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2 there is a concern that comes into play. And so I do  
3 not mean to demean the concern about the government  
4 having a sense of what individuals' political views are.

5                   But I'm saying that that happens, Your  
6 Honors, in all kinds of cases, whether it's  
7 redistricting, whether it's campaign finance. There's  
8 lots that we do to ascribe political views to people in  
9 this country. And adopting that doctrine is going to  
10 have pretty widespread consequences when it's not  
11 necessary.

12                   I do think that it should be common ground  
13 that there are multiple layers of protections for these  
14 employees. The basic rule -- and Justice Kennedy,  
15 remember, under the basic rule, the plaintiff has always  
16 come in and said, I'm a Democrat, right? The Elrod  
17 Branti rule when it's involved, one-off cases. The  
18 opinion in O'Hare describes the political views of the  
19 tow truck company there. And it has never been regarded  
20 as a First Amendment problem when you don't actually  
21 exercise any First Amendment rights.

22                   JUSTICE BREYER: But that is a First  
23 Amendment problem for the reason that lots of other  
24 people will have their speech chilled. And normally in  
25 the law there is a doctrine where the person who does

1 the bad thing makes a mistake, he's held anyway. That's  
2 true of transferred intent. You shoot A, but you meant  
3 to shoot B. It's true of -- of attempts generally.

4 MR. GOLDSTEIN: It's not true of the  
5 Constitution.

6 JUSTICE BREYER: Why not?

7 MR. GOLDSTEIN: Well --

8 JUSTICE BREYER: That is to say I would  
9 think that a statute that has a chilling effect on the  
10 speech of millions of people but is directly aimed at A,  
11 B, and C, if because of some fluke A, B, and C are not  
12 themselves injured, nonetheless everybody else is, and  
13 it would violent the First Amendment.

14 MR. GOLDSTEIN: Under --

15 JUSTICE BREYER: That, I think, is what you  
16 have here, which is why I raised my point.

17 MR. GOLDSTEIN: Great. Justice Breyer --  
18 and if you would just contrast in your own mind the  
19 statute that affects millions of people versus the beat  
20 cop who talks to one person in terms of its chilling  
21 effect, because First Amendment overbreadth doctrine was  
22 born because of your hypothetical.

23 The concern that a broad policy or statute  
24 will have widespread effects. That is not anything like  
25 this. We have a guide --

1 JUSTICE SCALIA: Do you know of any case in  
2 which we have relied on chilling effects where what was  
3 at issue was a one-off like this one as opposed to a --  
4 a general policy which had a chilling effect? I don't  
5 know of any case.

6 MR. GOLDSTEIN: To the contrary, I can tell  
7 you that in -- in both *Waters* and *Garcetti v. Ceballos*,  
8 the Court said, look, we recognize the rule that's being  
9 proposed to us. So in *Waters* it was the idea that the  
10 public -- the employer's views wouldn't matter; it would  
11 just be whether the speech was protected.

12 In *Garcetti* it was the question of whether  
13 it was the public employer's speech. And the public  
14 employee's argument in both those cases is that, look,  
15 these rules are going to chill speech because they are  
16 of uncertain boundaries. We need to have wide-ranging  
17 expression. If I have to bring my case, there will be  
18 inquiries into my speech views or whatever, and the  
19 Court said we just have to balance things here.

20 There is a real concern that is rooted in a  
21 history of the United States involving political  
22 patronage. We have -- the Court has never tried to  
23 extinguish politics from local government. And if you  
24 try to do that in New Jersey, we are going to be here a  
25 lot.

1 JUSTICE KAGAN: And the --

2 (Laughter.)

3 JUSTICE ALITO: And the question in this  
4 case seems to me to be highly artificial. It's sort of  
5 -- it's like a law school hypothetical.

6 MR. GOLDSTEIN: I agree.

7 JUSTICE ALITO: How often will it be the  
8 case that an employee will be unable to allege any  
9 expression or any association that is protected by  
10 the -- the First Amendment? It seems to me quite rare.

11 And it may be that this case comes to us the  
12 way it does because the plaintiff was dealing with two  
13 things, one was the First Amendment, and the other -- I  
14 mean one was the issue that's -- the question of his  
15 motivation, and the other was this alleged policy  
16 prohibiting any kind of political activity.

17 Even in the -- the person who is just  
18 apathetic, is there not a -- a First Amendment right to  
19 be -- say, I don't -- I don't like politics, I don't  
20 want anything to do with politics, I'm not going to  
21 register, I'm not going to vote?

22 MR. GOLDSTEIN: All right. So Justice  
23 Alito, the Third Circuit has a rule discussed in the  
24 brief -- brief in opposition adopted in a case called  
25 Ghaly that says you do have the right to be politically



1    apathetic.  The reason the case is so bizarre is that  
2    the other side, for its own reasons, decided not to  
3    assert that right.

4                    Now, I will say that it does nonetheless  
5    matter because there are going to be other kinds of  
6    cases where you have a public employee that just is not  
7    asserting any rights at all, and is not involved, say,  
8    in environmentalism or gun rights or whatever.  And the  
9    public employer, if it's thought just to have perceived  
10   the employee as having been involved in some  
11   association, then is subject to a claim.

12                   And our real --

13                   JUSTICE SOTOMAYOR:  I'm sorry.  You have  
14   to -- you have to show some facts to draw that  
15   inference.

16                   MR. GOLDSTEIN:  Well --

17                   JUSTICE SOTOMAYOR:  I mean, you just can't  
18   say, I'm involved in this and the employer fired me  
19   because of that.

20                   MR. GOLDSTEIN:  Well, Justice Sotomayor --

21                   JUSTICE SOTOMAYOR:  To show some connection  
22   between the firing and --

23                   MR. GOLDSTEIN:  Right.

24                   JUSTICE SOTOMAYOR:  -- the political belief.

25                   MR. GOLDSTEIN:  I would just take you back

1 to my hypothetical of getting rid of the sign. And his  
2 political view -- his support of Spagnola is discussed  
3 in -- in the chief's office, right? And then he has to  
4 be reassigned. And the chief has to really worry that  
5 he's going to be sued.

6 The -- my point is this: The set of cases  
7 that you have to be concerned with, there have been no  
8 other cases we've been able to identify like this one.  
9 It's very small.

10 JUSTICE KAGAN: Well --

11 MR. GOLDSTEIN: But the downside risk is  
12 significant.

13 JUSTICE KAGAN: Mr. Goldstein, I mean, if  
14 somebody had come in to me before today's argument and  
15 just said, does the First Amendment prevent the  
16 government from punishing a person because that person  
17 does not share the government's views, I would have  
18 said, why, yes, of course the First Amendment protects  
19 that. That's the whole point of the First Amendment.

20 And now you're telling me, no, the First  
21 Amendment does not prevent the government from punishing  
22 a person because that person doesn't share the  
23 government's views, unless that person is actively  
24 opposed to the government's views.

25 But if that person just really could not

1 care less, which a lot of people in this country could  
2 not care less; they don't vote, they don't pay  
3 attention, they wouldn't know who was running. But the  
4 government can punish that person because that person  
5 doesn't share the government's views. And I would have  
6 said, that is one strange doctrine.

7 MR. GOLDSTEIN: It -- it may be that I have  
8 not persuaded you in this case.

9 (Laughter.)

10 MR. GOLDSTEIN: The -- the -- I will say,  
11 Justice Kagan, what you ask is, can the government do  
12 it? The government cannot because there are lots of  
13 other protections. And remember, if the person is  
14 politically neutral, it is the case that -- the right of  
15 political association is the right of political  
16 association. If you aren't engaging it, you aren't  
17 actively pursuing the right in any way, or even if you  
18 aren't active about it.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Frost, you have a minute left.

21 REBUTTAL ARGUMENT OF MARK FROST

22 ON BEHALF OF THE PETITIONER

23 MR. FROST: Thank you, Mr. Chief Justice.

24 A couple points that I want to make with  
25 respect to declaring one as a neutral.

1                   If Heffernan was engaged in political  
2 activity and said, I'm supporting Spagnola, of course he  
3 would be protected by the First Amendment. What I'm  
4 hearing is that if he said, I'm neutral, he would be  
5 covered; he would be protected. I see little difference  
6 between being a neutral and being agnostic in the sense  
7 that I'm not taking a position.

8                   So -- so --

9                   JUSTICE SOTOMAYOR: I'm -- I'm so totally  
10 confused. I know it's the way it was presented to us,  
11 but I thought he testified that he had made a choice not  
12 to get involved in the campaign but that Spagnola was  
13 his friend and he supported him. So he wasn't neutral;  
14 he just wasn't engaging in associational conduct by  
15 choice. That's what I thought.

16                  MR. FROST: That's correct, Justice  
17 Sotomayor. And the point that I was trying to make was  
18 the fact that in this case he was not going to be  
19 exercising his right to vote or campaign for him, but --  
20 but clearly he engaged in what we would consider core  
21 First Amendment activity by picking up that sign.

22                  The mistake that the employer made was  
23 actually one that they perceived him as actually  
24 campaigning on behalf of Spagnola. And that should make  
25 no difference for the simple reason that with respect to

1 that activity, it's because the Court sees that the  
2 government is acting for an impermissible purpose, and  
3 that was the press --

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:02 a.m., the case in the  
8 above-entitled matter was submitted.)

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