No. 19-726

In The
Supreme Court of the United States

MALLORY JONES and TROY A. MOSES,

Petitioners,

vs.

RAMONE LAMKIN, individually and in his official capacity as Marshal of the Civil and Magistrate Court of Richmond County, Georgia and AUGUSTA, GEORGIA,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS MALLORY JONES AND TROY A. MOSES

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS MALLORY JONES AND TROY A. MOSES

Now comes the National Fraternal Order of Police ("FOP"), by and through the undersigned counsel, and pursuant to Supreme Court Rule 37.2(b) respectfully moves this Court for leave to file the attached *amicus* brief in support of Petitioners. The FOP timely notified the parties of its intention to submit its *amicus* brief more than ten (10) days prior to filing. It sought consent to file its *amicus* brief from the counsel of record for all parties pursuant to Supreme Court Rule 37.2(a). This Motion is necessary as Respondent Ramone Lamkin withheld consent and Respondent Augusta, Georgia, has not responded to the FOP's request for consent. Petitioners granted the FOP written consent to file its *amicus* brief as required by Supreme Court Rule 37.2(a).

The National FOP is the world's largest organization of sworn law enforcement officers, with more than 350,000 members in more than 2,100 state and local lodges. The FOP is the voice of those individuals we ask to protect our constitutional rights and serve our communities. Law enforcement personnel occupy a unique niche within the realm of public employment. The FOP offers their service as *amicus curiae* when important law enforcement and public safety interests are at stake, as in this case.

The members of the FOP have always recognized that it is their duty as public servants, first and foremost, to protect and serve 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 FOP is well-suited to provide its perspective on the First Amendment protections afforded to law enforcement officers.

The Eleventh Circuit's ruling erodes the First Amendment rights of the very individuals we ask to uphold our own constitutionally protected rights. As it stands, those First Amendment rights are contingent upon the geographic region the officer may serve. This case presents this Court with the opportunity to declare what should be a universal understanding—that political affiliation is not required for good policing. By highlighting the incompatibility of the *Elrod-Branti* standard applied to law enforcement personnel, the FOP requests this Court instead apply the framework it laid out in *Garcetti* as the appropriate vehicle to evaluate the contours of the First Amendment and police officers.

Accordingly, the FOP respectfully requests that this Honorable Court grant its Motion for Leave to file an *amicus* brief in support of the Petitioners and that the Court grant the Petitioners' Writ of Certiorari. The

FOP's *amicus* brief is filed simultaneously herewith as required by Supreme Court Rule 37.2(b).

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Fraternal Order of Police ("FOP") 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 FOP 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. The FOP offers their service as *amicus curiae* when important police and public safety interests are at stake, as in this case.

A recent survey conducted by the Police Executive Research Forum reported a 63% decrease in applications to become a police officer. Luke Barr, *US police agencies having trouble hiring, keeping officers, according to new survey*, ABC News (Sept. 17, 2019 4:01 AM), https://abcnews.go.com/Politics/us-police-agencies-trouble-hiring-keeping-officers-survey/story?id=65643752. Indeed, police departments across the country are amidst a

[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. 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 has consented in writing to the filing of this Brief. Respondent Ramone Lamkin withheld consent and Respondent Augusta, Georgia, has not responded to the FOP's request for consent to file. Accordingly, the FOP has prepared a Motion for Leave to be filed simultaneously. All parties received notice of the FOP's intention to file an *amicus* brief at least ten (10) days prior to the deadline to file the Brief.

decrease in applications, early exits, and higher rates of retirement. *Id.* Department troubles can certainly be attributed, in part, to recent trends in police-public tension and increased complexity in the nature of policing such as cyber crimes or handling an individual that is mentally unstable or overdosing on drugs. *Id.* However, the ruling from the Eleventh Circuit will only serve to exacerbate the staffing woes experienced by police departments large and small. The reasoning is simple. Dissolving the First Amendment rights of police officers discourages prospective applicants and serves as a catalyst for current law enforcement to consider alternative employment or retirement.

We note at the outset the uniqueness of the marshal position in Richmond County, Georgia. While the sheriff in each Georgia county is the chief law enforcement officer, the marshals are POST[2] certified, meaning their powers and duties include law enforcement, and it is undoubtedly a public employee. The question presented in this case involves First Amendment protections for public employees. Law enforcement—whether it be police officers, deputy sheriffs, or county marshals—are the quintessential public employees. FOP membership is made up of these employees.

The members of the FOP have always recognized that it is their duty as public servants, first and foremost, to protect and serve our communities. In

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[2] POST stands for "Peace Officer Standards and Training" and is the organization that trains and certifies all law enforcement officers in Georgia.

exchange for that commitment, law enforcement officers ask to be treated fairly by their governmental employers and receive protections under the law afforded to them by the United States Constitution. The FOP therefore has a substantial interest in the constitutional standards governing when a public employee deserves First Amendment protections.

The Eleventh Circuit's ruling perpetuates an unfortunate reality for today's police officers: The extent that they are protected by the First Amendment may depend on the geographic location they serve. The holding presents not only as a detriment to law enforcement, but also the communities they serve. Officers with years of acquired skills, knowledge, and experience may be removed from their community for supporting the wrong political party or candidate.

It is with these concerns and interests in mind that the FOP and its membership respectfully request to be heard.

SUMMARY OF ARGUMENT

"To protect and to serve" is a motto adopted by many police departments, both large and small, across the country.[3] It is not an expression conditioned upon allegiance to a particular political group, party, or candidate. Indeed, police officers enforce laws not based upon subjective partisan views and values, but objective, known policies and social axioms.

The general rule is that public employees cannot be fired solely for the reason that they were not affiliated with a particular political party or candidate. *Heffernan v. City of Paterson, N.J.*, 136 S.Ct. 1412 (2016). The *Elrod-Branti* standard is an exception to that general rule. Where political affiliation is an appropriate requirement for the effective performance of the public office involved, an employee may be terminated for supporting the political opponent of the elected office he or she serves. While that is a well-defined principle in this Court's jurisprudence, its application to law enforcement specifically is unpredictable across the lower courts creating problems for FOP members, law enforcement personnel, and departments across the country.

This Brief will highlight the inconsistency in *Elrod-Branti* as it applies to law enforcement. It will identify the trouble a department or trial court may have in analyzing law enforcement positions and duties, and why such an analysis is wholly irrelevant to good

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[3] *E.g.*, Los Angeles Police Department, The Origin of the LAPD Motto, http://www.lapdonline.org/inside_the_lapd/content_basic_view/1128 (last visited Jan. 6, 2020).

policing. *Amicus* in no way advocates for a wholesale overruling of this Court's *Elrod-Branti* jurisprudence, but merely submits it is perhaps an inappropriate standard to apply to law enforcement. In turn, *amicus* submits that the contours of law enforcement First Amendment rights will not go unchecked because there are internal measures and a legal framework in place.

Law enforcement risk their lives every day to enforce the laws of the United States and protect the communities where we live, work, and volunteer. They should be entitled to protection under the very laws they are sworn to uphold. The FOP, in support of Petitioners, asks that this Court reverse a ruling that deprives law enforcement of rights they bravely protect for others.

ARGUMENT

I. POLICE OFFICERS' FIRST AMENDMENT RIGHTS MUST NOT BE DEPENDENT UPON THE GEOGRAPHIC LOCATION IN WHICH THEY SERVE.

Many of the 350,000 FOP members serve in police departments across the country. They come from diverse backgrounds, operate in various environments, and offer unique perspectives. Yet, law enforcement remains united under a singular cause: promoting and ensuring the safety of the public. However, those members that serve the citizens of North Carolina, Alabama, or Illinois are treated differently than those

members that protect the citizens of Tennessee, California, and Pennsylvania.

A. The circuits are split causing law enforcement personnel to be subject to partisan dismissal in certain geographic locations while not in others.

The Eleventh Circuit's decision follows its previous holding in *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) and aligns it with the Fourth and Seventh Circuits in finding that law enforcement personnel (deputy sheriffs in each case) are subject to partisan dismissal.

- In *Terry*, a newly elected county sheriff refused to reappoint or rehire any of his predecessors' employees. *Terry*, 866 F.2d at 377. The plaintiffs were deputy sheriffs, clerks, investigators, dispatchers, jailers, and process servers that served under the former sheriff in Lawrence County, Alabama. *Id.* at 374. The Eleventh Circuit determined under the *Elrod-Branti* standard, "loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff." *Id.* at 377. The court stated that the deputy sheriff is the "alter ego" of the sheriff and held that there is no less restrictive means for meeting the needs of public service than for the sheriff to decline to

reinstate those deputies that did not support him. *Id.* With respect to the clerks, investigators, dispatchers, jailers, and process servers, the court found "the limited and defined roles these five positions tend to plan do not support the need for political loyalty to the individual sheriff." *Id.* at 378. Accordingly, *those* plaintiffs could maintain a cause of action against the sheriff for violation of their rights.

- In *Jenkins*, the elected sheriff of Buncombe County, North Carolina dismissed several deputy sheriffs. *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997). The deputies asserted claims, in part, for violations of their First Amendment rights, and alleged that they were dismissed for failing to support the elected sheriff's election bid, for supporting other candidates, and for failing to associate themselves politically with the elected sheriff's campaign. *Id.* at 1158. The Fourth Circuit stated that the district courts are to examine the specific position at issue and if the position resembles a policymaker, a communicator, or someone privy to confidential information, then loyalty to the sheriff is an appropriate requirement for the job. *Id.* at 1162. In that case, the deputies' claims were dismissed because the deputies' positions as law enforcement officers required loyalty to the sheriff and the deputies actively campaigned on behalf of the elected sheriff's opponents. *Id.* at 1164-65. The court limited its holding

to "those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff." *Id.* at 1165.

- In *Upton*, a probationary deputy sheriff in Kankakee County, Illinois was terminated by the elected sheriff, a Democrat. *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991). The deputy alleged that his termination resulted from his failure to support the elected sheriff during the election. *Id.* at 1210. The deputy personally supported the incumbent Republican and displayed a bumper sticker on his car. *Id.* The Seventh Circuit concluded that political considerations can be an appropriate requirement for the effective performance of a deputy sheriff's duties because they operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies. *Id.* at 1218.

The Third, Sixth, and Ninth Circuits have come to the opposite conclusion.

- In *Burns*, the Third Circuit held that the Cambria County, Pennsylvania deputy sheriffs did not enjoy significant autonomy or discretion in their jobs or that their political activities are relevant to their duties. *Burns v. County of Cambria, Pa.*, 971 F.2d 1015 (3d Cir. 1992). The Third Circuit stated that it could not say as a matter of law that party affiliation

would further the effective performance of the three tasks deputy sheriffs in Cambria County primarily perform: serving process, transporting prisoners, and providing security for courtrooms. *Id.* at 1022. Accordingly, dismissal of a deputy sheriff for failing to support the elected sheriff or work in his political campaign did not fall under the political dismissals recognized in *Elrod* and *Branti*.

- In *Hall*, the Sixth Circuit differentiated between the chief deputy and the deputy sheriff. *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997). It held that political affiliation was an appropriate requirement for effective performance of chief deputy position but *not* appropriate for position of deputy sheriff. *Id.* at 425-26. Terminated deputy sheriffs of Cumberland County, Tennessee alleged violations, in part, of their First Amendment rights, for supporting campaign opponents of the elected sheriff. *Id.* at 421. The sheriff gave alternative reasons for firing each of the plaintiffs and denied that he fired any for supporting political opponents. *Id.* The Sixth Circuit concluded that "[t]he record does not show that Cumberland County deputy sheriffs had the types of specific duties or responsibilities, or the amount of discretion or policymaking authority, that would make political affiliation an appropriate requirement for employment." *Id.* The duties of the deputy sheriffs in that case included "patrol[ing] the roads of the

county, enforcing the laws of Cumberland County and the State of Tennessee." *Id.* at 429.

- In *DiRuzza*, the Ninth Circuit rejected any per se rule that political affiliation is an appropriate job requirement for deputy sheriffs and therefore, they are subject to partisan dismissal. *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1309 (9th Cir. 2000). The deputy in that case alleged that she was not resworn as a deputy after the sheriff's election because she supported the opponent of the elected sheriff. *Id.* at 1307. The Ninth Circuit held that it is possible that some sheriffs in California may be policymakers, but it is necessary to analyze the individual deputy's actual duties before making any determination. *Id.* at 1312. The Ninth Circuit remanded the case to the district court and instructed the lower court to look at factors such as whether the deputy had vague or broad responsibilities, whether she was paid an unusually high salary, whether she had the power to control others or the authority to speak in the name of the department, whether the public perceived that she had such authority, and whether she created or substantially influenced the policy of the sheriff's department. *Id.* at 1311.

It is worth noting that the Ninth Circuit in *DiRuzza* rejected the district court's determination that the deputy sheriff was a policymaker and

therefore subject to partisan dismissal because, under state law, "a deputy sheriff exercises the same general authority as the sheriff." *Id.* at 1307 (analyzing Cal. Gov't Code § 24100). In explaining its holding, the Ninth Circuit cited this Court's decision in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). In *Umbehr*, this Court rejected any rule denying independent contractors protection for the exercise of their First Amendment rights because it "would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services. . . ." *Id.* at 678-79. Here, the lower court's reliance on Georgia state laws defining the duties and powers of the deputy marshal leaves Petitioners' First Amendment rights unduly dependent on state law definitions. Applied broadly, First Amendment rights of law enforcement personnel across the country are at the mercy of the state legislatures.

Such realities further spotlight the fracture among the circuit courts and the need for this Court to take up review. In this matter, the Eleventh Circuit went to great lengths to examine the position of marshal and deputy marshal under Georgia law. Ultimately, the Eleventh Circuit found that under Georgia law, a deputy marshal has the same powers and duties of the marshal and is therefore the "alter ego." *Jones v. Lamkin*, 781 Fed.Appx. 865 (11th Cir. 2019). The Fourth Circuit in *McCaffrey v. Chapman*, 921 F.3d 159, 168 (4th Cir. 2019)—analyzing Virginia law as it

applied to deputy sheriffs—came to the same conclusion.

Law enforcement, whether it be deputy marshals or deputy sheriffs, operate under a common purpose: to protect and serve. That common purpose is true in every state and every local police department from east coast to west coast. It does not change depending on how the state statute defines the scope of their authority.

Yet, despite serving a common purpose, under the current legal landscape their First Amendment rights fluctuate depending upon the geographic region in which they protect and serve. This case presents this Court with an occasion to rectify such differing treatments of those we ask to bravely protect our constitutional rights and patrol our communities.

B. The *Elrod-Branti* analysis does not account for the practical realities of police departments or procedural limitations of trial courts.

A proper *Elrod-Branti* analysis requires an examination that is position-specific with respect to the public office at issue. In *Elrod*, this Court noted, "[t]he nature of the responsibilities is critical." *Elrod v. Burns*, 427 U.S. 367 (1976). It is furthermore the employer's responsibility to "demonstrate that party affiliation is an appropriate job requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Thus, the

public employer must show, based upon the employee's responsibilities, that party affiliation should be considered for the employee to effectively perform those responsibilities.

As applied to law enforcement, that analysis is problematic for two reasons. First, police officers that serve in smaller departments in less populous localities may have the *exact same duties* as officers that serve in large, metropolitan cities; however, by virtue of his or her location, the officer in the smaller department will likely be closer to the elected officer. Accordingly, the political affiliation of the officer in the smaller department may factor more heavily into a trial court's *Elrod-Branti* analysis. Thus, a position-specific analysis can still result in officers with same or similar duties receiving *different* First Amendment protections despite a shared commitment among departments both large and small to protect and serve.

That particular point is important to the FOP's interest in this matter. Some FOP members belong to police departments comprised of only a few members, while others serve departments covering the country's largest metropolitan cities. It is critical that these members receive equal protection under the First Amendment regardless of their locality. According to the U.S. Department of Labor, police officers 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 governments, 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 those in the smallest departments will be increasingly vulnerable to the whim of local politics if the Eleventh Circuit's decision is left to stand.

Second, the detailed, position-specific and fact-based analysis of the particular duties of each law enforcement officer under *Elrod-Branti* is not only a monumental task for a local police department on the front end, but an exceedingly difficult and time consuming undertaking for a trial court on the back end. The trial court is always required to rely on the record. But what if the issue of a partisan dismissal is before the Court on a motion to dismiss? *See*, *e.g.*, *Jenkins*, 119 F.3d at 1166 (Motz, J., dissenting) (noting that the majority's "all-encompassing holding" was made without any inquiry into the actual job duties of the deputies because the record only consisted of the limited facts pled in the complaint). In that scenario, the record will be undeveloped beyond the initial allegations contained in the complaint. If the complaint is "skeletal", it will likely assert very little, if *any*, information on the tasks or duties performed by the law enforcement officer.

A trial court cannot perform a proper *Elrod-Branti* analysis at the motion to dismiss stage. Yet, in many cases it is asked to do so, and courts continue to dismiss law enforcement officers' First Amendment claims at this stage—including, notably, the seminal Eleventh

Circuit case relied upon heavily by the lower court in this matter. *See*, *e.g.*, *Terry*, 866 F.2d at 380 (Fay, J., concurring) (noting that the Court could not make a determination as to the other plaintiffs due to "the limited record before [it]"; however, it was able to determine that a party affiliation was an essential requirement for deputy sheriffs).

II. POLITICAL AFFILIATION IS NOT REQUIRED FOR THE EFFECTIVE PERFORMANCE OF POLICING.

In his dissent in *Branti*, Justice Powell predicted the problems and confusion federal courts would face when attempting to apply *Elrod* and *Branti* principles:

> The standard articulated by the court [in *Branti*] is framed in vague and sweeping language. Elected and appointed officials at all levels . . . no longer will know when political affiliation is an appropriate consideration in filling a position. *Branti*, 445 U.S. at 524 (Powell, J., dissenting).

Justice Scalia reiterated the concerns expressed by his colleague in his dissent in *Rutan*:

> [I]nterpretations of *Branti* [within the federal circuits] are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) (Scalia, J., dissenting). Thus, this Court recognized at the outset of its jurisprudence in this line of cases that it may have to revisit certain factual contexts to provide clarity. This case presents this Court with a definite opportunity to clear up some of the confusion and create logical policy applicable to law enforcement, while not completely overruling the established principles expounded in *Elrod* and *Branti*. The political affiliation of law enforcement personnel—police officers in particular—should not be considered as a requirement in the performance of duties.

A. Good policing is not contingent on partisan values.

There is no partisan method to conduct a traffic stop and no political practice to arrest a murderer. 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 make lawful arrests are inherently nonpartisan ventures. Subjecting law enforcement—as several circuit courts have—to *any* analysis that considers whether or not "party affiliation is an appropriate job requirement" politicizes law enforcement. It must end.

This case presents this Court with the right set of circumstances to end the "practice" of replacing employees of a sheriff's office or police department with members of the elected official's party. *See Elrod*, 427

U.S. at 351 (noting that "[i]t has been a practice of the Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace non-civil-service employees of the Sheriffs' Office with members of his own party. . . ."). This Court noted in *Elrod* that "patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government." *Id.* at 369-70. The "impediment" and detrimental effect of patronage dismissals of law enforcement officers to police departments and the communities they serve cannot be overstated.

The Eleventh Circuit's ruling in this case will render police departments less effective and erode the public's trust. The practical result is an established practice whereby department heads replace rank-and-file officers every time they support an opponent. As a consequence, officers with years of experience will be replaced by officers with less exposure to the communities they are charged with protecting.

Law enforcement officers' familiarity with the communities they serve is a crucial component of good policing. An officer that has served a particular community for years will be accustomed to the individuals, service providers, and private businesses that live and work in that community. Petitioners in this case are perfect examples. Jones and Moses had a combined thirty-plus years of experience serving the Richmond County community. *Jones v. Lamkin*, 781 Fed.Appx. 865, 867 (11th Cir. 2019). Jones "work[ed] with the community" and appeared for events as a

public speaker, while Moses was involved with community relations and made appearances at schools, nursing homes, and neighborhood associations. *Id.* These officers *knew* their community and by all accounts were outstanding officers. Their knowledge and experience simply cannot be replicated. Yet now, an officer who is less familiar with the community and less knowledgeable about specific cases, investigations, individuals, and businesses will be assigned in Richmond County. Such a result is a disservice to that department and community. That "practice" must be discouraged and discontinued.

B. There are government employees where political affiliation is an appropriate consideration.

Amicus in no way advocates that political affiliation is always an inappropriate consideration in the employment context. Rather, because of the direct effect on the community, such a practice should be abolished specifically in the context of law enforcement.

In *Branti*, this Court recognized that for certain employees, it is rather obvious that political affiliation is *not* an appropriate consideration: "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." *Branti*, 445 U.S. at 518. However, this Court noted that it is equally clear that certain positions require aligned

political affiliation. *Id.* For example, assistants to the Governor that help him or her write speeches, explain his or her views to the press, and communicate with the legislature must share the Governor's political beliefs and party commitments. *Id.*

Lower courts have provided additional examples of positions whereby political affiliation is an appropriate consideration. For example, the Sixth Circuit in *Balogh* stated that because of a trial judge's bailiff's confidential position, support of the judge's election opponent was grounds for the bailiff's dismissal. *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). In the Seventh Circuit, a city employee holding the second highest position in the city's water department could be dismissed as a result of political patronage. *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985). The Eleventh Circuit held a director of the city's social services agency could be terminated for failure to actively support the mayor in an election campaign, due to her policymaking position. *Ray v. City of Leeds*, 837 F.2d 1542 (11th Cir. 1988) ("[The Director] had the authority and discretion to deploy the resources available to her in order to address needs as she saw them. She set the policy of the Leeds Community Service Department, subject only to the authority of the mayor. . . .").

The bottom line is that *amicus* does not advocate for a complete overhaul of *Elrod-Branti*. In fact, it is not necessary. There are certain positions where political affiliation *is* appropriately considered, and the lower courts should have some flexibility in deciding how and when to make such a determination. However, *this case*

presents this Court with an occasion to make universal the understanding that law enforcement personnel must not be subject to such an evaluation. Furthermore, as discussed in the next Section, this Court already has a legal framework in place for courts to utilize in cases such as this.

III. THERE IS A LEGAL FRAMEWORK IN PLACE FOR EMPLOYERS AND COURTS TO EVALUATE THE CONTOURS OF THE FIRST AMENDMENT AND LAW ENFORCEMENT.

If this Court accepts Petitioners' Writ for Certiorari and concludes that party affiliation is not an appropriate consideration for job requirements of law enforcement officers, it does *not* follow that the appropriateness of the termination of a police officer will somehow become less certain. Disciplinary mechanisms are in place in every law enforcement department nationwide. Nor is it a signal that police officers' speech will go unchecked.

A. Under *Garcetti*, the First Amendment protects law enforcement when they speak as private citizens on matters of public concern.

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

That standard applies to all law enforcement personnel, including the deputy marshals petitioning this Court. Discussing its free speech jurisprudence, this 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 two-step inquiry to determine when public employees—in this case deputy marshals or law enforcement personnel—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. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968). That inquiry, notably, itself contains two questions: (1) Was the employee speaking as a citizen? (2) Was what the employee said a matter of public concern? If the speech is made pursuant to the employee's ordinary job 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) (citing *Garcetti*). Indeed, the touchstone of *Garcetti* is whether the public employee was making statements pursuant to his official duties. *Palardy v. Township of Millburn*, 906 F.3d 76, 83 (3d Cir. 2018). Here, Jones and Moses were not speaking pursuant to any official duties. Rather, they were

simply exercising a First Amendment right to be politically active and support a candidate of their choosing, on their own time.

Whether speech is a matter of public concern turns on the "content, form, and context" of the speech. *Lane*, 573 U.S. at 241 (citing *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). "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). No single factor is dispositive, and courts should evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. *Id.* at 454. Here, Moses' speech included wearing a campaign shirt, posting pictures on Facebook with the marshal's opponent, and asking family and friends to support the opponent. Jones' speech consisted of one Facebook post. Petitioners' speech qualifies as dealing with matters of political concern to the community of Richmond County, Georgia.

Under the second part to the *Garcetti* inquiry, if the employee indeed spoke as a citizen on a matter of public concern, then the government entity must have an adequate justification for treating the employee differently from any other member of the general public. *Garcetti*, 547 U.S. at 418. This is the *Pickering-Connick* balancing test. Courts must balance citizens' interest in commenting on matters of public concern and the

government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *See Connick*, 461 U.S. at 140.

Applying these principles here, Petitioners' interest in exercising their rights to express a political preference is not outweighed by any interest Richmond County may have in efficiently providing services via the marshal's office. Petitioners can support the candidacy of the elected official they serve under while performing their duties with integrity and discipline. Applied broadly, unlike other governmental offices, law enforcement personnel are not guided by the ever-changing political winds. Petitioners—like all FOP members and law enforcement personnel—operate under the impetus to protect and serve.

B. Police departments have internal policies and disciplinary measures in place to alleviate any concern that an officer may not carry out the expounded policies of the elected officer.

Police departments—or marshal's offices—have an unquestionable interest in implementing departmental policies, directives, and mandates that the rank-and-file officers are expected to follow. Subjecting the employees—police officers, deputies, detectives—to partisan dismissal therefore serves as an unnecessary check. It presupposes that subordinate officers will be *unable* to carry out the duties and policies that they have sworn to uphold merely because they disagree

with their elected supervisor. Any presupposition that an officer would disobey direct orders from his or her supervisor or department offends the notion of all law enforcement duty bound to uphold the law.

The employing department, more often than not, has policies in place to handle an employee that performs contrary to expected practices or who acts not in accordance with departmental positions. There are division directives, purposes, and procedures used to ensure employees are dutiful. For example, the City of Columbus Police Department's Division Directives provide:

> A. Sworn Personnel 1. Enforce and uphold the Constitution and laws of the United States of America, the State of Ohio, and the City of Columbus; the rules and regulations of the Division of Police; and the Oath of Office. 2. Protect life and property. 3. Preserve peace. 4. Obey all legal orders. 5. Use the Mission and Vision Statements, the Division of Police Code of Ethics, and the Core Values of the Division as a guide for the conduct of Division business. . . .

Columbus Police Division Directives, Rules of Conduct, Directive 7.02 at pg. 3. The City of Madison Police Department retains a "discipline matrix," which provides sanction categories for employees that violate the standard operating procedures (SOPs). For example, discipline is available for officers that fail to comply with SOPs and fail to "properly perform duties assigned" or "meet expectations of special initiatives." City of

Madison Police Department Standard Operating Procedure, Professional Standards and Internal Affairs Discipline Matrix, at pg. 2, cityofmadison.com/police/documents/sop/PSIAdiscMatrix.pdf.

Accordingly, law enforcement personnel that do not share the same political ideology as their supervisor will not be unchecked. Individuals that fail to uphold the standards, duties, or policies of their assigned office will be disciplined accordingly. And, when necessary, their actions can be evaluated under a well-defined legal framework that will ultimately decide when First Amendment rights may yield to the government's interests. *See supra* Section III.A.

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 law enforcement personnel in instances where their political ideology differs from their elected supervisor's would be tantamount to punishing officers for exercising their rights under the very laws they are sworn to uphold.

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

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