No. 12-1367

In the Supreme Court of the United States

SARAH JANE UNDERWOOD, PETITIONER

v.

RITA HARKINS, IN HER OFFICIAL CAPACITY AS CLERK OF THE SUPERIOR COURT OF LUMPKIN COUNTY, GEORGIA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held, consistent with other courts to consider the question, that the First Amendment does not compel a newly elected official to continue to employ as her deputy and legal "alter ego" the adversary she defeated in her election to office.

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The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 698 F.3d 1335. The district court's opinion (Pet. App. 31a-46a) is unreported but available at 2011 WL 2457680.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2012. A petition for rehearing was denied on January 15, 2013 (Pet. App. 47a-48a). Justice Thomas extended the time for filing a petition for a writ of certiorari to and including May 15, 2013, and the petition was filed that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Sarah Jane Underwood ran against her co-worker, respondent Rita Harkins, in the 2008 Republican primary to succeed Edward Tucker, a 35-year incumbent, as Clerk of the Superior Court of Lumpkin County, Georgia. Petitioner served as Tucker's Deputy Clerk, a position which, under Georgia law, is the Clerk's alter ego, vested with authority to exercise all powers of the Clerk. While the primary did not involve partisan conflict or disagreement about issues, it created tension among the parties to this suit and their co-workers, and after assuming office, respondent fired petitioner. After examining the Deputy Clerk's duties under Georgia law and making specific factual findings about the working relationship between respondent and her alter ego, the district court granted respondent summary judgment, rejecting petitioner's claims that the First Amendment prohibited her discharge. Pet. App. 38a, 46a. The Eleventh Circuit affirmed.

The court of appeals correctly held that the First Amendment does not require the Superior Court Clerk to retain a rival in a position state law makes her alter ego, simply because in practice, the daily duties under the prior clerk were allegedly more restricted. Contrary to petitioner's overblown claims of "dee[p] divi[sion]," Pet. 8, that narrow and context-specific holding—which by its explicit terms is limited to the "confines" (Pet. App. 17a) of alter ego cases and does not foreclose adopting petitioner's favored rule for any official who "is not the legal alter ego" of the supervisor, *id.* at 22a—conflicts with no decision of any other court of appeals or state court of last resort. On a realistic reading of the cases, the alleged split reflects at most natural variation resulting from the different facts of specific cases—but no square substantive disagreement—in this context-sensitive area.

For many reasons, this case would be an inappropriate vehicle: because the broad question petitioner articulates is not actually presented by the Eleventh Circuit's explicitly limited holding; because the district court has *already concluded* petitioner would lose under her favored rule, considering the job petitioner would actually perform, Pet. App. 33a, 45a; because there is an unresolved predicate question this Court would need to face before reaching the issue petitioner presents; and because this case involves concededly unusual facts—an alter ego position, an asserted First Amendment interest consisting of the employee's candidacy alone (most cases involve campaign speech or party membership), and purportedly narrower actual duties that are

based on the practices of a prior officeholder. The petition should be denied.

1. Edward Tucker served as the Clerk of the Superior Court of Lumpkin County, Georgia, from January 1973 to December 2008. Under Georgia law, the Clerk has a broad array of statutory responsibilities: to keep and run the clerk's office, issue and sign formal papers under authority of the court, file documents relating to title and conveyances of real property, attest deeds, remit portions of fees collected, and file and transmit civil case filings and dispositions. Pet. App. 2a-3a (citing Ga. Code Ann. § 15-6-61(a)(1)-(21) (2012)). The Clerk must execute a $150,000 bond and is personally liable if she fails to "faithfully account" for moneys received. *Id.* at 3a (citing Ga. Code Ann. §§ 15-6-59(a), 15-6-83 (2012)).

Tucker hired petitioner Sarah Jane Underwood in 1999, in 2004 appointed her Deputy Clerk, and in 2006 designated her office accountant. Pet. App. 5a, 32a. Respondent Rita Harkins also worked in the office. *Id.* at 32a. Under Georgia law, a Deputy Clerk is "[an] employe[e] of the [C]lerk of the superior court rather than [a] county employe[e]." *Id.* at 45a (citing Ga. Code Ann. § 15-6-59(b) (2010)). Like the Clerk, a Deputy must execute a "bond with good security." *Id.* at 4a (quoting Ga. Code Ann. § 15-6-59(b) (2012)). By statute, the "[p]owers and duties of deputy clerks shall be the same as those of [superior court] clerks." *Ibid.* Lumpkin County has declined to extend civil service protection to Deputy Clerks, who are "at-will employee[s] subject to discharge" at any time. *Ibid.*

2. In May 2008, Tucker announced that he would not seek reelection. Pet. App. 6a. Soon afterwards, respondent called an office meeting to announce she would seek the Republican nomination for Clerk; at that same meeting, after respondent spoke, petitioner announced that she would run in opposition. *Ibid.*; Complaint ¶ 8. The primary election was "not contentious" and focused on the candidates' qualifications rather than questions of policy or partisan politics. But the contest between co-workers created tension in the nine-person office, with other employees publicly taking opposing sides. Pet. App. 6a.

Respondent won the primary, ran unopposed in the general election, and took office as Clerk in January 2009. After the election, petitioner did not congratulate respondent or indicate that she would be able to work under her leadership. Pet. App. 6a-7a. Soon afterward, and consistent with petitioner's at-will status under state law, respondent terminated petitioner's employment. *Id.* at 33a.

3. Petitioner sued respondent in her official capacity under 42 U.S.C. § 1983, alleging that her termination violated her First Amendment rights of association and speech and seeking compensatory and punitive damages, attorneys' fees, and equitable relief. Complaint 9. Although maintaining that she had terminated petitioner "because of her attitude and work performance," respondent accepted, for summary judgment purposes, petitioner's allegation that "she was terminated because she ran against [respondent]." Pet. App. 33a-34a.

The district court granted respondent summary judgment. Pet. App. 46a. The court acknowledged that under this Court's decision in *Branti* v. *Finkel*, 445 U.S. 507 (1980), the "ultimate inquiry . . . is whether . . . affiliation is an appropriate requirement for the effective performance of the public office involved," an analysis that requires "balancing the constitutional rights of employees with government interests in effective performance of job functions." Pet. App. 38a (quoting *Branti*, 445 U.S. at 518). The court made specific findings about petitioner's job duties "[a]t the time [respondent] filled [the Clerk's office]." *Id.* at 33a. The district court found that respondent "interacts with the office accountant on a daily basis," and that in that position, petitioner had significant financial responsibility, including paying jurors, monthly accounts payable and receivable, reconciling the office's nine checking accounts, receiving funds and depositing them in a local bank—financial functions that respondent viewed as "high priority" because of the threat "money issues" could pose to the effective functioning of the office. *Ibid.*

Assessing both petitioner's actual job duties and the authority Georgia law vested in a Deputy Clerk, the district court concluded that "[respondent's] interest in office loyalty . . . outweigh[s] the First Amendment protection of [petitioner]'s candidacy." Pet. App. 41a. The district court considered, but declined to give controlling weight to, petitioner's argument that her duties under the former Clerk were ministerial, *id.* at 44a, concluding that the "close working relationship" between the clerk and the office accountant "creates a great potential for actual or threatened disruption." *Id.* at 45a (internal quotation

marks omitted). The court emphasized that it might have reached a different conclusion considering "the responsibilities of deputy clerks in other counties" who had different actual duties. *Id.* at 44a n.3.

4. The court of appeals affirmed, in a narrow opinion expressly limited to "the confines of the case before [it]," which it described as the particular circumstances where "the subordinate, under state or local law, has the same duties and powers as the elected official." Pet. App. 17a. Judge Jordan, joined in the majority by Judge Carnes, distinguished between a true "deputy"—who is authorized by law to act with the full scope of an elected official's powers—and other employees. *Id.* at 12a-13a (citing *Terry* v. *Cook*, 866 F.2d 373 (11th Cir. 1989)).

As to true deputies such as the position here, see Pet. App. 4a, 15a-16a, the court concluded the analysis required by *Branti* and *Elrod* v. *Burns*, 427 U.S. 347 (1976), could be resolved "as a matter of law," given the "closeness and cooperation required," because "a shared ideology" is never more important "than when an elected official appoints a deputy who may act in his or her stead." Pet. App. 13a, 17a-18a (quoting *Butler* v. *N.Y. State Dep't of Law*, 211 F.3d 739, 744 (2d Cir. 2000)). For all other officials, the determination "depends on the actual responsibilities of each position and the relationship of each to the [elected official]," *id.* at 14a (quoting *Terry*, 866 F.2d at 378); where the discharged employee "is not the legal alter ego of the official," "whether she is a confidential employee from whom loyalty can be demanded will ordinarily need to be determined as a matter of fact," *id.* at 22a. The court acknowledged

that petitioner's "daily duties" under the *former* Clerk "did not extend to the outer limits authorized by Georgia law," Pet. App. 19a, although petitioner performed sensitive duties, including the substantial accountant duties described above. *Id.* at 5a. But for an alter ego position, the court declined to treat those former duties as "determinative." *Id.* at 10a, 19a.

The court of appeals followed circuit precedent extending to candidacy this Court's prohibition on discharging a public employee "for refusing to support a political party or its candidates," unless "political affiliation is a reasonably appropriate requirement for the job." Pet. App. 9a-10a (quoting *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 714 (1996)). The court thus balanced the State's interests in "confidentiality and loyalty" against the need for "some degree" of First Amendment protection for candidacy. *Id.* at 11a-12a. The court recognized, however, that this case involves neither "pure political patronage" nor "pure political affiliation," because "there is no indication in this record that" petitioner and respondent, who are both Republicans, "had different political ideologies," *id.* at 16a-17a; nor is this a speech case, "in which an employee was terminated because of things she said during an election," *id.* at 16a n.3.

The court emphasized that its approach to alter ego cases "makes practical sense." Pet. App. 21a. That one elected official has not given his deputy "all of the discretionary or policymaking authority available under state or local law" does not "prevent that official (or a future one) from changing her mind, or from choosing to expand a subordinate's duties if

she is able to hire the subordinate of her choice." *Ibid*. (citing *Summe* v. *Kenton Cnty. Clerk's Office*, 604 F.3d 257, 269 (6th Cir. 2010)). The court "hesitate[d] to bind [respondent] to employ [her deputies] in ways they were employed in the past." *Ibid*. The court also explained that its approach affords "predictability to legislative bodies," as legislatures "can decide which powers to give to immediate subordinates of elected officials," and gives "fair warning" to employees about whether their jobs are subject to termination. *Id.* at 22a.

Judge Martin dissented. Although she agreed that courts should consider the "inherent powers" of the office in determining whether a public employee can be terminated, Pet. App. 25a, she would have found that petitioner had introduced sufficient evidence about her former duties to survive summary judgment. *Id.* at 28a. Judge Martin disagreed with the majority's interpretation of prior Eleventh Circuit cases applying *Elrod* and *Branti*, and invoked principles from a public employee speech case. *Id.* at 25a-27a (citing *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006)).

5. The Eleventh Circuit denied rehearing en banc. No judge called for a poll. Pet. App. 47a.

REASONS FOR DENYING THE PETITION

The court of appeals correctly applied uncontroverted principles of law to the special situation of subordinate officials clothed by state law with authority to act as "the legal alter ego of the [elected official]," and emphasized that petitioner's favored rule would "ordinarily" apply to employment decisions that fell outside that narrow circumstance.

Pet. App. 22a. Thus, this case does not even plausibly involve "the First Amendment rights of millions of public employees," Pet. 9, but by the explicit terms of the Eleventh Circuit's decision, Pet. App. 17a, 22a, only the relative handful of high-level officials charged with statutory authority to act as alter egos to an elected official. The court's decision is consistent with the great weight of authority from federal and state courts; petitioner identifies no case that conflicts with the court's narrow, context-specific holding; and the alleged "dee[p] divi[sions]," Pet. 8, vanish on even brief review.

This case is a poor vehicle to address the application of *Elrod* and *Branti* where job duties are disputed, because the broad question petitioner articulates is not actually presented by the Eleventh Circuit's explicitly limited holding; the petition implicates, but does not mention, a subsidiary division of authority that this Court would need to resolve before reaching the question; the unusual facts of this case would prevent the Court from issuing broad guidance; and the district court's opinion makes clear that petitioner's proposed rule would have no effect on the judgment. This Court has repeatedly and recently denied certiorari on petitioner's (and related) questions.[1] There is no reason for a different outcome here.

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[1] See, *e.g.*, *Riley* v. *Blagojevich*, No. 05-1060 (seeking review of whether *Elrod-Branti* analysis looks "solely to the job description"), cert. denied, 547 U.S. 1071 (2006); *Mills* v. *Meadows*, No. 99-703 (seeking review of whether analysis includes "actual job responsibilities"), cert. denied, 528 U.S. 1105 (2000); *Cutcliffe* v. *Jenne*, No. 97-1310 (asserting Eleventh Circuit erred by not conducting "individualized" analysis of

I. The Petition Implicates No Meaningful Conflict of Authority

Petitioner labors to manufacture a "shar[p]" (Pet. 3) division of authority between nine courts of appeals and four state high courts about what evidence courts can consider in conducting *Elrod-Branti* analysis. A reader's suspicions about the existence of such a remarkably broad and square split in this highly context-specific area would be well founded: On a realistic account of the cases, petitioner's supposed split collapses, revealed as an over-reading of the narrow court decision below and a selective account of opinions from other courts. Tellingly, the petition identifies *no case* affording First Amendment tenure protection to an elected official's immediate deputy and legal alter ego (or even a public employee with remotely similar responsibilities)—and certainly no case doing so based on evidence of an employee's duties under a *former* officeholder (as here). Few of petitioner's cases even engage the legal issue presented in the petition, much less resolve the issue adversely to the decision below.

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office), cert. denied, 523 U.S. 1118 (1998); *Gordon* v. *Cnty. of Rockland*, No. 96-1996 (seeking review of whether "inherent [or] actual duties control the *Elrod-Branti* inquiry"), cert. denied, 522 U.S. 820 (1997); see also *Gorecki* v. *Carlson*, No. 04-571 (seeking review about whether analysis of job duties is question of fact or law), cert. denied, 544 U.S. 960 (2005); *Beaver Cnty.* v. *Armour*, No. 01-1403 (same), cert. denied, 535 U.S. 1079 (2002); *Mumford* v. *Basinski*, No. 97-243 (urging test that would consider "all the facts" about job duties), cert. denied, 522 U.S. 914 (1997).

The petition instead relies on cases involving very different types of employment, ranging from law-enforcement officers to road-grader operators. Those decisions reflect "the natural result of" applying settled principles to "the myriad of governmental bodies, departments, and positions, and the varying responsibilities of public employees." *Waskovich* v. *Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993) (quoting *Pounds* v. *Griepenstroh*, 970 F.2d 338, 341 (7th Cir. 1992)); accord *McCloud* v. *Testa*, 97 F.3d 1536, 1556 (6th Cir. 1996) ("Between the category of 'line' or 'grunt' workers [entitled to First Amendment protection] and cabinet secretaries [who are not] lies a vast range of positions.").

A. The Court Of Appeals' Decision Does Not Conflict With Decisions Of Other Courts

Contrary to petitioner's assertion, Pet. 11, no case cited meaningfully conflicts with the narrow decision below.

1. Ninth Circuit. The petition relies principally on *DiRuzza* v. *County of Tehama*, 206 F.3d 1304 (2000), but omits key portions of its analysis that dispel any meaningful conflict with the decision below. *DiRuzza* did not involve the distinction between a statutory job *description* and evidence of an employee's "actual duties," but whether the mere *job title* of "deputy sheriff" permitted an employee to be terminated "for partisan reasons," based on "cases from other circuits holding that deputy sheriffs are policymakers" under the law of those States. *Id.* at 1307, 1309. The Ninth Circuit rejected the idea that the "*title* 'deputy sheriff'" was determinative because of "the different nature of the job performed by deputy sheriffs" in

other jurisdictions, *id.* at 1309, noting that "[u]nder California law," "[a]ll peace officers employed in the county sheriff's office, at whatever level, are sheriff's deputies," ranging from "higher-level employees" (such as "the undersheriff, lieutenant, sergeant and captain") to "lower-level employees" ("line peace officers and jail custodians"), *ibid.* The plaintiffs in *DiRuzza* were among "78 deputy sheriffs" in an office and—far from being the sheriff's immediate deputy (*i.e.*, "undersheriff")—were "the lowest ranking peace officers in the department." *Id.* at 1310-1311. The court's holding was narrow: a "categorization *based upon job title alone* obscures rather than clarifies the nature of the duties actually performed and the constitutional rights at issue." *Ibid.* (emphasis added). This case does not involve analysis based on "job title alone," but rather the substantive authority state law vests in a Deputy Clerk.

Far from conflicting with the decision below, Ninth Circuit precedent affirmatively supports it. Petitioner neglects to mention *Fazio* v. *City & Cnty. of San Francisco*, 125 F.3d 1328 (1997), which *DiRuzza* distinguished, 206 F.3d at 1309, and which upheld the termination of an Assistant District Attorney in part on grounds that his "powers under the San Francisco Charter [we]re . . . nearly identical to those of the actual [elected] District Attorney." *Id.* at 1334; see also *id.* at 1333 ("the powers statutorily granted to Assistant District Attorneys were very broad, regardless of whether or not the Assistant District Attorneys actually exercised those powers").

Unlike *DiRuzza*,[2] *Fazio* also involved the employee's candidacy: the District Attorney fired the plaintiff "[w]hen . . . [he] filed his papers to run against [his boss] for the District Attorney position." *Id.* at 1330.[3]

2. Eighth Circuit. If anything, the lone Eighth Circuit case petitioner cites (Pet. 14) *supports* the Eleventh Circuit's approach. *Horton* v. *Taylor*, 767 F.2d 471, 472, 475 (1985), involved a county judge's dismissal of five "road-grader operators." The court addressed whether there is a categorical "small-county exception" to *Elrod* and *Branti* given the district court's reliance on the "political realities of

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[2] The plaintiff in *DiRuzza* engaged in "political activity" and speech, supporting the incumbent's unsuccessful reelection bid, including "appearing in a televised political advertisement." 206 F.3d at 1306-1307. The nature of the First Amendment interest is critical, because *Elrod-Branti* analysis requires "balancing" the particular First Amendment interest and the State's interest in efficient and effective employees. Pet. App. 11a-12a.

[3] The other Ninth Circuit cases petitioner cites (Pet. 12-13) are inapposite. *Hunt* v. *County of Orange*, 672 F.3d 606, 609, 614 (2012), involved whether "one of sixty" lieutenants in the Sheriff's Department was a policymaker who could be lawfully demoted for "campaign speech" criticizing the Sheriff-Coroner for a "culture of corruption." The court addressed only the narrow issue of whether the district court's holding was consistent with the record and the jury's answers to specific interrogatories, not whether the case could be resolved based on a formal job description. *Hobler* v. *Brueher*, 325 F.3d 1145, 1146, 1155 (2003), held that an elected county prosecutor could terminate the "at-will confidential secretaries hired by [his] predecessor." The court upheld the termination because of the close working relationship involved, but neither suggested that the (non-attorney) secretaries had authority co-extensive with the county prosecutor, nor addressed whether their actual duties were narrower than their formal ones. *Id.* at 1152.

small, rural Arkansas counties." *Ibid.* In rejecting that proposition, the court held that employees whose work consisted of operating "heavy machinery over unpaved rural roads" plainly "did not have 'virtually all the duties' of the county judge himself"—and could not be said to be "the judge's second self, his confidential representative." *Id.* at 477. *Horton* did not address formal job descriptions or whether the plaintiffs' actual duties were more limited, but simply held as a matter of law that road graders were not subject to dismissal based on political affiliation. *Horton* says little about how the Eighth Circuit would resolve the discharge of statutory alter egos.

3. Third Circuit. Far from being the "alter ego" of any elected superior, the plaintiff in *Assaf* v. *Fields*, 178 F.3d 170, 171 (1999), was a fourth-tier official who did not even report directly to an (appointed) cabinet secretary. While the petition seeks to infer an absolute rule from *Assaf*'s discussion of the facts of that case, the court did not give "dispositive weight" (Pet. 15) to actual duties. Insofar as the court examined evidence beyond the written job description, it did so to clarify the plaintiff's authority, and did not conclude that the plaintiff exercised less authority than set forth in his job description. 178 F.3d at 172. The suggestion, Pet. 15, that the three-judge panel there fundamentally departed from prior decisions[4]—and did so by tacit

[4] As petitioner notes (Pet. 15), the Third Circuit has taken the position that *Elrod-Branti* analysis turns on "the function[s] of the public office in question and not the actual past duties of the particular employee involved," *Waskovich*, 2 F.3d at 1297. In any event, the Third Circuit's approach is more context-specific than the petition suggests. See, *e.g.*, *Zold* v. *Twp. of*

implication through "conspicuou[s] omi[ssion]," Pet. 15—strains credulity. The *Assaf* panel had neither the authority nor the intent to overrule prior circuit law: The court declined to address whether the plaintiff's job was "inherently political" and emphasized that "the only issue before [it] . . . [wa]s the propriety of the District Court's ruling that [the defendants] were entitled to qualified immunity." 178 F.3d at 174.

4. Tenth Circuit. The petition omits a key portion of the holding in *Jantzen* v. *Hawkins*, 188 F.3d 1247, 1252 (1999), which upheld a sheriff's dismissal of a deputy sheriff who ran as "a candidate for sheriff against his own boss." Because "the only factor driving [the deputy's] termination was his candidacy *qua* candidacy," the subordinate had not shown "that he was in any way terminated for supporting or affiliating with a particular political party." *Ibid.* (internal quotation marks omitted). The court held that firing a subordinate for running against his boss is "not a patronage dismissal[,] . . . not a dismissal because of political beliefs or affiliations[, and] not a dismissal based on politics at all," because "[t]he right to political affiliation does not encompass the mere right to affiliate with oneself." *Ibid.* (quoting *Carver* v. *Dennis*, 104 F.3d 847, 850 (6th Cir. 1997)).

Petitioner focuses on a portion of the court's opinion addressing employees fired for supporting their boss's opponent, not for their own candidacy.

Mantua, 935 F.2d 633, 637 & n.1, 638, 640 (1991) ("Although state law is not necessarily dispositive . . ., it is an important and influential factor."); *Wetzel* v. *Tucker*, 139 F.3d 380, 384 (1998) (considering evidence of past job duties).

But none of them had duties remotely equivalent to the sheriff's: a "jailer" was responsible for jail maintenance and two deputy sheriffs lacked statutory authority co-extensive with the sheriff. 188 F.3d at 1254-1255 & n.4. The court gave no indication that plaintiffs' "actual duties" varied from their "inherent powers." *Id.* at 1254-1256.

5. Maryland. Petitioner's contention (Pet. 16) that *Newell* v. *Runnels*, 967 A.2d 729 (Md. 2009), conflicts with decisions of the Fourth and Sixth Circuits would doubtless surprise the Maryland Court of Appeals, which explicitly and repeatedly cited those courts' supposedly conflicting decisions in support of its conclusion, and specifically rejected the idea that the case's outcome would have been different in the Fourth Circuit, *id.* at 755-756.[5]

There is no conflict. In *Newell*, a newly elected Republican State's Attorney dismissed two non-attorney "victim witness coordinators" for their "overt" support of his Democratic opponent (one had volunteered for the opponent's campaign, one wrote a supportive letter in a local newspaper, and both distributed literature). 967 A.2d at 736-737, 739. The court's main holding was to establish an analytical framework for identifying positions that might satisfy *Branti*, such as those to which a policymaking official has delegated "a significant portion of [his] total discretionary authority." *Id.* at 751. But there was

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[5] See 967 A.2d at 751 (block-quoting and adopting approach of *McCloud*, 97 F.3d at 1557 (cited at Pet. 22) for when a position is "policymaking"); *id.* at 751, 753-754, 759 (citing with approval *Nader* v. *Blair*, 549 F.3d 953, 959 (4th Cir. 2008) (cited at Pet. 19)).

no suggestion that the (non-attorney) plaintiffs' responsibilities were *anything like* those of the State's Attorney. Moreover, the plaintiffs' "job classification" was vague, emphasizing "flexibility" and "independent judgment." *Id.* at 738. There is no indication that either party had argued that the analysis should be limited to the plaintiffs' formal job responsibilities. To the extent *Newell* contemplates a context-specific analysis where an elected attorney terminates employees with a "clerical" job description, nothing in its approach conflicts with the court's holding here, which is limited to employees with statutory "alter ego" authority.

6. New Mexico. The newly elected state treasurer in *Garcia-Montoya* v. *State Treasurer's Office*, 16 P.3d 1084, 1087 (N.M. 2001), had demoted the "director of administrative services" after she had campaigned for the incumbent's unsuccessful reelection bid. But there was no indication that the plaintiff had statutory duties making her the supervisor's legal alter ego. Although, the court explained, "a plaintiff's actual duties, as well as the duties performed by the plaintiff's replacement, may be considered," they would only be "evidence of the *inherent duties* of the position as it is conceived by the public official accused of engaging in impermissible political patronage." *Id.* at 1090 (emphasis added). (Unlike here, the defendants there had "failed to provide a detailed list of inherent duties" of the office, *id.* at 1093.) *Garcia-Montoya* recognized and gave effect to the same concern motivating the court here: *i.e.*, that the First Amendment should not be read to "bind [newly elected officials] to employ [policymaking and

confidential subordinates] in ways they were employed in the past." Pet. App. 21a.[6]

B. The Petition's Other Authorities Support The Eleventh Circuit's Approach

1. Petitioner next contends that five circuits and two state supreme courts "refuse to consider an employee's actual duties" and "restrict the scope of the inquiry" to formal job descriptions. Pet. 17-18. But the cases petitioner herself cites disprove that blanket assertion. In *Regan* v. *Boogertman*, 984 F.2d 577 (1993) (cited at Pet. 18-19), the Second Circuit explained that, as part of its "independent factual analysis of several factors," the court "do[es] not *merely* look at [the plaintiff's] actions taken while in office," but "*also* look[s] at the power with which she is vested by law, and which is inherent in the office." *Id*. at 580 (emphasis added). Far from categorically barring consideration of actual job duties, the *en banc* First Circuit in *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236 (1986), explicitly considered not only a written "job description," but also the plaintiff's testimony about her duties, in identifying the "powers inherent in" an office. *Id.* at 242, 243-246.[7]

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[6] That court too would be surprised to learn its decision conflicted with those of the Sixth Circuit, whose decisions it cited with approval in concluding that evidence of actual duties was relevant to establishing the "inherent duties" of an office. 16 P.3d at 1090 (citing *Feeney* v. *Shipley*, 164 F.3d 311, 320 (6th Cir. 1999); *Faughender* v. *City of N. Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991)).

[7] While the petition argues (Pet. 18) that the court in *Valdizan* v. *Rivera-Hernandez*, 445 F.3d 63 (1st Cir. 2006),

The petition bases its characterization of Sixth Circuit law on a single case (Pet. 20 (discussing *Monks* v. *Marlinga*, 923 F.2d 423, 425 (6th Cir. 1991) (per curiam)[8]), but that hardly supports the claimed courtwide "refus[al] to consider" (Pet. 17) actual duties. The petition neglects to discuss *Summe* v. *Kenton County Clerk's Office*, 604 F.3d 257 (6th Cir. 2010), in which the court considered the position's inherent authority, "the duties that the new holder of that position will perform," and the previous supervisor's delegation of a significant "portion of his discretionary authority" to the deputy. *Id.* at 265-266; see also *id.* at 265 (actual duties are "evidence of the duties inherent in the position"); see also *McCloud*, 97 F.3d at 1557-1558 & nn.31, 35 (holding that an office's "pattern or practice" may in some circumstances determine the duties of an office).

The Seventh Circuit (cited at Pet. 20) will consider actual duties where a job description "leave[s] the reader unclear whether the job confers any policymaking or confidential discretion" such that

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considered only the plaintiff's formal job description, it neglects to note that there, the "plaintiff [had] offer[ed] no reason why" the job description "should not govern." *Id.* at 66.

[8] It is by no means clear that *Monks* distinguished between an office's formal job description and the actual duties a supervisor assigned to it, rather than between the office's required duties (however defined) and the work a particular employee *chose to do*. Thus, that case may reflect efforts to prevent plaintiffs from defining their own jobs in a way to grant themselves tenure protection. See 923 F.2d at 425 ("[W]e believe it appropriate to consider only the required duties of a Michigan county assistant prosecutor, not the job as it was performed by the [plaintiffs].").

"additional evidence would be necessary." *Riley* v. *Blagojevich*, 425 F.3d 357, 365 (7th Cir. 2005). Both that court and the Fourth Circuit (cited at Pet. 19) will also consider actual job duties if there is some reason "for thinking the official job descriptions systematically unreliable in [the] sense . . . [of] something that has been manipulated by officials seeking to expand their power to appoint loyalists beyond the lawful bounds." *Riley*, 425 F.3d at 360-361; accord *Nader*, 549 F.3d at 961.[9] Thus, those courts specifically permit consideration of actual duties to eliminate the risk, which petitioner emphasizes, Pet. 31, that supervisors will manipulate job descriptions to restrict employees' rights. Those concerns are not implicated here, where it is undisputed that petitioner's job description was long ago embodied in state law; nothing in the Eleventh Circuit's decision would foreclose consideration of actual duties under such circumstances.

Finally, the petition errs in seeking to infer a rule of general applicability from *Akers* v. *West Virginia Department of Highways*, 425 S.E.2d 840 (W. Va. 1992), which overturned the partisan demotion of a superintendent responsible for routine maintenance of county roads. But that court reviewed *all* "of the evidence taken in the administrative hearings" about the nature of the plaintiff's duties, including both

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[9] Because *Fellhauer* v. *City of Geneva*, 568 N.E.2d 870, 881 (Ill. 1991) (cited at Pet. 21), explicitly followed the Seventh Circuit's analysis, there is no reason to assume *Fellhauer* reflects a flat prohibition on considering actual job duties. The opinion contains no indication that the plaintiff alleged that his duties were narrower than his "policymaking" job description.

"[t]he job description on record" *and* "witness testimony" about the plaintiff's role. *Id.* at 845-846. The court held narrowly that "the evidence does not support the [defendant's] position." *Id.* at 846.

2. Far from demonstrating any conflict of authority, the cases petitioner cites underscore the courts' broad agreement that an office's alter ego duties are relevant to determining the degree of First Amendment protection to which its occupants are entitled. In *Butler* v. *New York State Department of Law*, 211 F.3d 739 (2d Cir. 2000), the court upheld the dismissal of an agency's deputy bureau chief, holding that "[t]here is no likely circumstance in which a shared ideology is more important than when an elected official appoints a deputy who may act in his or her stead." *Id.* at 744 (quoting *Regan*, 984 F.2d at 580). The court relied in part on the fact that the plaintiff there "routinely act[ed]" "on behalf of an elected official." *Ibid.*; accord *Regan*, 984 F.2d at 581 (noting that under town code, "Deputy . . . shall generally act for and in [the elected official's] behalf"). The *en banc* First Circuit likewise endorsed an alter-ego approach in *Jimenez Fuentes*, *supra*, which vacated a preliminary injunction ordering the reinstatement of an agency Regional Director that was "in effect, the alter ego of the Executive Director at the regional level," reasoning that it was "through the relationship with the Regional Directors that the Executive Director maintains effective control of the implementation of [agency] programs." 807 F.2d at 245. Accord, *e.g.*, *Nader*, 549 F.3d at 960-961 (upholding dismissal of agency Assistant Director in part because "the Assistant Director is authorized to act for the Director . . . in [his] absence"); *Monks*, 923

F.2d at 425-426 (affirming dismissal of assistant prosecutor where, "under a Michigan statute, an assistant prosecutor must 'perform any and all duties pertaining to the [elected] office of prosecuting attorney'"); *Riley*, 425 F.3d at 360-361, 363 (upholding partisan dismissal of an assistant prison warden because assistant wardens were the "top officials" below the warden, such that "when the warden is sick, on vacation, or simply off duty, one of the assistant wardens is in charge").

II. The Eleventh Circuit's Decision Is Correct

The court of appeals' decision is entirely consistent with *Elrod*, *Branti*, and 30 years of subsequent decisions.

This Court long ago held that public employees may be fired because of their political affiliation where the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; accord *O'Hare*, 518 U.S. at 714. *Branti*'s reference to "the public office involved" naturally invokes a context-specific analysis requiring consideration of the "particular kin[d] of jo[b]" at issue. *Elrod*, 427 U.S. at 368 (plurality opinion). In performing that analysis, this Court has looked to the duties of the office in general—not the specific role of the named plaintiff. *Branti* itself discussed "[t]he . . . responsibilit[ies] of an assistant public defender" in *general*, citing discussion of public defenders in *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979). See 445 U.S. at 519. In *O'Hare*, this Court extended *Branti* to independent contractors, but rejected the suggestion that protection should turn on

whether a *particular contractor* was dependent on government work, declining to require "courts . . . to inquire into" "th[o]se sorts of distinctions." 518 U.S. at 723.

Petitioner argues that "*Elrod* and *Branti* counsel a fact-based, realistic examination of a public employee's actual duties." Pet. 24. That the inquiry is context-specific and tied to the duties of a particular job is uncontestable. But reference to how state law (or a formal job description) defines the authority vested in a particular public office can hardly be dismissed as "theoretica[l]." Pet. 26.[10] Consideration of statutory duties is especially important in the particular circumstances at issue here, involving statutory alter ego positions, where

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[10] In tacit acknowledgment of the difficulties her position faces, petitioner argues for the first time that this Court should draw on First Amendment speech principles in applying *Elrod*/*Branti*. See Pet. 30-33. This Court, however, has specifically distinguished the inquiry even in traditional political patronage cases from the "different" (if "related") inquiry applicable "where a government employer takes adverse action on account of an employee or service provider's right of free speech." *O'Hare*, 518 U.S. at 719; cf. Pet. 30 (quoting *O'Hare* to omit acknowledgement that standard is "different"). Petitioner identifies no compelling reason to erase that longstanding distinction. The petition likewise invokes a grab-bag of principles from other First Amendment contexts, ranging from narrow tailoring and overinclusiveness to employee speech. See Pet. 27-33. But, tellingly, the petition cites not a single lower-court decision applying those principles in the political patronage context. Petitioner thus invites the Court to be the first to consider the novel application of those principles in this context. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to address argument not reached below because this is "a court of review, not of first view").

the legislature responsible for creating an office has acted to ensure that during the incapacity of an elected official, someone is available with authority to perform *all* its duties.

By ensuring that persons who serve in that alter ego role enjoy the complete confidence of the elected official, the Eleventh Circuit's rule both serves "the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti*, 445 U.S. at 517. It also avoids "hamstr[inging]" incoming officials from filling key positions "simply because of the way the prior administration operated." *Riley*, 425 F.3d at 361 (quoting *Hadfield* v. *McDonough*, 407 F.3d 11, 18 (1st Cir. 2005)); *Summe*, 604 F.3d at 269; Pet. App. 21a. The rule petitioner advocates, by contrast, would "give employees who are assigned policy duties an incentive to try to protect their jobs simply by not performing those duties," or to present "self-servin[g]" testimony after the fact "that the job description doesn't actually describe what [s]he does." *Riley*, 425 F.3d at 360-361. If an official job description is inaccurate, the employee has an incentive to change it: "[a] job holder does not want his job description to list duties that he does not perform, because the discrepancy will make it easy for his superiors to fire him for inadequate performance." *Id.* at 362.

Elected officials must be able to rely on official job descriptions, Pet. App. 22a, at least absent evidence of manipulation to increase political power (*e.g.*, an official rewriting a narrow job description to include broader authority to justify a partisan firing). Petitioner's rule would require newly elected officials to "conduct an investigation into the actual duties

performed by all the state employees who might be deemed policymaking or confidential employees, under pain of having to pay damages"—to say nothing of (as here) punitive damages and an action for reinstatutement—"if a jury disagrees with the results of his inquiry." *Riley*, 425 F.3d at 360.

There is little question that petitioner was respondent's statutory alter ego. Under Georgia law, a Deputy Clerk is statutorily authorized to exercise the same powers and duties as the Clerk. *Hendrick* v. *Georgia*, 354 S.E.2d 433, 434 (Ga. 1987); Ga. Code Ann. § 15-6-59(b) (2012).[11] Only after having given a "bond with good security" (as the Clerk must) and taking the same oath as the Clerk may a Deputy Clerk perform the duties of her office. Ga. Code Ann. § 15-6-59(b) (2012). As Deputy Clerk, petitioner also served as an administrative assistant to the Clerk and accountant for the office. Petitioner helped the Clerk maintain confidential personnel records and reported to him on personnel matters.

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[11] For the first time, petitioner suggests that her position "does not actually have the same powers as the Clerk," asserting that only the "chief deputy" does. Pet. 27 n.6. That reading is foreclosed by Ga. Code Ann. § 15-6-59(b), which states that "[p]owers and duties of deputy *clerks* shall be the same as those of the clerks." *Ibid.* (emphasis added). That the statute authorizes "appoint[ment] [of] one . . . deput[y] as chief deputy clerk" to "perform the duties of the clerk" if the clerk is removed for *misconduct*, *id.* § 15-6-82(c), does not limit the authority of other deputies. In any event, petitioner's argument is forfeited: The district court relied heavily on interpreting § 15-6-59(b) to mean that a deputy's powers "shall be the same as those of the clerks." Pet. App. 45a. Petitioner made no challenge (indeed, no *reference*) to that reading of § 15-6-59 in her briefs to the Eleventh Circuit.

Pet. App. 5a. As the accountant, petitioner managed accounts receivable and payable for nine separate accounts, received bonds and funds for escrow, and assisted with the creation of the annual budget. *Ibid.* As the Eleventh Circuit correctly concluded, *id.* at 18a, petitioner was the Clerk's alter ego.

III. This Case Is A Poor Vehicle To Address The Question Presented

In any event, this case is poorly suited to address the question petitioner presents. To begin with, this case involves unusual facts that limit its utility in providing guidance. This case involves the relatively uncommon situation of an alter ego to an elected official that both the court below and the Second Circuit have recognized represents a particularly compelling "circumstance in which a shared ideology" is important. Pet. App. 17a-18a (quoting *Butler*, 211 F.3d at 744). This case is also unusual because neither petitioner nor respondent was covered by civil service protection. Where such protections apply—as would be likely for many of the ministerial employees nationwide about whom the petition expresses concern, see Pet. 9—both parties likely would have been forced to resign before running for office, given the common civil service prohibition on engaging in overt partisan activity. See, *e.g.*, 5 U.S.C. § 1502(a)(3) (Hatch Act prohibition on covered employee being a candidate for public office in a partisan election). In that situation, the winner would assume office long

after both candidates had voluntarily removed themselves from the workplace.[12]

The considerable age of the cases petitioner cites, many of which are decades old, see Pet. 13-15, 20-21 (citing cases decided between 1985 and 1999) suggests that it is unusual for job descriptions to depart materially from a job's actual duties, and for any discrepancy to determine the outcome of an employment dispute. See *Riley*, 425 F.3d at 362 (noting employees' incentives to correct inaccurate job descriptions). And as the court of appeals observed, Pet. App. 16a, this case involves the unusual circumstance of action allegedly based on candidacy alone, and thus falls outside the norm for patronage cases, which ordinarily involve termination because of "partisan political affiliation or nonaffiliation." *Elrod*, 427 U.S. at 349 (plurality opinion); *Branti*, 445 U.S. at 508; accord 126 Harv. L. Rev. 2131, 2134 n.44 (2013) ("Fewer courts have treated public-employee candidacy under the *Elrod-Branti* doctrine.").

The rarity of candidacy cases has more significant implications. This Court has never applied the *Elrod-Branti* test to an asserted First Amendment right to be a candidate for office (whether or not against a superior). Indeed, the very test the petition invokes (Pet. 5, 8, 25 (quoting *Branti*, 445 U.S. at 518)) is framed in terms of protection for "party

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[12] Even absent civil service protections, common sense counsels that most unsuccessful candidates for office, especially those in an intimate work environment like that here, move on freely rather than remaining in their workplace after an election. In those circumstances, of course, there is no constitutional issue.

affiliation," a consideration not at issue here. This Court has distinguished cases involving other First Amendment interests, such as speech and association, as involving a "different" analysis and legal standard. *E.g.*, *O'Hare*, 518 U.S. at 719. Whether, and how, *Elrod-Branti* analysis applies to political candidacy cases is a significant threshold issue predicate to the question presented. Although the petition relegates the issue to a breezy (and unsupported) footnote, Pet. 23 n.5, significant uncertainty exists in the lower courts. See 126 Harv. L. Rev. at 2134 (surveying authority about "whether a public employee's candidacy even implicates First Amendment rights").[13] Nor can this Court simply assume the First Amendment interest exists and proceed to petitioner's question, because the *Elrod-Branti* inquiry requires balancing the employee's First Amendment rights against the State's asserted interest in efficiency and effectiveness. *Elrod*, 427 U.S. at 362-363 & n.16 (plurality opinion); Pet. App. 11a-12a. To the extent this Court is interested in providing guidance in this highly context-specific area, it should do so in a case that would not require

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[13] Compare *Carver* v. *Dennis*, 104 F.3d 847, 853 (6th Cir. 1997) (First Amendment does not compel supervisor to continue to employ subordinate who runs against him for election: "The First Amendment does not require that an official . . . nourish the viper in the nest."), and *Bart* v. *Telford*, 677 F.2d 622, 624 (7th Cir. 1982) ("The First Amendment does not in terms confer a right to run for public office, and this court has held that it does not do so by implication either."), with *Kent* v. *Martin*, 252 F.3d 1141, 1144 (10th Cir. 2001) ("an employee's candidacy for political office undoubtedly relates to matters of public concern") (internal quotation marks omitted), and *Click* v. *Copeland*, 970 F.2d 106, 112 (5th Cir. 1992) (same).

resolving a novel threshold issue before the question presented can even be reached.

Finally, application of petitioner's favored rule would provide no basis to disturb the judgment. Although petitioner attempts to downplay the district court's detailed analysis, see Pet. 5, that court made specific findings about petitioner's *actual* job duties "[a]t the time [respondent] filled [the Clerk's office]," Pet. App. 33a, noting the office accountant had "daily" interaction with respondent and had significant financial responsibilities whose effective discharge respondent considered a "high priority" for the office. *Ibid.* Contrasting petitioner's actual job duties with the actual "responsibilities of deputy clerks in other counties," *id.* at 44a n.3, the district court concluded that "[respondent's] interest in office loyalty . . . outweigh[s] the First Amendment protection of [petitioner]'s candidacy." *Id.* at 41a. In short, the district court has *already determined* that petitioner's actual duties did not entitle her to First Amendment protection from discharge. That factbound determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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