No. 19-342

In The
Supreme Court of the United States

MARK F. MCCAFFREY,

Petitioner,

v.

MICHAEL L. CHAPMAN, *et al.*,

Respondents.

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

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER MARK F. MCCAFFREY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Fraternal Order of Police ("NFOP") is the world's largest organization of sworn law enforcement officers, with more than 350,000 members in more than 2,100 lodges across the United States. The NFOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and public safety nationwide. Police officers occupy a unique niche within the realm of public employment. The NFOP offer their service as *amicus curiae* when important police and public safety interests are at stake, as in this case.

The members of the NFOP have always recognized that it is their duty as public servants, first and foremost, to serve and protect our communities. In exchange for that commitment, law enforcement officers ask to be treated fairly by their governmental employers and receive the protections afforded to them by the Constitution. As the voice of law enforcement, the

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[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. In addition, Petitioner and Respondent have consented in writing to the filing of this Brief and have notified the Clerk that they consent to the filing of *amicus* briefs in support of either or neither party. The parties received timely notice of this filing.

NFOP's perspective is unique and particularly relevant to the substantive issues presented herein.

Indeed, the Fourth Circuit's ruling in this case threatens not only officers' rights, but public safety interests as well. If the Fourth Circuit's decision is left to stand, law enforcement officers with years of acquired skills, knowledge, and experience may be terminated from their positions and removed from their communities merely for supporting a particular political party or candidate. Moreover, the Fourth Circuit's ruling erodes public trust in law enforcement by sending the message that the partisan political views of rank and file officers such as McCaffrey—the officers more likely to have direct contact with the public—is an appropriate job requirement. This potential is incompatible with officers' sworn duty to protect and serve all members of the public.

It is with these interests in mind that the NFOP and its membership respectfully request that this Honorable Court grant McCaffrey's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Police officers are not political puppets that enforce the law based upon subjective partisan views and values. The public deserves officers that protect and serve with a blind eye toward political affiliations. The officers deserve the First Amendment protections guaranteed by the very Constitution that they work to

uphold. The Fourth Circuit's holding is an injustice to communities and officers alike.

This brief will focus first and foremost on ensuring that the First Amendment protects police officers who speak as citizens on matters of public concern absent a showing of adequate justification to restrict such speech. This Court's free speech jurisprudence has set forth an adequate framework to analyze cases such as this—where a public employee is terminated for expressing his political affiliation—and it should have been applied by the lower courts. The NFOP further submits that *Elrod-Branti* inquiry is an inappropriate standard to apply to law enforcement personnel. It results in an unfair and untrue characterization of officers and should be confined to a narrow subset of public employees.

Finally, this case presents this Court with an opportunity to clarify confusion among the lower courts with respect to *Elrod-Branti* and *Pickering-Connick*. The test to protect public employees' First Amendment rights must be straightforward—especially as it applies to law enforcement. Police officers risk their lives every day to enforce the laws of the United States and should be entitled to protection under the very laws they are sworn to uphold. We ask this Court reverse a ruling that deprives law enforcement officers of the rights they bravely protect for others.

ARGUMENT

I. THE FOURTH CIRCUIT'S HOLDING WILL DISRUPT GOOD GOVERNMENT.

The public relies on law enforcement to provide safety and administer justice in a swift and efficient manner. When a department's most reliable, skilled, and experienced officers are removed from their positions as a result of partisan conflict, the government becomes less effective and communities are harmed in the process.

A. The facts before this Court implicate any police officer that supports a political opponent of his or her elected supervisor.

It is crucial that this Court appreciate the facts in this case regarding Petitioner Mark McCaffrey's termination from the Loudoun County Sheriff's Office ("LCSO"), because the Fourth Circuit's holding implicates every police officer across the country. The following facts are undisputed:

- LCSO is Virginia's largest sheriff's office employing over six hundred police officers.
- McCaffrey held the second lowest possible rank in LCSO. McCaffrey was a deputy first class charged with investigating homicides, rapes, and other egregious crimes. There are *eight* ranks above McCaffrey.
- McCaffrey's performance reviews were excellent.

- During the 2015 election cycle, McCaffrey supported Eric Noble, rather than incumbent Sheriff Michael Chapman, for the Republican nomination for Sheriff of Loudoun County. McCaffrey's support for Noble did *not* involve any public speeches, public appearances, or election-related propaganda such as buttons, shirts, or bumper stickers.
- The only evidence regarding McCaffrey's support of Noble includes: (1) a sign that was put in front of McCaffrey's residence supporting Noble; (2) that McCaffrey was a delegate to the Republican Convention for Noble; and (3) that the Police Benevolent Association ("PBA") invited McCaffrey to be an outside advisor in the screening of candidates for the general election.
- Because PBA proceedings are confidential, there is no evidence regarding any advice McCaffrey may have given the PBA about a particular candidate.
- Chapman won the Republican nomination and was ultimately re-elected as sheriff.
- On December 10, 2015 Chapman informed McCaffrey that his appointment as a deputy sheriff would not be renewed.
- Chapman admitted that McCaffrey was not reappointed due to his "active disloyalty" in supporting Chapman's opponent.

McCaffrey was neither insubordinate nor disobedient. He did not violate or refuse to follow any LCSO

policies, procedures, or directives from a supervisor. Yet, the Fourth Circuit found he could be terminated for supporting his supervisor's opponent.

Many of the 350,000 FOP members across the United States hold positions similar to McCaffrey's. They are boots-on-the-ground, rank and file officers charged with protecting and serving our communities. Undoubtedly, they serve at the pleasure of elected officials including sheriffs, police chiefs, city attorneys, and attorney generals. Today, more than ever, police officers come from diverse backgrounds, serve in various environments, and offer different perspectives. However, police officers remain united under the same cause: promoting and ensuring the safety of the public. Their decision to support one elected official over another does not represent an abandonment of those principles.

According to the U.S. Department of Labor, police officers and detectives held approximately 808,700 jobs in 2018. United States Department of Labor, Bureau of Labor Statistics, *33-3051 Police and Sheriff's Patrol Officers*, May 2018, https://www.bls.gov/oes/current/oes333051.htm#st. Of that number, 70% were employed by local governments, 8% were employed by state government, and less than 2% were employed by federal agencies. *Id.* Thus, the vast majority of law enforcement personnel are employed at the local level. And if the lower court's decision is left to stand in this case, the officers in cities and towns across the United States will be increasingly vulnerable to the whim of local politics.

In holding that McCaffrey's termination for his speech and affiliation was constitutional, the lower courts have essentially declared that police officers cannot be counted on to carry out their unbiased and impartial commitment to protect and serve their communities when they do not support their supervisor during an election. Such a decision is an offensive characterization of the individuals who have dedicated their lives to protecting our own.

B. The Fourth Circuit's decision will render police departments less effective and erode the public's trust.

If department heads are able to terminate rank and file officers every time they support an opponent, then exceptional officers will be removed from the communities that they know and protect. McCaffrey's termination provides a significant example of this unfortunate reality. McCaffrey was an effective and highly-regarded detective charged with investigating the most serious crimes, including high-profile rapes and murders. But he was not a policymaker. LCSO—and in turn, the communities it serves—placed trust and confidence in McCaffrey to protect the public from such pronounced dangers. Nevertheless, because McCaffrey voiced his support for his supervisor's election opponent, he was terminated from his position as a deputy.

Under the Fourth Circuit's holding in this case, had McCaffrey's entire unit supported Chapman's

challenger, then the entire Major Crimes Unit of the LCSO could conceivably have been terminated for "active disloyalty." As a result, investigations of the most serious crimes affecting Loudoun County would have been brought to a complete standstill. Here, the danger to the public cannot be understated. The amount of research and investigation that goes into a murder, rape, or kidnapping is expansive and can take months, even years. At the local level, these types of crimes can paralyze entire communities until justice is administered. Police officers like McCaffrey are charged with restoring peace to the community. Terminating an officer who has spent countless hours solving a high-profile crime endangers the entire community.

Indeed, the practical effect of McCaffrey's removal is that an accomplished officer with specialized skills acquired over years of training and experience must now be replaced by an officer who is potentially less familiar with the community being served and certainly less knowledgeable about the specific cases and investigations into major crimes. Such a result is a disservice to the department and community. Moreover, if the Fourth Circuit's decision stands, it will challenge the integrity and ethics of police officers, thereby reducing public trust in law enforcement.

To be sure, there are instances where it is clearly appropriate to terminate an officer. For that reason, disciplinary mechanisms are in place in every law enforcement department nationwide. For example, an officer may appropriately face discipline—including termination—for clear insubordination, refusal to

enforce adopted departmental policies, or untruthfulness. But to find that an officer's affiliation with an opposite political party or candidate provides adequate grounds for termination undermines those legitimate reasons we discipline officers. This is even more true when the terminated officer, like McCaffrey, has no authority to hire, fire, or discipline.

II. UNDER *GARCETTI*, THE FIRST AMENDMENT PROTECTS POLICE OFFICERS WHEN THEY SPEAK AS PRIVATE CITIZENS ON MATTERS OF PUBLIC CONCERN.

In *Garcetti v. Ceballos*, this Court held that public employees who speak as citizens on matters of public concern are insulated from their government employer's disciplinary actions. 547 U.S. 410 (2006). Discussing its free speech jurisprudence, the Court stated:

> The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Id. at 417 (citations omitted). This Court has developed a multi-step inquiry to determine when public employees'—in this case police officers'—speech will receive First Amendment protection.

First, the Court must determine if the employee spoke as a citizen on a matter of public concern.

Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563, 568 (1968). This step itself contains two questions: (1) whether the employee was speaking as a citizen or pursuant to his or her official duties; and (2) whether the employee was speaking on a matter of public concern. If the speech is made pursuant to the employee's official duties, then the employee is not speaking as a citizen for First Amendment purposes and the inquiry ends. *Lane v. Franks*, 573 U.S. 228, 230 (2014) (quoting *Garcetti*, 547 U.S. at 418). Here, the Fourth Circuit agreed that McCaffrey was *not* speaking pursuant to his official duties as a deputy sheriff. *McCaffrey v. Chapman*, 921 F.3d 159, 170 (4th Cir. 2019).

Whether speech involves matters of public concern turns on the "content, form, and context" of the speech. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). As this Court has explained:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

Snyder v. Phelps, 562 U.S. 443, 453 (2011). Government employees are often in the best position to know what ails the agencies for which they work. *Hunter v. Town of Mocksville, N. Carolina*, 789 F.3d 389, 396 (4th Cir. 2015). Speech that involves informing the public that a governmental entity has failed to discharge its

governmental responsibilities or bringing to light actual or potential wrongdoing is considered speech on a matter of public concern. *Rodgers v. Banks*, 344 F.3d 587, 596 (6th Cir. 2003). As this Court noted in *Garcetti*, "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance." *Garcetti*, 547 U.S. at 425.

Here, McCaffrey supported Sheriff Chapman's opponent due to his concerns about Sheriff Chapman's fitness for office, including potential criminal corruption, mismanagement of funds, and lack of integrity. McCaffrey's expression was not done to further any of his own self-interests. The public relies on police officers to safeguard their communities from both external hostilities and internal discord. Police officers themselves may be the only means to address departmental inefficiency. It would be a disservice to the public if police officers could be terminated for doing so.

Second, if the employee indeed spoke as a citizen on a matter of public concern, then the question becomes whether the government entity had an adequate justification for treating the employee differently from any other member of the general public. *Id.* at 418 (citing *Pickering*, 391 U.S. at 568). Citizens have an interest in commenting on matters of public concern and the government has an interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *See Connick*, 461 U.S. at 140.

Police departments such as the LCSO have an undeniable interest in implementing departmental policies, directives, and mandates that rank and file officers are expected to follow. Nevertheless, to hold that such an interest outweighs the individual officers' interest in speaking on matters of public concern by supporting a certain candidate presumes that rank and file officers will be insubordinate merely because they hold certain beliefs. It presupposes that subordinate officers will refuse or be unable to carry out the duties and policies they have sworn to uphold if they disagree with their elected supervisor. Such a presupposition offends the notion of all law enforcement officers' duty to uphold the law.

The lower courts in this case did not conduct the inquiry this Court outlined in *Garcetti*, finding instead that McCaffrey's termination was permissible because he was a policymaker under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507, 517 (1980). However, it is clear that McCaffrey was fired for expressing his preference for the Republican nomination for sheriff, and thus *Garcetti* should control. Moreover, applying *Garcetti*—and free of any presumption that an officer like McCaffrey holds a partisan policymaking position—shows that where a rank and file officer like McCaffrey speaks as a citizen on matters of public concern, that speech is protected by the First Amendment and the officer cannot be subject to termination.

III. SUBJECTING POLICE OFFICERS TO PATRONAGE DISMISSAL POLITICIZES ALL OF LAW ENFORCEMENT.

Once a court determines that rank and file police officers can hold partisan policymaking positions, all of law enforcement becomes politicized. Chiefs, executives, and senior staff may be fairly characterized as policymakers. But the public demands—rightfully so—that law enforcement be nonpartisan. The Fourth Circuit's decision that rank and file police officers can be considered partisan policymakers frames all law enforcement as political animals subject to partisan whims and biases.

A. *Elrod-Branti* is not an appropriate standard to apply to rank and file law enforcement personnel.

Law enforcement personnel, like judges, must be insulated from the political intentions that often motivate the other branches of government. While—for purposes of this case—it is worth the analysis to note that McCaffrey should not have been labeled a partisan policymaker, in the alternative, a test that seeks to determine if an officer's position is "sufficiently partisan" is altogether improper.

The *Elrod-Branti* analysis is an exception to the general rule that public employees cannot be fired solely for the reason that they were not affiliated with a particular political party or candidate. *See McCaffrey v. Chapman*, No. 117CV937AJTIDD, 2017 WL 4553533

(E.D. Va. Oct. 12, 2017). In *Branti*, this Court stated that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the States' vital interest in maintaining governmental effectiveness and efficiency." *Branti*, 445 U.S. at 517. The Court further explained that this exception may only apply if the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id*. at 518. In this case—where, it should be noted, McCaffrey was a member of the same political party as his supervisor—the district court inquired if McCaffrey's position "involved government decisionmaking on issues where there is room for political disagreement on goals or their implementation." *McCaffrey*, 2017 WL 4553533, at *3 (applying *Stott v. Haworth*, 916 F.2d 134, 141 (4th Cir. 1990)). This is a wholly inappropriate measure to be applied to law enforcement personnel.

Police officers are duty bound to uphold the law irrespective of their political beliefs or party affiliation. The duties and objectives of police officers to investigate, collect evidence, gather facts, and arrest are *inherently* nonpartisan ventures. The professionalism of modern law enforcement is established through intense training academies, required coursework, and examinations. Community policing initiatives are the norm. Party affiliation, today more than ever, has nothing to do with an officer's ability or inability to protect and serve the public.

Furthermore, as noted above, *even if* there was room for political disagreement on decisions made by rank and file police officers, in order to justify termination of the officer, the department must assume that the officer will be insubordinate. *See* Section II *infra*. Such an assumption is contrary to the character of law enforcement. Police officers will not be swayed by political agendas. There is no partisan way to investigate a murder and no political way to arrest a criminal.

The district court in this case also found that McCaffrey was a policymaker and therefore subject to termination under the *Elrod-Branti* exception. But the professional judgment utilized by officers to investigate, arrest, protect, and serve is not policymaking, and characterizing McCaffrey as a policymaker ignores the realities of his position. For one, McCaffrey was the second lowest rank in the LCSO. There were *eight* ranks above him. Presumably every single one of the individuals above McCaffrey would have to be labeled a policymaker under the lower court's expansive definition of the term. Second, *all* deputies that fall under the Fourth Circuit's jurisdiction can now—at least arguably—be considered a policymaker and thus subject to the *Elrod-Branti* exception. Any test that seeks to determine whether a police officer within a given department has sufficient "autonomy and decisionmaking ability" to be considered a policymaker must be abandoned. *McCaffrey*, 2017 WL 4553533, at *3.

It is conceivable that certain executive level staff, department heads, and senior leaders may be properly considered policymakers. Those individuals will be

obvious. *See* Section III.B. *infra*. However, individual officers like McCaffrey and the 350,000 other FOP members that do not hire, fire, or discipline, undoubtedly do not make policy. As such, it does not make sense to apply *Elrod-Branti* to such officers.

B. There are public employees that are appropriately subjected to the *Elrod-Branti* exception.

As this Court identified in *Branti*:

> Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.
>
> It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of

> the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.

Branti, 445 U.S. at 518. Rank and file police officers do not represent positions that may properly be considered political. They also cannot be fairly characterized as positions that formulate policy. However, that does not foreclose *Elrod-Branti* as a useful tool in other public sectors. Some examples are in order.

A county's financial resources director may be "effectively a cabinet-level position" in the particular county and thus, the *Elrod-Branti* exception may apply. *Bogart v. Vermilion Cty., Illinois*, 909 F.3d 210, 214 (7th Cir. 2018). A state police commissioner—who was a member of the governor's cabinet by law—is fairly considered a policymaker. *Rose v. Stephens*, 291 F.3d 917, 924 (6th Cir. 2002). The duties inherent in the position of a city attorney indicate a relationship of confidence and trust between the city attorney and the mayor. *Williams v. City of River Rouge*, 909 F.2d 151, 155 (6th Cir. 1990). Thus, under *Branti*, a city attorney does not enjoy First Amendment protection against politically-motivated dismissal. *Id.* Likewise, party affiliation is an appropriate requirement for the job of city

solicitor. *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981).

As another example, the governor in a given state has a legitimate interest in appointing politically loyal employees to certain positions. These employees, however, occupy only the top-level executive and senior leadership positions. These employees are charged with implementing policies that align with the elected party's political agenda and have an interest in operating an efficient workplace. This Court itself in *Elrod* rejected the notion that dismissals of lower-level employees were justified by the need for efficiency stating that "[t]he inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification." *Elrod*, 427 U.S. at 364.

Surely, in formulating the *Elrod-Branti* exception this Court did not intend for it to be a sword utilized by elected officials to remove entire sectors of an office that may have supported an opposing candidate or party. But under the Fourth Circuit's holding, that is exactly what is sanctioned. Instead, the exception must only apply to the subset of individuals—executive level, senior leadership, and department heads—for whom it was originally intended. This case presents an ideal vehicle through which the Court can provide this much-needed clarification.

IV. THIS CASE PRESENTS A LEGITIMATE VEHICLE TO ADDRESS UNCERTAINTY SURROUNDING *ELROD-BRANTI* AND *PICKERING-CONNICK*.

This case presents an opportunity for the Court to alleviate the "shambles" of "uncertainty and confusion" that has emerged in the decades since *Elrod-Branti*. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 112–13 (1990) (Scalia, J., dissenting). Specifically, the Court should grant review to eliminate the uncertainty as to what standard governs in cases involving political speech and political affiliation. The lack of a uniform standard has led to inconsistent treatment of deputy sheriffs from circuit to circuit. And, as discussed, *Pickering-Connick*, along with *Garcetti*, present the most suitable framework to analyze the First Amendment rights of police officers.

A. Several circuits have applied *Elrod-Branti* in a manner that undermines the Court's prior decisions in cases involving public employees' speech on matters of public concern.

This Court has yet to address the effect of *Elrod-Branti* on cases such as this one, where a government employee's speech concerns the employee's political affiliation. Indeed, as the Eleventh Circuit noted, the Court "has explained, in dicta, only that these inquiries are 'different, though related,' and that, 'where specific instances of the employee's speech or expression . . . are intermixed with a political affiliation

requirement[,] . . . the balancing *Pickering* mandates will be inevitable.'" *Leslie v. Hancock Cty. Bd. of Educ.*, 720 F.3d 1338, 1347 (11th Cir. 2013) (quoting *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996)). Consequently, the lower courts vary dramatically in their approaches to cases involving government employees' off-duty political affiliation and speech.

Further, although the Court suggested that a *Pickering* balancing inquiry will be "inevitable" in such cases, that has not been the reality. Instead, several circuits apply *Elrod-Branti* in a manner that either forecloses the *Pickering* balancing test entirely or weakens *Pickering* to the point of irrelevance. In the most extreme approach, the Ninth Circuit has held that the fact that a government employee is a policymaker is "dispositive of ***any*** First Amendment claim," and no *Pickering* analysis is conducted. *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994–95 (9th Cir. 1999) (emphasis added). In this view, a government employer is therefore ***always*** justified in terminating or retaliating against a policymaker for their political speech, regardless if the employee's (or the public's) interest in that speech outweighed the employer's interests.

Moreover, although the First, Fourth, Sixth, and Seventh Circuits apply both *Elrod-Branti* and *Pickering* in cases involving speech and affiliation, each of those circuits "find that situations involving a policymaker favor the employer as a matter of law, resulting in the same outcome as the sole application of *Elrod*." Alex Schoephoerster, *Finding A Uniform Application of*

Law to Protect Public Employee Political Speech and Political Affiliation, 29 ABA J. Lab. & Emp. L. 563, 581 (2014) (citing, *inter alia*, *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Rodriguez Rodriguez v. Munoz Munoz*, 808 F.2d 138 (1st Cir. 1986)). As demonstrated by the Fourth Circuit in this case, this approach forecloses any meaningful analysis under *Pickering*. Indeed, once the Fourth Circuit found that the *Elrod-Branti* policymaker exception applied to McCaffrey, it found "that Sheriff Chapman had an overriding interest in ensuring his ability to implement his policies through his deputies." *McCaffrey v. Chapman*, 921 F.3d 159, 170 (4th Cir. 2019). The court did not consider whether McCaffrey's expression had a detrimental impact on the workplace, whether his expression prevented McCaffrey from proper performance of his duties, or any of the other factors enumerated in *Pickering*.

In contrast, had McCaffrey's case been heard in the Third or Fifth Circuit, these factors would have been given consideration. In those circuits, whether an employee is a policymaker is merely one factor for the court to consider in balancing the government employer's interests against the employee's interests. *See Curinga v. City of Clairton*, 357 F.3d 305, 312 (3d Cir. 2004) ("*Elrod* considerations of fidelity may easily converge with the government's interest in managing an efficient workplace under the *Pickering* spectrum."); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir. 1992) ("[C]ases involving public employees

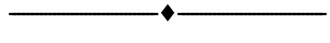
who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, where the government's interests more easily outweigh the employee's."). The Fifth Circuit specifically provides that courts should balance the extent to which an employee's actions involved public concerns against the extent to which "close working relationships are essential to fulfilling the [government employer's] public responsibilities." *McBee v. Jim Hogg Cty., Tex.*, 730 F.2d 1009, 1017 (5th Cir. 1984). If close working relationships are found essential, the court must then determine if the employee's actions disrupted those relationships so as to "prevent effective performance." *Id.*

In short, the lack of guidance on the interplay of *Elrod-Branti* and *Pickering* has created a scenario in which certain public employees can be terminated for speech on matters of public concern more readily in some jurisdictions than others. Further, some circuits—including the Fourth Circuit in this case—have applied *Elrod-Branti* in a way that focuses only on the employer's interests, effectively disregarding the *Pickering* balancing inquiry and its considerations of the employee's interest in speaking on matters of public concern.

B. The effect of this uncertainty has already been realized by police officers and has resulted in a circuit split over the treatment of deputy sheriffs.

Adding to the uncertainty and confusion surrounding *Elrod-Branti* is the fact that the courts are also divided on how to determine whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. As a result, whether a certain government position entails policymaking depends on the jurisdiction.

This confusion has spread to law enforcement and to deputy sheriffs like McCaffrey. In the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits, deputy sheriffs have been subject to dismissal under *Elrod-Branti*. *See, e.g.*, *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997); *Upton v. Thompson*, 930 F.2d 1209, 1210 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). Conversely, in the Third, Sixth, Ninth, and Tenth Circuits, deputy sheriffs have *not* been subjected to such patronage dismissals. *Burns v. Cty. of Cambria, Pa.*, 971 F.2d 1015, 1022 (3d Cir. 1992); *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997); *DiRuzza v. Cty. of Tehama*, 206 F.3d 1304, 1309 (9th Cir. 2000). This case is an ideal vehicle for the Court to correct a dangerous trend amongst the circuits that have held party affiliation is an appropriate requirement for the effective performance of law enforcement by rank and file officers.



CONCLUSION

The United States Constitution remains one of the few enduring protections for law enforcement officers against the retaliatory conduct of their governmental employers. To not protect the First Amendment rights of police officers in instances where they may affiliate with a certain candidate different from their elected supervisor or report on corruption within their department, would be tantamount to punishing officers for seeking to enforce the laws they are sworn to uphold.

The National Fraternal Order of Police as *amicus curiae* urges this Court to grant McCaffrey's Petition for a Writ of Certiorari to address these important issues.

Respectfully submitted,

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