 507. The police officer may seek *de novo* review in the New Jersey Superior Court's Law Division. *Id.* (citing N.J. Stat. § 40A:14-150). As with the CSA, appellate review is available consistent with the New Jersey Court Rules. *Id*. The remedies for the police officer are all-encompassing. They include reinstatement, back pay, *id.*, as well as counsel fees. *Oches*, 713 A.2d at 944.

Thus, even police officers in non-civil service jurisdictions enjoy the protections afforded Mr. Heffernan. Similar protections are available to other professions under their respective tenure laws. *See* N.J. Stat. § 18A:28-5 (teachers); N.J. Stat. § 40A:14-19 (firefighters).

C. The Vast Remainder Of New Jersey's Public Employees Have Protections Under Their Respective Collective Negotiation Agreements.

The 1947 New Jersey Constitution provides: "[p]ersons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." N.J. const. art. 1, § 19. This constitutional promise undergirds the Employer-Employee Relations Act (EERA), N.J. Stat. §§ 34:13A-1 *et seq.*

With the exception of "elected officials, members of boards and commissions, managerial executives, or confidential employees," the EERA guarantees public employees the right to "form, join and assist" any union, and to do so "without fear of penalty or reprisal[.]" N.J. Stat. § 34:13A-5.3. It further permits collective bargaining over the "terms and conditions of employment," as well as the "grievance and disciplinary review procedures" afforded employees.[5] *Id.*

"Since New Jersey is a highly unionized state, it was inevitable that public employees in massive numbers would seize upon the opportunity to organize and engage in the collective negotiations process." State of N.J. Public Employee Relations Commission, PERC

5. Civil service employees, and employees covered under the tenure laws, may also collectively negotiate. However, they may not negotiate away the CSA or tenure law provisions concerning grievance and disciplinary procedures, except for in cases involving minor discipline (*i.e.*, suspensions of five days or fewer). N.J. Stat. § 34:13A-5.3.

AFTER 40 YEARS 1 (2008), http://www.state.nj.us/perc/PERC_after_40_Years.pdf. This explosion has resulted in New Jersey obtaining the sixth-highest percentage of government sector union members. Barry T. Hirsch, et al., *Union Density Estimates by State, 1964-2014*, UNION MEMBERSHIP AND COVERAGE DATABASE, HTTP://UNIONSTATS.GSU.EDU/MONTHLYLABORREVIEWARTICLE.HTM (last visited on December 11, 2015). In fact, the League is not aware of any county or municipality whose employees have opted to forego collective negotiations.

Collective negotiations agreements (CNAs) provide protections similar to, if not greater than, those provided by the CSA. For example, during the relevant period, Mr. Heffernan was covered under a standard CNA between his union and employer. City of Paterson and Paterson Police PBA Local 1, August 1, 2003-July 31, 2008, HTTP://WWW.PERC.STATE.NJ.US/PUBLICSECTORCONTRACTS.NSF (last visited on December 11, 2015). The CNA permits the City of Paterson to discipline or remove police officers only for just cause. *Id.* at 6. In addition, it expressly permits police officers to engage in political activities, including joining political organizations, making political contributions, and even running for elected office. *Id.* at 12. Grievance and arbitration procedures are also set forth. *Id.* at 16-21.[6]

These CNA protections and procedures are commonplace, and can be utilized by those public sector employees employed by non-civil service jurisdictions and for whom no tenure laws are applicable.

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6. Because the City of Paterson is a civil service jurisdiction, the CSA's disciplinary procedures would supersede these provisions. *County of Monmouth v. Communications Workers of America*, 692 A.2d 990, 999 (N.J. Super. Ct. App. Div. 1997).

D. Affirming The Third Circuit's Holding Does Not Signal A War On Public Employees.

Mr. Heffernan's warning of a coming apocalypse if the Court affirms the Third Circuit's ruling rings untrue. Pet'r's Br. 22-29. Mr. Heffernan asserts "[t]he 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." *Id.* at 26. But this is simply not true in New Jersey. As noted, the CSA, the tenure laws, and the CNAs, already offer non-confidential public employees the same protections that Mr. Heffernan asks for here—that is, to be secure in their jobs from retaliation based on political activity, irrespective of whether the activity actually occurred.[7] There is no need to extend First Amendment protections to those who do not engage in any First Amendment-protected activity. Nor is there a need to allow individuals to bring § 1983 claims where they admittedly did not suffer any "deprivation."

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7. In the event a constitutional remedy is a must, it would seem the Fourteenth Amendment's Due Process Clause would be the appropriate vehicle. *See Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988)("When [government] decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.").

CONCLUSION

The judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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