No. 19-342

In The
# Supreme Court of the United States

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## MARK MCCAFFREY,

*Petitioner*,

v.

## MICHAEL L. CHAPMAN, *et al.*,

*Respondents.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an elected Virginia sheriff may constitutionally decline reappointing a deputy in the role of major crimes lead detective who had displayed clear political disloyalty and opposition to him, and whose duties involved significant autonomy, discretion, and a prominent role in implementing the sheriff's electorally-mandated law enforcement goals, priorities, and policies.

2. Whether an elected Virginia sheriff running a paramilitary-structured department must wait for a deputy's hostile political opposition and expression attacking his personal character, integrity, professionalism, and capabilities to manifest into actual disruption prior to taking lawful employment action.

3. Whether the court of appeals correctly held that where a public employee may be constitutionally terminated due to political disloyalty, the *Pickering-Connick* balancing test generally tips in favor of the government when terminating the employee for speech displaying that political disloyalty.

## ADDITIONAL RELATED PROCEEDINGS

United States District Court for the Eastern District of Virginia:

> *McCaffrey v. Chapman, et al.*, No. 1:17-cv-937 (Oct. 12, 2017)

United States Court of Appeals for the Fourth Circuit:

> *McCaffrey v. Chapman, et al.*, No.17-2198 (April 9, 2019), rehearing *en banc* denied (June 14, 2019)

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## STATEMENT

### A. Legal and Factual Background

1. Under Virginia law, constitutional officers such as the sheriff are independent public officials whose authority is derived from the Constitution of Virginia itself. VA. CONST. art. VII, § 4. "Their offices and powers exist independent from the local government and they do not derive their existence or their power from it. Their compensation and duties are subject to legislative control, but only by state statute and not local ordinance." *Roop v. Whitt*, 768 S.E.2d 692, 695 (Va. 2015) (citing VA. CONST. art. VII, § 4; *Carraway v. Hill*, 574 S.E.2d 274, 276 (Va. 2003)).

The Virginia Code sets forth procedures for electing sheriffs and filling vacancies, assigning to constitutional officers "the power to organize their offices and to appoint such deputies, assistants and other individuals as are authorized by law upon the terms and conditions specified by such officers." VA. CODE § 15.2-1600(A), (B). The General Assembly has passed laws specific to the role of the sheriff as a constitutional, elected officer. *See* VA. CODE §§ 15.2-1609–15.2-1625 (1997). Virginia law establishes that sheriffs may appoint deputies to "discharge any of the official duties of their principal during his continuance in office," and further provides that "any such deputy may be removed from office by his principal." VA. CODE § 15.2-1603.

Pursuant to well-established Virginia law, a sheriff's deputy is the employee of the sheriff, not the

locality which they serve. A county and its board of supervisors "have no say as to whom the sheriff shall appoint as his deputy; they do not prescribe his duties; they have no control over his conduct; they have no power to remove him from office nor any control over the duration of his term thereof. . . ." *Roop*, 768 S.E.2d at 695 (quoting *Bd. Of Sup'rs of Rockingham Cty. v. Lucas*, 128 S.E. 574, 576 (Va. 1925)).

The Virginia Code provides that no locality, defined as "counties, cities, towns, authorities, or special districts," shall prohibit any employee of the locality or deputies, appointees, and employees of local constitutional officers as defined in § 15.2-1600 from participating in political activities while off duty, out of uniform, and not on the premises of their employment. VA. CODE § 15.2-1512.2(A)-(C). The plain language of the statute does not purport to restrict the employment actions of elected constitutional officers, including sheriffs, as opposed to the actions of localities. Neither Code §§ 15.2-1600–1607, setting forth the parameters for constitutional officers generally, nor §§ 15.2-1609–1625, specific to office of sheriff, contain a similar statutory prohibition regarding restricting political activity of certain employees.

2. In addition to the statutory scheme setting forth the role of the sheriff as an elected, constitutional officer who may appoint deputies to discharge any of their principal's official duties, Virginia's public policy regarding the relationship between the sheriff and his deputies is deeply rooted in the jurisdiction's common law. In Virginia, "the

relationship between the sheriff and his deputy is such that he is not simply the 'alter ego' of the sheriff, but he is one and the same as the sheriff." *Whited v. Fields*, 581 F. Supp. 1444, 1454 (W.D. Va. 1984). The special relationship between Virginia sheriffs and their deputies is longstanding. *See, e.g., Lucas*, 128 S.E. at 576 ("In contemplation of law, both organic and statutory, a sheriff and a deputy sheriff are one"); *Mosby v. Mosby*, 50 Va. (9 Gratt.) 584, 603 (1853) ("The acts and defaults of the deputy, *colore officii*, are considered in law as the acts and defaults of the sheriff"); *Moore's Adm'r v. Downey and Another*, 13 Va. (3 Hen. & M.) 127, 132 (1808) ("The law looks upon the Sheriff and his officers as one person"); *James v. M'Cubbin*, 6 Va. (2 Call) 273, 274 (1800) ("It is a rule that the sheriff shall answer civilly for all the acts of his deputy").

3. The Loudoun County Sheriff's Office ("LCSO") maintains a paramilitary style structure and chain-of-command, which is essential for the agency to maintain orderly operations and discipline. Pet. App. 86. The LCSO maintains "General Orders" that provide a level of policy guidance in a law enforcement office setting. Pursuant to a cooperative agreement with Loudoun County that provides supplemental compensation to the LCSO as permitted by Virginia Code § 15.2-1605.1, the Loudoun County Human Resources Handbook applies to LCSO employees except where indicated therein. Pet. App. 80a-82a. The County Handbook's provision pertaining to political expression and prohibiting compelled political support as a condition of employment due to particular job duties notes that "[n]othing contained in this policy shall be interpreted

to apply to duly elected or appointed constitutional officers," such as the Sheriff and his sworn deputies. Pet. App. 84a-85a.

4. Petitioner, McCaffrey, joined the LCSO in 2005 with a background of twenty years in law enforcement. He served as a deputy from 2005 to 2008, and then as a major crimes detective from 2008 until the end of 2015 when he was not reappointed by Sheriff Chapman. McCaffrey served as the lead detective in complex, high-profile cases, including rape, robbery, and homicide investigations. Pet. App. 71a.

In describing his duties throughout the complaint, McCaffrey set forth the substantial responsibility, autonomy, and discretion afforded to him as a major crimes lead detective. McCaffrey defined his role as lead investigator in the successful prosecution of a high-profile first-degree murder wherein he exercised his discretion in marshaling resources, engaging other government officials, and directing the investigation. McCaffrey went to the scene and conducted field interviews, promptly requested more investigative support from the LCSO, contacted the Commonwealth Attorney's Office to invite them to the scene, and requested that an investigator from the Medical Examiner's Office come to the scene. McCaffrey worked closely not only with other law enforcement agencies, but with the Commonwealth's Attorney's Office in the prosecution of his high-profile cases. Pet. App. 99a, 115a.

McCaffrey responded to major crime incidents in the County whether on-duty or off-duty to handle

investigations, was very self-sufficient, was counted on to handle "the most mission critical tasks," and led by example "in working towards the fulfillment of agency goals" and the advancement of the LCSO's law enforcement agenda. Pet. App. 112a-113a. McCaffrey had substantial contact and interaction with the community, as he "listen[ed] to the needs of citizens and work[ed] to meet those needs," and made "a strong personal connection with virtually anyone to facilitate favorable resolution of his assigned cases." *Id.* He received the Loudoun County Investigator of the Month Award three times and was part of the "Team of the Month" three times. Pet. App. 71a. In 2015, McCaffrey was recognized for closing violent crime cases at a rate that significantly exceeded the national average. *Id.* He worked with the victims of crimes and their families, and received the Victim Services Award from the Loudoun County Commonwealth Attorney's Office. *Id.*

5. McCaffrey supported Sheriff Chapman when he first ran for sheriff in 2011, however when Sheriff Chapman ran for re-election in 2015 McCaffrey supported his political opponent. McCaffrey placed a sign in his yard and served as a delegate for the opponent at the Republican Convention in which the candidate for Loudoun County Sheriff was chosen. McCaffrey also served as an outside advisor in screening candidates for endorsement by the local chapter of the Virginia Police Benevolent Association ("PBA"). The PBA chapter vice president was another LCSO detective, and the PBA advised and consulted with Sheriff Chapman on matters in the past. Pet App. 103a, 115a.

The PBA opted not to endorse any candidate for Sheriff. Pet. App. 110a.

The complaint attacked Sheriff Chapman, personally and professionally, in purporting to state why McCaffrey politically opposed him. McCaffrey accused Sheriff Chapman of "appearing" to have done favors for campaign contributors; speculated that Sheriff Chapman's current senior commanders "loathe" and "detest" him, "sent around a picture of Chapman portrayed as Adolf Hitler," and believe he is an "arrogant, unstable guy"; accused Sheriff Chapman of having an "inflated view of his leadership abilities"; claimed that on one occasion Sheriff Chapman "reeked of alcohol"; accused Sheriff Chapman of failing to manage the LCSO budget properly; accused Sheriff Chapman of having "no compunction in lying in order to inflate the appearance of his own professional abilities"; labeled Sheriff Chapman a "malignant narcissist" who will "jeopardiz[e] a good deputy's career . . . while maintaining his sleazy staff"; opined that Sheriff Chapman's policies and directives have "undermined the effectiveness of the LCSO's operations," including directives regarding the LCSO gang intelligence unit, Taser maintenance, and the handling of several specific cases and investigations; asserted that "Chapman's prime professional consideration was self-promotion rather than advancing the critical mission that the LCSO undertakes in law enforcement"; amongst many other accusations disparaging Sheriff Chapman's and certain advisors' character, integrity, professional capabilities, and policies. Pet. App. 90a-109a.

McCaffrey never filed any complaints or reported any alleged misconduct, malfeasance, or unprofessionalism on the part of Sheriff Chapman to the LCSO, Loudoun County, or any other entity. McCaffrey never engaged in any whistleblowing activity. Additionally, McCaffrey did not speak publicly about the election, did not wear campaign apparel or accessories, and did not use his official LSCO position in support of Sheriff Chapman's opponent. Pet. App. 110.

The complaint alleged that Sheriff Chapman viewed McCaffrey's political opposition as disloyal, and believed it undermined the LCSO. Pet. App. 69a, 111a, 115a-116a. McCaffrey's colleagues warned him that there would be consequences for his disloyalty. After Sheriff Chapman won reelection, McCaffrey was not reappointed as a sworn deputy for Sheriff Chapman's second term. *Id.* McCaffrey alleged the sole reason he was not reappointed was because he politically supported Sheriff Chapman's opponent. *Id.*

### B. Proceedings Below

In July 2017, McCaffrey brought this lawsuit against Sheriff Chapman, Loudoun County, and its Board of Supervisors, seeking damages for alleged violations of his First Amendment rights to political association and expression. The case was removed to federal court, and respondents filed motions to dismiss for failure to state a claim. While the pre-answer motions to dismiss were still pending, and prior to any substantive discovery taking place, McCaffrey filed a motion for partial summary judgment. Sheriff Chapman opposed the motion as

premature and requested denial or postponement pursuant to Federal Rule of Civil Procedure 56(d).

1. On October 12, 2017, the district court dismissed McCaffrey's complaint for failure to state a claim. Pet. App. 46a-61a. The district court found that the exception to patronage dismissals carved out by *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), which permits public officials to terminate certain employees for their support of a political opponent, precluded McCaffrey's First Amendment claims. The district court employed the two-part inquiry set forth in *Stott v. Haworth*, 916 F.2d 134, 141-42 (4th Cir. 1990) for determining whether the *Elrod-Branti* exception applied. *Id.* at 53a-54a. The *Stott* test first asks "whether the position at issue, no matter how policy-influencing or confidential it may be, relates to partisan interests or concerns. That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation?" *Id.* at 53a-54a. If this inquiry is answered in the affirmative, "the next step is to examine the particular responsibilities of the position to determine whether it resembles a policy-maker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *Id.* at 54a.

Applying the Fourth Circuit's governing precedent in *Jenkins v. Medford*, 119 F.3d 1156, 1162-65 (4th Cir. 1997) (en banc) *cert denied*, 522 U.S. 1090 (1998), as well as Virginia statutory and common law regarding the special relationship between a sheriff

and his or her deputies, the district court acknowledged that sheriffs owe a duty to the electorate and the public at large to ensure their espoused policies are implemented, and "[t]hese policies and priorities are not implemented by the sheriff acting alone, but through the sheriff's deputies." Pet. App. 55a. The district court found that the office of deputy sheriff in Virginia involved government decisionmaking on issues where there was room for political disagreement on goals or their implementation. *Id.* at 54a-56a. The district court next turned to the second prong of the *Stott* test and analyzed the particular responsibilities of McCaffrey in his role as a major crimes lead detective.

The district court noted the complaint's allegations pertaining to McCaffrey's high level of autonomy and decisionmaking as lead detective in complex, high-profile cases, including the discretion to directly communicate with, coordinate, and request the resources of other government agencies in support of the LCSO's law enforcement mission. *Id.* at 57a. The district court held that "a deputy with McCaffrey's alleged experience, seniority and responsibilities with a sheriff's office is a policymaker," and thus met the *Elrod-Branti* exception to the general rule against partisan terminations of public employees. *Id.* at 57a-58a.

2. The court of appeals affirmed, over a dissent. Pet. App. 1a-45a. The Fourth Circuit first reviewed controlling case law that establishes and interprets the *Elrod-Branti* exception to the general rule prohibiting patronage dismissals, noting that in creating the exception, the *Elrod* plurality recognized

the dangers of the government's interests being "undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 8a-9a (quoting *Elrod*, 427 U.S. at 367). The Fourth Circuit further noted *Branti's* reasoning 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 State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* at 9a (quoting *Branti*, 445 U.S. at 517).

The Fourth Circuit proceeded to analyze the two-prong *Stott* test, noting that the court has had several occasions to do so in the context of a sheriff dismissing a deputy for supporting the sheriff's political opponent. Pet. App. 10a. The Fourth Circuit applied its holding in *Jenkins*, observing that in North Carolina the deputy sheriff position relates to partisan political interests as "deputy sheriffs play a special role in implementing the sheriff's policies and goals" upon which the sheriff was elected. *Id.* (quoting *Jenkins*, 119 F.3d at 1162). Deputy sheriffs that exercise significant discretion in their role "make decisions that create policy," and 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." *Id.* In finding that sheriffs may dismiss certain deputies due to political disloyalty, *Jenkins'* holding was not based simply on the deputy sheriff's title, but upon assessing the actual duties of the position, and was limited "to those deputies actually sworn to

engage in law enforcement activities on behalf of the sheriff." *Id.* at 11a-12a.

The Fourth Circuit proceeded to note that in this case, Sheriff Chapman was entitled, and had a duty, to carry out the policies the voters approved, as "[e]lections mean something. Majorities bestow mandates." Pet. App. 14a (quoting *Borzilleri v. Mosby*, 874 F.3d 187, 192 (4th Cir. 2017)). The Fourth Circuit agreed with the district court that McCaffrey's complaint made clear his specific duties involved significant discretion in carrying out Sheriff Chapman's law enforcement policies, goals, and priorities, distinguishing his core discretionary responsibilities from the deputies in *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) and *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000), who had more circumscribed authority concentrated on matters of custodial care and supervision. *Id.* at 14a-15a.

The Fourth Circuit reiterated its statement from *Jenkins* that it was "[n]ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him." Pet. App. 15a (quoting *Jenkins*, 19 F.3d at 1165). Turning back to the allegations in McCaffrey's complaint, the court noted that "[a]n entire section of the complaint reads as a political attack ad against Sheriff Chapman. . . . Requiring a sheriff to employ deputies who have displayed the level of hostility portrayed in this complaint could reasonably impede a sheriff's obligation to his electorate to implement the platform on which he campaigned." *Id.* at 15a-16a.

The Fourth Circuit clarified that "this does not mean that law enforcement responsibilities are or should be handled in a political manner." Pet. App. 16a. Instead, the court's decision was "based on the reality, recognized in *Jenkins,* that sheriffs do and should carry out the policies, goals and priorities on which they ran." *Id.* "Sheriffs, by virtue of their executive roles, do not set policy in the same way as those performing legislative roles. But, in attempting to faithfully enforce the law, they must make policy-oriented decisions about the allocation of manpower and financial resources." *Id.* Deputies with the duties and responsibilities of McCaffrey necessarily effectuate these policies with significant discretion and autonomy. *Id.*

The court of appeals also examined Virginia statutory and common law concerning the roles of sheriffs and their deputies, which confirmed that deputies who work autonomously to advance critical law enforcement functions have a policymaking role. Pet. App. 16a. The court compared Virginia law with North Carolina law pertaining to the roles of sheriff and deputies, noting that the two jurisdictions were substantially similar, but "Virginia case law is even more clear" that sworn deputies are alter egos of the sheriff. *Id.* at 17a, n.6. The court disagreed with the dissent's position that North Carolina law was distinct from Virginia law. Thus, the *Jenkins* holding was not cabined to North Carolina deputies significantly engaged in implementing their sheriff's law enforcement policies and goals. *Id.*

Finally, the court rejected McCaffrey's averment on appeal that the balancing of interests

test established by *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983) saved his First Amendment claims, as his political expression and support of Sheriff Chapman's opponent involved speech. Pet. App. 19a-21a. *Pickering* established a balancing test where the government's interest in efficiency is weighed against the community's interest in hearing the employee on a matter of "public concern." *Id.* at 19a-20a. The court held that the balancing inquiry weighed in favor of Sheriff Chapman, because once the *Elrod-Branti* policymaker exception was deemed to apply, the *Pickering-Connick* balance "generally tips in favor of the government because of its overriding interest in ensuring an elected official's ability to implement his policies through his subordinates." *Id.* at 21a (quoting *Borzilleri*, 874 F.3d at 194). In cases where "the *Elrod-Branti* exception applies, and an employer therefore does not violate his employee's association rights by terminating him for political disloyalty, the employer also does not violate his employee's free speech rights by terminating him for *speech* displaying that political disloyalty." *Id.* (quoting *Bland*, 730 F.3d at 394) (emphasis in original).

The Fourth Circuit denied McCaffrey's petition for rehearing *en banc* on June 14, 2019.

## SUMMARY OF ARGUMENT

The court of appeals correctly determined that given the duties of a sworn deputy sheriff in the role of LCSO major crimes lead detective, McCaffrey fell within the *Elrod-Branti* exception to the prohibition on patronage dismissals. The court also correctly determined that the *Pickering-Connick* doctrine's balancing test did not save his First Amendment claims pertaining to speech displaying his political disloyalty. The decision below does not conflict with any rule from this Court, and the petition does not identify a genuine conflict between circuit courts that warrants review where this case would serve as an appropriate vehicle. Variation between circuit court applications of the *Elrod-Branti* doctrine is due to materially distinguishable state laws and facts necessarily tied to the wide range of jurisdictions, public offices, specific positions, and political concerns at issue, and are best left to the circuit courts to assess on a case by case basis. There is also no genuine conflict between the circuits regarding the substantial weight afforded to the government in applying the *Pickering-Connick* balancing test to a "policymaker" employee whose speech at issue expresses political disloyalty. Accordingly, the petition for a writ of certiorari should be denied.

## REASONS TO DENY THE PETITION

### I. The Fourth Circuit's holding that the *Elrod-Branti* exception applied to LCSO deputy sheriffs with the autonomous, discretionary duties and responsibilities of a major crimes lead detective is not in conflict with this Court's decisions, and petitioner misstates the nature and depth of a disagreement amongst the circuit courts.

#### A. Petitioner's claims regarding the first Question Presented are premised on a mischaracterization of the Fourth Circuit's holding, which does not conflict with any decision from this Court.

1. The Fourth Circuit's holding is consistent with the precedent of this Court. The court of appeals found that a sworn deputy sheriff like McCaffrey, with the specific responsibilities of a major crimes lead detective as set forth on the face of the complaint, "had a special role in carrying out the law enforcement policies, goals, and priorities on which Sheriff Chapman campaigned and prevailed." Pet. App. 15a. Virginia law concerning the roles of sheriffs and their deputies confirmed that deputies performing such functions have a policymaking role subject to the *Elrod-Branti* exception. *Id.* at 16a-17a. Deputy sheriffs who are charged with the responsibilities and decisionmaking of a major crimes lead detective, including the significant public contact and resource management indicated in the complaint,

must be relied on to faithfully implement and further these goals while representing Sheriff Chapman in the community, building relationships, and working closely with other officials in resolving the highest profile crimes in the county. A major crimes lead detective has substantial autonomy and discretion in carrying out the sheriff's most vital law enforcement functions such that they can undercut and obstruct the effective implementation of the sheriff's policies and priorities which they plainly oppose.

McCaffrey, however, premises his claims upon a misapplication of the Fourth Circuit's holding, asserting the court of appeals determined that "essential law enforcement tasks that require professional judgment and discretion, such as the investigation of violent crimes," are inherently political, and thus whether one is "Republican or Democrat"[1] necessarily determines tasks like evaluating evidence or identifying a perpetrator. Pet. i.-ii, 14-15. Yet, the Fourth Circuit directly rebuffed McCaffrey's attempt to frame the role of an LCSO

[1] McCaffrey's claim that because both he and Sheriff Chapman were members of the same political party "there were no policy differences between them" (Pet. 24) is not a ground worthy of this Court's review, and is directly contradicted by the litany of policies and directives criticized at length in the complaint. McCaffrey condemned Sheriff Chapman's alleged "mismanagement" of LCSO operations as one of the reasons he politically supported his opponent, including disparaging broad policies such as shift structure and budget management, as well as Sheriff Chapman's handling of particular criminal investigations including a gang-related murder, a narcotics investigation with Fairfax County, a stolen gun trafficking case, a stolen vehicle trafficking case, and an investigation into the death of a newborn baby, to name just a few. Pet. App. 102a-109a.

major crimes lead detective in a vacuum without context: "This does not mean that law enforcement responsibilities are or should be handled in a political manner. That, of course, should never be the case." *Id.* at 16a. Instead, the court's decision was based on the reality that sheriffs in Virginia have an electoral mandate to carry out their law enforcement platform and goals, and sheriffs, "by virtue of their executive roles, do not set policy in the same way as those performing legislative roles. But, in attempting to faithfully enforce the law, they must make policy-oriented decisions about the allocation of manpower and financial resources," and these decisions are necessarily effectuated by deputies with McCaffrey's high-level responsibilities. *Id.*

2. The Fourth Circuit's holding recognizes that claiming there could be no politically driven disagreements about the policies and priorities involved in implementing an elected sheriff's critical law enforcement functions "is an unduly myopic view of the role of politics in the seemingly apolitical context of universal provision of services." *Upton v. Thompson*, 930 F.2d 1209, 1214 (7th Cir. 1991) (quoting *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985)). "While the ultimate goal of all sides might be the same, there is clearly room for principled disagreement in the development and *implementation* of plans to achieve that goal." *Id.* (emphasis in original).

The *Elrod-Branti* exception was designed to permit a government official to implement his or her electoral mandate when a subordinate's political disloyalty would interfere with the discharge of public

duties. *Elrod*, 427 U.S. at 367; *Branti,* 445 U.S. at 517. This is particularly relevant, as this Court has recognized, when the government official is tasked with "broader public responsibilities." *Branti*, 445 U.S. at 519, n.13 (distinguishing prosecutors from public defenders, as the latter's "primary, if not the only, responsibility . . . is to represent individual citizens in controversy with the State"). Much like sheriffs and their deputies primarily engaged in autonomous law enforcement functions, prosecutors and their assistants "make discretionary decisions of real consequence," "represent and safeguard the public at large," and have responsibilities "laden with ideological content," including "overseeing investigations, prosecuting crimes, and negotiating plea deals." *Borzilleri*, 874 F.3d at 191. Circuit courts "have held consistently that prosecutors are Policymaker/Confidential employees." *Danahy v. Buscaglia*, 134 F.3d 1185, 1192 (2d Cir. 1998) (collecting cases); *Fazio v. City & Cty. of San Francisco*, 125 F.3d 1328, 1333-34 (9th Cir. 1997).

3. Petitioner further distorts the Fourth Circuit's holding by incorrectly asserting that it found the *Elrod-Branti* exception applied to McCaffrey merely "as one of 600 sworn deputy sheriffs," and "will weaken all but the most ministerial positions." (Pet. i, 19, 27-28). Neither the decision below, nor the Fourth Circuit's precedents in *Jenkins*, *Knight*, and *Bland* support this. Petitioner disregards deputies, irrespective of rank or title, whose primary functions do not centrally impact execution of the sheriff's essential law enforcement policies, and thus political loyalty would not be necessary, for example: deputies in corrections, court services, transportation,

security, process service, or administrative and technical services. LCSO deputies in other divisions, or even in the same division but with a notably different role, may not serve as an LCSO liaison, working intimately with the Commonwealth's Attorney Office in prosecuting major crimes that face heightened public scrutiny; may not have the independence and authority to coordinate LCSO resources and obtain support from other law enforcement and government agencies; may not be able to shepherd those resources toward the department's core mission as they think appropriate; and may not have the extensive, direct contact with victims, their families, and the community at large while officially representing the sheriff.

The court of appeals properly examined the actual duties of McCaffrey as a major crimes lead detective, as opposed to merely his rank. *Elrod* involved the Chief Deputy of the Process Division of the Cook County Sheriff's Office, John Burns. 427 U.S. at 350. While Burns was in a supervisory role, the discretionary responsibilities of a chief deputy in the process service division are distinct from those of an LCSO major crimes lead detective. The latter's primary functions and decisionmaking directly impact matters fundamental to the sheriff's foremost public safety and law enforcement priorities upon which he was elected.

4. At bottom, petitioner claims a misapplication of facts to the Fourth Circuit's *Elrod-Branti* analysis. (Pet. 12). Yet, the facts petitioner wishes to apply are not present here. McCaffrey's specific duties and responsibilities were analyzed in

accordance with the Fourth Circuit's settled *Stott* test. McCaffrey was also not a junior level deputy with limited discretion, autonomy, and law enforcement responsibilities. The Fourth Circuit held that "a sworn deputy sheriff like McCaffrey had a special role in carrying out the law enforcement policies, goals, and priorities on which Sheriff Chapman campaigned and prevailed." Pet. App. 15a. Petitioner's contention that his discretionary law enforcement duties did not influence matters of political or policy concern, despite allegations illustrating otherwise, does not merit this Court's review.

McCaffrey's misplaced reliance on Virginia Code § 15.2-1512.2, which expressly applies only to localities, is without force. Similarly, McCaffrey's reference to excerpts of LCSO General Orders absent from the pleadings, save for a brief reference to General Order § 203 (Pet. App. 85a-86a), and averment that he was not a "de jure" policymaker (Pet. 24) misses the mark. "Under the rationale in *Branti*, a public employee need not literally *make* policy in order to fit within the *Elrod* policymaker exception." *Fazio*, 125 F.3d at 1332 (emphasis in original). Rather, the employee's position may be unprotected if "he has meaningful direct or indirect input into the decisionmaking process." *Tomczak*, 765 F.2d at 641 (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)). The Fourth Circuit's holding that LCSO deputies in the role of major crimes lead detective have the discretionary decisionmaking ability to meaningfully impact and undermine the implementation of the sheriff's law enforcement goals and priorities is not in conflict with

this Court's precedent. Accordingly, this case does not warrant review.

### B. Petitioner overstates the degree, and practical significance, of any difference among the circuit courts pertaining to the first Question Presented.

1. In averring that there is "confusion among the circuits" regarding the *Elrod-Branti* doctrine in general, McCaffrey cites Justice Scalia's dissent in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111-12 (1990). The *Rutan* dissent, which preferred *Elrod* and *Branti* be overruled, indicated that courts' various tests devised to implement *Elrod-Branti* have led to uncertainty that "undermines the purpose of both the nonpatronage rule and the exception." 497 U.S. at 112. However, petitioner moves on without stating Justice Scalia's point:

> My point is that there is no right line—or at least no right line that can be nationally applied and that is known by judges. Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring

> and firing are worth its undoubted costs. The answer to that will vary from State to State, and indeed from city to city, even if one rejects out of hand (as the *Branti* line does) the benefits associated with party stability.

*Id.* at 113 (emphasis added). The dissent recognized that the *Elrod-Branti* doctrine would unavoidably produce wide-ranging results, dependent in part on the law of the jurisdiction, the public office involved, the relationship between the public employer and employee being dismissed, and the facts pertaining to the employee's capacity to influence matters of political import.

2. The circuit court decisions cited by petitioner cover a range of various public offices, positions, roles, and relationships to applicable state or local laws, and do not lend support to his criticism of the decision below or the Fourth Circuit's controlling precedent, *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc) *cert denied*, 522 U.S. 1090 (1998), and its application in this case.

The Third Circuit's decision in *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265 (3d Cir. 2007) involved an apolitical Director of Environmental Education who failed to support the campaign of the new Democratic state governor. The court held that it was disputed whether Galli actually had any "meaningful input into decisionmaking concerning the nature and scope of a major program," given testimony that her position was "that of a low-level drone" allowing only the offer of information to her

superiors. *Id.* at 271-72. The "nature and scope" of the state employee's position, her relationship to and role in implementing the electoral mandate of the governor, and the public interest at issue are not comparable.

In *Burns v. Cty. of Cambria, Pa.*, 971 F.2d 1015, 1022 (3d Cir. 1992), the Third Circuit held that sheriff deputies who primarily perform the duties of "serving process, transporting prisoners, or guarding courtrooms" did not fall within the *Elrod-Branti* exception – a position consistent with the Fourth Circuit's view. By comparison, the Third Circuit affirmed in a per curiam decision a Pennsylvania district court's holding that assistant district attorneys fell within the *Elrod-Branti* exception, as state statute and case law provided the "power – and the duty – to represent the Commonwealth's interests in the enforcement of its criminal laws," and the "district attorney must be allowed to carry out this 'important function without hindrance from any source." *Mummau v. Ranck*, 531 F. Supp. 402, 404 (E.D. Pa. 1982), *aff'd*, 687 F.2d 9 (3d Cir. 1982) (per curiam) (internal citations omitted). The court further noted that "the allocation of scarce resources and the decision to prosecute a particular individual and specific classes of crime requires the reasoned and informed exercise of discretion." *Id.*

In *Shockency v. Ramsey Cty.*, 493 F.3d 941, 950-51 (8th Cir. 2007), the Eighth Circuit declined to find *Jenkins* or *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (upholding partisan firing of deputy sheriffs in Alabama) controlling "because they turned on state law provisions in different jurisdictions,"

whereas Minnesota law, and the legal relationship between sheriff and deputy in that jurisdiction, stood in contrast. By comparison, the Eighth Circuit in *Nord v. Walsh Cty.*, 757 F.3d 734, 741, 744 (8th Cir. 2014) noted that North Dakota law was substantially similar to North Carolina law regarding the roles of sheriff and deputy – just as the below court did with applicable Virginia statutes and common law. The Eighth Circuit found that "[f]or reasons similar to those expressed in *Jenkins*, loyalty is an appropriate requirement" for North Dakota deputy sheriffs responsible for carrying out the primary law enforcement duties of his principal, including "prevention and detection of crime" and "the protection of life and property." *Id.*

Other circuits applying *Elrod-Branti* to deputy sheriff positions similarly turn on distinctions in the legal relationship between sheriff and deputy under state law and the specific duties of the deputy, including how much if any discretion the deputy has in implementing law enforcement goals and priorities. In *DiRuzza v. Cty. of Tehama*, 206 F.3d 1304, 1311-12 (9th Cir. 2000), the Ninth Circuit held that "[a] deputy sheriff in California who works in a custodial position in a jail" and is responsible for custody, care, supervision, security, movement, and transportation, was not subject to partisan dismissal. The Ninth Circuit indicated its test was consistent with *Jenkins*, given the Fourth Circuit's test required courts to examine the specific job duties, not merely the title, of deputy sheriffs. *Id.*

The Ninth Circuit's test was also consistent with the Seventh Circuit's holding in *Upton v.*

*Thomas*, which analyzed the actual nature of the job performed by deputy sheriffs in Illinois and concluded they were policymakers given their level of discretion and decisionmaking in implementing the elected sheriff's law enforcement agenda. *DiRuzza*, 206 F.3d at 1312 (citing *Upton*, 930 F.2d at 1213, 1215). In *Dickeson v. Quarberg*, 844 F.2d 1435, 1443-44 (10th Cir. 1988), the Tenth Circuit found that a head jailer with primarily custodial and supervision duties and a special deputy whose duties were "ninety percent" secretarial could be terminated for political reasons. Neither employee was a sworn deputy, nor implemented any significant law enforcement functions on behalf of the sheriff. *Id.*

Finally, *Lopez-Quinones v. Puerto Rico Nat. Guard*, 526 F.3d 23 (1st Cir. 2008) does not support McCaffrey's position. While the Puerto Rico National Guard was "involved in operations – such as law enforcement and natural disaster relief – that involve policymaking and implicate partisan concerns," the employee dismissed for political reasons held a position with ministerial maintenance duties that did not "entail discretionary judgments involving the implementation of policy," or law enforcement functions, and on "the spectrum between policymaker and clerk," fell much closer to the latter. *Lopez-Quinones*, 526 F.3d at 27. McCaffrey's prominent role in implementing Sheriff Chapman's law enforcement policies is not analogous. Analysis of the distinguishable facts of these cases demonstrates that on the specific question presented there is no genuine conflict between circuits, and this Court's review is not warranted.

## II. Certiorari is unwarranted on the second Question Presented because this case does not involve "reporting official misconduct" or "exposing corruption," making it an inappropriate vehicle to resolve any such issue, and there is no applicable conflict between the circuit courts in relation to *Pickering-Connick* or *Elrod-Branti* implicated here.

1. Simply put, this case did not present an issue of speech aimed at "exposing corruption," "reporting official misconduct," or any public whistleblowing conduct whatsoever. The complaint did not allege that McCaffrey made any complaints, filed any reports, or publicly commented on any supposed misconduct. McCaffrey did not "speak out freely about official misconduct" as the petition purports (Pet. 27); the complaint explicitly alleged he did not even speak publicly about the election. Pet. App. 110a.

McCaffrey did not claim that he was terminated in retaliation for exposing misconduct or whistleblowing activity. Instead, the complaint explicitly alleged that McCaffrey's "single offense" was his political opposition and expression relating to the Republican primary election, which Sheriff Chapman perceived as disloyal and believed threatened to undermine the LCSO. Pet. App. 69a, 115a-116a. McCaffrey's alleged expression was politically driven: supporting Sheriff Chapman's opponent, advising the PBA against endorsing Sheriff Chapman, and serving as a delegate to the local party convention. While McCaffrey insinuates in his

petition that he "disseminated information" (Pet. 26-27), the complaint is clear regarding the nature of his political expression, and the alleged reason for termination. The Fourth Circuit appropriately disregarded McCaffrey's effort to reframe his complaint on appeal, aptly noting that "an entire section of the complaint reads as a political attack ad against Sheriff Chapman."[2] Pet. App. 15a.

2. Additionally, the Second Question presented fails to implicate any inconsistency between circuit courts and does not otherwise merit review. The decision below is not in conflict with any of the petition's cited case law, including the referenced Fourth Circuit decisions, pertaining to speech "exposing corruption and other official misconduct." Pet. 22. This is because, as set forth above, the complaint did not allege any such speech or resultant retaliatory conduct on that basis.

McCaffrey engaging in the political mudslinging represented in his complaint while advising the PBA and criticizing Sheriff Chapman's character, integrity, and competence to other LCSO employees to help his candidate get elected does not alter this. Law enforcement agencies and

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[2] As set forth above, this would be the same section of the complaint wherein McCaffrey proclaimed that Sheriff Chapman's current senior commanders "loathe" and "detest" him, refer to him as Hitler, and believe he is an "arrogant, unstable guy,"; stated that Sheriff Chapman has "an inflated view of his leadership abilities"; claimed that Sheriff Chapman "has no compunction in lying to inflate the appearance of his own professional abilities;" and accused Sheriff Chapman of being a "malignant narcissis[t] . . . maintaining his sleazy staff." Pet. App. 90a-109a.

paramilitary structured public employers are entitled to impose more restrictions on speech than other public employers, as "discipline is demanded and freedom must be correspondingly denied." *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 347 (4th Cir.), *cert. denied sub nom. Buker v. Howard Cty., Md.*, 138 S. Ct. 171 (2017); *see also Anderson v. Burke Cty., Ga.,* 239 F.3d 1216, 1222 (11th Cir. 2001) (holding same). Accordingly, "greater latitude is afforded to [law enforcement] officials in dealing with dissension in their ranks." *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 586 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 470 (2017) (quotation omitted); *see also Nord*, 757 F.3d at 741 (quoting *Buzek v. Cty. of Saunders*, 972 F.2d 992, 995 (8th Cir. 1992)) ("[L]aw enforcement agencies, more than other public employers, have special organizational needs that permit greater restrictions on employee speech"); *Nixon v. City of Houston*, 511 F.3d 494, 498 (5th Cir. 2007) (holding same).

*Morgan v. Robinson*, 881 F.3d 646 (8th Cir. 2018), *opinion vacated on reh'g en banc*, 920 F.3d 521 (8th Cir. 2019) does not assist McCaffrey. Sitting en banc, the Eighth Circuit granted qualified immunity to the sheriff and reiterated *Connick*'s language that there is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Morgan*, 920 F.3d at 526 (quoting *Connick*, 461 U.S. at 152); *see also Waters v. Churchill*, 511 U.S. 661, 673 (1994) ("Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. . . . But we have

given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern"). As the Fourth Circuit found in its decision below, "[r]equiring a sheriff to employ deputies who have displayed the level of hostility portrayed in this complaint could reasonably impede a sheriff's obligation to his electorate to implement the platform on which he campaigned." Pet. App. 15a-16a.

## III. The Fourth Circuit's holding that *Pickering-Connick* balancing generally tips in favor of the government when the policymaker exception applies and the employee's speech displays political disloyalty is sound, and the third Question Presented does not present significant conflict between the circuit courts on these facts.

1. The below court's application of the *Elrod-Branti* policymaker exception to the *Pickering-Connick* doctrine's balancing test was correct, and its reasoning does not conflict with any decisions from this Court. To be clear, in following the Fourth Circuit precedent established in *Bland* and *Borzilleri*, the decision below did not hold that an employee's status as a policymaker obviates the *Pickering-Connick* balancing test. The Fourth Circuit's rule is that "where an employer 'does not violate his employee's association rights by terminating him for political disloyalty, the employer also does not violate his employee's free speech rights by terminating him for *speech* displaying that political disloyalty.'" *Borzilleri*, 874 F.3d at 194 (quoting *Bland*, 730 F.3d at 394)

(emphasis in original). Thus, where "the *Elrod-Branti* policymaker exception applies, the *Pickering* balance generally tips in favor of the government because of its overriding interest in ensuring an elected official's ability to implement his policies through his subordinates." *Id.* *Borzilleri* notes that were it to strike the *Pickering* balance differently, those subject to patronage dismissal permitted by *Elrod-Branti* could attempt to shield themselves behind *Pickering* simply by criticizing the newly elected superior, and the Fourth Circuit's "First Amendment jurisprudence would then have become self-defeating." *Id.* at 194-95.

2. Despite some variance in tests, there is no legitimate inconsistency between the circuit courts that warrants review given the practical application of the below court's approach in this case. The Fourth Circuit's test is consistent with the First, Sixth, and Seventh Circuits, "which recognize[] the inherent inconsistency in a rule that protects a policymaking employee who overtly expresses his disloyalty while denying that same protection to one who merely belongs to a different political party." *Rose v. Stephens*, 291 F.3d 917, 921-22 (6th Cir. 2002); *see also Bonds v. Milwaukee County*, 207 F.3d 969, 979 (7th Cir. 2000); *Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998). Additionally, the Tenth Circuit has agreed with the Seventh Circuit that "[a]lthough an employee's status as a policymaker bears considerable attention when weighing the interests of the government, the policymaking employee exception does not apply and courts must apply *Pickering* balancing when the speech at issue *does not implicate the employee's politics or substantive policy viewpoints*." *Barker v. City of Del City*, 215 F.3d 1134,

1139 (10th Cir. 2000) (quoting *Bonds*, 207 F.3d at 979) (emphasis added).

The *Rose* court's holding was consistent with *O'Hare Truck Serv., Inc. v. City of Northlake, Ill.*, 518 U.S. 712, 719 (1996), which did not involve a policymaking or confidential employee but stated that "the balancing *Pickering* mandates will be inevitable" in cases where "specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement." The *Rose* court noted that its rule "is consistent with the Court's statements in *O'Hare* because we hold that the *Pickering* balance applies to these mixed cases but that the balance favors the government as a matter of law in a specific subset of them, *i.e.*, where the employee speaks on political or policy-related issues."[3] *Rose*, 291 F.3d at 921, n.1.

While there may be some abstract tension with the general principles espoused by the Second Circuit, the precise legal rule of that court is consistent with the Fourth Circuit's approach. In *McEvoy v. Spencer*, 124 F.3d 92, 100 (2d Cir. 1997) the court addressed the situation that "arises when adverse action is taken against a policymaking employee *both* because

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[3] The Ninth Circuit's approach in *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994-95 (9th Cir. 1999) goes beyond the Fourth Circuit's approach in finding that if the employee is subject to the *Elrod-Branti* exception, the inquiry is "dispositive of any First Amendment retaliation claim," regardless of whether the speech at issue relates to politics or policy. However, the decision below is not the appropriate vehicle to address the Ninth Circuit's approach as the facts of this case produce the same result regardless of the test applied.

of political affiliation and speech." (Emphasis in original). The court held that "[i]n this context, where the lines between political association and speech are often blurred, we conclude that adverse action may be taken against a policymaker because of political affiliation, even if the employer was also motivated in part by speech protected under *Pickering*." *Id.*

The Second Circuit recognized the same inconsistency that the Fourth, Sixth, and Seventh Circuits acknowledged, and held that where a public employer can "dismiss or demote a policymaking employee merely because it dislikes the employee's political affiliation, the employer should be permitted to take the same action when the employee not only belongs to a disfavored party or holds the 'wrong' political beliefs, but additionally disrupts the workplace by speaking out." *McEvoy*, 124 F.3d at 101 (citing *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993)). *McEvoy* clarified that where "an adverse action against a policymaking employee was not even in part motivated by the employee's political affiliation," traditional *Pickering* balancing would have to be applied. *Id.* at 101. Even in those situations, however, "the policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance. *Id.* at 103. Thus, because McCaffrey alleged he was terminated due to his political disloyalty, including his support for, and affiliation with, Sheriff Chapman's primary opponent during his bid for reelection, the Second Circuit's test provides the same result.

Similarly, the Eighth Circuit's test, while not on all fours with the Fourth Circuit's approach,

reaches the same functional result with the facts of this case. In *Hinshaw v. Smith*, 436 F.3d 997, 1006 (8th Cir. 2006) the Eighth Circuit noted its hesitation "to expand the *Elrod-Branti* exception to a case *where party affiliation is not alleged as a basis for the termination*." (Emphasis added). Furthermore, under *Hinshaw,* even where political loyalty and affiliation is not a basis for termination, "the employee's status as a policymaking or confidential employee weighs heavily on the government's side of the *Pickering* scale when the speech concerns the employee's political or substantive policy views related to her public office." *Id.* at 1007.

While the Eighth Circuit in *Nord* applied the *Pickering-Connick* balancing test to hold Nord's speech was unprotected, the court also found that "[f]or reasons similar to those expressed in *Jenkins*, loyalty is an appropriate requirement for the deputy sheriff position in the instant case, and accordingly the confidential nature of Nord's employment weighs heavily on the government's side of the *Pickering*/*Connick* balancing. . . ." *Nord,* 757 F.3d at 744; *see also Curinga v. City of Clairton*, 357 F.3d 305, 312 (3d Cir. 2004) (noting that when an employee's speech is "intermixed" with a political affiliation requirement, "[n]ot only the balancing, but the outcome as well, may be inevitable because the public employer's interest may weigh so heavily that no other outcome is possible"); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir. 1992) (en banc) ("[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 (as a private citizen)"). The variance in tests applied by the circuit courts would not alter the result of the decision below, and therefore this Court's review is not merited.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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