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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY TO BRIEF IN OPPOSITION

I. The Fourth Circuit's opinion conflicts with *Elrod-Branti*.

a. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). As a result, the Court has carefully circumscribed the *Elrod-Branti* exception from the First Amendment's protections to that small group of public employees for whom partisan affiliation is a necessary requirement. "[T]he 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 v. Finkel*, 445 U.S. 507, 518 (1980). The inherently *partisan* character of the work to be done and, consequently, the importance of *party affiliation* for the employee undertaking it, are the touchstones of the *Elrod-Branti* exception.

The Fourth Circuit's precedents seem to embrace these principles. *See*, *e.g.*, *Field v. Prater*, 566 F.3d 381, 387 (4th Cir. 2009) ("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.*") (Emphases in original.) But here, the Fourth Circuit held that McCaffrey was a partisan policymaker because he "had a special role in carrying out the law enforcement policies, goals and priorities on

which Sheriff Chapman campaigned and prevailed." Pet. 15a. Similarly, Chapman contends that McCaffrey exercised "high-level responsibilities" that involved effectuating the sheriff's policy-oriented decisions. Opp. 17. Such reasoning is far-removed from the analysis mandated by *Elrod-Branti*.

This proposition that deputy sheriffs are partisan policymakers rests on the erroneous assumption that the implementation of policies, as opposed to the making of those policies, necessarily implicates political ideology or partisan loyalties. Such reasoning proves far too much, for then *Elrod-Branti* becomes no longer an "exception" for a small class of partisans as this Court intended – "party affiliation is not necessarily relevant to every policymaking or confidential position," *Branti*, 445 U.S. at 518 – but vastly expands to capture the majority of public employees whose work amounts to implementation of some policy they had no role in making. *See* Pet. 14.

Chapman states that sheriffs "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." Opp. 17 (quotations omitted). But McCaffrey had no role in setting the budget or goals for his position or his unit. There is nothing in the record that establishes that McCaffrey allocated resources in the performance of his duties. McCaffrey "effectuated" the sheriff's resource allocations in the same sense that every deputy did – he worked within the agency shaped by those allocations. It is a gross

distortion of *Elrod-Branti* to claim that McCaffrey, near the bottom of the chain-of-command (Pet. 3-4), had any sort of partisan policy role that should cost him his First Amendment rights.

Chapman points to decisions of the Fourth Circuit and other circuits which distinguish between deputies engaged in "street" law enforcement and those engaged in the management of jails, concluding that only the former can be policymakers. Opp. 11, 24. But there is no logical or record support for the proposition that one group is responsible for implementing a sheriff's policies, but the other is not. Sheriffs commonly campaign on issues concerning the operation of jails and the matters of public safety that entails. In some local jurisdictions, an *elected* sheriff's responsibilities are limited to the operation of jails, courtroom security, service of process, transport of prisoners, and related functions. For example, the mission of the Richmond Sheriff's Office is "[t]o maintain a secure jail and a safe court system . . . to preserve public safety . . . [and] to lower recidivism by providing faith-based and community-based programming that empower returning citizens to become productive members of society." Richmond City Sheriff's Office: *Our Mission*, www.richmondgov.com/Sheriff/index.aspx. While perhaps not as apparently exciting as catching the bad guys in the first place, such necessary and practical functions are important aspects of law enforcement, and certainly are not more "ministerial" than other law enforcement duties.

Neither the Fourth Circuit nor Chapman have explained how political ideology is relevant to the discretion exercised by McCaffrey as a major crimes lead investigator. Neither a "special role," as the Fourth Circuit would have it, Pet. 15a, nor having "substantial autonomy and discretion," as Chapman argues, Opp. 16, identifies a partisan character to the job that can trigger the *Elrod-Branti* exception. A deputy sheriff, or any public employee, can have a "special role" without needing to be a Republican or a Democrat to fulfill it. Everything that is "special" does not implicate partisan politics. Likewise, the exercise of discretion is surely not an inherently partisan undertaking. Such reasoning is wholly untethered to the tight constraints set out in *Elrod-Branti*.

b. Both the Fourth Circuit and Chapman have turned the *Elrod-Branti* exception into a blunt instrument to punish public employees who would "obstruct the effective implementation of the sheriff's policies and priorities." Opp. 16. *See also* Pet. 9a. But in this Court's conception, *Elrod-Branti* does not mandate punishment at all. The fact that a speechwriter for a Democratic governor might be replaced if a Republican is elected, or *vice versa*, simply reflects the different political beliefs of the parties, not any wrongdoing by the speechwriter. *See Branti*, 445 U.S. at 518. Employees who do what the Fourth Circuit and Chapman fear – obstruct the effective execution of policies set by elected officials – are guilty of insubordination, and can readily be dismissed on that ground. *Elrod*, 427 U.S. at 366 (recognizing "[t]he lack of any justification for

patronage dismissals as a means of furthering government effectiveness and efficiency" because "employees may always be discharged for good cause, such as insubordination or poor job performance"). *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.").

The expansion of the *Elrod-Branti* exception under the reasoning of the Fourth Circuit and Chapman would allow politicians to summarily dismiss most public employees for political disloyalty without having to establish any actual wrongdoing or poor job performance by them. That ominous prospect clearly calls for this Court's review to draw the *Elrod-Branti* analysis by the lower courts back to the far narrower exception to the First Amendment that this Court has established.

II. Conflicts among the circuits have left the law governing the *Elrod-Branti* limit on First Amendment freedoms in disarray.

Chapman argues that we "overstate" the disarray in the application of *Elrod-Branti*, Opp. 21, but in doing so Chapman simply disregards the statements of circuit courts themselves that the jurisprudence of the *Elrod-Branti* exception is in disarray, *e.g.*, *Kolman v. Sheahan*, 31 F.3d 429, 433-34 (7th Cir. 1994); *Cope v. Heltsley*, 128 F.3d 452, 461 (6th Cir. 1997), and that the circuit courts "have adopted sharply conflicting views"

on the subject. *Underwood v. Harkins*, 698 F.3d 1335, 1347 (11th Cir. 2012) (Martin, J., dissenting).

While Chapman claims that "the petition does not identify a genuine conflict between circuit courts that warrants review where this case would serve as an appropriate vehicle," Opp. 14, his authority for that argument includes decisions that acknowledge that conflict. *Id.* at 21-25. *See Rutan*, 497 U.S. at 111-12 (Scalia, J., dissenting); *Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) ("Despite the Court's guidance, lower courts have issued 'conflicting and confusing' opinions."); and *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991) (Law "is unsettled" as to whether partisan political affiliation is a proper job requirement for deputy sheriffs.).

The disarray in the application of the *Elrod-Branti* exception is widespread and continuing. Decisions in conflict with the decision below include *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 271-72 (3d Cir. 2007); *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997); and *Horton v. Taylor*, 767 F.2d 471, 476-81 (8th Cir. 1985).

Chapman attempts to distinguish *Galli* on the facts, Opp. 22-23, but he fails to acknowledge that the public employee in *Galli* supervised others, assisted in preparing the agency budget, and communicated with other government officials and the public. Unlike the categorical reasoning by which the Fourth Circuit here affirmed the district court's dismissal on the pleadings, the *Galli* Court held that – even with the supervisory

role of the employee at issue – there was a material fact in dispute regarding whether that public employee had any "meaningful input into the decisionmaking concerning the nature and scope of a major program." 490 F.3d at 271-72. Chapman cannot assert that McCaffrey had any such input into the decisionmaking process regarding any major program because Chapman structured the Loudoun County Sheriff's Office ("LCSO") so that a homicide detective like McCaffrey could not have such input. Pet. 2-4.

The conflict between the decision below and *Horton* is even more pronounced. The Eighth Circuit relied heavily (767 F.2d at 476-81) upon the Fourth Circuit's reasoning in *Jones v. Dodson*, 727 F.2d 1329 (1984), a decision overruled by the Fourth Circuit in *Jenkins*, 119 F.3d at 1164. *Jenkins* is the driving precedent for the Fourth Circuit's application of the *Elrod-Branti* exception here. Pet. 10a-19a.

Chapman contends that the differences in outcome in circuit court decisions applying the *Elrod-Branti* exception are due entirely to differences from state to state in the statutes and common law establishing the relationship between sheriffs and deputies. Opp. 24. This ignores the plain differences in the courts' applications of legal standards related to the *Elrod-Branti* exception. *See*, *e.g.*, *Hall*, 128 F.3d at 429 (Deputy sheriffs "on patrol" are not policymakers, contrary to the decision below.).

The most striking flaw in this argument is that the specific facts relevant to deputies in the LCSO – which

Chapman (and the Fourth Circuit) ignores – lead to a conclusion in favor of McCaffrey and against the Fourth Circuit's decision. Pursuant to his statutory authority and his Cooperative Agreement with Loudoun County (to get essential funding for the LCSO), Chapman issued General Orders and adopted the Loudoun County Human Resources Manual and provisions of the Virginia Code so as to guarantee the First Amendment rights of a deputy like McCaffrey, Pet. 2-6, rights Chapman now claims he can violate with impunity.

III. The Fourth Circuit's opinion conflicts with *Pickering-Connick*.

This Court's *Pickering-Connick* balancing test is designed to resolve the conflicts that can occur between a public employee's *free speech* rights and the interest of the government in efficient operations, while the *Elrod-Branti* exception concerns the limits on the *free association* rights of a narrow class of public employees based on their partisan role in government. *See Pickering v. Bd. of Ed.*, 391 U.S. 563, 573 (1968); *Elrod*, 427 U.S. at 357; Pet. 7a. Thus, *Elrod-Branti* and *Pickering-Connick* are conceptually independent and adjudicate distinct First Amendment interests.

a. The Fourth Circuit rejected McCaffrey's free speech claim, concluding that once it had determined that McCaffrey was a policymaker, his free speech rights were not violated when he was terminated for political disloyalty. Pet. 21a. The Fourth Circuit cited no authority from this Court to justify holding that a public employee is "disloyal," and so can be terminated,

simply when, with no disruption of his agency, he participates in the electoral process to replace a corrupt superior.

This Court has never endorsed such an analysis, noting to the contrary that those within an agency are best positioned to learn of and report official misconduct, and should be encouraged to make such reports. *Lane v. Franks*, 573 U.S. 228, 236 (2014) ("There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are often in the best position to know what ails the agencies for which they work.' *Waters v. Churchill*, 511 U.S. 661, 674 (1994)."); *Pickering*, 391 U.S. at 572, 574 ("[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."). The Fourth Circuit's notion that their characterization of McCaffrey as a policymaker automatically trumps any serious consideration of the value of McCaffrey's anti-corruption expression (Pet. 21a) is clearly at war with this Court's solicitude for public employees' free speech rights.

Whether a public employee is truly a major policymaker can be considered in the *Pickering-Connick* balancing, but which way that fact cuts is far from clear. Such a policymaker may be in a unique position to learn of serious corruption, making protection of such disclosure all the more important. What cannot be said, as the Fourth Circuit and Chapman do, is that no protection can be given to such a disclosure in any circumstance. If allowed to stand, the Fourth Circuit's

decision would defeat the disclosure of corruption from the best-positioned sources.

b. Contrary to his claim of McCaffrey's "political mudslinging" (Opp. 27), Chapman argues that this case does not involve speech because McCaffrey was not a true whistleblower and did not complain publicly. Opp. 26. The First Amendment's protections are not limited to formal whistleblowing, but protect all expressive activity by citizens regarding matters of public concern. *Connick v. Myers*, 461 U.S. 138, 148 (1983) (All expression that "seeks to bring to light actual or potential wrongdoing or breach of public trust" is covered by the free speech clause.). McCaffrey's expressive activity, including placing a sign in support of Chapman's opponent, participating as a delegate in opposition to Chapman's nomination, and advising the Board of the Loudoun chapter of the Virginia Police Benevolent Association ("VPBA") that decided to endorse no candidate for sheriff in the 2015 general election, constitutes protected speech. *See*, *e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 54-57 (1994) (recognizing "residential signs [as] an unusually cheap and convenient form of communication"); *Bland v. Roberts*, 730 F.3d 368, 384-87 (4th Cir. 2013) (posting a "like" on Facebook and stating support for a sheriff's opponent is expression akin to "displaying a political sign in one's front yard"). Even speech delivered in private is protected. *Connick*, 461 U.S. at 146 & n.8; *Givhan v. Western Line Consolid. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *Jackler v. Byrne*, 658 F.3d 225, 235 (2d Cir. 2011); *Anthoine v. No. Cent. Counties Consortium*, 605 F.3d 740, 749 (9th Cir. 2010).

IV. Conflicts among the circuits have left the law governing the *Pickering-Connick* balancing test in disarray.

Just as Chapman ignored what the lower courts themselves have stated about conflicting applications of the *Elrod-Branti* exception, he ignores the definitive statement by Judge Pryor in *Leslie v. Hancock Cnty. Bd. of Ed.*, 720 F.3d 1338, 1348-49 (11th Cir. 2013) concerning the conflict among the circuits regarding the application of the *Pickering-Connick* balancing test. Judge Pryor's statement describes the three conflicting applications of the *Pickering-Connick* balancing test by circuit courts, Pet. 21-22, and needs no elaboration.

Decisions of the Eighth Circuit in *Morgan v. Robinson*, 881 F.3d 646 (8th Cir. 2018) and the Tenth Circuit in *Prager v. LaFaver*, 180 F.3d 1185 (10th Cir. 1999) are directly in conflict with the Fourth Circuit's decision below, as we have explained. Pet. 22-23.

V. The Fourth Circuit has elevated unadulterated political loyalty to an elected official to an essential requirement for service as a public employee.

What is at stake here is whether a public employee can be compelled to vote for the boss on the pain of being fired. McCaffrey was excellent at his job; enjoyed outstanding evaluations; and expressed his concern over Chapman's corruption in the most measured, nondisruptive way, through his vote, a yard sign, and advice to the VPBA. Pet. 24-25. Such facts make clear

that the Fourth Circuit's decision and Chapman's arguments elevate unadulterated political loyalty to an elected sheriff, come what may, to an essential requirement for service in law enforcement as a deputy sheriff. *See*, *e.g.*, Pet. 21a; Pet. 29. Nothing could be more offensive to the First Amendment principles at work in *Elrod-Branti* and *Pickering-Connick*. As the dissent noted below, Pet. 41a n.4, the Fourth Circuit tried to obscure that stark reality by "inventing" facts, a move copied by Chapman.

Chapman contends that a deputy like McCaffrey manages LCSO resources at his discretion, Opp. 15, 19, has the "independence and authority" to get support from other agencies, *id.* 19, and officially represents Chapman in the community. *Id*. 16, 19. Offering no citations, Chapman claims these attributes are "indicated in the complaint." *Id.* 15. There are no such "indications" in the complaint. To the contrary, LCSO deputies operate in a highly supervised structure with no discretion to manage agency resources or to represent the sheriff to the public. *See* Pet. 3-4, 86a-87a, 140a-178a.

The Fourth Circuit and Chapman ignore Chapman's critical exercise of his authority under VA. CODE §15.2-1600(B) to prescribe the conditions of employment of LCSO deputies, which include guarantees of their rights to political activity that preclude dismissal simply for the "political disloyalty" championed by the Fourth Circuit and Chapman. These guarantees are found not only in the General Orders but in the Loudoun County personnel regime, and related

Virginia Code provisions, that Chapman adopted in order to secure 75% of the LCSO's funding from Loudoun County.[1] *See* Pet. 2-6, 80a-86a, 137a-139a, 176a-178a.

At bottom, the Fourth Circuit's decision dramatically diminishes the First Amendment rights of deputy sheriffs as understood by this Court and contributes an analysis to the jurisprudential disarray governing *Elrod-Branti* and *Pickering-Connick* that can only corrode the First Amendment rights of other public employees.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

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Respectfully submitted,

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[1] Clearly what Chapman bargained for was the lion's share of the LCSO's funding, far more than the "supplemental compensation" described by Chapman. Opp. 3.