No. 11-881

In the Supreme Court of the United States

BILLY A. MERRIFIELD, PETITIONER,

v.

BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANTA FE; ROMAN ABEYTA; BERNADETTE SALAZAR; ANNABELLE ROMERO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment permits a public employee to sue his employer for adverse employment actions allegedly resulting from the employee's association with an attorney regarding matters of purely private concern.

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The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 654 F.3d 1073. The opinion of the district court (Pet. App. 27a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2011, and a petition for rehearing was denied on August 19, 2011. Pet. App. 38a-39a. On November 8, 2011, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 16, 2012. The petition for a writ of certiorari was filed on January 17, 2012, the first weekday after a federal holiday. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner was terminated for sending "a sexually graphic image to the personal cell phone of * * * [a] subordinate[]" during working hours. Pet. App. 2a.[1] After a nine-day hearing, the hearing officer concluded that the termination was justified. *Id.* at 4a-5a. Petitioner then brought a Section 1983 action, alleging—for the first time—that the termination "violated his First Amendment right to associate with counsel by retaliating against him for hiring an attorney." *Id.* at 5a-6a. But the district court found as fact that County officials "did not retaliate against [petitioner]," *id.* at 30a; rather, they "terminated [him] * * * because of unprofessional conduct," *id.* at 36a. The court dismissed the lawsuit. *Id.* at 37a.

[1] The very graphic image is described in the briefing below. See Resp. C.A. Br., Exh. A, at 8.

The Tenth Circuit affirmed. Pet. App. 26a. It did not question the district court's factual finding that petitioner was terminated because of unprofessional conduct rather than his subsequent decision to hire a lawyer. Instead, the court of appeals held that, following this Court's decision last Term in *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011), any such retaliation claim based on the right of association would require that the association involve a matter of public concern. *Id.* at 19a. Because petitioner "failed to establish that his association with counsel involved a matter of public concern," he was not entitled to relief. *Id.* at 23a.

Petitioner now seeks review of the Tenth Circuit's decision to resolve a purported circuit "split." Review is not warranted. For starters—and contrary to petitioner's assertion—only two circuits have dispensed with the public-concern requirement for associational claims remotely like this one, and both did so, without analysis, more than twenty years ago. But the logic of this Court's recent decision in *Guarnieri* confirms that the decision below was correct: There is "no sound basis for granting greater constitutional protection" to claims based on the right of association than ones based on the Speech or Petition Clauses. 131 S. Ct. at 2495. Accordingly, whatever stale conflict petitioner claims did not survive *Guarnieri*.

In any event, a decision in petitioner's favor by this Court would not afford him relief, because the judgment below is independently supported by the district court's factual finding that no retaliation occurred. See Pet. App. 30a. Thus, even if petitioner were correct that the public-concern requirement

should not apply to his particular associational claim, the fact remains (and is not challenged in the petition) that he was terminated for reasons wholly separate from his decision to hire a lawyer.

1. Petitioner Billy Merrifield previously worked as a Youth Services Administrator at a Santa Fe County youth correctional facility. Pet. App. 1a. On January 22, 2007, while representing the County at a corrections conference in Florida and during work hours, petitioner sent a sexually graphic image to the personal cell phone of a subordinate at the facility. The recipient displayed the image to other employees, one of whom reported the incident. *Id.* at 2a-3a. On January 25, the County placed petitioner on paid administrative leave pending an investigation. Petitioner then retained an attorney who instructed the County to direct correspondence concerning the situation through counsel. *Id.* at 3a.

2. On February 22, 2007, Annabelle Romero, the County's Director of Corrections, issued a letter recommending petitioner's termination. The letter stated that the investigation found that petitioner had "participated in a sexually inappropriate environment at the facility, and participated in other improper behavior among staff at the facility." Pet. App. 3a. It also reported "failings on [petitioner's] part as a supervisor and improper conduct in [his] supervisory dealings with employees." *Ibid.*

On February 23, petitioner's attorney sent a letter to Human Resources Director Bernadette Salazar, requesting access to a number of documents, including those pertaining to the allegations in Romero's letter as well as "[e]ach and every policy, protocol or memo-

randum the County claims [petitioner] violated." Pet. App. 3a. On March 5, Salazar sent petitioner copies of County policies on cell-phone use, sexual harassment, and the responsibilities of managers and supervisors. *Ibid.* At the same time, Salazar offered petitioner's attorney the opportunity to view his personnel file. Because petitioner had already participated in a meeting where he had been afforded the opportunity to explore the basis for the recommendation of termination, the letter denied petitioner's request for further information or documents. *Id.* at 3a-4a. The letter further explained that, because petitioner was entitled to a full evidentiary predisciplinary hearing, the requested materials could be sought through the appeal process. *Id.* at 4a.

On March 8, 2007, petitioner attended the predisciplinary proceeding with his attorney, after which Salazar approved Romero's termination recommendation. Pet. App. 4a. Petitioner appealed the decision to County Manager Roman Abeyta, who rejected the appeal in a March 21 letter that detailed the reasons for petitioner's dismissal. Abeyta explained that petitioner's transmission of a sexually graphic cell-phone image constituted "intolerable behavior," exhibited "poor judgment," and was "an example of the unacceptable behavior" petitioner had engaged in as Administrator. *Ibid.* Abeyta also concluded that petitioner sent and received inappropriate e-mails on county computers during work hours and inappropriately used his work cell phone to make personal calls. *Ibid.*

Petitioner invoked his right under Santa Fe County personnel rules to appeal the termination to a

hearing officer. After *nine days* of hearings, the hearing officer issued a 19-page decision affirming petitioner's termination. She concluded that the discipline was justified because of petitioner's improper transmission of sexually graphic images through his cell phone and work computer, and because he had fostered an environment of misuse of county computer equipment. Pet. App. 5a. The hearing officer also determined that petitioner had been afforded due process, as he "was given sufficient notice that these matters were the basis for termination * * * [and] given an opportunity to respond to these matters at the pre-termination hearing." *Ibid.* (internal quotation marks omitted).

3. Petitioner filed suit in federal district court under 42 U.S.C. § 1983 against the Board of County Commissioners, Abeyta, Salazar, Romero, and petitioner's supervisor Greg Parrish. The complaint alleged that respondents violated petitioner's due process rights and—for the first time—a First Amendment right to associate with counsel during the disciplinary process. Pet. App. 5a-6a.

The district court granted respondents summary judgment on the retaliation claim. Pet. App. 6a. The court found as fact that "there is simply no evidence of retaliation due to [petitioner]'s consulting with counsel." *Id.* at 32a. In addition to the lack of evidence petitioner produced, the district court also noted that the disciplinary process commenced before petitioner retained an attorney. *Ibid.* As a result, the court concluded that "[i]n reading the materials presented it is difficult to find that [petitioner]'s retention of, or consultation with, counsel had any causal connection to his termination," but rather

stemmed from "a pattern of immature, salacious, and unprofessional conduct sufficient for disciplinary action."[2] *Id.* at 31a-32a. Accordingly, the district court granted the respondents summary judgment.[3] *Id.* at 27a, 36a-37a.

4. The Tenth Circuit affirmed. Pet. App. 2a. The court first rejected petitioner's claim that he was deprived of due process because he was not given adequate pretermination notice of the charges and evidence against him. The court rejected petitioner's claims that the Romero letter provided inadequate notice, because notice can be provided at the pretermination hearing itself. *Id.* at 9a-10a (citing *Powell* v. *Mikulecky*, 891 F.2d 1454, 1459 (10th Cir. 1989)). And the court held that petitioner failed to

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[2] Petitioner produced affidavits from former employees claiming that the County "had a custom or policy of threatening individuals with severe consequences if they hired a lawyer." Pet. App. 32a. The district court ruled much of that evidence inadmissible on grounds not challenged here. See *id.* at 32a-34a; *id.* at 6a. The court excluded the entire testimony of Sandra Urioste, for example, because she could not "link her perceptions to any person, place or subject matter" relevant to the case. *Id.* at 34a (citation omitted). The court also struck part of the testimony of former employee Petra Sifuentes since "she has offered no facts to buttress her opinion that [defendant Greg Parrish] approved" of the alleged policy. *Id.* at 34a (internal quotation marks omitted).

[3] In a separate memorandum opinion, the district court granted respondents summary judgment on petitioner's due process claim. See *Merrifield* v. *Cty. Com'rs of Santa Fe*, NO. 2:08–CV–00122–RLP/ACT, op. at 5 (D.N.M. Aug. 14, 2009).

preserve any objection to the adequacy of the notice at the pretermination hearing.[4] *Ibid.*

The court of appeals also rejected petitioner's claim that the County violated his freedom to associate with an attorney. Pet. App. 10a-23a. It noted that this Court has identified "two distinct" kinds of constitutionally protected associations, "the 'intrinsic' sense [of association], which relates to certain intimate human interactions, and the 'instrumental' sense, which relates to associations necessary to engage in the enumerated First Amendment rights." *Id.* at 14a (citing *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-618 (1984)). The court of appeals held that this Court's precedents, which provide that a public employee asserting that his employer interfered with his speech or petition rights must show that his activity involved a matter of public concern, apply equally to the "instrumental right of freedom of association [with an attorney] for the purpose of engaging in speech, assembly, or petitioning for redress of grievances."[5] Pet. App. 15a.

The court explained that suspending the public-concern requirement for "instrumental" association claims would also offend "the Supreme Court's

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[4] The Tenth Circuit declined to adjudicate petitioner's state-law claim that the district court's calculation of back pay constituted a "constructive discharge," reversing the district court's judgment on that issue and remanding with instructions to dismiss the claim without prejudice to permit resolution in state court. Pet. App. 24a-26a. Petitioner does not seek to revisit that determination in this Court.

[5] The court noted that petitioner's lawsuit did not implicate a claim of "retaliation based on the employee's exercise of the intrinsic right of freedom of association." Pet. App. 15a.

teaching that the 'political' First Amendment rights should be treated equally, at least in the government-employment context." Pet. App. 18a. (citing *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985)). The court concluded it would be indefensible not to employ the requirement in the association context, noting that this Court had drawn on right-of-association cases when it first recognized the public concern test in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), Pet. App. 17a. The court explained that since "the public-concern test in speech-retaliation cases has its origin in freedom-of-association cases[,] * * * [i]t would be ironic, if not unprincipled, if the public-concern requirement derived from freedom-of-association cases did not likewise apply to retaliation for such association." *Id.* at 17a-18a.

As further support for this proposition, the court relied on the "very recent[]" decision in *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488, 2495 (2011). Pet. App. 12a-13a. In *Guarnieri*, the court of appeals explained, this Court held that "'claims of retaliation by public employees do not call for [a] divergence' in the treatment of petition and speech claims." *Id.* at 19a (quoting *Guarnieri*, 131 S. Ct. at 2495). The court noted this Court's concern about "the practical consequences of using different rules for evaluating retaliation claims based on different clauses of the First Amendment." *Ibid.* Giving "special status to retaliation claims" under any one clause, *id.* at 18a, the court of appeals reasoned, would produce divergent rules that "would aggravate potential harm to the government's interests by compounding the costs of compliance with the Constitution," *id.* at 18a-

19a (quoting *Guarnieri*, 131 S. Ct. at 2498). The court recognized that it would make little sense to afford the right to associate with counsel greater protection: Since it is "protected only as a means to effectuate rights to speak and petition, [it] cannot be entitled to more protection through the First Amendment than the enumerated First Amendment rights themselves." *Id.* at 22a.

REASONS FOR DENYING THE PETITION

A. No "Circuit Split" Survives *Guarnieri*

Petitioner incorrectly asserts (Pet. 7) that the courts of appeals are "deeply divided" in a three-way split. Several of the decisions petitioner cites in support of this claim explicitly decline to reach the issue, and he overlooks contradictory authority that undermines his theory. Nor does petitioner confront the significance of this Court's decision just last Term in *Borough of Duryea* v. *Guarnieri*, *supra*. That decision confirms the soundness of the court of appeals' analysis of First Amendment claims in the public-employment context. More to the point, *Guarnieri* renders obsolete the two cursory, decades-old circuit decisions comprising the remnants of petitioner's alleged conflict.

1. Petitioner contends that "three circuits apply the public concern requirement but only in the context of associations coextensive with speech"—so-called "hybrid" claims. Pet. 11. Not so. As petitioner ultimately acknowledges, "the Third Circuit has not explicitly ruled on this issue," Pet. 12. In *Sanguigni* v. *Pittsburgh Board of Public Education*, 968 F.2d 393 (3d Cir. 1992), the court held: "[W]e do not find it necessary to confront the issue whether *Connick* [v.

Myer, 461 U.S. 138, 143 (1983),] generally applies to claims involving the freedom of association." *Id.* at 400. Contrary to petitioner's suggestion (Pet. 11), the Ninth Circuit likewise declined to confront this issue. Petitioner cites *Hudson* v. *Craven*, 403 F.3d 691 (9th Cir. 2005), but ultimately concedes that that decision suggests only that "future free-standing association cases *may* not be subject to a public concern test." Pet. 12 (emphasis added). But that is not how that opinion has been interpreted within the Ninth Circuit. In *Biggs* v. *Town of Gilbert*, No. CV11–330–PHX–JAT, 2012 WL 94566, at *6 (D. Ariz. Jan. 12, 2012), for example, the court held that "*Hudson* * * * indicate[s] that the Ninth Circuit would hold that the public-concern requirement applies to a claim for the right to associate with counsel for the purpose of legal representation." Notably, that decision came after this Court's recent decision in *Guarnieri*.

The Seventh Circuit—again contrary to petitioner's assertion (Pet. 11)—likewise does not limit the public concern requirement to hybrid claims. In *Balton* v. *City of Milwaukee*, 133 F.3d 1036 (7th Cir. 1998), the court applied the requirement to "purely associational claims," *id.* at 1041, brought by firefighters who faced retaliation for declining to join an officers' association. See also *Klug* v. *Chicago School Reform Bd. of Trustees*, 197 F.3d 853, 857 (7th Cir. 1999) (applying the public concern requirement to a purely associational claim).

Ignoring *Balton* and *Klug*, petitioner relies on a statement in *Carreon* v. *Illinois Department of Human Services*, 395 F.3d 786 (7th Cir. 2005), that "[t]here is authority for the proposition that a governmental employee's right to associate with his

lawyer extends to matters of private concern." *Id.* at 796. But the court stopped short of holding the public concern requirement inapplicable to non-hybrid claims because the court affirmed summary judgment against the employee on other grounds. *Id.* at 797. *Carreon* did not cite (much less distinguish) *Balton* and *Klug*, and we are aware of no court in the Seventh Circuit that has cited *Carreon* for the proposition that the public concern requirement does not apply to purely associational claims. Petitioner also relies on *Montgomery* v. *Stefaniak*, 410 F.3d 933 (7th Cir. 2005), Pet. 11, but that case concerned the right to *intimate* association (specifically, the plaintiff's right to associate with her fiancé), which manifestly is not implicated in this case, Pet. App. 14a-15a, and which courts treat substantially differently. See, *e.g.*, *Anderson* v. *City of LaVergne*, 371 F.3d 879, 881 (6th Cir. 2004); *Parks* v. *City of Warner Robins*, 43 F.3d 609, 615 (11th Cir. 1995).

2. What remains of petitioner's asserted split are two decades-old, cursorily reasoned precedents from the Fifth and Eleventh Circuits. Pet. 9-10. As the court below correctly recognized, this Court's "very recent[]" decision in *Guarnieri* informs the proper resolution of the question presented here. Pet. App. 12a-13a, 19a, 22a. Accordingly, whatever force those courts' decisions may have had—and, as explained below, they had very little to begin with—is critically undermined by *Guarnieri*. *Ibid.*

Guarnieri recognized that applying "a different rule for each First Amendment claim" by a public employee would potentially harm government interests by "add[ing] to the complexity and expense of compliance with the Constitution." 131 S. Ct. at

2498. It held that "claims of retaliation by public employees do not call for * * * divergence" in analysis depending upon whether the First Amendment right invoked is the Speech Clause or the Petition Clause. *Id.* at 2495. "The substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees," the Court reasoned, "are just as relevant when public employees proceed under the Petition Clause. Petitions, no less than speech, can interfere with efficient and effective operation of government." *Ibid.*

As the court of appeals recognized, it defies logic, after *Guarnieri*, "not [to] impose the public-concern requirement on claims that the government retaliated against an employee for associating with an attorney to speak or petition the government when [the requirement is imposed] on claims that the government retaliated against an employee for speaking or petitioning the government." Pet. App. 19a. Petitioner identifies no case decided since *Guarnieri* in which a court reached a different conclusion, and the Fifth and Eleventh Circuits should be afforded the opportunity to revisit the issue in light of that decision. See generally *Todd* v. *S.S. Mut. Underwriting Ass'n (Berm.) Ltd.*, 601 F.3d 329, 332-334 & n.8 (5th Cir. 2010) (overruling circuit precedent in light of intervening Supreme Court precedent); *United States* v. *Gaspar*, 344 Fed. Appx. 541, 545-546 (11th Cir. 2009) (same).

Giving those circuits the chance to reconsider stale precedent in light of *Guarnieri* is all the more appropriate because those courts gave the issue only "short shrift" on their first passes. Pet. App. 20a. The cases petitioner identifies, Pet. 9-10, *Coughlin* v.

Lee, 946 F.2d 1152, 1158 (5th Cir. 1991), and *Hatcher* v. *Board of Public Education & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987), each answered the question summarily in a single paragraph. Both courts overlooked entirely this Court's opinion in *McDonald*, on which the Tenth Circuit correctly relied below (and this Court relied in *Guarnieri*, see 131 S. Ct. at 2495), and ignored the "roots of the public-concern requirement of *Pickering* and *Connick* in freedom-of-association decisions." Pet. App. 20a. Both courts failed to engage in any analysis of the right of instrumental association and instead relied upon decisions that were either narrow in scope or wholly irrelevant to the question presented.

Coughlin, for example, addressed only an employee's "discharge[] for his political affiliation," 946 F.2d at 1158, and cited decisions of this Court concerning dismissal or differential treatment of public employees in retaliation for political affiliation or patronage. See *id.* at 1158 & nn.15-16 (citing, for example, *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns,* 427 U.S. 347 (1976)). As the Tenth Circuit noted below, "although *Coughlin* stated that the employee in that case was 'not subject to the threshold public concern requirement,' the alleged association for which he was retaliated against was affiliation with a political campaign, an association that we would consider to be an association on a matter of public concern." Pet. App. 21a (citation omitted). Indeed, *Connick* itself suggested that political affiliation is a matter of public concern per se. See 461 U.S. at 149. While subsequent Fifth Circuit decisions have followed *Coughlin* outside of

the political-affiliation context, these more recent panels have considered themselves bound by precedent and have expressly declined to reanalyze the issue—the recognized "force" of the counterarguments notwithstanding. See *Boddie* v. *City of Columbus*, 989 F.2d 745, 747 (5th Cir. 1993) ("[T]he answer to this question is not open for this panel."); see also *Breaux* v. *City of Garland*, 205 F.3d 150, 157 n.12 (5th Cir. 2000) (quoting *Boddie* for the proposition that a retaliation claim predicated on free association "'is not subject to the threshold public concern requirement'").

Hatcher rested its conclusion largely on this Court's opinion in *NAACP* v. *Alabama*, 357 U.S. 449 (1958). See *Hatcher*, 809 F.2d at 1558; Pet. 10. But that case in no way touched upon the question of retaliation against government employees based on instrumental association, nor did it cite either *Connick* or *Pickering*. See *NAACP*, 357 U.S. at 462, 466 (reversing a production order requiring the disclosure to the state attorney general of NAACP membership lists because of the likelihood of a "substantial restraint upon the exercise * * * of [the members'] right to freedom of association").

Neither court, of course, had the benefit of *Guarnieri* and neither grappled with the "potential harm to the government's interests" created by having "[a] different rule for each First Amendment claim." 131 S. Ct. at 2498. Both courts failed to consider the virtues, recognized in *Guarnieri*, of consistency and uniformity in analyzing retaliation claims that are based upon similar First Amendment rights and that implicate substantially identical government interests. See *id.* at 2495. Neither court

anticipated this Court's admonition against treating a First Amendment right as essentially a "right to transform everyday employment disputes into matters for constitutional litigation in the federal courts." *Id.* at 2501.

3. The Second, Fourth, Sixth, Seventh, and now Tenth Circuits are the only circuits to have decided the issue after thorough consideration, and they are unanimous in applying *Connick*'s public concern requirement to associational claims. Pet. App. 19a; *Cobb* v. *Pozzi*, 363 F.3d 89, 106 & n. 5 (2d Cir. 2003); *Edwards* v. *City of Goldsboro*, 178 F.3d 231, 250 (4th Cir. 1999); *Balton* v. *City of Milwaukee*, 133 F.3d 1036, 1040 (7th Cir. 1998); *Boals* v. *Gray*, 775 F.2d 686, 692 (6th Cir. 1985).

These circuits have recognized that this Court has long held that "the rights protected by the First Amendment are 'inseparable' and that no 'sound basis' exist[s] for according greater protection to one right over another." *Cobb*, 363 F.3d at 105 (quoting *McDonald*, 472 U.S. at 485). These circuits have also recognized that *Connick* and its predecessor, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), "while themselves speech cases, are based upon freedom of association cases." *Boals*, 775 F.2d at 692; accord Pet. App. 17a. Those courts that have addressed the issue recently considered *Guarnieri* to decisively support applying the public concern requirement to associational claims. Thus, the Tenth Circuit noted that *Guarnieri* had "expressed concern about the practical consequences of using different rules for evaluating retaliation claims based on different clauses of the First Amendment," *id.* at 19a, and that applying different rules "would aggravate potential

harm to the government's interests by compounding the costs of compliance with the Constitution,'" *ibid.* (quoting *Guarnieri*, 131 S. Ct. at 2498).

Particularly in light of *Guarnieri*, this Court's intervention is not warranted. There is increasing uniformity among the courts of appeals. Petitioner identifies no court of appeals since 1991—much less since *Guarnieri*—that has fully analyzed the question presented here and adopted a position contrary to that of the Tenth Circuit. In the same time frame, several courts have reached conclusions that accord with the decision below. *Guarnieri* stands as a powerful affirmation of the correctness of that approach.

B. The Tenth Circuit's Decision Is Correct

1. It is well settled that "the government as employer * * * has far broader powers than does the government as sovereign." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). As this Court has explained, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Ibid.* (quoting *Waters*, 511 U.S. at 675 (plurality opinion)). That principle reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. Public employers have a "legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'" *Id.* at 150-

151 (quoting *Ex Parte Curtis*, 106 U.S. 371, 373 (1882) (alterations in *Connick*)).

To balance these interests, the Court has held that while the First Amendment protects the right of a public employee "to participate in public affairs," *Connick*, 461 U.S. at 144-145, when the public employee's "expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials * * * enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. By applying the public concern test to employees' claims of retaliation, this Court ensures that public employees do not enjoy "a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Id.* at 147.

Just last Term, this Court held that the public concern test applies with equal force to petitions brought by public employees. *Guarnieri*, 131 S. Ct. at 2495. The Court recognized that "the rights of speech and petition share substantial common ground," *id.* at 2494, and both "are integral to the democratic process," *id.* at 2495. Accordingly, the Court held, there is "no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Ibid.* (quoting *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985)).

2. The same conclusion follows for claims based on the right of association. This Court has never intimated that the right of association receives greater protection than other First Amendment

rights. Rather, the Court has long acknowledged that the freedom of association is closely related to the freedom to petition, and "[t]hese rights * * * are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). These rights, "though not identical, are inseparable." *Ibid.* (quoting *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)). And indeed, as the court of appeals noted below, because "the public-concern test in speech-retaliation cases has its origin in freedom-of-association cases[,] * * * [i]t would be ironic, if not unprincipled, if the public-concern requirement derived from freedom-of-association cases did not likewise apply to retaliation for such association." Pet. App. 17a-18a; see also *Boals*, 775 F.2d at 692 (noting that the reasoning of *Connick* and *Pickering* is "based upon freedom of association cases").

The case for giving association claims preferential treatment is especially weak where, as here, see Pet. App. 15a, the plaintiff asserts an "instrumental" freedom of association claim—that is, a claim based on the "right to associate for the purpose of engaging in those activities protected by the First Amendment." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984). Petitioner engaged an attorney to assist him in challenging the County's disciplinary proceedings, which is a form of "petitioning." Cf. *Guarnieri*, 131 S. Ct. at 2496 (filing grievance is "petitioning"). Such an "instrumental" claim is inherently bound to the First Amendment right being exercised through the association. As the court of appeals correctly concluded, because the right of association at issue here is

"protected only as a means to effectuate rights to speak and petition, [it] cannot be entitled to more protection through the First Amendment than the enumerated First Amendment rights themselves." Pet. App. 22a. Thus, "it would be anomalous to exempt [the freedom of association] from *Connick*'s public concern requirement and thereby accord it an elevated status among First Amendment freedoms." *Cobb*, 363 F.3d at 105.

3. "The substantial government interests that justify a cautious and restrained approach to the protection of speech" and petition rights "are just as relevant when public employees" bring claims based on the right of association. *Guarnieri*, 131 S. Ct. at 2495. In the public-employee free speech cases, this Court has consistently warned that public employees may disrupt the work place through unfettered First Amendment activity. *Connick*, 461 U.S. at 152-153; see also *Guarnieri*, 131 S. Ct. at 2496 (expressing similar concern in petition context). So too here. Public employees can use speech and petition activity to "seek to achieve results that 'contravene governmental policies or impair the proper performance of governmental functions,'" *id.* at 2495 (quoting *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006)), "frustrate progress towards the ends they have been hired to achieve," or "bring the 'mission of the employer and the professionalism of its officers into serious disrepute." *Id.* at 2495-2496 (quoting *City of San Diego* v. *Roe*, 543 U.S. 77, 81 (2004) (per curiam)). Such concerns about "interfer[ing] with the efficient and effective operation of government" (131 S. Ct. at 2495) are in no way diminished when public

employees engage counsel to help them assert their speech and petition rights.

Petitioner asserts "the workplace disruption rationale is wholly inapplicable in lawyer association cases such as this one," Pet. 20, because, petitioner argues, "the employer may never even know that the employee has retained counsel" and "[s]ome associations with lawyers may in fact *promote* office efficiency and stability." Pet. 21. But petitioner's counsel did not play the behind-the-scenes role contemplated by this argument; counsel's participation was highly visible, directing that "all communications on the matter [would] go through hi[m]," demanding extensive discovery even before the informal hearing that was itself designed to give him "the opportunity 'to explore the basis for the recommendation of termination,'" and representing petitioner in hearings and meetings with administrators. Pet. App. 3a-4a.

Indeed, *Guarnieri* recognized the potential disruptiveness of counsel in the petition context. The Court explicitly noted the role of "Guarnieri's attorney [in] invit[ing] the jury to review myriad details of government decisionmaking." 131 S. Ct. at 2496. As the Court observed, "[i]t is precisely to avoid this intrusion into internal governmental affairs that this Court has held that, while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance." *Id.* at 2497 (internal quotation marks and citations omitted). Moreover, protecting the freedom of association even where it does not touch on a matter of public concern "would be unnecessary, or even disruptive, when there is

already protection for the rights of public employees to file grievances and to litigate." *Ibid*. See generally *infra* at pp.20-22. Applying the public concern test to instrumental association claims is necessary to prevent litigants from "evad[ing] the rule articulated in the *Connick* case by wrapping their speech in the mantle of" the right of association. 131 S. Ct. at 2497. This risk of circumvention is particularly pronounced where, as here, the claim is for an "instrumental" association, which is inherently bound to an underlying speech or petition claim. It makes no sense to permit litigants to circumvent the public concern requirement by simply pleading retaliation for association that is only "instrumental" to protecting another First Amendment interest.

C. State And Local Provisions Afford Public Employees Ample Protection

Petitioner suggests that under current law, government employees are at risk of termination "merely for seeking legal counsel regarding their own termination hearings." Pet. 22. That assertion overlooks that state and local legislatures have adopted robust statutory protections for public employees. See *Engquist*, 553 U.S. at 606-607 ("[A]ll the states have, for the most part, replaced at-will employment with various statutory schemes protecting public employees from discharge for impermissible reasons."). Unlike the one-size-fits-all cause of action petitioner seeks under the First Amendment, the remedies governments have created are tailored to strike a "delicate balance" between the rights of employees and the needs of government. *Id.* at 607. As this Court noted in *Guarnieri*, "[t]hese statutory protections are subject to legislative

revision and can be designed for the unique needs of State, local, or Federal Governments, as well as the special circumstances of particular governmental offices and agencies." 131 S. Ct. at 2497.

This case is illustrative of the statutory protections state and local governments afford public employees. Pursuant to state law, Santa Fe County adopted a detailed set of regulations protecting employees.[6] See generally N.M.S.A. § 3-13-4(A) (1978) ("Any municipality may establish by ordinance a merit system for the hiring, promotion, discharge and general regulation of municipal employees."). Before taking any disciplinary action against a protected employee, Santa Fe County must provide notice, show just cause for the disciplinary action, and allow the employee to respond at both pre- and post-determination hearings. Santa Fe County Human Resources Rules and Regulations §§ 7.1; 8.1-8.11. Important here, Santa Fe County also specifically grants employees the right to have representation in both of those hearings. See *id.* §§ 8.2(C), 8.11(A)(4). Any protected employee dissatisfied after receiving a final decision from a hearing officer can appeal to the state district court. See *id.* § 8.11(D). Thus—had petitioner actually alleged during his disciplinary proceedings that he had been terminated for hiring a lawyer—those proceedings, under County Rules, would have

[6] This brief refers to the version of the rules in effect at the time the district court granted summary judgment. The County has since revised the rules in ways not pertinent to the disposition of the petition, to provide additional clarity and increase the time employees have to respond during the disciplinary process.

afforded a mechanism for resolving that claim. Petitioner does not contend otherwise.

Many states likewise guarantee employees the right to have representation in disciplinary hearings. See, *e.g.*, Cal. Gov't Code § 19574.1 (West 2011) (providing right for employee or representative to inspect documents and interview other employees); Fla. Stat. Ann. § 110.227(6)(b) (West 2011); Ill. Comp. Stat. Ann. § 415/11 (West 2011). Petitioner fails to explain why these existing state statutes must be supplemented with a judicially created First Amendment remedy. As this Court has recognized, it makes little sense for "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations [to] be augmented by the creation of a new judicial remedy." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). Indeed, creating an additional federal remedy could *discourage* state and local governments from affording employees such statutory protection. The availability of attorneys' fees under federal law, see 42 U.S.C. § 1988, will encourage litigants to pursue relief, as petitioner did here, under Section 1983, instead of using the remedial schemes available under state and local law. Governments would have little reason to provide such detailed procedures in the face of routine resort to federal judicial remedies.

D. This Case Is A Poor Vehicle To Resolve A Question That Is Neither Recurring Nor Important

1. This case does not warrant review for the further reason that even a decision in petitioner's favor on the question presented would afford him no

relief. As the district court found, "there is simply no evidence of retaliation due to [petitioner]'s consulting with counsel." Pet. App. 32a. There is no question that the County began disciplinary proceedings immediately after learning of petitioner's transmission of the graphic image and well before it learned he had retained counsel. *Ibid.* Instead, as the district court concluded, petitioner's termination resulted from a "pattern of immature, salacious, and unprofessional conduct [that was] sufficient for disciplinary action[,] * * * includ[ing] termination." *Ibid.* Petitioner has not challenged that finding here.

Although a federal appeals court "can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground," Pet. App. 7a (quoting *Alpine Bank* v. *Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009)), courts should "not anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (quoting *Liverpool, N.Y. & P.S.S. Co.* v. *Emigration Comm'rs*, 113 U.S. 33, 39 (1885)) (Brandeis, J., concurring); accord *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 663 (2003) (Stevens, J., concurring in dismissal of certiorari as improvidently granted). Even though petitioner does not argue that the district court erred in granting summary judgment against him, he urges this Court to ignore the district court's factual findings and instead reach out to answer an abstract question of constitutional law that does not control the outcome of this case.[7]

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[7] Moreover, to prevail on remand, petitioner would not only have to persuade the court of appeals that the district court erred in granting respondents summary judgment; to have even

2. What is more, petitioner raised his First Amendment retaliation claim for the first time in federal court, without presenting it to the hearing officer in the administrative proceeding. See Compl. for Civil Rights Violations and Pet. for Writ of Cert., *Merrifield* v. *Bd. of Cnty. Comm'rs*, No. 2:08-cv-00122-LCS-ACT (D. N.M. Feb. 4, 2008). If this Court were to decide this issue, it should do so only in a case where the complaining employee fully availed himself of his administrative remedies by presenting this claim at every stage of the proceedings. That not only gives due respect to state and local remedial schemes, rather than interposing the federal courts between local governments and their employees in the first instance. It also ensures that the administrative record is fully developed—as it could have been during petitioner's nine-day post-termination hearing—and that the First Amendment claim is not simply trumped up to revive (and federalize) a mine-run employment dispute.

3. Finally, petitioner has failed to demonstrate that the narrow claim presented by this petition is recurring and important. Petitioner baldly asserts,

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a faint hope of prevailing, petitioner would *also* have to prove that the district court erred in excluding affidavits that the district court correctly concluded were not linked to "any person, place or subject matter involved in the case" and did not suggest the County opposed an employee's mere consultation with counsel. Pet. App. 34a-35a. If that were not enough, to overcome the individual respondents' qualified immunity defense, petitioner also would have to show that it was "clearly established" at the time that his associational rights extended to matters that were not matters of public concern despite overwhelming authority to the contrary. See *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam).

without citation, that of "federal judicial opinions applying the *Connick* test" over the past decade, "more than one hundred have involved freedom of association claims." Pet. 16. But petitioner makes no effort to show that association claims played a significant role in the resolution of *any* of those cases, and associational rights were not simply mentioned in passing. Nor has petitioner made any effort to demonstrate that the kind of associational claim at issue in his case occurs with any frequency. That is true whether petitioner's claim is understood to implicate a freestanding "freedom of association claim disentangled from any" underlying speech or petition claim, as his petition alleges, Pet. 16; see also Pet. 7, or rather involves "only the instrumental right of freedom of association for the purpose of engaging in speech, assembly, or petitioning for redress of grievances," Pet. App. 15a, as the court of appeals concluded.[8]

In an apparent effort to remedy that, petitioner cites general statistics about the total number of government employees and numbers discharged. Pet. 16. But even petitioner's own inflated estimates

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[8] The Tenth Circuit's decision was narrow and by its own terms considered "only the instrumental right of freedom of association." Pet. App. 15a. The court below expressly did "not determine whether the public-concern requirement applies when a government employee claims retaliation based on the employee's exercise of the intrinsic right of freedom of association," nor did it "determine whether the public-concern requirement applies when the alleged protected association is for the free exercise of religion." *Ibid.* Contrary to petitioner's claim, the court of appeals did not purport to "create[] a categorical restriction on a public employee's freedom to seek personal legal counseling," Pet. 19.

reveal that only a minute fraction of discharged public employees raise associational claims of any sort, much less an associational claim of the sort raised by petitioner. Petitioner's claim that associational claims arise frequently is belied by the fact that the most recent circuit authority he cites dates from *2006*. See Pet. 15.

Nor has petitioner demonstrated that this case involves any real "intrusion upon freedom of association." Pet. 17. Petitioner has pointed to nothing to suggest that, in the more than *two decades* that courts have applied the public concern requirement to association claims, employers have taken advantage of the rule to impose restrictions on employees' ability to consult with legal counsel or penalized "an employee's private consultation with an attorney." Pet. 7. That is because the public concern requirement is not being used as a tool for persecution, as petitioner imagines, Pet. 22, but rather as a commonsense safeguard to prevent government employees from constitutionalizing everyday workplace grievances. This case perfectly illustrates that point: The district court found as fact that petitioner was terminated for his disruptive distribution of sexually graphic images during work hours, and yet he is petitioning this Court for review of a hypothetical injury to his First Amendment rights. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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