No. _____

In The
Supreme Court of the United States

MARK F. MCCAFFREY,

Petitioner,

v.

MICHAEL L. CHAPMAN, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980), the Court recognized a patronage exemption from First Amendment protections for public employees involved in partisan policymaking. In *Pickering v. Board of Educ.,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983), the Court recognized that public employees' free-speech rights may be outweighed by the government's need for operational efficiency.

Petitioner Mark F. McCaffrey was terminated from his position as a deputy sheriff by Respondent Sheriff Michael L. Chapman in retaliation for McCaffrey's support for Chapman's opponent for the Republican nomination for sheriff, due to what McCaffrey believed to be Chapman's official misconduct. Chapman admitted that McCaffrey's termination was solely due to McCaffrey's "disloyalty," not job performance. The Fourth Circuit held that, as one of 600 "sworn deputy sheriff[s]" McCaffrey was subject to partisan termination under *Elrod-Branti*, even though policymaking was expressly limited to officers far above the chain-of-command from McCaffrey. The court disposed of McCaffrey's free-speech claim by concluding that their *Elrod-Branti* holding meant that the *Pickering-Connick* balance tipped in favor of the government.

This case presents these questions for clarification by the Court that have divided the lower courts:

1. Does the investigation of violent crimes and other essential law enforcement tasks that

QUESTIONS PRESENTED – Continued

require professional judgment and discretion so involve partisan political concerns that a deputy sheriff's support for an incumbent sheriff's opponent for a political party's nomination can justify his termination under *Elrod-Branti*?

2. Can a public employee be terminated for "disloyalty" to an elected official for having expressed opposition to his re-nomination due to that official's misconduct when there is no evidence such expression threatened any disruption to the agency's operations?

3. Does a conclusion that a public employee occupies a partisan policymaking position under *Elrod-Branti* automatically foreclose evaluation of whether that employee's interest in speaking on a matter of public concern outweighs the government's interest in operational efficiency under *Pickering-Connick*?

PARTIES TO THE PROCEEDING

Petitioner is Michael F. McCaffrey. Respondents are Michael L. Chapman, in his personal capacity and his official capacity as Sheriff of Loudoun County; the Board of Supervisors of Loudoun County, Virginia, in their official capacities; and Loudoun County, Virginia.

RELATED CASES

- *McCaffrey v. Chapman, et al.,* No. 1:17-cv-937, U.S. District Court for the Eastern District of Virginia. Judgment entered Oct. 12, 2017.

- *McCaffrey v. Chapman, et al.,* No. 17-2198, U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 9, 2019, rehearing *en banc* denied June 14, 2019.

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The Fourth Circuit's decision is printed at 921 F.3d 159 and reprinted at Pet. 1a. The district court opinion granting Respondents' motions to dismiss is available at 2017 WL 4553533 and is reprinted at Pet. 46a.

JURISDICTION

The Fourth Circuit issued its opinion on April 9, 2019 and denied Petitioner's petition for rehearing *en banc* on June 14, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS

The relevant constitutional, statutory, and administrative provisions are reproduced beginning at Pet. 135a.

STATEMENT

A. Factual and Legal Background

1. The Sheriff of Loudoun County is one of five local officials who are called "constitutional officers" because their positions are created directly by the Virginia Constitution. VA. CONST. art. VII, § 4. As such, sheriffs are not employees of a local government, and

the General Assembly can prescribe their duties and provide for their compensation. *Id.*; VA. CODE §§ 15.2-1600(A), 15.2-1609.

Constitutional officers have been delegated the power to "organize their offices," which includes the power to "appoint such deputies, assistants and other individuals . . . upon the terms and conditions specified by such officers." VA. CODE § 15.2-1600(B). The Loudoun County Sheriff's power over deputies is not unfettered, as Loudoun County has legislated minimum qualifications for persons appointed as deputies. *See* LOUDOUN COUNTY, VA. ORDINANCES ch. 228, § 228.02. Moreover, the Virginia General Assembly has mandated that "no locality shall prohibit an employee of the locality, including . . . deputies, appointees, and employees of local constitutional officers . . . from participating in political activities while these employees are off duty, out of uniform and not on the premises of their employment with the locality." Pet. 137a-138a. "Political activities" includes "voting; registering to vote; soliciting votes or endorsements on behalf of a political candidate or political campaign; expressing opinions, privately or publicly, on political subjects and candidates; displaying a political picture, sign, sticker, badge, or button; . . . [or] attending or participating in a political convention, caucus, rally, or other political gathering." Pet. 138a.

With approximately 600 deputies, the Loudoun County Sheriff's Office ("LCSO") is the largest Sheriff's Office in Virginia and is organized into a paramilitary chain-of-command structure. The Sheriff's

General Orders govern the conduct of LCSO employees and set terms and conditions on the delegated authority exercised by deputies at every level of that structure. Pet. 86a, 142a.

At the top of the chain-of-command is the Sheriff, *id.*, who is located in the Office of the Sheriff, along with two colonels who serve as Bureau Commanders or Chief Deputies, and the five majors who command the LCSO's five divisions. Pet. 86a, 140a-141a. The Bureau Commanders "assume the functions of the Sheriff in his absence." Pet. 141a. It is the Office of the Sheriff that "is responsible for establishing policy," which "is issued in the form of guidance to division commanders who, in turn, are responsible for formulation and continuing update of specific directives for their respective divisions." *Id.*

Below major, there are seven ranks (in descending order): captain, first and second lieutenant, sergeant, master deputy, deputy first class, and deputy. Pet. 142a-143a. McCaffrey was a deputy first class. The ranks from captain through sergeant are supervisory positions. Pet. 143a.

LCSO employees may not use their positions to endorse political candidates or to support a political issue, but otherwise the General Orders expressly assure employees that they do not prevent LCSO employees from exercising their constitutional rights. Pet. 145a.

McCaffrey worked in the Criminal Investigations Division ("CID"), which is charged with investigating

the most serious crimes through a structure and procedures mandated in the General Orders to which CID detectives must "strictly adhere." Pet. 153a. Supervision and control are maintained by a hierarchy topped by the CID Commander, followed by two lieutenants, then the supervisors of various investigative sections, and finally the CID detectives, where McCaffrey served. Pet. 151a-152a. Those procedures specify 14 actions to be taken in the preliminary phase of a case, Pet. 161a-163a, 18 for the follow-up investigation, Pet. 163a-166a, with an overlay of a variety of "investigative techniques and resources" to be employed. Pet. 166a-174a.

2. Chapman and Respondent Loudoun County Board of Supervisors entered into a Cooperative Agreement under which Loudoun County pays 75% of the LCSO's budget. Pet. 80a-81a, 83a. Beyond the County funding of the lion's share of the LCSO's operations, the purpose of the Agreement was "to establish a uniform personnel system so that the employees of the Sheriff will have the same rights and benefits and will be subject to the same procedures and regulations as County employees." Pet. 81a. Under the Agreement, the Loudoun County Human Resources Manual ("Handbook")[1] applies to employees of the Sheriff, Pet. 80a-81a, and Loudoun County and its Board assumed responsibility to ensure Chapman's compliance with the policies in the Handbook with an effective enforcement

[1] Loudoun County refers to this Manual as a "Handbook," a convention we will follow here.

mechanism at hand – the Board's control of most of the LCSO's funding. Pet. 82a-83a.

Accordingly, the General Orders make the personnel rules in the Handbook applicable to LCSO employees. Pet. 146a. McCaffrey's contract provided that the conditions of his employment were governed by the Handbook and the General Orders. Pet. 80a.

The Handbook's rules "ensure a system of personnel management based on merit principles," including "[f]air treatment of applicants and employees in all aspects of personnel management without regard to . . . political affiliation." Pet. 83a-84a, 174a, 176a. The Handbook assures that "[e]mployees will be protected against coercion for partisan political purposes." Pet. 84a, 176a. Moreover, "[t]he Board of Supervisors has . . . declared that the county does not discriminate against employees or applicants for employment based on political affiliation, sexual orientation, or gender identity." Pet. 84a, 177a.

Most importantly, the Handbook also provides:

> Employees have every right to vote as they choose, to express their opinion, and to join political organizations. County employees have the right to not be forced to take a political position as a condition of employment due to particular job duties. Nothing contained in this policy shall be interpreted to apply to duly elected or appointed constitutional officers.

> Participation in political activities is permitted unless:
>
> > 1. Such activities take place during assigned hours, or
> >
> > 2. Involvement adversely affects the employee's ability to do his/her job or adversely affects the employee's department.

Pet. 84a-85a, 177a-178a.

3. In addition, the Virginia Code provides that "no locality shall prohibit . . . employees of local constitutional officers from participating in political activities while these employees are off duty, out of uniform and not on the premises of their employment with the locality." VA. CODE § 15.2-1512.2(B), Pet. 137a. "Political activities" include "voting; . . . displaying a political picture, sign, sticker, badge, or button; participating in the activities of, or contributing financially to, a political party, candidate, or campaign or an organization that supports a political candidate or campaign; [or] attending or participating in a political convention, caucus, rally, or other political gathering." VA. CODE § 15.2-1512.2(C), Pet. 138a.

While the Sheriff is not a "locality," Loudoun County is. By virtue of the Cooperative Agreement, the General Orders, and McCaffrey's contract, Chapman committed the LCSO to treat its employees under the same rules as County employees, bringing deputies generally, and McCaffrey specifically, within the scope of this statute.

4. McCaffrey joined the LCSO in 2005 after 20 years in law enforcement in New York. From 2008 to the end of his service in 2015, McCaffrey was the lead detective in complex, high-profile cases, including rape, robbery, and homicide investigations. Pet. 71a. McCaffrey uniformly received outstanding Performance Assessments and the excellence of his work was acknowledged by a number of awards. *Id.* Though an outstanding investigator, McCaffrey was far down the chain-of-command, and so was neither a policymaker nor a spokesperson for the LCSO. Pet. 71a-72a, 86a-87a.

While McCaffrey voted for Chapman in his first election, Chapman's conduct during his first term raised concerns for McCaffrey about Chapman's integrity and fitness for office, Pet. 90a, centering on (a) Chapman's questionable fundraising, official expenditures, and hiring practices, such as awarding LCSO contracts to campaign contributors or hiring their family members, Pet. 90a-94a; (b) Chapman's abusive and malicious treatment of employees and unprofessional comportment, Pet. 94a-102a; and (c) Chapman's mismanagement and malfeasance in the LCSO's operations, ranging from ordering deputies to get rid of tickets of Chapman's friends to erratic efforts to save money, after mismanaging the LCSO's budget, that compromised the LCSO's mission. Pet. 102a-109a.

Motivated by these public concerns, McCaffrey became a delegate to the Republican Convention for Chapman's opponent, Eric Noble, in the contest for the 2015 Republican nomination for Sheriff, and put up a

small sign at his home supporting Noble. Pet. 109a-110a. McCaffrey made no public speeches or appearances during the campaign. McCaffrey did not wear any election-related buttons, shirts, or display any other campaign paraphernalia. Pet. 110a.

The Board of the Loudoun Chapter of the Virginia Police Benevolent Association ("PBA") invited McCaffrey to participate as an outside advisor in the screening of local candidates in the 2015 election for possible PBA endorsement, including candidates for Sheriff. McCaffrey's contributions to that process were not made public because the Board's deliberations were confidential, and McCaffrey has never disclosed them. The Board decided to endorse no candidate for Sheriff that year. *Id.* McCaffrey's political activities were on his own time and fully complied with the rules and policies of the LCSO, Loudoun County, and the Virginia Code. Pet. 110a-111a.

Nonetheless, McCaffrey's political expression infuriated Chapman, who had a means of retaliation at hand because the appointment of each of the LCSO's deputies technically expires at the end of every four-year term of a sheriff, and are commonly reappointed for the next term. On December 10, 2015, McCaffrey received notice from Chapman that he would not be reappointed for Chapman's second term, beginning in January 2016. Pet. 112a.

Though the notice gave no reasons for McCaffrey's termination, Chapman told prosecutors working on a major murder case with McCaffrey that his offense

was "active disloyalty" by supporting Chapman's opponent for the nomination, and that this "undermined the agency as a whole." Pet. 69a-70a, 115a-116a. Nevertheless, Chapman emphasized that McCaffrey was a good detective and that his termination was not related in any way to his performance on the job. Pet. 68a-69a, 115a-116a.[2]

Chapman's retaliation against McCaffrey did not stop at failing to reappoint him. After McCaffrey had been given notice that he would not be reappointed, Chapman ordered the numerical score of McCaffrey's final full-year Performance Assessment to be lowered to deprive McCaffrey of any bonus connected to that score, but without changing the substance of that Assessment or the outstanding evaluation of his work. Pet. 114a.

Finally, months after McCaffrey had left the LCSO, Purcellville Police Chief Cynthia McAlister was exploring with the LCSO the feasibility of creating a Domestic Violence Coordinator position. When Chapman heard a rumor that McCaffrey might be considered for the position, he had one of his subordinates tell Chief McAlister that the LCSO would withdraw its resources from the initiative if McCaffrey were hired. Pet. 116a-117a.

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[2] Chapman has never provided any evidence supporting his claim that McCaffrey "undermined" the LCSO. To the contrary, in the district court, Chapman argued that he needed discovery concerning McCaffrey's supposed "undermining" conduct in order to respond to McCaffrey's motion for partial summary judgment.

B. Procedural History

On July 23, 2017, McCaffrey brought this lawsuit seeking damages against Chapman, Loudoun County, and its Board of Supervisors for violations of his rights under the United States and Virginia Constitutions. Pet. 66a-67a.[3] On October 12, 2017, the district court granted Respondents' motions to dismiss and denied McCaffrey's motion for partial summary judgment on the ground that, under the *Elrod-Branti* exception, McCaffrey occupied a partisan policymaking position, and so his termination violated no rights under either the United States or Virginia Constitutions. Pet. 54a-58a.

A divided panel of the Fourth Circuit affirmed on April 9, 2019, the majority concluding that political loyalty was a legitimate requirement for McCaffrey's position as a "sworn deputy sheriff." Pet. 8a-19a. The Fourth Circuit denied McCaffrey's petition for rehearing *en banc* on June 14, 2019 by a vote of nine to six.

[3] The Complaint was filed in Loudoun County Circuit Court, and then removed to the U.S. District Court for the Eastern District of Virginia.

REASONS TO GRANT THE PETITION

I. The Fourth Circuit's holding that Loudoun County deputy sheriffs are subject to partisan termination merits review because it is incorrect and in conflict with decisions of this Court and of other circuits.

A. The Fourth Circuit's notion that law enforcement inherently involves partisan political judgments is wrong and in conflict with this Court's precedents.

1. Relying on *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (*en banc*), which addressed the status of North Carolina deputy sheriffs, the determinative factor for the panel majority's *Elrod-Branti* analysis was whether a deputy sheriff was "'actually sworn to engage in law enforcement activities on behalf of the sheriff.'" Pet. 18a (quoting *Jenkins*, 199 F.3d at 1166). This attribute was key, according to the majority, because "deputy sheriffs play a special role in implementing the sheriff's policies and goals," and "on patrol [they] exercise significant discretion and make decisions that create policy." Pet. 10a (citing *Jenkins*, 119 F.3d at 1162). *See also* Pet. 16a ("A deputy sheriff necessarily carries out the sheriff's policies, goals and priorities."). *Jenkins* explained that this policymaking occurs when deputies are "'called upon to make on-the-spot split-second decisions effectuating the objectives and law enforcement policies which a particular sheriff has chosen to pursue.'" 119 F.3d at 1162 n.44 (quoting *McBee v. Jim Hogg County*, 703 F.2d 834, 839, *vacated on other grounds*, 730 F.2d 1009 (5th Cir. 1984)). And

sheriffs can be liable for a deputy's misbehavior. Pet. 11a. At bottom, according to the majority, a deputy sheriff acts as the sheriff's "alter ego." Pet. 17a n.6.

Even though the majority claimed that they must "look to the actual duties of the position of the deputy sheriff" in their *Elrod-Branti* analysis, Pet. 12a, to the majority, the fact that McCaffrey was "engaged in law enforcement activities and not performing custodial duties," trumped all the specific facts concerning the structure of the LCSO, the General Orders' express limitations on policymaking and on the discretion of deputies, McCaffrey's employment contract, and the protections provided by the Handbook. Pet. 17a-18a. They did not even mention the protections for employee political activity set out in VA. CODE § 15.2-1512.2. The bottom-line, the majority says, is that "Sheriff Chapman was entitled to carry out the policies on which he ran and won with deputy sheriffs who did not oppose his re-election." Pet. 15a.

This is not an accurate statement of the law. As this Court has cautioned, "it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior. The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct." *Elrod*, 427 U.S. at 365. "[C]itizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 573 U.S. 228, 231 (2014). *Elrod-Branti* is not an incumbent-protection scheme.

2. Under *Elrod-Branti*, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. As the Fourth Circuit itself has put it, "It is not enough . . . to show merely that [public employees] make *some* policy; the ultimate question under *Branti* is whether [those employees] make policy *about matters to which political ideology is relevant*." *Fields v. Prater*, 566 F.3d 381, 387 (4th Cir. 2009) (emphasis in original).

At every step, the majority's reasoning is in conflict with this standard. The majority simply posits that McCaffrey is a policymaker of some sort, notwithstanding the fact that the Sheriff's own General Orders clearly say he is not and cannot be. Even the notion of "policymaker" employed by the majority is suspect, for they understand that to mean the role of deputies *implementing* or *effectuating* the sheriff's policies, not making policies. But implementing the policies of elected superiors is the fundamental task of most public employees, who simply cannot be considered partisans for *Elrod-Branti* purposes without the *Elrod-Branti* patronage "exception" swallowing the First Amendment rights of public employees. And, as this Court has pointed out, a failure to implement policies is a matter of job performance that has no inherent link to partisan political maneuvering. "[E]mployees may always be discharged for good cause, such as insubordination or poor job performance, where those bases in fact exist." *Elrod*, 427

U.S. at 366. *See also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990) ("A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient.").

3. The majority never explains how "law enforcement activities" inherently involve partisan political concerns save to say that deputies exercise "significant discretion" in implementing a sheriff's policies. The majority focuses on "loyalty to the sheriff," Pet. 11a (quoting *Jenkins*, 119 F.3d at 1164), as necessary for Chapman "to carry out the policies on which he ran and won." Pet. 15a.[4] But again, such reasoning proves too much since most public employees with more than ministerial responsibilities carry out policies of elected leaders. With their concern for Chapman's ability to fulfill his campaign promises driving their analysis, the majority disregarded this Court's admonition that "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Rutan*, 497 U.S. at 362.

Moreover, the general claim that deputies exercise "significant discretion" ignores the significant limits placed on deputies' discretion by the General Orders, as we described above. To be sure, law enforcement unavoidably does involve judgment and discretion, and

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[4] The dissent rightly criticized the majority as having improperly "invented facts" in their references to Chapman's "policies" since the Complaint, which defines the factual universe in a Rule 12(b)(6) adjudication, is silent as to Chapman's campaign program. Pet. 41a n.4.

by the majority's thinking partisan concerns infect it all. So Republicans and Democrats evaluate evidence differently? Identification of a perpetrator depends on political ideology? Partisan interests determine who is and who is not investigated?

While all power may be abused for political purposes, the majority concluded that partisan concerns are so *inherently* part of the law enforcement enterprise that partisan qualifications can be used for hiring and firing deputy sheriffs. That is a stunning proposition at odds with elementary principles of fairness and constitutional rights. As the dissent observed, "I question whether such a deputy can ever make decisions that leave room for political disagreement, as we should always adhere to the principle that '[p]olitics should not be an active ingredient of good law enforcement.'" Pet. 41a n.4 (quoting *Mitchell v. Thompson*, 18 F.3d 425, 428 (7th Cir. 1994) (Wood, J., dissenting). *See generally Wood v. Georgia*, 370 U.S. 375, 379 (1962) (reversing a contempt citation for urging "the citizenry to take notice when their highest judicial officers threatened political intimidation and persecution of voters in the county under the guise of law enforcement"); Robert Jackson, *The Federal Prosecutor*, 25 J.AM.JUD.SOC'Y 18, 19 (1940) (criticizing prosecutorial focus on a person rather than a crime because "the crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally . . . in the way of the prosecutor himself").

The majority retreated somewhat from their conclusion that public employees involved in law enforcement are subject to patronage termination because law enforcement is a partisan endeavor. They noted, "[t]his does not mean that law enforcement responsibilities are or should be handled in a political manner." Pet. 16a. But given the majority's holding, what does that mean? Such a statement further obscures whatever legal rule should be at work here. Is law enforcement such an inherently partisan undertaking under *Elrod-Branti* – even if not "handled in a political manner" – that any public law enforcement professional can be fired simply for not voting for the boss? The majority held that the answer is "yes." Under all the facts here and under the fundamental principles of our constitutional scheme, we think the answer can only – *must* only – be "no." This divide is not simply between the parties to one case, but between competing understandings of the First Amendment rights of public employees. That is a critical reason why this case merits this Court's review.

B. Confusion among the circuits has left the law governing the *Elrod-Branti* limit on First Amendment freedoms in disarray.

Justice Scalia observed a decade after *Branti* was decided that it had produced a "shambles" of "inconsistent and unpredictable results." *Rutan*, 497 U.S. at 111-12 (Scalia, J., dissenting). Over the years, the circuit courts have echoed that criticism. *See, e.g.*,

Kolman v. Sheahan, 31 F.3d 429, 433-34 (7th Cir. 1994) (quoting Justice Scalia's observation); *Cope v. Heltsley*, 128 F.3d 452, 461 (6th Cir. 1997) ("[I]t is hard for even one Supreme Court justice to say what the [*Elrod-Branti*] exception means"); *Underwood v. Harkins*, 698 F.3d 1335, 1347 (11th Cir. 2012) (Martin, J., dissenting) ("[O]ur sister circuits have adopted sharply conflicting views.").

The analysis of the majority below, following *Jenkins* as the Fourth Circuit's governing precedent, Pet. 12a n.4,[5] turned on the fact that a deputy was engaged in law enforcement on behalf of the sheriff, Pet. 17a-18a, and that loyalty to the sheriff was necessary to implement the sheriff's policies. Pet. 10a-11a. The majority made no deeper inquiry into what a deputy like McCaffrey actually did in the tightly structured regime of the General Orders.

A very different approach was taken by the Third Circuit in *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265 (3d Cir. 2007), which reversed the district court's grant of summary judgment rejecting a claim that a government employee was terminated for her failure to support the political party in power. The court held that the important line for *Elrod-Branti* purposes was between policy- and non-policymaking positions. *Id.* at 271. To identify on which side of that line the plaintiff fell, the court had to drill down beyond the fact that she supervised employees, helped prepare the budget,

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[5] The dissent had a decidedly different reading of *Jenkins* from that of the majority. *See* Pet. 27a-33a.

and communicated with government officials and the public to determine as a matter of fact whether she had "meaningful input into decisionmaking concerning the nature and scope of a major [] program." *Id.* The court held that this was an issue of material fact in dispute that defeated summary judgment. *Id*. at 271-72, 276.

In *Shockency v. Ramsey Cty.*, 493 F.3d 941 (8th Cir. 2007), the Eighth Circuit explicitly rejected the Fourth Circuit's conclusion in *Jenkins* that deputy sheriffs hold partisan policymaking positions. One of the plaintiffs in *Shockency* was a deputy sheriff who commanded an 80-employee patrol division, communicated department policy to the public, developed enforcement strategies for community policing, assisted with budget preparation, and composed strategy for long-range improvements in the uniformed patrol division. Another plaintiff was a sergeant in charge of the midnight patrol shift and manager of the field training program. The court concluded that the plaintiffs were "two of many chief deputies" in the department and that neither "had a close, exclusive relationship with the sheriff which necessitates confidentiality." 493 F.3d at 951. Moreover, unlike the majority here, the Eighth Circuit took account of the terms of the employee's collective bargaining agreement and state law that protected employees' right to engage in political activities. *Id.*

The Eighth Circuit had previously rejected the "alter ego test" (adopted by the Fourth Circuit, *Jenkins*, 119 F.3d at 1164), reasoning that "while the [government employer] may be held to high account for what

his employees do, it does not follow that each employee is, therefore, the [employer's] second self, his confidential representative." *Horton v. Taylor*, 767 F.2d 471, 477 (8th Cir. 1985).

The *Horton* Court underscored that the *Elrod-Branti* test focused on the actual duties performed by the plaintiff to decide whether party affiliation is an appropriate requirement for the position. *Id.* at 478. The Seventh Circuit, too, would not stop the *Elrod-Branti* inquiry where the Fourth Circuit does, at the level of an employee being a "sworn deputy," but would examine the duties and responsibilities of a particular office. *Fleener v. Sheahan*, 107 F.3d 459, 464 (7th Cir. 1997). *See also Ezell v. Wynn*, 802 F.3d 1217, 1225 (11th Cir. 2015) ("[A] factual determination remains necessary for an subordinate whose statutory duties do not make her the 'alter ego' of the hiring authority.").

More recently, in *Nord v. Walsh Cnty.*, 757 F.3d 734 (8th Cir. 2014), the Eighth Circuit dealt with a factual situation closer to the circumstances of the instant case, in which there are claims of violations of both associational rights and free speech rights. *Nord* involved what the court described as "an intermixed claim," which means that speech was intermixed with a political affiliation requirement. The court ruled that in such a case, the *Pickering-Connick* balancing test must be applied after a determination is made as to whether the speaker occupied a policymaking position. *Id.* at 744; *see also Hinshaw v. Smith*, 436 F.3d 997, 1005-07 (8th Cir. 2006).

The First Circuit has concluded that "[a]n ability to undermine operations through incompetence or malfeasance does not mean that the actor engaged in policymaking or was a confidant or spokesman for policymakers." *Lopez-Quinones v. Puerto Rico Nat'l Guard*, 526 F.3d 23, 27 (1st Cir. 2008). The majority below relied heavily on the contrary proposition that simply McCaffrey's role in implementing the Sheriff's agenda, a role he shared with every employee in the LCSO, made his position a partisan policymaking one. Pet. 10a. *See also Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (*en banc*) (court looks to actual duties and appropriateness of party affiliation in applying *Elrod-Branti*).

In its application of the *Elrod-Branti* analysis, the Tenth Circuit has reasoned that the employer's interest in maintaining the personal loyalty of employees "cannot be elevated to the level of 'personality control.'" *Dickeson v. Quarberg*, 844 F.2d 1435, 1440 (10th Cir. 1988). The position of the deputy sheriff terminated in that case was determined to fall outside of the *Elrod-Branti* exception. *See also id.* at 1441-42 (noting that "the circuits differ on the appropriate test to employ," and reviewing precedents).

II. The Fourth Circuit's ruling that the *Pickering-Connick* balancing test for free-speech claims tilts in favor of the government as a matter of law if the claimant's position falls within the *Elrod-Branti* exception was incorrect and in conflict with decisions of this Court and other circuits.

There is similar conflict and confusion in the application of the *Pickering-Connick* test. In a 2013 opinion, the Eleventh Circuit surveyed the decisions of the various circuits involving the application of the *Pickering-Connick* test to speech by a government employee in a policymaking position:

> The circuit courts that have addressed whether a policymaking or confidential employee may prevail under the *Pickering* balance have taken three different approaches. The first approach, taken by the First, Sixth and Seventh Circuits, "hold[s] that where an employee is in a policymaking or confidential position and is terminated for speech related to political or policy views, the *Pickering* balance favors the government as a matter of law." *See Rose v. Stephens*, 291 F.3d 917, 922 (6th Cir. 2002); *see also Foote v. Town of Bedford*, 642 F.3d 80, 84 (1st Cir. 2011); *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 978 (7th Cir. 2000). . . . The second approach, taken by the Ninth Circuit, first inquires whether the employee serves in a position in which political affiliation or patronage is a proper consideration and then treats that inquiry as "dispositive of any First amendment claim.". . . The

> third approach, taken by the Second and Eighth Circuits, limits the application of the decisions of the Supreme Court that address political affiliation. *Hinshaw v. Smith*, 436 F.3d 997, 1005-07 (8th Cir. 2006); *Lewis v. Cowen*, 165 F.3d 154, 162-63 (2d Cir. 1999).

Leslie v. Hancock Cnty. Bd. of Educ., 720 F.3d 1338, 1348-49 (11th Cir. 2013). These conflicts persist. The decision below is only the most recent example of the decades-long conflicts.

Several circuits have ruled that an employee's interest (and, in turn, the community's interest) in exposing corruption and other official misconduct is entitled to greater weight than most other speech. *E.g.*, *Lytle v. City of Haysville*, 138 F.3d 857, 865 (10th Cir. 1998); *Kinney v. Weaver*, 367 F.3d 337, 361 (5th Cir. 2004); *Jackler v. Byrne*, 658 F.3d 225, 236 (2d Cir. 2011); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013). The Fourth Circuit had also assigned great weight in the *Pickering* analysis to speech that addressed official misconduct in decisions that predated the decision below. *E.g.*, *Hunter v. Town of Mocksville*, 789 F.3d 389, 398-400 (4th Cir. 2015); *Smith v. Gilchrist*, 749 F.3d 302, 311-12 (4th Cir. 2014); *Durham v. Jones*, 737 F.3d 291, 302 (4th Cir. 2013); *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009); *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir. 1998); *Cromer v. Brown*, 88 F.3d 1315, 1327 (4th Cir. 1994). Particularly as the Sheriff in this case has shown no disruption to his operations, the majority's failure to accept the allegations of misconduct in the complaint as true, give appropriate weight to

McCaffrey's speech in the *Pickering* analysis, and grant his motion for partial summary judgment was error. *See Prager v. LaFaver*, 180 F.3d 1185, 1192 (10th Cir. 1999) ("[A]n employee's strong interest in disclosing governmental corruption outweighs unsubstantiated assertions of workplace disruption.").

Morgan v. Robinson, 881 F.3d 646 (8th Cir. 2018) bears a factual resemblance to this case. There, a deputy sheriff not only criticized the sheriff, but he also opposed him in a political party primary election. The deputy was terminated because of his campaign speeches that included negative comments about the sheriff. In the First Amendment retaliation action that followed, the district court granted the sheriff's motion for summary judgment based on his qualified immunity defense. The sheriff made only the minimal demonstration of disruption due to the deputy's critical speeches. The grant of summary judgment was reversed on appeal. The *Pickering* balance tilted plainly in the deputy's favor in that case even without the element of corrupt conduct that McCaffrey charged in this case.

III. This case is an excellent vehicle for review of exceptionally important issues and addressing the disarray among the precedents governing them.

A. The facts of this case provide an efficient vehicle to clarify the application of both *Elrod-Branti* and *Pickering-Connick*.

This case presents distinct facts that will help the Court clarify the bounds of the *Elrod-Branti* exemption and illuminate its relationship to the *Pickering-Connick* balancing test.

For example, for the reach of *Elrod-Branti*:

- McCaffrey was *de jure* (under the General Orders) not a policymaker.

- McCaffrey was in fact neither a policymaker nor a confidant of the Sheriff.

- McCaffrey exercised discretion and judgment in investigating violent crimes, but that discretion was exercised within the bounds of a detailed framework set out by the General Orders.

- McCaffrey's powers were not even close to being coterminous with those of the Sheriff.

- McCaffrey was of the same political party as Chapman, and there were no policy differences between them.

- McCaffrey's political activity was not animated by any partisan interest but by concerns over Chapman's misconduct and integrity.

- Chapman admitted that the sole reason for McCaffrey's termination was his "disloyalty" for supporting Chapman's opponent for the Republican nomination for sheriff, not McCaffrey's performance.

- McCaffrey's political activity did not undermine any of the Sheriff's policies.

For the relationship of *Elrod-Branti* to *Pickering-Connick*:

- McCaffrey's political activity amounted to expression concerning Chapman's misconduct in office, not a partisan dispute over policy.

- McCaffrey was an effective and highly regarded investigator.

- Chapman acknowledged the excellence of McCaffrey's work.

- McCaffrey's expression caused no disruption in the operations of the LCSO.

- The terms of the Sheriff's General Orders, the Handbook, McCaffrey's employment contract, and the Virginia Code all purported to guarantee McCaffrey's rights to engage in political expression as he did.

B. The Fourth Circuit's reasoning, which conflates the reporting of official misconduct with political disloyalty, stifles speech that is essential to assuring accountability.

Among the foundational principles of our system of governance is the requirement of accountability for the exercise of official power. *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991) (The Framers understood that those who wield power should be "accountable to political force and the will of the people."); *Bowsher v. Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring in the judgment) ("Power and strict accountability for its use are the essential constituents of good government."). Accountability is not achievable unless abuses of power are identified. The ruling of the majority below and the reasoning supporting it that speech about official misconduct is not only subordinate to the interest in preserving loyalty to elected leaders (Pet. 11a, 15a), but also not to be considered at all in the *Pickering-Connick* balancing where the employee is a policymaker (Pet. 21a) effectively undermines accountability.

Speech on a matter of public concern lies at the heart of the First Amendment. *Lane v. Franks*, 573 U.S. 228, 235 (2014). "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's right to disseminate it." *San Diego v. Roe*, 544 U.S. 77, 82 (2004). Exposing governmental inefficiency and misconduct is a matter of "considerable significance." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). The majority below failed to acknowledge "the

potential societal value" in McCaffrey's dissemination of information about the Sheriff's misconduct. *Id.*

As noted above, those in government service are in the best position to observe official misconduct. *Waters v. Churchill*, 511 U.S. 661, 674 (1994). "It is essential" that such well-placed individuals "be able to speak out freely" about official misconduct. *Pickering*, 391 U.S. at 572. If the First Amendment rights of those senior employees who are willing to speak out about official misconduct are not adequately protected when they come forward, the most effective means of assuring accountability will be severely weakened or eliminated altogether.

C. The reasoning of the Fourth Circuit will weaken the First Amendment protection of public employees in all but the most ministerial of positions.

The majority below applied the *Elrod-Branti* test improperly by concluding that every sworn sheriff's deputy who exercises traditional law enforcement duties of investigation and arrest occupies a partisan political position. Pet. 10a, 13a n.5, 14a-16a. This expands the scope of the *Elrod-Branti* patronage exception beyond this Court's limitations. In *Elrod*, the Court held that a sheriff violated the associational rights of a chief deputy by terminating the deputy because of his political affiliation. 427 U.S. at 350, 371-73. Clearly then, not every deputy sheriff is in a position involving political considerations despite the reasoning of the majority below. Yet, the rule in the

Fourth Circuit is that every deputy sheriff who swears an oath to enforce the law falls within the *Elrod-Branti* exception and can be dismissed without cause based upon her or his party affiliation or campaign activity. Pet. 16a; *Jenkins*, 119 F.3d at 1165. The stated rationale for this expansive application of the *Elrod-Branti* exception by the Fourth Circuit is

> that deputy sheriffs play a special role in implementing the sheriff's policies and goals. Deputy sheriffs on patrol exercise significant discretion and make decisions that create policy. The sheriff relies on his deputies "to foster public confidence in law enforcement" and "to provide the sheriff with the truthful and accurate information he needs to do his job."

Pet. 10a. This reasoning is plainly at odds with the delineation of the scope of the patronage exception in *Elrod* and *Branti*.

Under the Fourth Circuit's rule, only the most ministerial governmental positions would be entitled to protection for the exercise of their First Amendment right of freedom of association. The exception established by *Elrod* and *Branti* is a narrow one that does not extend to employees who are not significantly connected to policymaking that involves "partisan political interests . . . [or] concerns." *Branti*, 445 U.S. at 519; *see Lopez-Quinones v. Puerto Rico Nat'l Guard*, 526 F.3d 23, 27 (1st Cir. 2008). The law enforcement functions of investigation and arrest by their nature do not and should not involve partisan considerations. Because McCaffrey's position did not have "meaningful

input into decisionmaking concerning the nature and scope of a major program," it was not a position for which partisan political considerations were appropriate and it, therefore, did not fall within the *Elrod-Branti* exception. *See Galli*, 490 F.3d at 271-72. The reasoning of the majority below, if allowed to stand, would deny all but the lowest in the organizational hierarchy of government agencies their First Amendment rights of association.

D. The notion that law enforcement is an inherently partisan undertaking undermines public respect for law enforcement and threatens due process.

The majority opinion from the Fourth Circuit rests on the view that the day-to-day law-enforcement duties of LCSO deputies – ranging from writing traffic tickets to investigating brutal homicides – all must advance a particular sheriff's policies and goals (on which he or she campaigned), and so implicate inherently partisan judgments. Pet. 14a-16a. But such partisan law enforcement has *never* been acceptable. *See, e.g.*, Michael Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L. & POL'Y REV. 324, 342 (2007) ("[A] partisan law enforcement decision is an illegitimate or largely illegitimate individual law enforcement decision directly intended to further the ability of the decision-maker's political party to win elections."). The offensiveness of this notion by itself warrants this Court's review.

This idea is at war with fundamental principles of law-enforcement ethics. *See, e.g.*, International Association of Chiefs of Police, *Law Enforcement Code of Ethics*, available at https://www.theiacp.org/resources/law-enforcement-code-of-ethics ("I will never . . . permit . . . political beliefs . . . to influence my decisions."). It makes a cynical mockery of the Handbook's commitment to political non-discrimination and protection against partisan coercion. Pet. 176a. It can only serve to diminish respect for law enforcement at a time when law enforcement's public standing has been buffeted by various controversies.

Elrod's observation that "difference of political persuasion . . . is an inadequate basis for imputing disposition to ill-willed conduct," 427 U.S. at 365, reflects an important attribute of democratic government – the recognition of a loyal opposition. *See* Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1959 (2014) ("Loyal opposition is one of democracy's grandest terms. . . . [I]t is a stand-in for some of the best practices in democracy: making space for dissent, knitting outsiders into democracy's fabric."). Politics does not trump everything. The proposition that Democratic and Republican deputies, even deputies who did not vote for the incumbent sheriff, can work effectively together as professionals and advance, not undermine, their agency's law-enforcement mission is, or should be, the norm. The majority's reasoning overturns that proposition here, where McCaffrey's expression did not even involve any "difference of political persuasion" or partisan issue, but simply Chapman's misconduct in

office. The majority's reasoning marshals *Elrod-Branti* to protect the politician, not any policy for which his constituents voted.

Considered more broadly, if law-enforcement decision-making is unavoidably partisan, what does that mean for the due process rights of criminal suspects? Does scrutiny of the political views of law-enforcement agents now become fair game in criminal proceedings?

And what of the commitment made to protect McCaffrey's First Amendment rights in the General Orders, the Handbook, his employment contract, and the Virginia Code? Do these have no legal, much less moral, force? Do they boil down to so much cynical duplicity?

At bottom, both the principle driving the reasoning of the Fourth Circuit majority, and the implications of that principle, underscore the importance of granting this Petition.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

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Respectfully submitted,

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