No. _____

In The
Supreme Court of the United States

DIANE SCOTT HADDOCK,

Petitioner,

v.

TARRANT COUNTY, TEXAS, PATRICIA BACA-BENNETT, KENNETH EARL NEWELL, JESUS NEVAREZ, JR., HONORABLE JUDITH WELLS, JEROME S. HENNIGAN, JAMES B. MUNFORD; ALEX KIM,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where public employees allege violations of First Amendment rights by their government employers, this Court has established the *Pickering*/*Connick* balancing test for free speech cases, extended *Pickering*/*Connick* to freedom of petition cases, and established the *Elrod*/*Branti* balancing test for political party affiliation cases. Although this Court has recognized constitutional freedoms of intimate and expressive association, the Court has yet to examine how far government employers may infringe on either, or articulate an appropriate strict scrutiny balancing test.

The questions presented are:

I. If multiple and distinct First or Fourteenth Amendment rights are involved—either collectively or as alternative factual theories—is each right analyzed separately under its own prescribed strict scrutiny balancing test, or are the rights conflated and evaluated with a single balancing test? If the rights are conflated, which test applies, what is the balancing test for intimate association, and how does it fit?

II. Where *Elrod*/*Branti* applies, are judicial employees such as associate judges policymakers or confidential employees as a matter of law, or are there factual scenarios in which they may not be?

QUESTIONS PRESENTED—Continued

III. When a municipality and state officials co-employ a worker in a position created, funded and co-administered by the municipality under a state statute, what minimum involvement in violations of that worker's constitutional rights is required to hold the municipality responsible under 42 U.S.C. §1983?

RELATED PROCEEDINGS

Diane Scott Haddock v. Tarrant County, Texas, Patricia Baca-Bennett, Kenneth Earl Newell, Jesus Nevarez, Jr., Honorable Judith Wells, Jerome S. Hennigan, James B. Munford, Alex Kim, No. 4:18-cv-00817-O (N.D. Tex., November 11, 2019).

Diane Scott Haddock v. Tarrant County, Texas, Patricia Baca-Bennett, Kenneth Earl Newell, Jesus Nevarez, Jr., Honorable Judith Wells, Jerome S. Hennigan, James B. Munford, Alex Kim, No. 19-11327 (5th Cir. February 1, 2021), opinion revised and petition for rehearing granted, petition for en banc review denied, May 18, 2021.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Diane Scott Haddock respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit below.

OPINIONS BELOW

The revised opinion of the United States Court of Appeals for the Fifth Circuit (Pet.App.3-19) is unreported and available at 852 Fed.Appx. 826. The withdrawn opinion of the United States Court of Appeals for the Fifth Circuit (Pet.App.20-42) is reported at 986 F.3d 893. The Order of the District Court for the Northern District of Texas (Pet.App.43-76) is available at 2019 WL 7944073. The Fifth Circuit's order granting rehearing but denying en banc review (Pet.App.77-78) is unreported.

JURISDICTION

The Fifth Circuit entered its withdrawn opinion and judgment on February 1, 2021 (Pet.App.20-42). On May 18, 2021, the Fifth Circuit issued a revised opinion (Pet.App.3-19) after granting petitioner's timely petition for rehearing and denying petitioner's timely petition for rehearing en banc (Pet.App.77-78). On March 19, 2020, this Court ordered the deadline

extended to file any petition for writ of certiorari due on or after that date to 150 days from the lower-court judgment, an order this Court rescinded only as to lower-court judgments dated on or after July 19, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

INTRODUCTION

This case presents an ideal vehicle for this Court to close gaps in its jurisprudence about the First Amendment rights of public employees. In several landmark decisions, this Court has authored or used scrutiny tests to guide lower courts in balancing the First Amendment rights of public employees against various justifications claimed by government employers to infringe on a specific right, but it has not explained how multiple First Amendment rights in the same case should be analyzed—separately or collectively as one right—or which test courts should apply.

For freedom of speech claims, this Court established in *Connick v. Myers*, 461 U.S. 138 (1983), the *Pickering*/*Connick* balancing test—a two-part inquiry for determining when discharging a public employee

because of the employee's speech violates the First Amendment. The threshold question is whether the employee's speech may be "fairly characterized as constituting speech on a matter of public concern." *Connick*, 461 U.S. at 146. If so, courts must then employ the balancing test outlined in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to determine whether the employee's free speech interests outweigh the government employer's interests in "promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568. This Court extended the *Pickering*/*Connick* balancing test to public employees' First Amendment rights to petition their government (by filing internal grievances with or suing their government employers to assert or clarify their rights) in *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397-98 (2011).

Regarding the First Amendment's freedom from political fealty or coerced belief, in *Branti v. Finkel*, 445 U.S. 507 (1980), this Court clarified its previous decision in *Elrod v. Burns*, 427 U.S. 347 (1976), to explain the constitutional limits on a government employer's power to consider a job candidate's political allegiance in what is now often called the *Elrod*/*Branti* inquiry or exception. Moving away from the "policymaker" and "confidential employee" labels suggested by *Elrod*'s plurality, the Court explained "the ultimate inquiry 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).

This Court has also recognized a right of association with two distinct components—an individual's right to associate with others in intimate relationships and a right to associate to engage in speech and other expressive conduct traditionally protected by the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The precise source of the intimate association right has not been authoritatively determined. In *Roberts*, the Court suggested the intimate association right is a component of personal liberty protected by the Due Process Clause [*see Roberts*, 468 U.S. 618-19], but this Court also cited the First Amendment in *City of Dallas v. Stranglin*, 490 U.S. 19, 23-24 (1989).

Whatever the intimate association right's source, this Court has yet to guide lower courts by stating an appropriate balancing test defining the limits of a government employer's use of employee's marital status (or the identity, speech or activity of the employee's spouse) as a requirement for public employment. Nor has this Court articulated how lower courts should analyze adverse employment decisions by government employers where the infringement on multiple First Amendment rights is alleged, either collectively or under alternative factual theories. The result is a gap in this Court's First Amendment jurisprudence that has left lower courts grappling with whether to analyze each First Amendment right separately, or which test to apply or how to apply it. Multiple splits in the circuit courts of appeals have emerged. This case's facts present an excellent

opportunity for this Court to resolve these issues, and the Court should grant this petition so its authoritative voice can be heard.

STATEMENT OF THE CASE

Petitioner Diane Haddock—an appointed associate family court judge and Tarrant County employee—sued her government employers under the First Amendment and was fired soon after. She alleged her termination occurred because of her husband's election speech and her refusal to silence him or publicly support the candidate he opposed (in violation of her freedom of intimate association and freedoms from compelled speech and political patronage under the First Amendment). Alternatively, she alleged her firing was in retaliation for suing to clarify and protect her First Amendment rights (an independent violation of her First Amendment freedom of petition).

I. Factual Background

Tarrant County family courts are presided over by seven elected district judges, who are assisted by a pool of seven appointed associate judges. Pet.App.4. In a system Tarrant County established under state statute, rather than each associate judge supporting one district judge, all seven associate judges serve all seven district judges. ROA.671-74. Since each of the seven associate judges has a separate working relationship with each of the seven district judges, Tarrant County's system creates forty-nine independent, interpersonal

working relationships between associate and district judges. ROA.671-74.

Haddock served Tarrant County as an associate judge for nearly twenty years. Pet.App.4. Because the Tarrant County family court associate judges each serve more than one district judge, Texas law requires that Tarrant County associate judges be appointed with the unanimous approval of the district judges; they can be removed, however, by a majority vote. TEX. FAM. CODE §§201.001(d), 204(b). Pet.App.4.

In 2016, Haddock and fellow associate judge James Munford showed interest in running for a district judge position. Pet.App.4. It was believed they would run against one another for the 322nd district seat. Pet.App.4. Around the same time, the grandparents of a child who died while in her mother's custody—after Haddock had signed the order giving the mother custody—circulated claims that Haddock had mishandled the case, alleging that she had taken a bribe. Pet.App.4-5. This allegation was false, and the Fifth Circuit acknowledged there was no evidence any such incident had ever occurred. ROA.645-46; Pet.App.5. Munford's wife, however, repeated the false "bribe" allegation publicly to gain political advantage for her husband. Pet.App.5; ROA.645-46. Although Munford and his wife vowed to retract her accusation, neither did. ROA.646. Haddock later decided not to run. Pet.App.5.

As the campaign continued, Haddock's husband associated with various other groups and individuals,

some of whom became convinced Munford had no business being a family court judge and actively campaigned against him. Pet.App.5. One such political group accused Munford of being a "RINO" (Republican In Name Only), violating the Second Amendment by signing protective orders requiring litigants to surrender their firearms without adequate evidence, physically abusing and sexually assaulting his first wife, and terrifying his current wife by threatening her and a male friend of hers with a gun. Pet.App.5. For her own part, Haddock did not engage in any political activity. Pet.App.5. She endorsed no candidate, made no speech, had never met, and did not know, the blogger associated with the attacks described above. ROA.646; ROA.660.

District Judge Patricia Baca-Bennett, who supported Munford's candidacy, blamed Haddock's husband for the political attacks on Munford and sought to put a stop to this opposition by demanding that Haddock publicly support Munford (as Baca-Bennett was already doing on social media and elsewhere) and that Haddock "get her husband under control." Pet.App.5; ROA.646-47. Because the Texas Canons of Judicial Conduct—which apply to associate judges and district judges—expressly prohibit judges from publicly endorsing other candidates for political office but allow judges' spouses to do so, Haddock refused to do either. Pet.App.5. *See* Texas Code of Judicial Conduct, Canon 2B ("A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others . . . "); Canon 5(3) ("A judge . . . shall not authorize the

public use of his or her name endorsing another candidate for any public office . . . "); *see also* Texas Judicial Ethics Opinion 170 ("The Code does not attempt to regulate the conduct of a judge's spouse, so this conduct [by the spouse] would not be prohibited.").

Baca-Bennett then subjected Haddock to badgering, threats, back-biting, undermining and maligning, and a campaign to orchestrate the termination of Haddock's employment. Pet.App.5. Baca-Bennett further sought to intimidate Haddock's husband by reminding him "who Diane works for." Pet.App.5-6. Baca-Bennett spread rumors about Haddock in her courtroom, at the courthouse, and on social media, including a false rumor that Haddock resigned, which undermined Haddock's authority as a judge. Pet.App.5-6; ROA.655-59; ROA.786-91; ROA.754-61.

During the campaign, Haddock learned that the district judge for District 233 (the judicial district for which Haddock's associate judge position was also named) was retiring. Pet.App.6; ROA.658. Kenneth Newell won the Republican primary for that seat (Newell then ran unopposed in the general election, meaning he knew before the election he would become District 233's district judge). Pet.App.6. Newell spoke with Haddock about her future as the District 233 associate judge. Pet.App.6. He acknowledged Haddock was qualified but stated he had "not made a decision about what to do with" Haddock yet because of Baca-Bennett's public crusade against Haddock. Pet.App.6; ROA.658-59.

Tarrant County's written policies claim its employees cannot be forced by other employees, elected officials, or those who regularly do business with the county to participate in public speech or political affiliation and are protected from discipline or termination for refusing. ROA.674-75; ROA.801. In response to Baca-Bennett's attacks, Haddock made unsuccessful complaints to Tarrant County's human resources department that Baca-Bennett was violating her First Amendment rights; Haddock then escalated her complaints directly to Tarrant County's highest executive—County Judge Glen Whitley. Pet.App. 6; ROA.659; ROA.679-81. When this escalation failed, Haddock sued in the U.S. District Court for the Northern District of Texas, which had jurisdiction under 28 U.S.C. §§1331 and 1343. Haddock sued Baca-Bennett and Tarrant County under 42 U.S.C. §1983, alleging Baca-Bennett had subjected her to a hostile work environment in retaliation for Mr. Haddock's political activity and Haddock's own refusal to support Munford or silence Mr. Haddock, and that Tarrant County, among other claims, was deliberately indifferent to it and intentionally subjected associate judges to lesser freedoms from political and speech coercion than its other employees—all of which she alleged were violations of her First Amendment rights. Pet.App. 6; ROA.674-82.

During the six months between the March 2018 primary and the filing of Haddock's First Amendment lawsuit in October 2018, not only was Newell undecided about Haddock, Baca-Bennett could not marshal enough votes among the district judges to have Haddock fired. ROA.534. Within days of Tarrant County's and

Baca-Bennett's being served with her lawsuit in October 2018, however, something changed. Without Haddock's knowledge, Tarrant County and the district judges removed Haddock from early drafts of the 2019 jury trial calendar. ROA.662. Fewer than ninety days later, Haddock was terminated as associate judge. Pet.App. 6. Haddock amended her complaint to address her termination, adding the District Judges in their official capacities as defendants, and demanding reinstatement or front pay in lieu thereof. Pet.App. 6. Haddock asserted her termination had occurred because of Mr. Haddock's political activity and Haddock's own refusal to support Munford or silence Mr. Haddock. Alternatively, she alleged she was fired in retaliation for having filed her lawsuit to enforce her First Amendment rights—itself a violation of Haddock's First Amendment freedom of petition. ROA.640; ROA.661-62; ROA.685-86.

II. Procedural Background

Among other claims, Haddock asserted in the district court that associate judges are not policymakers under Tarrant County's scheme. ROA.668-70. Haddock argued associate judges are not policymakers because, like district judges, they swear an oath and must determine the law and facts, and apply the law to the facts. ROA.667-68. When presiding over a case referred by a specific district judge, an associate judge will try to follow that judge's preferences and avoid reversal, as district judges follow appellate court precedents to avoid reversal. ROA.668. Associate judges have no employees, no budget, no authority over other

employees' work, time off, hiring, firing, or conditions of employment. ROA.668. Haddock also asserted that Tarrant County family court associate judges are not confidential employees. ROA.668-70. Each district judges' preferences are generally known among family law practitioners and hardly confidential. ROA.668. Under Tarrant County's unique "seven serving seven" structure, an associate judge simply cannot be in confidential relationships with all seven district judges that would either compromise her judicial independence or require her to engage in district judge's off-the-bench activities. ROA.668-70.

The district court recognized that Haddock made no claim for money damages against the district judges in their official capacities, and that the district judges did not contest her right to injunctive relief from constitutional violations under the Eleventh Amendment. Pet.App.55-56. Under FED.R.CIV.P. 12(b)(1), the district court nevertheless "dismissed" any damage claims against the district judges as barred by the Eleventh Amendment because district judges are state officials, the state would have been the real, substantial party in interest, and the State of Texas had not waived sovereign immunity. *See Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (cleaned up). Pet.App.6-7; Pet.App.56. Since Haddock had not brought damage claims against the district judges in their official capacities, Haddock did not appeal this ruling. Pet.App.6-7.

The district court also dismissed Haddock's claim for injunctive relief against the district judges under FED.R.CIV.P. 12(b)(6). Pet.App.7; Pet.App.64. Without addressing or hearing any evidence on the unique and

novel configuration of Tarrant County's family court associate judge system—seven associate judges serving seven district judges—the district court ruled Haddock's associate position involved both policymaking and confidential relationships with the district judges. Pet.App.7; Pet.App.64. Without addressing Haddock's freedom of speech, freedom from compelled speech, freedom of intimate association or freedom of petition claims separately, the district court held Haddock had failed to state a claim on which relief could be granted and dismissed all of Haddock's claims against the district judges under *Elrod/Branti*. Pet.App.7; Pet.App.64.

The district court dismissed all claims against Tarrant County under FED.R.CIV.P. 12(b)(6), holding Haddock had failed to allege an underlying constitutional violation, or to allege a county policy or policymaker that caused the alleged violation under *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). Pet.App.8; Pet.App.67; Pet.App.74. The district court dismissed all claims against Baca-Bennett individually under FED.R.CIV.P. 12(b)(6) based on qualified immunity. Pet.App.8; Pet.App.52. Haddock timely appealed. Pet.App.8.

The Fifth Circuit affirmed, holding initially that Haddock was both "a policymaker subject to the *Elrod/Branti* exception" and a "confidential employee." Pet.App.26; Pet.App.31. The Fifth Circuit ruled Haddock was therefore subject to a patronage dismissal under *Elrod/Branti*. Pet.App.21. Citing its own precedent, the Fifth Circuit rejected the need for any balancing test other than *Elrod/Branti* ("where the Government's interest in political loyalty is weighed against an employee's First Amendment interests, the

tests frequently merge."). Pet.App.25. The Fifth Circuit then ruled *Elrod/Branti* foreclosed Haddock's intimate association claim (the right not to be terminated because of her *husband*'s election speech), and her compelled speech claim. Pet.App.25-26. Like the district court, in its initial opinion the Fifth Circuit never acknowledged or addressed, much less ruled on, Haddock's alternative factual theory—that she was terminated in retaliation for filing her First Amendment lawsuit. Pet.App.20-42; Pet.App.43-76. Having ruled that *Elrod/Branti* foreclosed all of Haddock's First Amendment claims, the Fifth Circuit ruled Haddock had failed to allege an underlying constitutional violation. Pet.App.40. It declined to reach whether Haddock had sufficiently alleged a Tarrant County custom, policy or practice, or an action by a Tarrant County policymaker, to trigger the county's municipal liability under *Monell*. Pet.App.40. For the same reason, the Fifth Circuit upheld Baca-Bennett's qualified immunity. Pet.App.40-41. One justice concurred, also citing the Fifth Circuit's own precedent, observing that Haddock should be afforded the same constitutional status under the First Amendment as "confidential employees." Pet.App.41.

The Fifth Circuit denied en banc review but granted rehearing. Pet.App.77-78. On rehearing, the Fifth Circuit withdrew its prior opinion and substituted a revised opinion, removing any mention of its previous holding on Haddock's alleged policymaker status. Pet.App.3-19. This time, again citing its own precedent, the Fifth Circuit based its ruling solely on the contention that "Haddock was a confidential

employee." Pet.App.10; Pet.App.13. The court noted, "[w]e need not address whether Haddock was also a policymaker under the *Elrod/Branti* exception because we hold that she was a confidential employee." Pet.App.10, n.4. The Fifth Circuit then ruled as it had the first time—*Elrod/Branti* applied, and Haddock's speech and intimate association claims fell to it, warranting no separate *Pickering/Connick* or other analysis. Pet.App.14; Pet.App.17. On rehearing, the Fifth Circuit acknowledged Haddock's alternative freedom of petition factual theory, but rather than address or analyze it, the court disposed of that claim in a footnote citing no authority: "To the extent we have not explicitly addressed any of Haddock's claims, such as her freedom of petition claim based on filing this suit, our holding that she is a confidential employee suffices to affirm dismissal of *all* Haddock's First Amendment claims." Pet.App.17, n.5 (emphasis in original).

Simultaneously with issuing of its revised opinion on May 18, 2021, the Fifth Circuit entered a take nothing Final Judgment, from which Haddock timely brings this Petition for Writ of Certiorari. Pet.App.1-2.

REASONS FOR GRANTING THE PETITION

The facts highlight widening inconsistencies among the circuit courts of appeals on important and recurring First Amendment questions, but these facts also present a chance for this Court to clarify its jurisprudence, reconcile discrepancies, and foster more uniform outcomes.

I. An entrenched circuit split stems from gaps in this Court's First Amendment precedent where more than one First Amendment freedom is at issue, or in applying different balancing tests to similar fact patterns.

Confronted with commonly-occurring fact patterns involving the intersection of two or more First Amendment rights, the circuit courts of appeals are in conflict about whether to evaluate them separately and give each right its enumerated balancing test, or to combine them into one right, and if so, which balancing test to apply.

A. The courts of appeals are intractably divided.

1) In cases mixing political party affiliation and free speech, there is a circuit split over whether to apply *Pickering/Connick* to the speech, *Elrod/Branti* to the job, or something else.

a. In the Second Circuit, *Elrod/Branti* is reserved exclusively for employment decisions based solely on political party affiliation, and *Pickering/Connick* applies to all speech cases, even where speech touches on employee's job duties.

Second Circuit. In *Lewis v. Cohen*, 165 F.3d 154 (2d Cir. 1999), the person in charge of Connecticut's

lottery was fired by his employers for refusing to publicly support a change in how the lottery was conducted. *Lewis*, 165 F.3d at 157. While one justice concurred, suggesting that because Lewis was a policymaker the court should apply *Elrod/Branti* to the job, rather than applying *Pickering/Connick* to the speech, the majority held *Pickering/Connick* applied. *Lewis*, 165 F.3d at 162-63. Citing its own precedent, the Second Circuit also ruled that, even if Lewis's employment position tipped the balancing test in the employer's favor, Lewis could still establish liability by proving that the employer disciplined the employee in retaliation for refusing the employer's command to speak, rather than out of the employer's fear of the disruption. *Lewis*, 165 F.3d at 163.

b. In the First, Sixth, Seventh, and Tenth Circuits, *Elrod/Branti* is applied to situations where the employee's speech relates specifically to either her political affiliation or substantive policy views.

At least four circuits apply *Elrod/Branti* to situations where the employee's speech relates to either political affiliation or substantive policy views.

First Circuit. In *Flynn v. City of Boston*, 140 F.3d 42 (1st Cir. 1998), terminated city employees alleged their firing was because of political patronage and comments they made about their new boss's policies. *Flynn*, 140 F.3d at 43-44. The First Circuit applied

Elrod/Branti to the patronage claims (citing its own precedent to hold that meant more than party affiliation), but it applied *Pickering/Connick* to the speech claims and upheld the discharge because the speech related to the employees' job duties—voicing opposition directly to their supervisor. *Flynn*, 140 F.3d at 45-46. The First Circuit noted that, despite their policymaker/confidential employee positions, *Pickering/Connick* would likely have led to a different outcome on the speech claim if the case had involved "public expressions of political opposition or whistle-blower reports made publicly or within the agency but outside regular channels." *Flynn*, 140 F.3d at 46-47.

Sixth Circuit. In *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 1998), the Sixth Circuit considered the First Amendment claims of the former Commissioner of the Kentucky State Police, who was terminated over his refusal to withdraw a memorandum he had submitted to the Secretary of the Justice Cabinet and the governor, announcing Rose's intention to eliminate a deputy police commissioner's position and reassign him to a lower position for disruptive and inefficient actions. *Rose*, 291 F.3d at 919. The Sixth Circuit noted this Court had not yet addressed whether the *Elrod/Branti* exception applied (rather than *Pickering/Connick*) where a policymaker is discharged based on actual speech rather than political affiliation. *Rose*, 291 F.3d at 921. After collecting cases acknowledging at least three approaches taken by other circuits, the Sixth Circuit ruled that, "where an employee is terminated for speech related to his policy views, the

Pickering/Connick balancing test favors the government employer as a matter of law." *Rose*, 291 F.3d at 922. Thus, *Elrod/Branti* ended the inquiry when the speech related to Rose's specific job duties.

Seventh Circuit. Initially, in *Warzan v. Drew*, 60 F.3d 1234 (7th Cir. 1995) the Seventh Circuit expanded *Elrod/Branti* beyond mere political affiliation to speech related to a policymaker's job duties. *Warzan v. Drew*, 60 F.3d at 1238. Citing its own precedent, the Seventh Circuit found *Warzan*—Milwaukee County's Controller—to be a policymaker and affirmed her discharge for voicing concerns to state officials (reported in the *Milwaukee Journal*) about her superiors' plans for health administration, because her expressed viewpoints related to her job duties regarding the county's budget. *Warzan*, 60 F.3d at 1237-38. In *Bonds v. Milwaukee County*, 207 F.3d 969 (7th Cir. 2000), the county withdrew an offer it had made to a city employee after the city employee spoke at a public meeting. *Bonds*, 207 F.3d at 974. The county claimed Bonds made his city employer look bad, which the county said triggered its concerns about Bonds' trustworthiness, propriety and loyalty in the county's policymaking position. *Bonds*, 207 F.3d at 978. The Seventh Circuit first held that because the remarks Bonds made as a city employee did not relate to the job duties for which he was hired at the county, *Elrod/Branti* did not apply to the job ("The policymaking employee exception does not cover a government entity's refusal to hire based on the prospective employee's criticism of a different government entity for whom he had worked."). *Bonds*,

207 F.3d at 973. Applying *Pickering/Connick* to the speech, the Seventh Circuit then held Bonds spoke at the public meeting not as a citizen but at the request of the city—his then employer—and therefore had no free speech protection from the county, even though the county's concern was solely related to loyalty and not the content of the speech. *Bonds*, 207 F.3d at 979-80. Had Bonds appeared at the meeting on his own volition, the Seventh Circuit would have held under *Pickering/Connick* the speech was protected.

Tenth Circuit. In *Barker v. City of Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000), Barker was an administrative assistant for the city manager. *Barker*, 215 F.3d at 1136. A contentious election resulted in a new mayor who appointed a new city manager, who was Barker's boss until he fired her. *Id*. When a reporter contacted Barker about an alleged open meetings violation she may have witnessed, her boss and the city attorney told her she could speak to the reporter if she told the truth and felt it was good for the city. *Barker*, 215 F.3d at 1137. When the reporter published Barker's remarks as signifying the open meetings act violation had occurred, she was fired a month later. *Barker*, 215 F.3d at 1137. Barker's lawsuit over her termination alleged both free speech and political association claims. The Tenth Circuit affirmed summary judgment on her political patronage claim, because she was a confidential employee. *Barker*, 215 F.3d at 1139. But because the Tenth Circuit found her comments on open meetings issue did not relate to her policy viewpoints, it rejected *Elrod/Branti*, applied

Pickering/Connick, and found Barker spoke on a matter of public concern. *Barker*, 215 F.3d at 1139-40. Since the city had relied solely on its loyalty interest and articulated no disruption concern, the Tenth Circuit reversed the summary judgment on Barker's speech claim and remanded for a factual determination of whether her termination was based on patronage or her speech. *Barker*, 215 F.3d at 1140.

c. In the Ninth and Fifth Circuits, *Elrod/Branti* applies to all speech made by employees at the policymaking or confidential employee level.

At least two circuits apply *Elrod/Branti* to all speech made by any policymaking or confidential employee. Under this approach, a court first determines whether the employee is in a policymaking or confidential position, and that inquiry resolves any First Amendment retaliation claims.

Ninth Circuit. In *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994-95 (9th Cir. 1999), the Ninth Circuit cited its own precedent in *Fazio v. City & Cnty. of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997), and held that finding an employee to be a policymaker or confidential employee under *Elrod/Branti* extinguished *all* First Amendment free speech rights for that employee. *Biggs*, 189 F.3d at 994-95.

Fifth Circuit. In its decision below, the Fifth Circuit reached the same result as the Ninth Circuit had

in *Fazio* and *Biggs* ("To the extent we have not explicitly addressed any of Haddock's claims, such as her freedom of petition claim based on filing this suit, our holding that she is a confidential employee suffices to affirm dismissal of *all* Haddock's First Amendment claims.") Pet.App.17, n.5.

d. In the Eighth Circuit, *Pickering/Connick* applies to all employment decisions based on speech, but an employee's policymaking or confidential position level may weigh heavily on the government's side of the *Pickering* scale.

Eighth Circuit. In *Hinshaw v. Smith*, 436 F.3d 997 (8th Cir. 2006), the executive director of a police and firefighter retirement fund spoke to the governor's office about a bill related to the structure of the fund's board, to whom she reported. *Hinshaw*, 436 F.3d at 1000-01. Hinshaw did not dispute the statement by the governor's office she presented herself as representing the board and its views on the bill. *Hinshaw*, 436 F.3d at 1001. The Eighth Circuit considered but rejected the Sixth Circuit's approach in *Rose, supra*, that when speech relates to a policymaking or confidential employee's political or policy views, *Elrod/Branti* is dispositive ("We hesitate to expand the *Elrod–Branti* exception to a case where party affiliation is not alleged as a basis for the termination. Accordingly, we decline to follow all aspects of *Rose* in this case."). *Hinshaw*, 436 F.3d at 1006. Instead, the Eighth Circuit

applied *Pickering/Connick* and found Hinshaw's interest in speaking on a matter of public concern was outweighed by her insubordination in failing to present her employer's views on a matter within her job description. *Hinshaw*, 436 F.3d 1007-08. Had it not been Hinshaw's job to speak on such matters, the employer's loyalty interest argument under *Elrod/Branti* would not have been enough to uphold her termination.

2) In cases mixing political affiliation and intimate association, there is a circuit split over whether *Elrod/Branti* erases the First Amendment right of intimate association, so a public employee may be punished for her spouse's speech or party affiliation.

a. In the Second Circuit, the right of independent association is a separate right and may be maintained by a policymaking or confidential employee independently of a political patronage claim.

Second Circuit. In *Adler v. Pataki*, 185 F.3d 35, 47 (2d Cir. 1999), Adler was a lawyer for a state agency. *Adler*, 185 F.3d at 39. His wife—also a lawyer—had filed a wrongful termination lawsuit against the attorney general's office. *Id*. The court presiding over Mrs. Adler's case awarded her sanctions against the state, and about a week later the state fired Mr. Adler. *Adler*, 185 F.3d at 44. Adler claimed firing him because of his

wife's lawsuit violated his First Amendment right of intimate association. *Adler*, 185 F.3d at 41-42. As deputy counsel for litigation at his agency, Adler conceded he was a policymaker. *Adler*, 185 F.3d at 39. Affirming the dismissal of his patronage claim on that basis, the Second Circuit turned to Adler's intimate association claim he was fired because of his wife's lawsuit, concluding that when a government employer retaliates against one spouse for conduct of the other spouse, the First Amendment is violated ("A relationship as important as marriage cannot be penalized for something as insubstantial as a public employer's discomfort about a discrimination lawsuit brought by an employee's spouse."). *Adler*, 185 F.3d at 44. The Second Circuit remanded for a factual determination of whether Adler was fired for political reasons or because of his wife's lawsuit, stating, "If [Adler] can persuade the trier [of fact] of such motivation, [his claim is not barred] even though he held a policy-making position." *Adler*, 185 F.3d at 47.

b. In the Fifth and Ninth Circuits, intimate association claims are subjected to *Elrod*/*Branti* analysis.

Fifth Circuit. In its decision below, the Fifth Circuit extended its own precedent and held the *Elrod*/*Branti* confidential employee inquiry resolved Haddock's intimate association claim. Pet.App.14-17. Although the Fifth Circuit stated it was joining what it called the "unanimous opinion of our sister Circuits" on this issue, it did not acknowledge or address *Adler, supra*.

Further, its citations to the Sixth and Seventh Circuits' decisions in *Simasko v. Cnty. of St. Clair*, 417 F.3d 559 (6th Cir. 2005) and *Soderbeck v. Burnett Cnty.*, 752 F.2d 285 (7th Cir. 1985) were somewhat inapposite. In *Simasko*, a public employee was fired for remaining neutral himself, not solely because his brother supported the boss's opponent. *Simasko*, 417 F.3d at 563-64. In *Soderbeck*, a jury had found the plaintiff was *not* a policymaking or confidential employee, so the Seventh Circuit never squarely addressed any intimate association claim arising out of her marriage to the previous sheriff. *Soderbeck*, 417 F.3d at 563-64 (fired for remaining neutral himself, not just because brother supported boss's opponent).

Ninth Circuit. In *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999), Biggs was an associate at a private law firm who provided legal services for the city. *Biggs*, 189 F.3d at 991. The city threatened to fire the firm unless the Biggs family (Biggs, her husband and her daughter), ceased political activity objectionable to the city council. *Id*. Instead, the law firm fired Biggs, and she and her family members sued alleging the city had violated their First Amendment rights to free speech and intimate association. *Id*. The district court granted summary judgment on qualified immunity as to Biggs' claims, but it denied summary judgment on the husband's and daughter's claims. *Biggs*, 189 F.3d at 991-92. Finding Biggs was a policymaker for the city even as an independent contractor, the Ninth Circuit affirmed the dismissal of her free speech claims under its own precedent and *Elrod/Branti*.

Biggs, 189 F.3d at 994-97. On the husband's and daughter's intimate association claims, the Ninth Circuit reversed the denial of summary judgment, holding that although they had standing, the husband's and daughter's claims were derivative of Biggs' and were extinguished by her policymaking position. *Biggs*, 189 F.3d at 997-98.

3) In cases mixing political party affiliation and freedom of petition, there is likely to be a circuit split as *Guarnieri* takes hold.

Since this Court's holding in *Guarnieri* treats freedom to petition cases like freedom of speech cases, another circuit split will emerge similar to the split seen in the section above at pp. 15-25. Each circuit will likely either apply its previous approach to cases with both free speech and political party affiliation elements to cases involving both political party affiliation and freedom of petition, or formulate a new approach. The Fifth Circuit has done the former, while the Seventh Circuit has done the latter.

Fifth Circuit. In its initial decision below, the Fifth Circuit did not mention Haddock's freedom of petition claim [Pet.App.20-42]; nor had the trial court. Pet.App.43-76. On rehearing, the Fifth Circuit dropped a footnote declaring "[t]o the extent we have not explicitly addressed any of Haddock's claims, such as her freedom of petition claim based on filing this suit, our holding that she is a confidential employee suffices to

affirm dismissal of *all* Haddock's First Amendment claims." Pet.App.17, n.5.

Seventh Circuit. In *Hagan v. Quinn*, 867 F.3d 816 (7th Cir. 2017), arbitrators for Illinois' Workers Compensation Commission sued their governor for refusing to reappoint them in retaliation for their previous lawsuit seeking to block implementation of his reform legislation, which they contended was protected freedom to petition under the First Amendment. *Hagan*, 867 F.3d at 819. Although the Seventh Circuit acknowledged this Court's *Guarnieri* test ("speaking as a citizen on a matter of public concern") to the arbitrators' first lawsuit, it cited its own precedent and applied *Elrod/Branti*, holding that because the arbitrators were policymakers, a lawsuit seeking to enforce their personal substantive policy views over their employer's was not protected by the First Amendment. *Hagan*, 867 F.3d at 828-29.

4) Before this Court's 2020 decision to vacate *Carney v. Adams* on standing grounds, an acknowledged circuit split had emerged which is likely to reoccur, on whether judges are or are not policymakers or confidential employees as a matter of law, or whether factual scenarios might exist in which they are not.

While the circuit courts of appeals do not appear to be in conflict based on the handful of cases involving judges and judicial employees, they would be conflict

had this Court not vacated a Third Circuit opinion in 2020 for holding that the plaintiff lacked Article III standing.

Third Circuit. In *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), *vacated on other grounds*, *Carney v. Adams*, 141 S.Ct. 493 (2020), the Third Circuit acknowledged but distinguished decisions by the Sixth and Seventh Circuits, holding that state judges—appointed or elected—are not policymakers. *Adams*, 922 F.3d at 178. Judges must be "unswayed by partisan interests," they must "take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will," and "[i]ndependence, not political allegiance, is required . . . " *Adams*, 922 F.3d at 178-79. In a decision this Court called "highly fact-specific," it vacated for lack of Article III standing. *Carney v. Adams*, 141 S.Ct. at 501, 503.

Seventh Circuit. In *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988), the Seventh Circuit concluded that judges are policymakers under *Elrod/Branti*. There, a Republican state court judge fired two Democrats who, had they remained public defenders, would sometimes have served as judges pro tempore. *Id*. The Seventh Circuit explained that a judge "both makes and implements governmental policy." *Kurowski*, 848 F.2d at 770. It therefore held that a person selecting judges could consider the politics of judicial candidates for appointment. *Id*. The Seventh Circuit has since written that "judges and hearing officers typically

occupy policymaking roles for First Amendment purposes." *Hagan*, 867 F.3d at 828.

Sixth Circuit. The Sixth Circuit followed *Kurowski*. In *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993), a Democratic judicial aspirant argued that a Republican governor's practice of naming judges based solely on recommendations by Republican county chair persons violated the First Amendment. *Newman*, 986 F.2d at 160. The Sixth Circuit disagreed: "We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions . . . " *Newman*, 986 F.2d at 163.

B. The circuit split stems from a gap in this Court's First Amendment precedent that only this Court can fill.

This Court has never defined the source or scope of the intimate and expressive rights of association it recognized in *Griswold* and *Roberts*, for public employees or, arguably, for all Americans. Nor has it articulated or assigned a balancing test for submitting government employers' infringements on these rights to the strict scrutiny core First Amendment rights require—an unfortunate reality an once titled in a *Texas Journal of Women and the Law*[1] article as "intimate association—a jurisprudence adrift." Collin O'Connor Udell, 7 TEX. J. WOMEN & L, *Intimate Association: Resurrecting a Hybrid Right*, at p. 239.

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[1] Now Texas Journal of Women, Gender, and the Law.

This Court has never confronted squarely and addressed how multiple First Amendment rights presenting in the same case should be evaluated—separately or together, and with what test? The rare intersection of First Amendment facts and interests presented by these extraordinary facts provides the Court with a rare and valuable opportunity to resolve important and recurring issues for public employees and employers, and to fill a gap in this Court's First Amendment jurisprudence.

II. The questions presented are important and recurring, and this case presents the ideal vehicle for resolving them.

Since the establishment of the *Pickering/Connick* and *Elrod/Branti* balancing tests, this Court has written more recently that petitions to the courts and similar bodies can "address matters of great public import," and that "[t]he government must not misuse its role as employer unduly to distort this deliberative process." *Guarnieri*, 564 U.S. at 382, 396. In a landmark decision outside the employment context, the Court stated in *Citizens United v. FEC*, 558 U.S. 310, 336 (2010), that the First Amendment "has its fullest and most urgent application speech uttered during a campaign for political office." The Court has yet to clarify, however, whether or how this "fullest urgency" relates to the *Elrod/Branti* or *Pickering/Connick* analysis of public employees' First Amendment rights. In *Pickering*, the Court noted that "statements 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." *Pickering*, 391 U.S. at 574 (citation omitted). This Court has called marriage "a right of privacy older than the Bill of Rights—older than our political parties" [*Griswold*, 381 U.S. at 486] and "central to any concept of liberty" [*Roberts*, 468 U.S. at 619 (cleaned up)], but it has yet to articulate a balancing test for the intimate association rights of public employees.

The circuit splits outlined above show the struggle the circuit courts of appeals face when applying this Court's existing precedents to more complex fact patterns, particularly where public employees allege that two or more of their First Amendment rights have been infringed by their government employer. As of March 2012, federal, state and local governments employed 22 million Americans.[2] Presumably, the majority of government employees are married or will be married. They will vote, speak, and affiliate politically and socially. Policymakers, confidential, and other public employees will continue to speak publicly, and to sue and file grievances with their government employers to clarify or protect First Amendment rights—sometimes on matters of public concern, sometimes on matters directly related to their job duties, sometimes on matters not related directly to their job duties but involving public elections, and sometimes none of the above—or

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[2] *2012 Census of Governments: Employment Census Report*; Government Division Briefs, United States Census Bureau, U.S. Department of Commerce, by Lisa Jessie and Mary Tarleton, released March 6, 2014.

decline to do so, and so will their spouses. The rare confluence of First Amendment rights presented by these facts represents the ideal vehicle for this Court to produce an opinion that will guide lower courts on important and recurring issues.

III. The Fifth Circuit's decision is wrong.

FED.R.CIV.P. 8(a)(2) merely requires a short and plain statement of the claim showing the pleader may have relief. This Court has said a complaint "does not need detailed factual allegations," as long the facts alleged are "enough to raise a right to relief above the speculative level," but the court must assume "that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing 5 WRIGHT & MILLER, FED. PRAC. & PROC. §1216, 235-36 (3d ed. 2004). "Rule 12(b)(6) does not countenance . . . dismissal based on a judge's disbelief of a complaint's factual allegations." *Nietzke v. Williams*, 490 U.S. 319, 327. Under the Fifth Circuit's own precedent, FED.R.CIV.P. 12(b)(6) dismissals are disfavored and rarely granted, because the standard for dismissal is very high. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009).

Taking Haddock's well-pled factual allegations as true, her government employers did not punish her for her *own* speech or political activity (via hostile work environment or termination), because she made no speech. ROA.646; ROA. 660. Rather, they punished her

because she was married to Mr. Haddock—the person to whom they attributed speech and political activity they abhorred. ROA.639-40. When she sued to clarify or protect her First Amendment rights, she was removed from the jury calendar immediately and fired in ninety days. ROA.662; Pet.App.6. In her 42 U.S.C. §1983 action, Haddock alleged her government employers' actions (a hostile work environment, then termination) violated four distinct First Amendment rights: 1) freedom of intimate association/marriage; 2) freedom of petition; 3) freedom of speech (and from compelled speech); and 4) freedom from coerced political patronage in public employment. ROA.639-88.

In applying *Elrod/Branti* to a court bailiff, the Sixth Circuit showed why court personnel may sometimes be properly classified as confidential employees. *Balogh v. Chambers*, 855 F.2d 356 (6th Cir. 1988). "Judicial aides who work in chambers and are assigned to one judge . . . normally handle sensitive information about cases of a confidential nature, information which is not public information." *Id*. "Judges must be able to rely on the confidentiality of the relationship with such aides, just as they must rely on the confidentiality of their relationship with their private secretaries and law clerks . . . [and] the staff in . . . immediate chambers. . . ." *Balogh*, 855 F.2d 356-57.

Under Tarrant County's unique structure, as an associate judge Haddock served seven district judges—not one. ROA.671-74. Associate judges have no employees, no budget, no authority over other employees' work, time off, hiring, firing, or conditions of

employment. ROA.668. Although they hear cases, associate judges swear an oath and must determine the law and facts, and also apply law to fact. ROA.667-68. Associate judges will try to follow a referring judge's preferences to avoid reversal, as district judges follow appellate court precedents to avoid reversal. ROA.668. Each district judge's preferences are generally known among family practitioners and are hardly confidential. ROA.668. Serving seven judges instead of one, an associate judge simply cannot be in confidential relationships with all seven district judges that would either compromise her judicial independence or require her to engage in a district judge's off-the-bench activities. ROA.668-70. Thus, Haddock alleged Tarrant County family court associate judges are neither policymakers nor confidential employees. Rather than take Haddock's allegations as true, the Fifth Circuit looked to a Sixth Circuit case based on Ohio law to define Haddock's responsibilities in Texas. Pet.App.10. The Texas statute defining a family court associate judge's powers and responsibilities lacks any requirement she receive confidential communications. Pet.App.61-62.

That the Fifth Circuit never seriously considered the seven-serving-seven structure of Tarrant County family courts is evidenced by the court's erroneous comment about Haddock's math ("Haddock's math is misguided—this case has nothing to do with her relationships with the other associate judges. Only seven working relationships are relevant—between Haddock and her superiors, the district judges."). Pet.App.11.

Even on rehearing, the Fifth Circuit did not appreciate that Haddock's working relationships with other associate judges never counted. Rather, each of the seven associate judges had a working relationship with each of the seven district judges (forty-nine working relationships, not counting relationships between associate judges), and all seven associate judges presumably had the same First Amendment rights. It is one thing to assert a public employee must satisfy seven superiors with her qualifications, experience, work product and efficiency. Every job with more than one boss requires that. It is quite another matter to assert vital government interests require seven associate judges' (and their spouses') personally held beliefs and opinions to be in perfect lockstep with all seven district judges' political affiliations, beliefs, and substantive policy positions. It is even more implausible to insist that if they are not, an associate judge cannot follow precedent or keep court confidences and must be fired. The district court should have heard evidence on Tarrant County's entire forty-nine working relationship structure before ruling on 12(b)(6) as a matter of law that confidential relationships automatically arose in every one of the forty-nine relationships.

A government employer's infringements on core First Amendment rights are subject to strict scrutiny, and even for policymaking or confidential employees, under *Elrod/Branti* the government must show "an overriding interest," of "vital importance" in requiring Haddock's beliefs to be the same as the hiring authority. *Branti*, 445 U.S. at 515-16. On this point, it is the

government employers' argument that lacks factual facial plausibility. There is no evidence they were ever concerned that Associate Judge Munford's wife falsely alleged that Haddock had taken a bribe, or that they were concerned about Munford's remaining an associate judge or becoming a district judge if he had committed domestic violence. These were allegations that came from the public; they were not family court secrets. Even if they had been, keeping secrets about an individual family court political candidate's domestic violence history cannot be essential to a vital *government* interest—that only advances individual interests. But the government employers (and the Fifth Circuit) apparently believe Haddock cannot call balls and strikes in a family court case, or keep legitimate court confidences, after twenty years on the bench, unless she support's Munford's candidacy, or unless Mr. Haddock stops opposing him, which lacks credence. When employers are likely motivated by the content of the speech or identity of the speaker rather than a vital government interest, the case should have proceeded to an evidentiary stage.

But the argument also lacks credence for substantive legal reasons. Below, the Fifth Circuit demurred from ruling on whether Baca-Bennett's public support of Munford's candidacy, or her attempt to force Haddock to do the same or silence Mr. Haddock's opposition, violated Texas' Code of Judicial Conduct. Pet.App.6, n.3 ("We express no opinion whether these allegations against Baca-Bennett, if true, violate Texas's Code of Judicial Conduct."). After the Fifth

Circuit's plenary power expired, however, the State of Texas did not demure. On August 16, 2021, through its State Commission on Judicial Conduct, the State of Texas issued a Public Warning and Order of Additional Education against Baca-Bennett.[3] Among other holdings, the Commission found Baca-Bennett's public media campaign supporting Munford violated Canons 2B and 5(2) by lending "the prestige of judicial office to advance the private interests of the judge or others," and engaging in "willful or persistent conduct that is clearly inconsistent with the proper performance of [her] duties or casts public discredit upon the judiciary or administration of justice."

Thus, the State of Texas has now simultaneously taken contrary positions on what its vital government interests are:

1) through its State Commission on Judicial Conduct—on the one hand—Texas asserts Baca-Bennett's supporting candidates on social media and elsewhere violated Texas' Code of Judicial Conduct by lending the prestige of judicial office to advance the private interests of the judge or others, for which she must be publicly warned and reeducated to protect its vital government interests; but

[3] http://www.scjc.state.tx.us/media/46842/baca-bennett18-0388-et-alpubwarn-oae-81621.pdf.

2) through the position of its district judges below, Texas argued its vital government interests required that Baca-Bennett be allowed to force Haddock to do the same.

Even without the Commission's ruling, the inherent inconsistency between the express language of Texas' Code of Judicial Conduct and the district judges' position should have created a fact issue on both Haddock's political patronage and free speech claims. How can it be essential to a vital government interest for Baca-Bennett—a state official—to force another judge to do something the State of Texas has prohibited either of them from doing? That the Code also *allowed* Mr. Haddock (as a judge's spouse) to engage in election speech should have raised a fact issue on Haddock's intimate association claim. How can it be essential to a vital government interest for Baca-Bennett—again, a state official—to use her office's power over Haddock's job to stop Mr. Haddock from doing something the State of Texas has elsewhere authorized him to do?

The Fifth Circuit should have reversed the district court on Haddock's constitutional claims and reached the *Monell* question on Tarrant County's liability under §1983, but this Court can do so now. "Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . " 42 U.S.C §1983. In *Monell v. Dep't of Soc. Servs. of City of N.Y.*, this Court established

that a local government can be a "person" subject to liability under §1983. *Monell*, 436 U.S. at 690. While a municipality is not automatically vicariously liable under §1983 for tortious conduct by its employees or representatives, a plaintiff may properly bring a §1983 claim against a county by alleging her injury resulted from the county's custom or policy, or a single action by a county policymaker. *Monell*, 436 U.S. at 694-95. The D.C. Circuit has recognized joint-employer liability in the Title VII context. *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). But this Court appears to have never directly confronted what minimum conduct would trigger municipal liability under *Monell* in the joint-employer context. It should do so here in the interest of justice. Over three-and-a-half years have passed since the primary election out of which this controversy began. If this Court resolved the First Amendment issues and reversed without addressing *Monell*, this case could come back on the *Monell* question, then take the parties several more years to reach trial, as memories and evidence grow stale. Guidance from this Court would bring justice more swiftly and clarify the *Monell* joint-employer question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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