No. _____

In the

Supreme Court of the United States

ROBERT R. BENNIE, JR.,

Petitioner,

v.

JOHN MUNN, in his official capacity as Director of the Nebraska Department of Banking and Finance, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Robert Bennie, a successful financial advisor, was one of the leaders of the Lincoln, Nebraska, Tea Party. Because Bennie called President Obama "a communist" in a prominent newspaper, state regulators pressured Bennie's employer to impose heightened supervision, conduct unannounced audits, and levy other sanctions to provide them with "some comfort."

The Constitution prohibits government officials from retaliating against individuals for protected speech. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To prevail on a First Amendment retaliation claim, a plaintiff must show, among other things, that a person of "ordinary firmness" would have declined to speak in light of the government's adverse action. The courts of appeals have split on whether a trial court's determination on this issue is subject to clear error or de novo review. The question presented, which the court below viewed as "likely [] dispositive," is:

In light of the First Amendment's strong speech protections, are "ordinary firmness" decisions reviewed on appeal solely for clear error, as the Third, Sixth, and Eighth Circuits hold, or are they reviewed de novo, as the First, Ninth, Tenth, Eleventh, and D.C. Circuits hold?

LIST OF ALL PARTIES

The Petitioner is Robert Bennie, Jr. The Respondents are John Munn, sued in his official capacity as Director of the Nebraska Department of Banking and Finance; Jack E. Herstein, sued in his official capacity as the Assistant Director in charge of the Bureau of Securities in the Nebraska Department of Banking and Finance; and Rodney R. Griess, sued in his official capacity as the Securities Investigation and Compliance Unit Advisor in the Nebraska Department of Banking and Finance.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies in this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert R. Bennie, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 822 F.3d 392 (8th Cir. 2016), and is included in Appendix (App.) A. The opinion of the United States District Court for the District of Nebraska is reported at 58 F. Supp. 3d 936 (D. Neb. 2014), and is included in App. B. The order of the Eighth Circuit denying the petition for rehearing en banc is not published and is included in App. C.

JURISDICTION

On May 11, 2016, the court of appeals entered its judgment. On June 8, 2016, Petitioner filed a petition for rehearing en banc. On July 7, 2016, the court of appeals denied the petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The First Amendment, as incorporated against the States by the Fourteenth Amendment, provides, in

relevant part, that the government "shall make no law . . . abridging the freedom of speech."

INTRODUCTION

"[A]n appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). The decision below contravenes this basic principle of First Amendment jurisprudence. According to the Eighth Circuit, a trial court's finding on whether a person of ordinary firmness would be chilled by the government's adverse action is a question of fact to be reversed only if the appeals court finds clear error. App. A-10. The Eighth Circuit's decision, adopting a dim view of an appellate court's role in safeguarding vital First Amendment freedoms, warrants this Court's review for two reasons. First, the decision exacerbates a circuit split on the standard by which a court of appeals should review a trial court's "ordinary firmness" finding. Second, the issue involved in this circuit split is one that recurs in every First Amendment retaliation appeal.[1]

[1] Although the facts in this case highlight the importance of this Court's review, the issue presented is a purely legal one.

STATEMENT OF THE CASE

A. Bennie Criticizes President Obama and Other Politicians

In a robust democracy, citizens can criticize politicians without fear of retribution from government officials. *See* Ivan Hare & James Weinstein, *Extreme Speech and Democracy* 1 (2009) ("From the dawn of modern democracy, it was recognized that the right of the people to criticize government, laws, and social conditions was inherent in the very concept of rule by the people."). Petitioner Robert Bennie is a financial advisor who was involved as the leader of the Lincoln, Nebraska, Tea Party in his personal time. *See* App. A-2. From 1997 to 2010, Bennie was a successful financial advisor at LPL.[2] Order on Final Pretrial Conf., ECF No. 173 ¶ 10. LPL is a brokerage firm, which holds assets and executes financial transactions. App. A-2. The Nebraska Department of Banking and Finance regulates brokerage firms by monitoring their advertisements for compliance with financial regulations. *Id.* The Department also possesses the power to sanction brokerage firms and their employees by fining them and even barring them from operating in Nebraska. *Id.*

Until the events giving rise to this lawsuit, Bennie had received no disciplinary action, fine, reprimand, or restriction from either the Department or LPL. Transcript of Trial Proceedings, ECF No. 192, at 51:2-15, 72:13-73:5, 92:2-17. In fact, the only contact

[2] LPL was formerly known as Linsco Private Ledger. In 2008, the company changed its name to LPL.

that Bennie ever received from a state regulator during his fourteen-year tenure at LPL occurred in the late 1990s, when a regulator called with a question about materials contained within a CD-ROM. *Id.* Bennie answered the question, and never heard from the regulator again. *Id.* In 2009, *Barron's Magazine*—a well-regarded magazine on finance—named Bennie as one of the top 1,000 Financial Planners in the United States. *Id.* at 54:3-23.

Beginning in 2009, Department officials Rodney Griess, Jack Herstein, and John Munn, prompted by Bennie's appearance in newspaper articles and television ads, wielded the Department's vast regulatory authority to retaliate against Bennie for his political speech.[3] In August of that year, Bennie aired television ads in which he remarked that "it's a basic American right to keep and bear arms" and "if we decide to do business, I'll contribute $100 towards your purchase of a firearm. God Bless You and God Bless America." Trial Exhibit No. 1. LPL approved the ad, which comported with the pertinent financial regulations allowing gifts of up to $100 for new customers. Transcript of Trial Proceedings, ECF No.192, at 46:21-47:8, 121:24-124:24.

Around the same time, Griess discovered a promotional CD-ROM that Bennie used to highlight a

[3] The defendants are sued in their official capacity as employees of the Nebraska Department of Banking and Finance. At all relevant times, John Munn was the Director of the Department, Jack Herstein was the Assistant Director in charge of the Bureau of Securities, and Rodney Griess was the Securities Investigation and Compliance Unit Advisor.

software service developed by LPL. App. A-2.[4] He assumed that the CD-ROM had been distributed recently, and therefore lacked the requisite disclosures necessitated by recent changes in financial regulations. Transcript of Trial Proceedings, ECF No. 192, at 124:14-24. In fact, Bennie had distributed the CD-ROM to clients three years earlier, at which time it had contained all the required disclosures. *Id.* at 34:15-36:17, 121:24-124:24. The CD-ROM carried several hallmarks that revealed its older origins.[5] Yet, instead of discarding the CD-ROM, which presented no issues, Griess asked LPL to "talk to Bennie." App. A-3. LPL agreed to do so in an email, which Griess forwarded to Herstein, adding: "Bob [Bennie] always is seen wearing a cowboy hat lately, so I say 'Hang Him High.' " App. A-2 to A-3.

On February 1, 2010, columnist Don Walter published an article in the *Lincoln Journal Star*, one of the most circulated newspapers in Nebraska. App. B-3 to B-4. The article's print version was entitled "Fringe, faction, or force?", whereas its online version was entitled "Bennie acts as Lincoln's Tea Party Voice."

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[4] A colleague forwarded the CD-ROM to Griess after receiving it from her husband, who had in turn received it from a friend at a county fair. App. B-2 to B-3.

[5] For instance, the CD-ROM contained the words "securities offered through Linsco Private Ledger Member NASD SIPC." Transcript of Trial Proceedings, ECF. No. 192, at 35:1-6. Linsco Private Ledger changed its name to LPL near the end of 2007. *Id.* at 35:7-14. Earlier the same year, the National Association of Securities Dealers (NASD) changed its name to Financial Industry Regulatory Authority, Inc. (FINRA). *Id.* at 35:15-23.

Trial Exhibits Nos. 219-220.[6] The article—which served as the "flashpoint" for the regulators' retaliation—discussed Nebraska's Tea Party movement. App. B-10. It identified Bennie as "one of the chief organizers" and "the face of the Tea Party movement in Lincoln." *Id.* The article quoted Bennie's critical remarks about President Obama and politicians in both parties. *Id.* In particular, the article reported Bennie as describing what he considered to be the remarkable differences between himself and President Obama: "I'm a freedom-loving American, and he's a communist. I'm honest and he's dishonest. He didn't tell us all of what [he] was going to do. I believe he's an evil man." *Id.*

The column detailing Bennie's political role in the local Tea Party did not implicate the Department's regulatory authority. Yet the article irked Griess, who, on the very next day, promised to delve into Bennie's "recent string of activities"—namely, Bennie's comments about President Obama in the *Lincoln Journal Star*, Bennie's alleged "lack [ ] of disclosure" in a promotional CD-ROM, and his "gun slingin[g] ads," App. B-5, none of which violated any financial (or other) regulation.

B. State Regulators Retaliate Against Bennie for Bennie's Political Speech

State regulators proceeded to use the Department's substantial regulatory powers to retaliate against Bennie for his political speech. A day after the *Lincoln Journal Star* quoted Bennie's political views, Griess initiated a conference call with Bennie's

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[6] The exhibits are not available on PACER, but were presented to the district court during trial.

superiors at LPL to discuss Bennie's "recent string of activities," *i.e.*, the television ad, the CD-ROM, and Bennie's *Lincoln Journal Star* comments about President Obama. App. B-5. Although these activities were lawful, Griess "suggested that [Bennie] may be acting as a gun dealer" and questioned whether LPL approved Bennie's activities. Trial Exhibit No. 31 at 28:8-10.

Two days later, Griess scheduled another conference call in an email, in which he suggested that LPL take "heightened supervisory actions" to appease the Department. Trial Exhibit No. 14. He indicated that another subject for the upcoming conference call would be whether LPL would "anticipate imposing any kind of heightened supervision, more frequent/unannounced exam schedule, specialized advertisement approval process or other sanction(s)" on Bennie. *Id.* Griess explained that such actions might "provide the Department with a little better sense that the firm is 'on top of' addressing this type of activity." *Id.* That, in turn, would provide "some comfort to [the Department] and really [would be] in the best interest of the public." *Id.*

LPL's regulatory attorney Kenneth Juster read the email and remarked to the company's Vice President Christopher Zappala: "Nice—regulation through harassment." *Id.* Juster and Zappala met the following day to discuss the issues raised by Griess. *Id.* They found nothing improper about any of Bennie's activities and agreed that the *Lincoln Journal Star* article did not need to be submitted for approval under either LPL policy or the applicable financial regulations. Trial Exhibit No. 41.

Nonetheless, LPL assigned Bennie to a senior analyst for advertising review, which, as Juster testified, was partially an effort to "give the state comfort" that the firm was monitoring Bennie. *Id.* Bennie testified that although LPL eventually sent Bennie a letter (a month later) explaining that this assignment was due to a "new organizational structure," App. B-7, LPL initially stated that it assigned Bennie to a senior analyst in light of pressure from the Department. Trial Exhibit No. 41. LPL's appeasement efforts paid off: Griess testified that he viewed Bennie's reassignment as a sign that LPL had "taken to heart" his suggestion that LPL subject Bennie to heightened supervision. Transcript of Trial Proceedings, Vol. 1, ECF No. 192, at 177:9-11.

Despite LPL's concession, state regulators remained irked by Bennie's statements about President Obama in the *Lincoln Journal Star* article. A week after the article was published, Griess, Herstein, and Sheila Cahill (the Department's legal representative) participated in a second conference call with Juster and Zappala. Transcript of Trial Proceedings, ECF No. 192, at 172:11-12. During this call, Griess and Herstein directed several additional questions to LPL, including whether the company had any policies or guidelines regarding Bennie's communication of his political views to the public or press. App. A-4. Juster testified that he understood the regulators' comments as "suggest[ing] that [LPL] should be monitoring the political statements" of its employees.[7] Trial Exhibit No. 31.

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[7] Department officials gave differing explanations for this harassment. Griess sought to justify the questions as a way to (continued...)

On February 18, 2010, ten days after the second conference call, Munn received in the mail a dinner invitation that Bennie sent to potential clients. Trial Exhibit No. 239. The invitation encouraged potential clients to reserve a private one-on-one dinner with Bennie to discuss financial plans. *Id.* LPL had approved the invitation, believing that it complied with financial regulations. Trial Exhibit No. 246. The Department, however, believed that the invitation was non-compliant because it did not mention Bennie's registered representation status with LPL, his investment advisor representative status with LPL, or his business, Bob Bennie Wealth Management. Trial Exhibit No. 238. Griess emailed LPL's Vice President with an ominous warning: he ordered all of Bennie's "one on one" dinner meetings to be cancelled immediately, and forbade the planning of future events using Bennie's invitation "until the status of this communication with the public is brought into compliance." *Id.* Griess explained that the Department "is expressly concerned, not only with the persistent, multiple, repeated acts of non-compliance, but with the continued failure of LPL to act in an appropriate manner to remedy the issues." *Id.* He then warned that the Department "may invoke whatever administrative action deemed necessary and appropriate under its authority against both Mr. Bennie and/or LPL Financial to insure compliance." *Id.*

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[7] (...continued)
make sure that Bennie was in compliance with LPL's internal policies. Cahill stated that the questions were prompted by LPL's ability "as a private employer" to restrict Bennie's political speech.

Griess then forwarded this email to Herstein, stating that "[h]opefully [LPL will] get the message loud and clear that the Department is just about to the 'end of its rope' with this crap. If not, $$$$$$$$!" *Id.* LPL ordered Bennie to cancel all scheduled dinner appointments, and Bennie did so. App. A-5. Juster then emailed Griess, protesting that the invitation was fully compliant with all advertising regulations and strongly disagreeing with Griess's accusation of "repeated acts of non-compliance." App. B-6. A week later, the Department changed course, and allowed Bennie to continue with the meetings as scheduled. App. A-6.[8]

Around the same time, the regulators targeted yet another invitation from Bennie, one which encouraged potential clients to attend a free seminar on rebuilding retirement income. Trial Exhibit No. 248. Unlike the dinner invitation, the seminar invitation was in fact missing a required disclosure. Trial Exhibit No. 252. LPL informed state regulators that the missing disclosure was the result of oversight by an LPL reviewer, who mistakenly thought that the invitation would be distributed on a letterhead that contained the disclosure. App. A-6. The regulators publicly dropped the matter, but, privately, Herstein instructed Griess to keep "this in a reserve file" with the hope that Bennie "will eventually hang himself along with LPL."[9] *Id.*

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[8] The Department explained this change by claiming that the Department and LPL "agree[d] to disagree." App. A-5.

[9] Bennie's public records request uncovered these internal emails, and Bennie attached the emails as trial exhibits.

Bennie, meanwhile, reported the harassment to then-Nebraska Governor Dave Heineman. Transcript of Trial Proceedings, Vol. III, ECF No. 193, at 152:1-10. Governor Heineman asked Director Munn whether the Department's investigation of Bennie's advertisements was politically motivated. *Id.* Munn forwarded the Governor's inquiry to Griess and Herstein. Griess responded in an email: although "Mr. Bennie did not author the [*Lincoln Journal Star*] article, and does not appear to be subject to our regulatory purview regarding it, the comments made regarding the President etc., regardless of anyone's political views do tend to be quite polarizing to say the least . . . ." Trial Exhibit No. 17. Munn assured Griess and Herstein that he would suggest to the governor that Bennie's political speech "would be like [Munn] standing up in front of the flags and seal in [his] office and talking about a topic like abortion." *Id.*

Suspecting improper government retaliation, Bennie submitted a public records request to the Department. Transcript of Trial Proceedings, ECF No. 192, at 105:3-7. The resulting documents revealed that the Department's regulators had targeted Bennie because of his political statements. Fearful of further retribution, Bennie declined to host any Tea Party events in 2012, an election year. App. A-6.

C. The District Court Rules Against Bennie

Bennie filed a civil rights lawsuit under 42 U.S.C. § 1983 against Griess, Herstein, and Munn, alleging that the Department retaliated against him for engaging in activities protected by the First Amendment. App. A-6 to A-7. A plaintiff seeking to prevail on such a claim must show that: (1) his speech

is protected by the First Amendment, (2) the government took an adverse action that was motivated in part by the plaintiff's speech, and (3) the adverse action was severe enough to chill a person of ordinary firmness from continuing to speak. *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).

The district court expressly "disapprove[d] of the defendants' conduct." App. B-1. After hearing testimony from both sides, the court rejected the regulators' contention that they had simply made "legitimate inquiries" regarding Bennie's advertising activities. App. B-12 to B-13. The court noted that it was "apparent, from [] emails and the follow-up inquiries of LPL, that the Department had an interest in [Bennie's] statements of political opinion." *Id.* The regulators' "testimony to the contrary [was] simply not credible." App. B-13. The court also found that Griess, Herstein, and Munn "were looking for reasons" to go after Bennie after they read his statements about President Obama in the *Lincoln Journal Star*. App. B-13 to B-14. "Some of the questions [the regulators] asked of LPL would not have been asked had it not been for the plaintiff's political activity. The Department had no business asking those questions; to do so was certainly wrong, and [ ] arguably unconstitutional." App. B-14.

Despite these findings, the district court dismissed Bennie's lawsuit because "even if there was a constitutional violation, it was de minimis—insufficiently substantial to support a claim for relief." *Id.* Citing precedent from the Eighth Circuit, as well as from the Third and Sixth Circuits, the district court held that "whether an alleged retaliatory act was sufficient to deter a person of

ordinary firmness from exercising his constitutional rights is [ ] ultimately a question of fact." App. B-12. The court concluded that there was not enough evidence to demonstrate that Griess, Herstein, and Munn caused "everything bad that [had] happened" to Bennie and, therefore, the retaliation could not be deemed severe enough to chill a person of ordinary firmness from continuing to speak on political issues. App. B-16.

D. A Divided Eighth Circuit Panel Affirms, Using a "Clear Error" Standard of Review

A divided Eighth Circuit panel—reviewing the trial court's "ordinary firmness" holding for clear error—affirmed. App. A-2. At the outset, the Eighth Circuit considered "threshold issues," and found that Bennie's lawsuit presented a live controversy that could be redressed by his request of injunctive relief. *See* App. A-7 to A-8. Then the circuit court determined both that it was undisputed that Bennie engaged in protected speech and that the trial court's "ordinary firmness" determination was the "focus of th[e] appeal." App. A-9.

Bennie argued that this mixed question of law and fact was subject to de novo review. *Id.* The Eighth Circuit disagreed. It granted that, at first blush, the district court's reference to the retaliation as de minimis "appears to bear out Bennie's characterization" of that determination as principally a legal one. Nevertheless, the Eighth Circuit concluded that the question of "ordinary firmness" "encapsulate[s] the factual finding that . . . the state regulators' actions were 'insufficiently substantial' to be actionable." *Id.* And because it viewed the

"ordinary firmness" determination as factually based, the Eighth Circuit determined that it would affirm the district court unless the district court "was clearly wrong." App. A-2.

The Eighth Circuit acknowledged that its decision to apply clear error, rather than de novo, review was "likely [ ] dispositive." App. A-9. The circuit court viewed the relevant question on appeal as whether the regulators' actions "could support finding an ordinary person would be chilled," not whether "a reasonable factfinder . . . must find a sufficient chilling effect." App. A-13. Like the district court, the circuit court rejected the regulators' excuses for their politically motivated actions, noting that their justifications "reflect a troubling misunderstanding of the—nonexistent—role that political speech by persons in regulated entities should play in the department's investigatory and enforcement activities." App. A-16 n.9 Yet the circuit court reluctantly ruled in favor of the regulators "[b]ased on [the clear error] standard of review." App. A-17.

Dissenting, Judge Beam explained that Bennie should prevail on his First Amendment claim under any standard. *See* App. A-17. Although Bennie might be described as a citizen with "unusually firm resolve," he nevertheless "gave way to self-censorship" after a public records request revealed the regulators' retaliation. App. A-18 to A-19. Hence, it was "clear error . . . not to have concluded in this case that an ordinary person would have done the same." App. A-19. Therefore, Judge Beam would have remanded to the district court with instructions to grant declaratory relief and for a determination of the proper amount of attorneys' fees. *Id.*

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW DEEPENS A CONFLICT AMONG THE COURTS OF APPEALS

A. Like the Eighth Circuit, the Third Circuit and the Sixth Circuit Review a Trial Court's "Ordinary Firmness" Determination for Clear Error

In determining that an appellate court should review a trial court's "ordinary firmness" holding for clear error, the Eighth Circuit exacerbated a split among the circuit courts. The Third Circuit, like the Eighth Circuit, reviews for clear error a trial court's findings on whether a person of ordinary firmness would be chilled by the government's retaliatory actions. *Bistrian v. Levi*, 696 F.3d 352, 376 (3d Cir. 2012). In *Bistrian*, a federal inmate challenged, on First Amendment retaliation grounds, the prison's decision to place him in a "special housing unit" a second time after he protested the conditions there during his first time. The Third Circuit affirmed the trial court's denial of relief, holding that whether an adverse action is "sufficient to deter a person of ordinary firmness from exercising his constitutional rights' is an objective inquiry and ultimately a question of fact." *Id.* (quoting *Rauser v. Horn*, 241 F.3d 330, 333-34 (3d Cir. 2001)).

The Sixth Circuit reached the same conclusion in a case featuring "Joe the Plumber," a political activist

who gained notoriety for confronting then-Senator Barack Obama on the latter's tax plan. *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583-84 (6th Cir. 2012). After that well-known confrontation in a public forum, members of the Ohio Department of Job and Family Services allegedly conducted searches for Wurzelbacher in the Department's databases. The Sixth Circuit held that "[w]hether an alleged adverse action is sufficient to deter a person of ordinary firmness is generally a question of fact," *id.*, and affirmed the district court's finding that plaintiff's generalized allegations of humiliation and embarrassment did not meet the threshold required to state a claim for First Amendment retaliation. *Id.*

B. In Contrast, the First, Ninth, Tenth, Eleventh, and D.C. Circuits Review a Trial Court's "Ordinary Firmness" Finding De Novo

Several circuits instead require an appellate court to review de novo a trial court's findings on "ordinary firmness." For example, in *Tao v. Freeh*, 27 F.3d 635 (D.C. Cir. 1994), an FBI language specialist alleged that the Bureau required her to go through a lengthy promotion-application process in retaliation for her complaints of racial discrimination within the FBI. *Id.* at 637. The district court granted summary judgment in favor of the Bureau. Ostensibly applying the same First Amendment retaliation test that the Eighth Circuit applied in this case, the D.C. Circuit reversed. *Id.* The court reasoned that the lengthier promotion-application process is "sufficient, as a matter of law, to constitute an 'adverse action' for constitutional purposes." *Id.*

Other cases also demand independent review in First Amendment retaliation cases. The First Circuit, for instance, considered this issue in *Davignon v. Hodgson*, 524 F.3d 91, 100 (1st Cir. 2008), where a sheriff suspended five correctional officers for their roles in collective bargaining negotiations. The court applied de novo review in discerning the latitude that courts should give a government-employer to retaliate under the test set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *Davignon*, 524 F.3d at 100. The First Circuit held that, although the issue of causation was reviewed for clear error, the other steps involved in the analysis are to be reviewed de novo. *Id.*

The Ninth Circuit reached the same result when considering a First Amendment retaliation claim by a high school security specialist. *Posey v. Lake Pend Oreille Sch. Dist. No.* 84, 546 F.3d 1121, 1128 (9th Cir. 2008). In *Posey*, the school eliminated the position of "security specialist" after the plaintiff sent a letter to the school district's Chief Administrative Officer complaining of inadequate safety policies at the school. The Ninth Circuit held that "the 'rule of independent review' will always require the court independently to evaluate the ultimate constitutional significance of the facts as found." *Id.* at 1129 (quoting *Bose Corp.*, 466 U.S. at 500-01).

The Tenth Circuit is in accord. *See Powell v. Gallentine*, 992 F.2d 1088 (10th Cir. 1993). In *Powell*, a university professor alleged that he was fired by the regents after he published allegations of grade fraud at the university. *Id.* at 1089-90. There, too, the appellate court reviewed the First Amendment retaliation claim de novo. *Id.* at 1090.

The Eleventh Circuit considered the issue in a case involving a city's retaliatory termination of a firefighter who opposed the mayor's proposal to decrease the budget at a city council meeting. *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1556-57 (11th Cir. 1995). The court held that where "government employment decisions were made in retaliation for the exercise of First Amendment rights," the court conducts "*de novo* review on the question of whether the First Amendment protects the employee's conduct." *Id.* at 1560. These cases, which all involve First Amendment retaliation claims, show a firmly entrenched split among the circuit courts.

II

CERTIORARI SHOULD BE GRANTED TO BRING CLARITY TO AN IMPORTANT AND RECURRING FEDERAL QUESTION THAT IS CLEANLY PRESENTED IN THIS CASE

The question presented is important and recurring. The standard of review is a crucial issue implicated in every First Amendment retaliation appeal. *See* W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045, 1049 (1993) ("It is difficult to overstate the practical significance of the standard of review."); Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19, 19 (1998) ("Jurisdiction is an issue in every appeal. So is the standard of review."). First Amendment retaliation cases involve plaintiffs of all walks of life, from public employees such as firefighters, police officers, and university professors, to prisoners, to everyday citizens such as Bennie. Resolving the question presented by

this petition will provide much-needed guidance for all of these plaintiffs as well as the courts.

Not only is the question presented important to First Amendment litigants, it is also critical to political speech—a key element of our founding and the First Amendment. Political speech takes different forms and is an integral part of the democratic process. *See* Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 Wm. & Mary Bill Rts. J. 533, 573 (2010) ("Citizen participation in the democratic process takes two primary forms: political deliberation and the exercise of the vote, protected respectively by the right of free speech and the right to vote."). Political parties host events throughout the year, and private citizens often use such events as a way to participate in the public sphere. Moreover, such speech is not limited to expressly partisan advocacy. It can also take the non-partisan form of raising budget concerns at a city council meeting or writing a letter to the school district on its lax security measures. Hence, the issue presented in this petition is critical to millions of people. And this Court's recent ruling that even a perceived political viewpoint is sufficient for a First Amendment retaliation claim, *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016), underscores that the question presented is more important now than ever.

Second, de novo review helps correct erroneous denials of constitutional rights. A meritorious claim that is wrongly rejected by a court is intolerable for any constitutional right, but is especially so in the context of the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod v. Burns, 427 U.S. 347, 373 (1976). Under clear error review, however, erroneous deprivations of First Amendment rights go uncorrected as long as such deprivations were not "clearly" erroneous. Accordingly, the danger of the decision below is not just that it has deprived Bennie of his First Amendment protection. It is also that a lax standard of review effectively deprives countless other Americans of their First Amendment rights.

Third, de novo review ensures that the "person of ordinary firmness" standard is applied consistently throughout the judiciary. By reviewing a trial court's finding de novo, appellate courts can correct variations among trial courts, which often stem from a fact-finder's sympathy or distaste for the speech involved in each case. Such errors are inimical to the First Amendment. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Ultimately, "[t]he vagaries of potential free speech protections conspire against the average individual . . . ." David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 Berkeley J. Emp. & Lab. L. 1, 45 (1998). Because it both sets precedent and is constrained by precedent, independent appellate review checks the tendency of judges to apply vague standards in a way that favors speech with which they agree.

Fourth, de novo review results in precedents that make the legal rule clearer and more precise. Clear error review is properly applied to historical facts (*e.g.*, "Was the stoplight green?"), which naturally vary from case to case. By contrast, de novo review is necessary for a mixed question of fact and law like the ordinary firmness standard, which is clarified through the evolutionary process of common-law adjudication. *See Bose*, 466 U.S. at 505. That is exactly how this Court has clarified other mixed questions—*e.g.*, whether "the events [ ] leading up to the stop or search . . . viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause." *Heien v. North Carolina*, 135 S. Ct. 530, 542 (2014) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). Indeed, this Court has already hinted that its intervention might be needed to provide clarity in the area. *Williams v. Taylor*, 529 U.S. 362, 408 (2000) (O'Connor, J., concurring) ("[I]t is sometimes difficult to distinguish a mixed question of law and fact from a question of fact . . . ."). Doing so would provide much-needed guidance to citizens, regulators, and lower courts.

For all these reasons, the question presented in this case calls for this Court's review. And this case provides an excellent vehicle for the Court to do so. With respect to the retaliation claim, the trial court found that all other elements have been met, and both Eighth Circuit opinions in this case suggest that the appellate panel also would have ruled in favor of Bennie, if it had decided the "ordinary firmness" question in his favor. Although the standard of review is at issue in every First Amendment appeal, some First Amendment retaliation plaintiffs will win or lose regardless of the standard. *Cf. Charter Canyon*

Treatment Ctr. v. Pool Co., 153 F.3d 1132, 1133 (10th Cir. 1998) (employee welfare plan administrator's "denial of medical benefits could not be sustained under any standard of review"). Here, however, the stakes are particularly high because, as the Eighth Circuit majority noted, the standard of review was "likely [ ] dispositive" in its decision to affirm the trial court. App. A-9.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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