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, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL SCHWARZ
P.O. Box 1656
Santa Fe, NM 87504
(505) 988-2053

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The court of appeals held that public employees may be discharged for consulting privately with an attorney regarding their own employment rights (or on any other matter of private concern). But the "public concern" requirement that a public employee must satisfy to assert a claim under the Speech and Petition Clauses (see *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011); *Connick* v. *Myers*, 461 U.S. 138 (1983)) makes no sense in the context of an associational claim like the one here, which is unrelated to public speech or petitioning activity.

That is why two courts of appeals have rejected the approach of the court below and held the public concern requirement inapplicable to all associational claims, and three others have recognized the different considerations relevant to this subset of associational claims. This Court should grant the petition to resolve the confusion regarding this question and ensure that public employees' claims are not assessed under different legal standards depending on where a lawsuit is filed.

A. The Confusion Among The Lower Courts Necessitates This Court's Intervention Now.

There is a clear conflict among the lower courts regarding the question presented. Two courts of appeals do not apply the public concern requirement to association claims. Four courts of appeals, including the court below, have held that the public concern requirement applies. Three other courts have expressed some confusion on the issue and applied the requirement to only a sub-category of such claims.

Respondents argue that this admitted conflict does not warrant review for two reasons. Neither is substantial.

First, respondents assert that review is not appropriate now because the two courts of appeals that have held the public concern requirement inapplicable to associational claims, the Fifth and Eleventh Circuits, would likely reach a different result in light of this Court's decision in *Guarnieri*. Opp. 9-15.

But *Guarnieri* held only that retaliation claims predicated on the *Petition* Clause must satisfy the same public concern requirement as Speech Clause claims, a holding "justified by the extensive common ground in the definition and delineation of these rights," and the logically-sensible application of the public concern requirement in the petition context. See 131 S. Ct. at 2495. Thus this Court explained that, "[a]s under the Speech Clause, whether an employee's petition relates to a matter of public concern will depend on 'the content, form, and context of [the petition], as revealed by the whole record.'" *Id.* at 2501.

The *Guarnieri* Court specifically cautioned, however, that "[c]ourts should not presume there is always an essential equivalence" among different First Amendment activities or that one clause's "precedents necessarily and in every case resolve [other First Amendment] claims." 131 S. Ct. at 2495. On the contrary, "[i]nterpretation" of the different clauses "must be guided by the objectives and aspirations that underlie the [associated] right." *Ibid.* Thus, if "special concerns * * * provide a sound basis for distinct analysis," then "the rules and principles that define [different First Amendment] rights might dif-

fer in emphasis and formulation." *Ibid.* That describes the situation here exactly.

Critically, the Fifth Circuit and the Eleventh Circuit had decided, before *Guarnieri*, to apply the public concern requirement to Petition Clause claims. See, *e.g.*, *Rathjen* v. *Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989); *D'Angelo* v. *Sch. Bd. of Polk Cnty.*, 497 F.3d 1203, 1211 (11th Cir. 2007). Both courts of appeals thus correctly anticipated this Court's holding in *Guarnieri* and much of its reasoning and yet *still* declined to apply the public concern requirement to associational claims.

Indeed, the Eleventh Circuit—rather than ignoring this Court's decision in *McDonald* v. *Smith*, 472 U.S. 479 (1985), as respondents claim (Opp. 14)—expressly relied on *McDonald* in holding that both Petition and Speech cases had to meet the public concern threshold (see *D'Angelo*, 497 F.3d at 1211), but explicitly reaffirmed the "significant difference between [an association] claim and [Speech and Petition] claims * * * *[d]espite* * * * *McDonald*." *Id.* at 1212 (emphasis added). Similarly, the Fifth Circuit held the public concern requirement applicable to petitioning claims (in *Rathjen*) before reaching the contrary conclusion in *Coughlin* with respect to associational claims.

Respondents' view that *Guarnieri* will lead these courts to reach a different conclusion regarding associational claims is thus undermined by their existing precedent (which anticipated the result and reasoning of *Guarnieri* and at the same time determined that a different outcome is appropriate with respect to associational claims), and by this Court's analysis in *Guarnieri* itself (which recognized that its reasoning was limited to claims with characteristics similar

to speech and petition claims, a standard that associational claims do not remotely satisfy). See pp. 11-12, *infra*. There is thus a clear conflict among the courts that will not be eliminated by reconsideration in light of *Guarnieri*.

Second, respondents assert that the decisions of the Third, Seventh, and Ninth Circuits are irrelevant because those courts of appeals have not adopted a clear standard with respect to every type of associational claim. Opp. 9-11. What these courts have recognized, however, is that the across-the-board rules that apply to speech and petitioning claims do not fit in the association context—and that a more tailored approach is necessary. They thus clearly conflict with the approach taken by the court below, and by the Second, Fourth, and Sixth Circuits, all of which have adopted a categorical rule, and confirm the need for this Court's intervention.

Thus, although the Seventh Circuit in *Balton* v. *City of Milwaukee*, 133 F.3d 1036 (7th Cir. 1998), applied the public concern requirement, it also noted that, despite being "so useful in resolving public employee free speech cases, [it] is not easily transferable to freedom of association cases." *Id.* at 1039. Foreshadowing later developments, the court opined that "strict reliance on *Pickering*/*Connick* presents potential problems" and "may not appropriately recognize the important distinction between speech and association." *Id.* at 1040.

Two years later, the Seventh Circuit carved out an exception for association with an attorney by finding that a teacher had a constitutional right "to obtain legal advice [which] does not depend on the purposes for which the advice is sought." *Denius* v. *Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000). Although the

defendant in *Denius* avoided liability due to qualified immunity (see *id.* at 955), that case clearly established the law of the circuit on this issue. *Carreon* v. *Illinois Department of Human Services*, 395 F.3d 786 (7th Cir. 2005), confirms that *Denius* stands "for the proposition that a governmental employee's right to associate with his lawyer extends to matters of private concern" (*id.* at 796).

The Ninth Circuit adopted a similar approach in *Hudson* v. *Craven*, 403 F.3d 691 (9th Cir. 2005), by applying the public concern requirement only to hybrid claims where "[t]he speech and associational rights * * * are * * * intertwined." *Id.* at 698. This limited holding has engendered confusion in the district courts, with some extending the requirement to free-standing association claims,[1] while others continue to treat speech and association differently even after *Hudson* and *Guarnieri*. *E.g.*, *Hanford Exec. Mgmt. Emp. Ass'n* v. *City of Hanford*, 2011 WL 5825691, at *20, *23 (E.D. Cal. 2011) (requiring plaintiffs to establish they "spoke on a matter of public concern" for their speech claim but requiring only that they "engaged in protected association" for their association claim (citing *Hudson*, 403 F.3d at 695)).

And in *Sanguigni* v. *Pittsburgh Board of Public Education*, 968 F.2d 393, 400 (3d Cir. 1992), as discussed in the petition (at 12-13), the court applied the public concern requirement only because the association claim—like the claims in *Hudson* and *Bal-*

[1] Respondent cites (Opp. 10) one case, *Biggs* v. *Town of Gilbert*, 2012 WL 94566 (D. Ariz. 2012), as an example. The *Biggs* court, however, acknowledged that no "Supreme Court case or a Ninth Circuit * * * case [was] directly on point" (*id.* at *6), another indication of the uncertainty and confusion that require this Court's review.

ton—rested on the same facts as the employee's speech claim.

These decisions thus confirm the different treatment of association claims in the lower courts and the need for this Court's intervention to resolve the confusion and resulting uncertainty.

B. The Issue Is Properly Presented In This Case.

There is no doubt that the court of appeals' holding rests entirely on its determination regarding the question presented: it squarely held that the public concern requirement applies to a public employee's claim that he was discharged in retaliation for exercising his right of association, even when, as here, that association (obtaining confidential legal advice) was private in nature. Pet. App. 15a-16a; Pet. 5-6.

Indeed, this case offers an ideal opportunity to address whether the public concern requirement applies to association claims, because it involves a *pure* association claim. Petitioner sought an attorney only to consult with him in a private employment dispute, not to join together with the attorney to publicly express a grievance or other message. By contrast, "hybrid" claims—many of those brought in the employment retaliation context—involve an act of association tied to speech, such as casting the circulation of a newsletter in the workplace as association with coworkers. See *Sanguigni*, 968 F.2d at 400.

Respondents nonetheless assert that review is not appropriate because the district court rested its decision on a different ground—that petitioner was not discharged in retaliation for his association with an attorney. Opp. 23-24. But the Tenth Circuit expressly declined to rest its decision on that ground

(Pet. App. 6a-7a), and instead reached the constitutional question. The court of appeals' decision not to rest on a narrow, fact-based ground of decision—and instead to reach out to decide a legal question that had divided the other courts of appeals—strongly indicates that the court below had significant concerns about the district court's factual analysis.

Certainly the record before the court of appeals provided strong support for such a concern. To begin with, there was undisputed evidence that petitioner's supervisor had told him that he would be "as good as gone" if he consulted an attorney. Pet. App. 31a. In addition, the district court refused to consider affidavits proffered by petitioner that provided strong evidence of a policy of discharging employees who consulted with counsel. See Pet. App. 32a-35a. That ruling, which respondents had not sought, was challenged before the court of appeals. Pet. App. 6a.[2]

The factual record in this case is thus unclear regarding the reason for petitioner's discharge. The issue will remain to be resolved on remand if this Court rules in petitioner's favor on the purely *legal* question upon which the Tenth Circuit rested its decision in this case. That some fact questions will have to be resolved on remand provides no ground for declining to grant review to resolve a legal issue on which the courts of appeals are divided.

Respondents also contend that review by this Court is appropriate only in a case in which the plaintiff raised his constitutional claim in the state

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[2] In addition, the relevant legal standard requires only that the impermissible ground for termination be "a motivating factor" in the dismissal. *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 , 287 (1977).

administrative process. Opp. 25. But that argument is precluded by this Court's determination that there is no exhaustion requirement for Section 1983 claims. *Patsy* v. *Bd. of Regents*, 457 U.S. 496, 516 (1982) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.").

It is true that, to sue a *municipality* under Section 1983, the plaintiff must receive a final ratification of the action by a municipal policymaker whose decisions are not subject to *de novo* review by higher-ranking officials. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality); *id.* at 137 (Brennan, J.). But petitioner sued individual officials as well as the County, so this requirement would apply only to his claims against the County. And in any event, petitioner met his burden on this score: he appealed his termination to a County Hearing Officer for a final decision, who affirmed the decision on an arbitrary-or-capricious standard of review (while noting specifically that *de novo* review would have resulted in a different outcome). Pet. 4. That is all this Court's decisions require.[3]

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[3] Respondents correctly observe that petitioner did not specifically raise his First Amendment claim before the hearing officer. But that is not what *Praprotnik*, which also involved a First Amendment retaliation claim, requires. All a Section 1983 plaintiff must do is obtain a final statement of municipal policy, which then may be challenged in federal court on constitutional grounds. This Court, in *Praprotnik*, required the plaintiff to appeal to St. Louis's Civil Service Commission only his adverse employment decision, not also his constitutional claim of retaliation. *Id.* at 116.

C. The Issue Is Important.

Unwilling to dispute directly the frequency with which public employees assert freedom of association claims, respondents intimate that such claims are typically asserted only in passing. Opp. 25-26. That simply is not true.

Far from addressing association claims only incidentally, the vast majority of the recent opinions citing *Connick* in the right to association context confront the issue head-on and recently have increased in frequency. Since the decision below, for example, federal courts have decided fifteen cases that included a separate freedom of association claim. See *Baar* v. *Jefferson Cnty. Bd. of Educ.*, 2012 WL 738741 (6th Cir. 2012); *Barry* v. *Moran*, 661 F.3d 696 (1st Cir. 2011); *White* v. *Cleary*, 2012 WL 924338 (D.N.J. 2012); *Campanella* v. *Cnty. of Monroe*, 2012 WL 537495 (W.D.N.Y. 2012); *Biggs* v. *Town of Gilbert*, 2012 WL 94566 (D. Ariz. 2012); *Walls* v. *Sumner Cnty. Bd. of Educ.*, 2011 WL 6888408 (M.D. Tenn. 2011); *Hanford*, 2011 WL 5825691; *Gusler* v. *City of Long Beach*, 2011 WL 4628742 (E.D.N.Y. 2011); *Pa. State Troopers Ass'n* v. *Pawlowski*, 2011 WL 4592786 (M.D. Pa. 2011); *Burgos* v. *City of New Britain*, 2011 WL 4336757 (D. Conn. 2011); *Lee* v. *Padilla*, 2011 WL 3475480 (D.N.J. 2011); *Morris* v. *City of McAlester*, 2011 WL 4036161 (E.D. Okla. 2011); *Gusler* v. *City of Long Beach*, 2011 WL 4625991 (E.D.N.Y. 2011); *Lee* v. *Padilla*, 2011 WL 3475480 (D.N.J. 2011); *Lee* v. *Cnty. of Passaic*, 2011 WL 3159130 (D.N.J. 2011).

And, of course, litigated cases understate the significance of the issue because the vast majority of terminations are *not* litigated. More importantly, the

rule below will guide government actors in future employment matters.

Finally, the issue is important because it places a very substantial cloud over the ability of public employees to consult counsel privately to obtain advice regarding their own employment situations. The Tenth Circuit's decision, if upheld, gives employers a constitutional shield to engage in this type of retaliation. This Court should not countenance such a significant interference with individuals' ability to obtain legal advice.[4]

D. The Tenth Circuit's Decision Is Wrong.

Respondents do not dispute that petitioner's association with his attorney is protected by the First Amendment. Their arguments for the application of the public concern requirement fail completely to come to grips with the analysis in the petition. See Pet. 20-22.

As a threshold matter, respondents are simply wrong in contending (Opp. 17-18) that *Guarnieri* decides this case. This Court has long recognized that the enumerated rights that prohibit "'abridging'

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[4] Respondents also suggest that state and local remedies obviate the need for a Section 1983 action tailored to protect the associational right. Opp. 21-23. But it has been a bedrock principle of Section 1983 jurisprudence, since *Monroe* v. *Pape*, that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183 (1961). Accordingly, the nature and quality of state remedies is irrelevant to petitioner's claim. More fundamentally, respondents have failed to—and cannot—point to any state law providing a remedy for violation of public employees' First Amendment rights.

freedom of speech, the right peaceably to assemble and to petition" differ from the "the 'associational freedom' * * * that goes with those rights." *Schneider* v. *Smith*, 390 U.S. 17, 25 (1968).

Guarnieri itself warned against presuming that "there is always an essential equivalence" among First Amendment rights; instead, the "[i]nterpretation of [a specific First Amendment right] must be guided by the objectives and aspirations that underlie the right." 131 S. Ct. at 2495. Accordingly, the *Guarnieri* court was clear that its decision rested on the "substantial overlap" and "substantial common ground" between speech and petition rights, (*id.* at 2493-2494), a commonality that does not exist as strongly in the association context. A tailored rule for associational claims, therefore, would not impermissibly elevate the protection above speech and petition rights; rather, it would provide the appropriate level of protection for a First Amendment freedom that encompasses necessarily private concerns.

Respondents claim that protecting an individual's private association with his lawyer could be disruptive to the workplace and argue that permitting an associational claim would "permit litigants to circumvent the public concern requirement by simply pleading retaliation for association." Opp. 20-21. But there is a key difference between what is at issue here—private consultation with a lawyer—and the use of a lawyer in public proceedings such as a hearing. Because only the latter situation implicates speech or petition interests, it is only the latter situ-

ation in which respondents' arguments are applicable. That simply is not this case.[5]

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL SCHWARZ
P.O. Box 1656
Santa Fe, NM 87504
(505) 988-2053

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

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[5] Respondents contend that petitioner's counsel did not "play a behind-the-scenes role." Opp. 20. That is true, but misleading: *the events cited by respondents occurred after petitioner was discharged for his private consultation with counsel*. They therefore are irrelevant to the constitutional claim. Moreover, as respondents' own brief makes clear (Opp. 22), representation of counsel is permitted by the rules governing the termination hearing process.