No. 16-1053

IN THE

Supreme Court of the United States

BRIAN C. MULLIGAN,

Petitioner,

v.

JAMES NICHOLS, an individual, *et al.*,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITIONER

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April 14, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

The Petition presents two important questions for review. The Ninth Circuit denied relief to Petitioner Brian C. Mulligan because it did not believe the leaks and negative media campaign the defendants waged against him was severe enough to deter a person of "ordinary firmness" from continuing to exercise their First Amendment rights. It also believed the retaliation consisted only of speech and that a plaintiff must clear a high bar to state a claim under such circumstances.

The Ninth Circuit erred. Juries, not judges, should decide whether government retaliation violates the Constitution. The Seventh Amendment requires that. But some courts have held otherwise and, like the Court of Appeals here, taken this issue away from the jury. There is a split among, and even within, the circuits about who should answer the "ordinary firmness" question.

The police union's Brief in Opposition—the other First Amendment defendant, the City of Los Angeles, waived a response—does not dispute that this conflict exists. Instead, it argues that granting certiorari to resolve the conflict would result in an advisory opinion because the Ninth Circuit did not apply the ordinary firmness test here. That is false. The ordinary firmness test is an essential part of the retaliation analysis and the issue many retaliation cases, including this one, turn on. The Ninth Circuit did not provide any alternative reasons for its decision.

The Opposition also misconstrues the problems with the "retaliatory speech" rule first expressed in *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676 (4th Cir. 2000), and followed by the Court of Appeals here and in numerous other cases. *Suarez* encourages judges to

make subjective decisions about the value of expression and to construe the government's actions broadly or narrowly to reach a certain result. The Opposition does not discuss those problems or try to reconcile *Suarez* with this Court's many pro-speech decisions, most notably *Crawford-El v. Britton*, 523 U.S. 574 (1998), in which the Court struck down a similar high bar in prisoner retaliation cases. *Crawford-El* is precisely on point. The same factors that warranted review there justify granting certiorari here. But the union failed to discuss *Crawford-El* in its Opposition. It did not even mention the case, instead comparing itself, a defendant, to the plaintiffs in retaliation cases and distorting the nature and purpose of the attacks on Mulligan.

Imposing heightened burdens of proof violates the Constitution and chills the exercise of First Amendment rights, including, as here, a citizen's fundamental right to petition the government for a redress of grievances. Allowing judges, not juries, to decide when retaliation violates the First Amendment has the same effect and makes federal procedure more, not less, confusing. Thus, the Court should not avoid these important questions. It should grant certiorari and clarify the law in First Amendment retaliation cases brought by private citizens like Mr. Mulligan.

I. THE NINTH CIRCUIT'S DECISION REFLECTS A WIDESPREAD CONFLICT ABOUT WHETHER A JUDGE OR JURY SHOULD DECIDE WHEN GOVERNMENT RETALIATION VIOLATES THE CONSTITUTION

The Petition shows the numerous conflicts between and within the circuits about whether a judge or a jury should decide the fact-intensive question of whether government retaliation is severe enough to

deter a person of "ordinary firmness" from continuing to engage in protected conduct. Petition ("Pet."), at 15-17. The Opposition does not dispute that these conflicts exist nor does it challenge the gravity of the problems they create. Instead, the Opposition claims that the "Ninth Circuit's decision did not turn on the 'ordinary firmness' test" but "focused on the 'competing rights of the officials themselves'" and "imposed a 'high bar . . .'" for Mulligan to state a claim. Opposition ("Opp."), at 8-9.

That is wrong. The Ninth Circuit believed the negative media campaign that the police union and the Los Angeles Police Department waged against Mulligan was not "adverse action . . . that would chill a person of ordinary firmness from continuing to engage in the protected activity." Appendix ("App.") B, at 11a-12a (quotations omitted).[1] The Ninth Circuit applied a heightened standard when considering that question because it believed this was a "retaliatory speech" case and because it believed a high bar was needed to promote government efficiency and to protect the government's own speech rights. *Id.* at 12a. But that was part of the Ninth Circuit's ordinary firmness analysis, not something else.

[1] The union also distorts the nature of the retaliation against Mulligan. It did not just publish a recording of Mulligan and did not just respond to Mulligan's statements about his encounter with Officers Nichols and Miller. As the District Court explained, Mulligan "alleges that LAPD and LAPPL [the union] maliciously conspired to retaliate against [Mulligan] for attempts to seek legal redress." App. D, at 51a. Thus, these were not isolated acts. Construed in the light most favorable to Mulligan, they were part of a lengthy, coordinated campaign to discredit Mulligan and pressure him to drop his legal claims.

The Opposition also misconstrues the potential effect of the first question presented. "For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quotations omitted). This case is not an abstraction. It involves concrete legal issues between adverse parties, with millions of dollars in damages at stake. And the Ninth Circuit decided Mulligan's First Amendment claim on this issue alone. If the Court grants certiorari and rules that a jury must decide the ordinary firmness question, it will have to vacate the Ninth Circuit's decision and remand the case to that court to consider the other issues presented on summary judgment, using the proper standard and viewing the evidence in the light most favorable to Mulligan, something the lower courts failed to do before. Pet., at 13-14. That easily satisfies Article III's "Case or Controversy" requirement.

Furthermore, the Ninth Circuit said it "d[id] not understand [its prior decisions] to stand for the proposition that speech can *never* give rise to a claim of First Amendment retaliation in the absence of a loss of tangible rights or government benefits." App. B, at 14a (fn. 5). Thus there is no merit to the union's argument that Mulligan's claim failed because the only retaliation was speech.

Resolving the conflict about whether a judge or a jury should decide the ordinary firmness question may not, itself, end this case. But that is not required to grant certiorari. This Court has a "standard practice of avoiding broad constitutional questions except when necessary to decide the case before [it]." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring). Thus, when the Court decided *Fed. Election Comm'n v. Wis. Right to*

Life, Inc., 551 U.S. 449 (2007), it avoided the broader argument about whether its prior campaign finance decision should be overruled because that was not necessary. "There the appellant was able to prevail on its narrowest constitutional argument because its broadcast ads did not qualify as the functional equivalent of express advocacy . . . ." *Citizens United*, 558 U.S. at 374. By contrast, in *Citizens United*, the Court had to assess the broader constitutional issue. *Id.* at 374-75. The same is true here.

This issue will not disappear. In the past month, courts have decided dozens of motions that involve the ordinary firmness test. They reached very different results. For example, the Third Circuit reversed the denial of the government's motions to dismiss and directed a trial court to enter judgment for the government, without a trial, because it did not believe the retaliation was severe enough to meet the ordinary firmness test. *Mirabella v. Villard*, — F.3d —, 2017 WL 1228552, at *4-10 (3d Cir. Apr. 4, 2017). Meanwhile, a Ninth Circuit panel reversed a grant of summary judgment because "a rational jury could conclude that [the plaintiff] was arrested without probable cause, which is sufficient to establish the first element of retaliation . . .," in other words "that the officers' conduct would chill a person of ordinary firmness from future First Amendment activity." *Vohra v. City of Placentia*, — F. App'x —, 2017 WL 1032631, at *2 (9th Cir. Mar. 17, 2017). This disparity will continue unless the Court grants this Petition.

II. THE "RETALIATORY SPEECH" RULE CONFLICTS WITH THIS COURT'S RULINGS, MOST NOTABLY *CRAWFORD-EL*, A PRISONER RETALIATION CASE THAT REJECTED A HEIGHTENED BURDEN OF PROOF IN RETALIATION CASES

The Opposition also misconstrues the problems with the "retaliatory speech" rule discussed in *Suarez*, which the Ninth Circuit cited as a reason for denying Mulligan relief. The issue is not a traditional circuit conflict, *i.e.*, that some circuits follow *Suarez* while others reject it. Rather, the rule is "inconsistent with this Court's rulings, which have rejected such heightened, judicially-created standards in First Amendment cases. It also has several built-in exceptions which render it so malleable that courts reach different results in strikingly similar cases." Pet., at 4.

The Petition describes the problems in detail. *Id*. at 25-28. Most notably, *Suarez* conflicts with this Court's ruling in *Crawford-El.* There the Court struck down a clear and convincing evidence standard the D.C. Circuit had created to assess retaliation claims by prisoners. It did that because "questions regarding pleading, discovery and summary judgment [in retaliation cases] are most frequently and most effectively resolved either by the rulemaking process or the legislative process." 523 U.S. at 595.

It is impossible to square *Suarez's* rule with *Crawford-El* or *Snyder v. Phelps*, 562 U.S. 443, 458 (2011), which rejected a rule in emotional distress cases because it encouraged subjective decision-making. Indeed, *Suarez* cannot be squared with any of this Court's many pro-First Amendment decisions. The Opposition does not even try. Instead, the union

cites *Bond v. Floyd*, 385 U.S. 116 (1966), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), for the generic proposition that government officials have First Amendment rights. Opp., at 13-14. That has nothing to do with the retaliatory speech rule. The second question presented focuses on whether courts have the power to create a heightened standard to decide if an ordinary citizen can recover for First Amendment retaliation when the government's retaliation includes speech. Under this Court's First Amendment jurisprudence, the answer is no.

There is also no merit to the union's suggestion that, under *Bond* and *Garcetti*, government officials can never be held liable for First Amendment retaliation when they claim to be exercising their own rights. The Ninth Circuit did not say that; in fact, it said otherwise. App. B, at 14a. And this Court rejected a similar argument in *Crawford-El*, stating that, "[g]iven the wide variety of civil rights and 'constitutional tort' claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals." *Crawford-El*, 523 U.S. at 600-01.

Furthermore, neither *Bond* nor *Garcetti* concerned the right of ordinary citizens to exercise their constitutional rights free from government retaliation. *Garcetti* was filed by a government employee (a prosecutor) and concerned the rights public employees have against their employers. *Bond* involved a legislator who had been excluded from the Georgia House of Representatives because he criticized the Vietnam War, violating the fundamental principle that "legislators be given the widest latitude to express their views on issues of policy." *Bond*, 385 U.S. at 136.

In fact, *Bond* supports Mulligan's claim, as the Court reinforced and extended First Amendment protections there.

III. THESE ARE IMPORTANT CONSTITUTIONAL ISSUES, WHICH ONLY THIS COURT CAN CLARIFY AND WHICH CANNOT BE AVOIDED

These questions go to the heart of our Constitution. They matter to civil rights plaintiffs, who have a right to speak and petition, and to have a jury decide whether the government retaliated against them for exercising those rights.

Governments should also care about this Petition. They defend hundreds, if not thousands, of retaliation cases each year. There should be a clear framework to decide them. That will create predictability and uniformity in decisions. It will streamline litigation and reduce the burden on judges. The current framework does not do that. It creates chaos, leading to the unpredictability and extensive litigation that this Court warned against in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Those concerns were serious enough to eliminate a complicated, fact-intensive balancing test in admiralty cases. They matter even more in the First Amendment context. That is, no doubt, why the Court has applied *Grubart's* logic to several First Amendment cases. Pet., at 17-18. First Amendment retaliation cases deserve the same treatment.

The Opposition offers several "alternative" reasons for denying certiorari. Opp., at 18-23. The Ninth Circuit did not rule on those issues, though, so they are not properly presented for review. And they have nothing to do with the questions presented in the Petition.

They also lack merit. Mr. Mulligan is not trying to recover damages for a "reputational injury." The retaliatory media campaign caused him to lose his job. ECF No. 304, at 184, 227-35. That easily satisfies the federal standing requirements. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 433 (1988) (recognizing "probable economic injury" as "sufficient to satisfy the [Article III 'injury-in-fact' requirement]. . . ." (quotations omitted)); *see also Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008) (noting that "economic injury is not the only kind of injury that can support a plaintiff's standing" and that "[i]mpairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing"). Similarly, Mulligan presented compelling evidence that the police union and LAPD worked together to obtain the Glendale Police Department's recording of Mulligan and to publish that recording as part of a negative media campaign that would pressure Mulligan into dropping his legal claims against the LAPD. As the District Court noted on summary judgment, the "joint [state] action requirement can be satisfied by either proving the existence of a conspiracy or by showing that the private actor willfully participated in the act with the State or its agents." App. C, at 26a (citing *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)). The District Court found that Mulligan "set forth evidence tending to raise a triable issue of fact on this issue." *Id.*

The Opposition also ignores the important questions the Petition raises about the Petition Clause. "The promise of self-government depends on the liberty of citizens to petition the government for the redress of their grievances." *Van Deelen v. Johnson*, 497 F.3d 1151, 1155 (10th Cir. 2007). Thus, "[w]hen public

officials feel free to wield the powers of their office as weapons against those who question their decisions, they do damage not merely to the citizen in their sights but also to the First Amendment liberties and the promise of equal treatment essential to the continuity of our democratic enterprise." *Id.*

That is why the Tenth Circuit reversed (in part) a grant of summary judgment in *Van Deelen*. The district court made a comparable error there: it believed the plaintiff could not recover for First Amendment retaliation because his legal actions concerned his own matters, not matters of public concern. The Tenth Circuit found otherwise, stating that "a private citizen exercises a constitutionally protected First Amendment right *anytime* he or she petitions the government for redress; the petitioning clause of the First Amendment does not pick and choose its causes." *Id.* at 1156. Moreover, the "public concern" test "was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens." *Id.* And "any attempt to apply it to the broader context of speech by private citizens would quite mistakenly curtail a significant body of free expression that has traditionally been fully protected under the First Amendment, ..." *Id.* at 1157 (quotations omitted).[2]

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[2] The Tenth Circuit discussed the ordinary firmness test in *Van Deelen*, finding that "[i]f accepted as credible by a jury, Mr. Van Deelen's allegations of physical and verbal intimidation, including a threat by a deputy sheriff to shoot him if he brought any more tax appeals, would surely suffice under our precedents to chill a person of ordinary firmness from continuing to seek redress for (allegedly) unfair property tax assessments." *Van Deelen*, 497 F.3d at 1157. It also noted that "a jury is free to find Mr. Van Deelen's evidence unpersuasive or incredible, but that is the function of the fact finder, not this court, in our judicial

The same is true here. By following *Suarez's* special retaliatory speech rule and by giving judges, not juries, the authority to apply the ordinary firmness test, courts have unwittingly curtailed important constitutional rights and made it harder to manage First Amendment retaliation cases. Those problems must be corrected.

CONCLUSION

Judicial restraint does not require that the Court check its common sense at the courthouse door. The Petition raises serious questions about the different ways courts decide First Amendment retaliation claims brought by private citizens and the role a jury should play in that process. These are not trivial issues. They affect the very foundation of our system of self-government. Therefore, Mr. Mulligan respectfully requests that the Court grant the Petition.

Respectfully submitted,

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system." *Id*. *Van Deelen* further demonstrates the conflict among the circuits about whether a judge or jury should decide the ordinary firmness issue.