No. _____

# 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,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Under the First Amendment, a government employer may not dismiss an employee for lack of political allegiance unless the dismissal serves "'an overriding interest' 'of vital importance.'" *Branti* v. *Finkel*, 445 U.S. 507, 515-16 (1980) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 362, 368 (1976) (plurality opinion)). To satisfy this test, the employer must prove that political allegiance is "an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

The question presented is whether the First Amendment prohibits a government official from dismissing an employee for lack of political allegiance when political allegiance would be an appropriate requirement for the employee's statutory or formal job description but not for the job the employee actually performs.

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## PETITION FOR A WRIT OF CERTIORARI

Sarah Jane Underwood respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 698 F.3d 1335 and reprinted at App., *infra*, 1a. The opinion of the Northern District of Georgia is available at 2011 WL 2457680 and reprinted at App., *infra*, 31a.

## JURISDICTIONAL STATEMENT

The Eleventh Circuit filed its opinion on October 18, 2012, and denied a petition for rehearing on January 15, 2013. App., *infra*, 47a. On April 9, 2013, Justice Thomas extended the time for filing a petition for a writ of certiorari through May 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

> petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), this Court held that the First Amendment prohibits a government employer from firing an employee for political reasons unless the government proves that political affiliation "is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Petitioner was fired from her position as a deputy clerk after losing a bid for the Clerk's position to respondent, who fired her immediately upon taking office. Petitioner sued, claiming that political loyalty was not an appropriate requirement for her purely ministerial job, which primarily involved accounting and purchasing office supplies.

A divided panel of the Eleventh Circuit affirmed the district court's order entering summary judgment for respondent. Even though it acknowledged that petitioner's actual job did not involve policymaking or discretion, the majority held that political affiliation was an appropriate requirement for the job of deputy clerk as it was described by state statute. Citing the "vast gulf" between the statutory job description and petitioner's actual job, and the circuits' "sharply conflicting views" on this issue, the dissenting judge criticized the majority's rule for unnecessarily burdening First Amendment rights.

The decision below is wrong under *Elrod* and *Branti*, general First Amendment jurisprudence, and this Court's decisions mandating a practical, fact-based inquiry in the related area of governmental restrictions on speech by public employees. The issue is important not only to millions of government employees, but also to the electorate at large, and this case is an ideal vehicle in which to consider it.

## A. Facts

Petitioner Sarah Jane Underwood worked in the Superior Court Clerk's office in Lumpkin County, Georgia, for nearly a decade. She began in 1999 as an administrative assistant, became a deputy clerk in 2004, and was assigned the role of office accountant in 2006. Underwood Dep. 10:14-16, 12:25-15:3, Aug. 10, 2010. Petitioner maintained the accounts of office finances, received and deposited funds, and purchased

office supplies. *Id.* at 13:6-12, 17:25-18:12; Harkins Dep. 38:19-39:4, Aug. 17, 2010.

In 2008, the Superior Court Clerk announced that he would not seek reelection. App., *infra*, 6a. Petitioner and respondent Rita Harkins, another deputy clerk at the time, each announced that they would seek the Republican Party nomination for the position. *Id.* Two other candidates from outside the office also competed for the nomination. *Id*. The primary "was 'not contentious,'" and neither petitioner nor respondent made critical statements about the other during or after the campaign. *Id*. at 6a.

Respondent won the primary contest, was unopposed in the general election, and became Clerk. App., *infra*, 6a. Petitioner expected to keep her job as a deputy clerk; before the election, respondent had said that if she won, "no one in the clerk's office would be losing his or her job." *Id*. at 7a. Nevertheless, respondent's first official act as Clerk was to fire petitioner. *Id*. She did not dismiss any other employees. *Id.*

### B. Proceedings Below

1. Petitioner filed suit under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Georgia, against respondent in her official capacity as Clerk. App., *infra*, 34a. The complaint alleged that respondent violated petitioner's First Amendment rights of affiliation and association by

firing her "to retaliate against [petitioner] for seeking the Clerk's position." Compl. ¶¶ 20-22.

Respondent moved for summary judgment and, for purposes of that motion, "admitted that she fired [petitioner] because she had run for the office of clerk in the Republican primary." App., *infra*, 7a. In opposing summary judgment, petitioner relied on *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), which hold that a public employee may not be fired for political reasons unless the governmental employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Petitioner argued that political loyalty was not a legitimate requirement for her ministerial, non-policymaking job.

On June 16, 2011, the district court granted respondent's motion for summary judgment. The court stated that respondent was entitled to fire petitioner for purposes of the "'effective performance of the public office involved.'" App., *infra*, 46a (quoting *Calvert* v. *Hicks*, 510 F. Supp. 2d 1164, 1169 (N.D. Ga. 2007).

2. A divided panel of the Eleventh Circuit affirmed. It acknowledged that petitioner's dismissal was subject to the rule of *Elrod-Branti*. App., *infra*, 12a.[1] It also "recognize[d] that petitioner's daily

[1] The court of appeals rejected respondent's contrary argument based on *Clements* v. *Fashing*, 457 U.S. 957 (1982),

(Continued on following page)

duties under [the former Clerk] did not involve the setting of policy or the exercise of unlimited discretion." *Id.* at 19a. The court believed, however, that "an elected official may dismiss an immediate subordinate for opposing her in an election without violating the First Amendment if the subordinate, under state or local law, has the same duties and powers as the elected official." *Id*. at 17a.

The panel cited a Georgia statute that gives a deputy clerk the same powers as the Clerk. App., *infra*, at 4a (citing GA. CODE. ANN. § 15-6-59(b) (2012)). It reasoned that an employee with such "statutory powers" – regardless of her actual duties – is "the type of confidential employee who can be terminated under *Elrod*, *Branti*, and their progeny" because she is "essentially the legal alter ego of the clerk." *Id*. at 18a. In the panel's words, "What matters . . . is not what the subordinate actually does on a day-to-day basis, but rather what the subordinate is legally empowered to do under state or local law." *Id*. at 19a.

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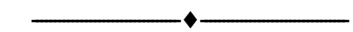
which upheld state constitutional provisions that prohibited all sitting judges from running for state legislative office. There was no such viewpoint-neutral prohibition in this case; petitioner was not fired for running *per se*; she was fired for opposing respondent. The Eleventh Circuit's ruling is consistent with those of other circuits on this point. *See*, *e.g*., *Thomas* v. *Carpenter*, 881 F.2d 828, 828-29, 831-32 (9th Cir. 1989); *see also Jordan* v. *Ector County*, 516 F.3d 290, 293, 297-99 (5th Cir. 2008); *Jantzen* v. *Hawkins*, 188 F.3d 1247, 1256-57 (10th Cir. 1999).

3. Judge Martin dissented, noting that the circuits have adopted "sharply conflicting" approaches for determining whether particular public employees are protected from dismissal for political reasons under *Elrod* and *Branti*. App., *infra*, 26a (Martin, J., dissenting). She disagreed with the majority's conclusion "that the inquiry is such a narrow and purely legal one." *Id.* at 25a. Judge Martin emphasized the fact-based nature of the determination required by *Elrod* and *Branti* and the "vast gulf" in this case "between what is formally provided under Georgia law and what is the reality on the ground." *Id*. at 27a-28a. She explained that "while the formal job description might support a particular rationale for restricting an employee's First Amendment rights, the scope of her actual job might not do so. Relying on the formal job description can therefore result in the excessive restriction of an employee's constitutional rights." *Id*. at 27a.

The dissent further noted that respondent "conceded that her deputy clerks have little discretion in their job and instead are required to follow specific instructions to execute limited, well-defined tasks." App., *infra*, 28a. Accordingly, "the formal job description for the deputy clerks 'bear[s] little resemblance' to their actual job." *Id.* (quoting *Garcetti* v. *Ceballos*, 547 U.S. 410, 424 (2006)) (alteration in original). "[U]nder *Elrod* and *Branti*, the governmental interest in political loyalty can support the discharge of a public employee only if political loyalty is an appropriate requirement for that employee's job." *Id.* at

29a. By ignoring the reality of Underwood's job and instead relying solely on the statutory job description, the majority's decision "has the effect of burdening [petitioner's] First Amendment rights beyond that which the Constitution allows." *Id.* at 30a.

The court of appeals denied rehearing en banc on January 15, 2013. App., *infra*, 47a-48a.



## REASONS FOR GRANTING THE WRIT

This Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), establish that the First Amendment prohibits government employers from firing public employees in retaliation for political beliefs or affiliation unless the government can demonstrate that the discharge serves "'an overriding interest' 'of vital importance.'" *Branti*, 445 U.S. at 515-16 (citations omitted) (quoting *Elrod*, 427 U.S. at 362, 368). "[T]he ultimate inquiry . . . is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518.

The courts of appeals and highest courts of several States are deeply divided over how to conduct this crucial inquiry. Four federal courts of appeals and the highest courts of two States focus on the employee's actual duties. Six other federal courts of appeals and the highest courts of two other States,

like the panel majority in this case, restrict the inquiry to an employee's formal or statutory job description. In many cases, the court's choice of approach dictates the outcome of the case.

The decision below is wrong because it unduly restricts First Amendment rights. The Eleventh Circuit's refusal to consider petitioner's actual job duties allowed the government to prevail without actual proof of an overriding interest of vital importance, as required by *Elrod* and *Branti*. While the rule adopted below contravenes the First Amendment, considering an employee's actual job upholds First Amendment rights without sacrificing the government's legitimate interest in political loyalty when it is actually required.

This case presents a clean vehicle for resolving this issue. Respondent conceded for purposes of summary judgment that she fired petitioner because of her political opposition. The Eleventh Circuit's decision turned solely on its holding that political affiliation could be required based on the statutory job description, regardless of the fact that petitioner's actual duties were purely ministerial.

Politically motivated retaliation often follows elections, as is demonstrated by the frequent litigation of the question presented in many federal and state courts. The decision below restricts the First Amendment rights of millions of public employees – not only those who run for office, but those who support or oppose candidates or merely belong to the

"out" political party – as well as the electorate itself. A question of this importance deserves this Court's review.

## I. The Federal Courts of Appeals and the Highest Courts of Four States Are Intractably Divided on Whether to Base *Elrod-Branti* Decisions on an Employee's Formal Job Description or on Her Actual Job

The critical inquiry under *Elrod* and *Branti* is whether political affiliation is "an appropriate requirement for the effective performance" of the public employee's job. *Branti*, 445 U.S. at 518. The answer to this question hinges on what the job in question is, which in turn depends on "the nature of the [employee's] responsibilities." *Elrod*, 427 U.S. at 367.

The federal courts of appeals and the highest courts of several states "have adopted sharply conflicting views" on the appropriate method of conducting this inquiry. App., *infra*, 26a (Martin, J., dissenting). The court below joined five other circuits and the highest courts of two States, which restrict the inquiry to the employee's formal or statutory job description. In contrast, four circuits and the highest courts of two States consider the tasks the employee actually performs.

Petitioner's actual job was entirely ministerial. While she was one of three employees with the title "deputy clerk," her actual job involved little beyond bookkeeping and purchasing office supplies. The

"record . . . underscores a vast gulf between what is formally provided under Georgia law and what [was] the reality on the ground." App., *infra*, 27a-28a (Martin, J., dissenting). Since petitioner's actual job was not one for which political affiliation was an appropriate requirement, she could not constitutionally be fired for running against respondent. In any of the jurisdictions that consider the employee's actual job, petitioner's claim would have survived summary judgment.

### A. Four Federal Courts of Appeals and the Highest Courts of Two States Consider the Employee's Actual Job Duties

In disagreement with the decision below, the Eighth, Ninth, Tenth, and Third Circuits, as well as the highest courts of Maryland and New Mexico, do not limit their inquiry to formal job descriptions when deciding whether a public employee could constitutionally be fired for political reasons. Rather, they consider the job the employee *actually* performed, based on *actual* job duties.

1. In the Ninth Circuit, whether political loyalty is an appropriate job requirement depends on the duties that the employee actually performs on a day-to-day basis. *See DiRuzza* v. *County of Tehama*, 206 F.3d 1304, 1310 (9th Cir. 2000). In *DiRuzza*, the newly elected sheriff fired a deputy sheriff who had supported the losing candidate. *Id.* at 1306. Just as Georgia law technically vests deputy clerks with the

same authority as clerks, a California statute authorized deputy sheriffs to exercise all the powers of sheriffs. *See id.* at 1307 (citing CAL. GOV'T CODE § 24100). The district court in *DiRuzza*, like the Eleventh Circuit here, relied exclusively on that statutory framework to hold that the deputy sheriff could be fired without violating the First Amendment under *Elrod* and *Branti*. *Id.*

The Ninth Circuit reversed. Although it recognized that the statute authorized deputy sheriffs to assume greater responsibilities, the court reasoned that "[t]he actual, not the possible, duties of an individual employee determine whether political loyalty is appropriate for the effective performance of her job." 206 F.3d at 1310. The court explained that the importance of the rights at stake requires this careful, focused analysis. "Given the range of duties performed by deputy sheriffs in California, a conclusion that deputy sheriffs are per se policymakers is inconsistent with important First Amendment rights as well as the analysis the Supreme Court requires under *Elrod* and *Branti.*" *Id.* at 1309. Accordingly, the court remanded "for a determination of whether [the plaintiff's] *actual duties* were those of a policymaker." *Id.* at 1306 (emphasis added).

The Ninth Circuit has consistently applied the "actual duties" approach articulated in *DiRuzza*. *See*, *e.g.*, *Hunt* v. *County of Orange*, 672 F.3d 606, 613 (9th Cir. 2012) ("[T]he district court properly considered Hunt's *actual job requirements and responsibilities*. . . ." (emphasis added)); *Hobler* v. *Brueher*, 325

F.3d 1145, 1151 (9th Cir. 2003) ("What matters . . . [are the plaintiffs'] actual duties. . . .").

2. The Tenth Circuit looks to both "the inherent powers of the positions and the actual duties performed." *Jantzen* v. *Hawkins*, 188 F.3d 1247, 1253 (10th Cir. 1999). In *Jantzen*, deputy sheriffs and other employees claimed a violation of their First Amendment rights after they were fired for supporting a losing candidate. *Id*. at 1250. Following its earliest precedent on this issue, the Tenth Circuit considered the jobs that the plaintiffs actually performed, as evidenced by the record. *See id*. at 1253 n.1. That evidence showed that the deputy plaintiffs' duties involved routine police work, and the court concluded that there was "no compellingly politically loyal way to arrest a thief, [and] no partisan way to serve a summons or to stop a speeding motorist." *Id.* at 1255. The court therefore reversed the district court's grant of summary judgment for the defendants and remanded for trial. *Id.* at 1256.

The Tenth Circuit acknowledged the "inherent powers" of the deputy sheriffs but gave them little weight. For example, it noted that the applicable statute authorized the sheriff to appoint deputies "to serve on a community sentencing system planning council." 188 F.3d at 1255 n.4. But because nothing in the record indicated that the plaintiffs actually carried out such duties, the court disregarded the statutory job description and concluded, based on "the

record," that the deputy sheriffs "were not policy makers." *Id.* at 1256.[2]

3. The Eighth Circuit likewise focuses on actual duties. In *Horton* v. *Taylor*, 767 F.2d 471, 475 (1985), the district court had upheld the patronage dismissal of five road-grade operators by the newly elected county judge. The district court "relied heavily on its perception of the political realities of small, rural Arkansas counties," and on an "alter ego" theory. *Id.* at 473, 475.

On appeal, the Eighth Circuit reversed. It explained that "[t]he *Branti* test is a functional one, focusing on the actual duties an employee performs." 767 F.2d at 477. The court of appeals therefore focused its analysis on the plaintiffs' actual responsibilities, which involved the "manipulation of heavy machinery over unpaved rural roads." *Id*. The Eighth Circuit concluded that political loyalty was not an appropriate requirement for the plaintiffs' jobs. *Id.* at 478.

4. While the Third Circuit historically may have followed a different approach, its most recent precedent focuses on the "actual duties" of the employee.

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[2] In following its earliest precedent requiring an assessment of actual duties, *see Dickeson* v. *Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988), *Jantzen* explicitly rejected a previous panel's deviation from *Dickeson*, which focused on formal job descriptions. *See* 188 F.3d at 1253 n.1 (rejecting the rule of *Green* v. *Henley*, 924 F.2d 185, 186 (10th Cir. 1991) (per curiam)).

In the past, it had decided *Elrod-Branti* cases based on "the function of the public office in question and not the actual past duties of the particular employee involved." *Wetzel* v. *Tucker*, 139 F.3d 380, 384 (3d Cir. 1998) (quoting *Brown* v. *Trench*, 787 F.2d 167, 168 (3d Cir. 1986)). Even then, however, the court stated "that evidence of past job duties may in some cases be informative." *Id*. at 384.

In its most recent published opinion, *Assaf* v. *Fields*, 178 F.3d 170 (3d Cir. 1999), the Third Circuit relied on the plaintiff's actual duties, which did not conform to his official job description. In *Assaf*, the Director of the Bureau of Vehicle Management claimed that he was dismissed for political reasons. *Id.* at 171. The court explained that "the inquiry into the employee's duties is a 'fact specific' one, and that although we look to 'the functions of the public office in question and not the actual past duties of the particular employee involved, evidence of past job duties may be, and often is, informative.'" *Id.* at 177 (citations omitted). The court's phrasing conspicuously omits its previous qualification that actual past duties are not "determinative." *See*, *e.g.*, *Boyle* v. *County of Allegheny*, 139 F.3d 386, 397 (3d Cir. 1998).

In *Assaf*, the court of appeals in fact gave dispositive weight to the plaintiff's actual job duties, including his testimony "to the substantial limits of his authority." *Id.* at 172. The court credited, among other things, the plaintiff's assertion that he "did not negotiate maintenance contracts with outside vendors" even though his official job description clearly

vested him with the power to do so. *Id.*; *see also id.* at 176-80 (providing other examples of the plaintiff's limited actual duties). The court concluded that political affiliation could not appropriately be required for the position. *Id.* at 172.

5. In *Newell* v. *Runnells*, 967 A.2d 729, 751-53 (Md. 2009), the Maryland Court of Appeals (the State's highest court) focused on the employees' actual duties. The plaintiffs, who had been "victim witness coordinators" in the State's Attorney's Office, were dismissed after supporting the losing candidate for State's Attorney in their county. *Id.* at 736. In analyzing the plaintiffs' *Elrod-Branti* claims, the court quoted but did not confine itself to their formal job description. *Id.* at 737-38. Rather, it looked at the facts of record to determine what functions the plaintiffs actually performed. Thus, it considered the extent of the plaintiffs' interaction with the general public and the nature of their communications with prosecutors. *See id.* at 752-53. Because "disputed facts concerning the *actual job duties* inherent in Plaintiffs' positions prevent[ed the court] from discerning the true nature of the Plaintiffs' positions on [the existing] record," *id.* at 759 (emphasis added), the court remanded for trial. *Id.* at 762.

6. The New Mexico Supreme Court also focuses on the plaintiff's "actual duties." *Garcia-Montoya* v. *State Treasurer's Office*, 16 P.3d 1084, 1090 (N.M. 2001) (citing *Jantzen*, 188 F.3d at 1253 & n.1). In *Garcia-Montoya*, the court began by noting that "[t]he inquiry under *Elrod-Branti* is necessarily fact specific."

*Id.* at 1090. Besides briefly mentioning that the plaintiff's job classification was "financial manager I," *id.* at 1091, the court made no effort to determine the specifics of that classification.

Instead, the court analyzed the record evidence of the plaintiff's duties at length. *See* 16 P.3d at 1091-93. Based on that analysis, and "bear[ing] in mind the Supreme Court's admonition that cases involving doubt must be resolved in favor of the First Amendment protection against political patronage," the court held that the defendant "failed to demonstrate a vitally important interest sufficient to justify infringement on [the plaintiff's] freedom of political belief." *Id.* at 1093.[3]

### B. Six Circuit Courts and Two State Supreme Courts Base Their Decisions on Formal Job Descriptions

Consistent with the decision below, five circuits and the supreme courts of Illinois and West Virginia refuse to consider an employee's actual duties. Instead,

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[3] While the New Mexico Supreme Court also referred to "the duties performed by the plaintiff's replacement," 16 P.3d at 1090, the court did not pursue that point except to note that the replacement's duties were unclear. *Id*. at 1093. Even if such evidence were relevant, the employer would have to show that changes in the position made it one for which political loyalty would be an appropriate requirement. Hence, the New Mexico court's rule would have prevented summary judgment against petitioner in this case.

these courts restrict the scope of the inquiry to formal job descriptions.

1. The First Circuit "'focus[es] on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office.'" *Valdizan* v. *Rivera-Hernandez*, 445 F.3d 63, 66 (1st Cir. 2006) (quoting *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986)). In *Valdizan*, the plaintiff's formal job description included "participation in 'the formulation and implementation of public and finance policy' . . . [and] 'ample liberty in the use of . . . judgment.'" *Id.* The First Circuit rejected the plaintiff's argument that his position was "more technical than the official job description suggests, and, therefore, that his position was not truly policymaking in nature." Based solely on the broad parameters of the job description, the court concluded that political loyalty was an appropriate requirement. *Id.*

2. The Second Circuit also focuses on the legal or formal description of the employee's position. In *Regan* v. *Boogertman*, the plaintiff asserted a violation of her First Amendment rights after a patronage dismissal. Although the town code permitted the Tax Collector to "'delegate any of his powers or direct any of his duties to be performed to a Deputy,'" the plaintiff claimed that "her role as Deputy Tax Collector was merely ministerial," with "virtually no discretion." 984 F.2d 577, 580 (2d Cir. 1993) (citation omitted). The Second Circuit nevertheless looked beyond "her actions taken while in office" to "the power with

which she [was] vested by law." *Id.* It also ruled that the fact that the Tax Collector had not delegated his powers to the plaintiff was "not dispositive," because he might delegate more authority in the future. *Id.* at 581. The court therefore concluded that the job description made political loyalty an appropriate requirement. *Id.* The Second Circuit has continued to adhere to this rule. *See*, *e.g.*, *Butler* v. *N.Y. State Dep't of Law*, 211 F.3d 739, 744 (2d Cir. 2000).

3. The Fourth Circuit follows the same rule. *See*, *e.g.*, *Nader* v. *Blair*, 549 F.3d 953 (4th Cir. 2008). The plaintiff in *Nader*, formerly one of six Assistant Directors of an administrative agency, alleged that she was fired by the new director in retaliation for her political affiliation. 549 F.3d at 957-58. The plaintiff argued that she had "never actually [been] assigned . . . any tasks that required her to make policymaking decisions." *Id.* at 958. The Fourth Circuit rejected her argument, based on longstanding circuit precedent that the proper focus is "on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office." *Id.* at 961 (quoting *Stott* v. *Haworth*, 916 F.2d 134, 142 (4th Cir. 1990)). The court held that the defendant could appropriately require political loyalty based on the inherent powers of the plaintiff's office. *Id.* at 962.

4. The Sixth Circuit applies the same test: The "relevant focus of analysis is [on] the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the

office." *Monks* v. *Marlinga*, 923 F.2d 423, 425 (6th Cir. 1991) (per curiam) (citation omitted). In *Monks*, former assistant county prosecutors alleged that the newly elected County Prosecutor declined to reappoint them because of their political affiliation. *Id.* at 424. The Sixth Circuit rejected the plaintiffs' argument that their positions were "limited, technical and neutral," *id.* at 425, on the ground that "Michigan law statutorily impose[d] the inherent policy-making responsibilities of the prosecutor on the assistant prosecutor." *Id.* at 426.

5. The Seventh Circuit likewise interprets "*Elrod* and *Branti* [to] require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office." *Tomczak* v. *City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985). The court applied this rule in *Riley* v. *Blagojevich*, 425 F.3d 357 (7th Cir. 2005), where two assistant prison wardens alleged that they were fired by the Governor of Illinois because "they [were] not of his political party." *Id*. at 359. In support of their First Amendment claim, they argued that "they [were] not policymaking officials or confidential employees." *Id*. Refusing to consider the wardens' actual duties, the Seventh Circuit confined its analysis to the duties outlined in the official job descriptions, which "ascribe[d] significant policymaking responsibilities to assistant wardens." *Id*. at 365. The court therefore held their dismissals constitutional. *Id.*

6. The highest courts of two States follow the same approach. In *Fellhauer* v. *City of Geneva*, the Supreme Court of Illinois rejected an *Elrod-Branti* claim based on the plaintiff's position "[a]ccording to local ordinance," rather than allowing the plaintiff to compile a record of what his position entailed. 568 N.E.2d 870, 880-81 (Ill. 1991) (citing *Tomczak*, 765 F.2d at 640).

Finally, in *Akers* v. *West Virginia Department of Highways*, the Supreme Court of West Virginia rejected a defendant's argument based on actual duties. Ruling for the employee who had been dismissed, the court relied on the "job description on record with the Department" to hold that political affiliation was an inappropriate requirement for the plaintiff's position. 425 S.E.2d 840, 842-43, 846 (W. Va. 1992).

### C. The Conflict Is Deep, Entrenched, and Ripe for Review

The conflict among the circuits and state courts of last resort about how to perform the critical inquiry under *Elrod* and *Branti* is broad, deep, and ripe for this Court's review. Eight jurisdictions rely solely on formal job descriptions, while six consider employees' actual jobs. Each circuit's rule, except possibly the Third, is entrenched. The courts of appeals and highest courts of four States have consistently applied their respective rules, in some circuits in spite of repeated challenges, and the courts have discussed each other's decisions.

This broad and entrenched conflict includes a conflict between decisions of the Fourth Circuit and the Maryland Court of Appeals – a situation particularly calling for this Court's review. *Cf., e.g.*, *Wos* v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013); *South Dakota* v. *Yankton Sioux*, 522 U.S. 329, 342 & n.4 (1998); *California* v. *Taylor*, 353 U.S. 553 (1957). Public employees and employers in Maryland face differing results in state and federal court, creating an incentive for forum shopping. This situation is unacceptable, especially with important First Amendment interests at stake; and only this Court can resolve it.

## II. THE ELEVENTH CIRCUIT'S DECISION FAILS TO PROTECT PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS OF POLITICAL AFFILIATION

In *Elrod* and *Branti*, this Court first addressed whether patronage dismissals of public employees violated the First Amendment.[4] To answer that

[4] While *Elrod* and *Branti* concerned *inter*-party patronage dismissals, their rule applies equally to *intra*-party dismissals like the one in this case. *See*, *e.g.*, *Jordan* v. *Ector Cnty.*, 516 F.3d 290, 295-96 (5th Cir. 2008) (doctrine applies when issue involves "loyalty to a particular candidate as distinguished from a political party") (quotation marks and citations omitted); *McCloud* v. *Testa*, 97 F.3d 1536, 1546 (6th Cir. 1996) (that *Elrod-Branti* protections apply to intra-party disputes is "clearly established"); *Robertson* v. *Fiore*, 62 F.3d 596, 601 (3d Cir. 1995) (joining "all other courts that have previously addressed this question" in holding that *Elrod* and *Branti* govern intra-party

(Continued on following page)

question, the Court considered the duties of the dismissed employees to determine whether political affiliation was "an appropriate requirement for the effective performance" of their jobs. *Branti*, 445 U.S. at 518. There was no mention of formal, statutory job descriptions, in contrast with the court of appeals' holding here that "[w]hat matters . . . is not what the subordinate actually does on a day-to-day basis, but rather what the subordinate is legally empowered to do under state or local law." App., *infra*, 19a.[5]

The Eleventh Circuit's approach is wrong under *Elrod* and *Branti*. It infringes the First Amendment rights of public employees without materially advancing the government's interests in effective job performance and employee loyalty. The decision is also inconsistent with this Court's instruction in the closely related context of restriction of public employees'

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dismissals); *Dickeson* v. *Quarberg*, 844 F.2d 1435, 1437 n.2 (10th Cir. 1988); *see also Barnes* v. *Bosley*, 745 F.2d 501, 506 n.2 (8th Cir. 1984) (calling the contrary argument "specious").

The rule applies whether the challenged dismissal follows a primary or general election. *See*, *e.g.*, *Tomczak* v. *City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985) (holding that *Branti*'s reasoning applies "especially in election districts where a primary victory within the dominant party virtually assures victory in the subsequent general election").

[5] The Eleventh Circuit was correct in its threshold determination that the First Amendment affords protection from discharge to public employees who oppose candidates for election by running themselves. *See* App., *infra*, 12a; *supra* p. 5 n.1. It would not make sense to afford protection to employees who support or oppose candidates, but not to the candidate herself.

speech. In that area, the Court has made clear that the proper focus is on an employee's actual job duties, to ensure that First Amendment rights are not unnecessarily abridged. The rule in the context of political affiliation should be the same.

### A. *Elrod* and *Branti* Counsel a Fact-Based, Realistic Examination of a Public Employee's Actual Duties

1. In *Elrod*, a plurality of this Court first recognized that "patronage dismissals severely restrict political belief and association" and constitute a "severe encroachment on First Amendment freedoms." 427 U.S. at 372-73. In that case, a newly elected county sheriff (a Democrat) fired three Republican employees. 427 U.S. at 350-51. Though the plurality acknowledged the government's interest in "efficiency and effectiveness," it considered that interest "fully satisfied by limiting patronage dismissals to policymaking positions." *Id.* at 372.

Whether an employee is a policymaker, the plurality explained, depends on "whether the employee *acts* as an adviser or formulates plans for the implementation of broad goals." 427 U.S. at 368 (emphasis added). In his controlling concurrence, Justice Stewart stated that "a nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375 (Stewart, J., concurring).

On remand, the government would bear the "burden" of "demonstrat[ing] an overriding interest [in political allegiance] in order to validate an encroachment on protected interests," with "cases of doubt being resolved in favor of the particular [employee]." *Id.* at 368 (plurality opinion).

2. This Court reaffirmed and refined this test in *Branti*. There, a newly appointed public defender (a Democrat) fired two assistant public defenders (both Republicans). 445 U.S. at 508-10. The Court reaffirmed that "unless the government can demonstrate 'an overriding interest' 'of vital importance,' requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." *Id.* at 515-16 (citations omitted) (quoting *Elrod*, 427 U.S. at 362, 368).

The *Branti* Court further explained that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Finding that the assistant public defenders' "primary . . . responsibility . . . [was] to represent individual citizens" in a manner having "no bearing whatsoever on partisan political concerns," the Court concluded that "allegiance to the dominant political party" was not an appropriate requirement for the effective performance of their

jobs. The Court therefore held the plaintiffs' discharge unconstitutional. *Id.* at 519-20.

3. *Elrod* and *Branti* call for a functional and fact-based inquiry. The burden imposed on the government employer is high – to justify a patronage dismissal by proving "'an overriding interest' 'of vital importance.'" *Branti*, 445 U.S. at 515-16 (citation omitted) (quoting *Elrod*, 427 U.S. at 362, 368). That burden cannot normally be satisfied by conjectural, abstract concerns. *Cf. Consol. Edison Co. of N.Y., Inc.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."); *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973) ("To sacrifice First Amendment protections for so speculative a gain is not warranted. . . .").

Yet the Eleventh Circuit's focus on a statutory job definition does just that. Respondent could not prove that political affiliation was an appropriate requirement for petitioner's actual job, so she relied instead on a statutory job description covering anything that the job might theoretically have entailed. That description is not relevant to the *Elrod-Branti* inquiry, however, especially in light of the "vast gulf" in this case between the statutory description and the job that petitioner actually performed. App., *infra*, 27a-28a. To paraphrase the Tenth Circuit, there is "no compellingly politically loyal way" to keep the books,

and "no partisan way" to purchase office supplies. *Jantzen*, 188 F.3d at 1255; *see* p. 12, *supra*.[6]

### B. The Decision Below Is Inconsistent with This Court's First Amendment Jurisprudence, Which Requires Proof That the Governmental Action Serves a Compelling Interest and Is Narrowly Tailored

1. Where fundamental First Amendment rights are at stake, this Court requires the government to "present more than anecdote and supposition." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000). Government action that infringes First Amendment rights "must be narrowly tailored to promote a compelling Government interest," *id.* at 813, to solve "an actual problem [that] has been proved." *Id.* at 822. For this reason, even if a particular government action might be constitutional as applied to some people, it will not pass constitutional muster if it is "seriously overinclusive" by "abridg[ing] the First Amendment rights" of others. *Brown* v. *Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741-42 (2011); *see also*,

[6] The Eleventh Circuit's "alter ego" theory is also inconsistent with *Elrod* and *Branti*. A deputy does not actually have the same powers as the Clerk; the statute authorizes the chief deputy – which petitioner was not – to assume such powers on a contingent basis. *See* GA. CODE ANN. § 15-6-59, -82 (West 2012). The possibility that a job will become political at some time in the future does not satisfy the strict requirements of the First Amendment.

*e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 362 (2010) (statute allegedly intended to protect dissenting shareholders found "overinclusive because it covers all corporations, including . . . corporations with only single shareholders"); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-22, 122 n.* (1991) (narrow tailoring and overinclusiveness analysis).

By focusing on the broad statutory description of the deputy clerk's job, the court below made the requirement of political loyalty applicable to individual employees, like petitioner, to whom it could not constitutionally apply. If the Georgia statute had dictated that all "deputy clerks" be considered political employees, without regard to their actual jobs, such an overly broad law would violate the First Amendment. *See*, *e.g.*, *Akers* v. *Caperton*, 998 F.2d 220, 222-25 (4th Cir. 1993); *Akers* v. *West Va. Dep't of Highways*, 425 S.E.2d at 846-47; *cf. City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[7] It is no more acceptable for the Eleventh Circuit to rely on a statute's broad definition of "deputy clerk" to deny First Amendment

[7] Both *Akers* cases concerned a West Virginia statute that conditioned government employment on "holding . . . political beliefs and party commitments consistent or compatible with those of the governor," which the statute declared to be "essential . . . to the effective performance of and . . . an appropriate requirement for occupying certain offices or positions in state government." W. VA. CODE § 29-6-4(d). The Fourth Circuit and the West Virginia Supreme Court both held this statute unconstitutional as applied to County Maintenance Supervisors.

protection to individuals in that job category whose actual jobs do not require political loyalty.

2. Focusing exclusively on a formal job description leaves legitimate First Amendment activity unprotected, whereas a rule focusing on an employee's actual job does not sacrifice legitimate governmental interests.

While acknowledging that petitioner performed purely ministerial tasks, the court of appeals justified its decision based on speculation that a deputy clerk's potential duties might someday make the position one for which political affiliation could be required. That rule is inconsistent with the settled First Amendment principle that "[m]ere speculation of harm does not constitute a compelling state interest," *Consol. Edison Co.*, 447 U.S. at 543, and that narrow tailoring and the "least restrictive" means of accomplishing a legitimate governmental end is required. *Elrod*, 427 U.S. at 363; *see Playboy Entm't Grp., Inc.*, 529 U.S. at 813.

Considering an employee's actual duties, on the other hand, entails little if any sacrifice of the government's interests. An employee "may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist." *Elrod*, 427 U.S. at 366; *see also Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 74 (1990) ("A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient."). Moreover, "government

officials may . . . terminate at-will relationships, unmodified by any legal constraints, without cause," so long as the discharge is not for "expressing, or not expressing, specific political views." *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 725-26 (1996).

### C. In the Related Context of Restrictions On Speech or Expression, This Court Focuses on the Employee's Actual Job

The decision below is inconsistent with this Court's resolution of a "related . . . inquiry" in cases where "a government employer takes adverse action on account of an employee or service provider's right of free speech" or expression. *O'Hare*, 518 U.S. at 719. In that situation, this Court requires a "practical" inquiry into the duties "an employee *actually* is expected to perform." *Garcetti* v. *Ceballos*, 547 U.S. at 424-25 (emphasis added). The same rule should apply in cases involving political affiliation or allegiance.

1. In *Pickering* v. *Board of Education*, this Court held that public employees may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest," unless the government can demonstrate that its interest "as an employer, in promoting the efficiency of [its] public services," outweighs the employees' rights of free speech. 391 U.S. 563, 568 (1968). Under *Pickering* and its progeny, the Court applies a balancing test to

determine whether the First Amendment requires a government employer to "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." *Connick* v. *Myers*, 461 U.S. 138, 150, 154 (1983).

In *Garcetti*, the Court clarified that under *Connick-Pickering*, "[t]he proper inquiry" into an employee's job duties "is a practical one." 547 U.S. at 424. Because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, . . . the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 424-25. This Court expressed its concern that allowing a job description to govern would impermissibly suggest "that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* at 424.[8]

[8] Indeed, this Court recognized the inappropriateness of relying on legislative labels in *O'Hare*, when it extended *Elrod-Branti*'s prohibition against politically-motivated dismissals of employees to cover independent contractors hired by the government. *O'Hare*, 518 U.S. at 720. The Court reasoned that drawing a distinction between employees and independent contractors "would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs." *Id.* at 722.

2. The *Connick-Pickering* and *Elrod-Branti* lines of cases both concern adverse employment actions by the government as employer, based on an employee's exercise of First Amendment rights. It makes little sense for courts to conduct different inquiries to determine whether an employee may claim First Amendment protection – practical and fact-based under *Connick* and *Pickering*, but based solely on job title or formal job description under *Elrod* and *Branti* – depending on whether the employee's protected activity consists of speech or political affiliation.

That is especially true when one considers that the substantive test under *Elrod-Branti*, once triggered, is designed to be *more* protective of the employee than *Connick-Pickering*'s balancing test, which is more favorable to the government. Under *Elrod* and *Branti*, "conditioning the retention of public employment on the employee's support of the in-party" requires the government to "demonstrate 'an overriding interest' 'of vital importance.'" *Elrod*, 427 U.S. at 363; *Branti*, 445 U.S. at 515-16 (citations omitted) (quoting *Elrod*, 427 U.S. at 362, 368); *see Rutan*, 497 U.S. at 71 n.5 (government must prove a "compelling" interest).

Moreover, the "vital government end" must be served "by a means that is *least restrictive* of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Elrod*, 427 U.S. at 363 (emphasis added). The Court established this high

bar because "one's beliefs and allegiances ought not to be subject to probing or testing by the government." *O'Hare*, 518 U.S. at 719.

By contrast, under *Connick* and *Pickering*, the government has "broader discretion to restrict speech when it acts in its role as employer," and requires only "an adequate justification." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568). It therefore should not be more difficult for an employee to prove that she qualifies for protection under *Elrod-Branti* than under *Connick-Pickering*, and the inquiry should not make it more likely that an employee will be denied protection when her job category, but not her job, is deemed to require political allegiance.

## III. THIS CASE IS AN IDEAL VEHICLE FOR CONSIDERING THIS IMPORTANT QUESTION

This case presents an excellent vehicle for resolving the conflict among the lower courts. There is no dispute over the reason for petitioner's dismissal. "[F]or purposes of summary judgment [respondent] admitted that she fired [petitioner] because she had run for the office of clerk in the Republican primary." App., *infra*, 7a. The case therefore is a clean vehicle, not complicated or muddied by factual questions about the reason for petitioner's dismissal. The only issue for this Court's resolution is a pure question of law. Moreover, the court of appeals' resolution of that issue was the sole basis of the decision below. A ruling

in petitioner's favor by this Court would lead to reinstatement of her suit.

The issue in this case is important, as it affects millions of Americans who work for state and local governments. As of 2011, there were nearly twenty million such public employees. *See* U.S. Census Bureau, 2011 Public Employment and Payroll Data, http://www.census.gov/govs/apes/ (last visited May 11, 2013). Because the Eleventh Circuit's rule makes political loyalty a requirement for categories of jobs across the board, without requiring proof of its necessity for the actual jobs that particular employees perform, it will deter many public employees from running for office at the risk of losing their jobs.

More significantly, the Eleventh Circuit's rule is not limited to employees who run for office. It also would apply to public employees who want to support or oppose a candidate, and even to employees who merely belong to a different political party, as was the case in *Elrod* and *Branti*. The impact of the decision below on fundamental rights of belief and association, *O'Hare*, 518 U.S. at 719, is therefore extremely broad. Especially in small communities like the one in this case, "[a]s government employment . . . becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition." *Elrod*, 427 U.S. at 356. The decision below is likely to "chill" government employees' participation in the political process. *See Rutan*, 497 U.S. at 73.

The decision below also affects the First Amendment rights of entire communities by limiting the pool of qualified candidates, and thereby "distort[ing] the electoral process." *See Branti*, 445 U.S. at 513 n.8; *cf. Anderson* v. *Celebrezze*, 460 U.S. 780, 786 (1983) (noting the public's "basic constitutional right[ ]" in having candidates on the ballot). Under the Eleventh Circuit's rule, the very individuals who may be the most qualified candidates – those with experience in the operation of the relevant office or agency – risk losing their existing jobs by running. In the end, the electorate and the public are the losers.

The harm done to these important interests is exacerbated by the frequency with which this issue arises. It is not uncommon for newly elected supervisors to retaliate against subordinates who opposed or did not support their campaigns. Litigation often ensues, as is evident from the number of reported opinions and the fact that ten federal courts of appeals have addressed the question presented, in some cases repeatedly. In the Sixth Circuit alone, the issue has arisen in over twenty cases in the last two decades. It is time for this Court to consider and settle this question definitively.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

698 F.3d 1335
United States Court of Appeals,
Eleventh Circuit.

Sarah Jane UNDERWOOD, Plaintiff-Appellant,
v.
Rita HARKINS, in her official capacity as Clerk of the Superior Court of Lumpkin County, Georgia, Defendant-Appellee.

No. 11-13117. | Oct. 18, 2012.

**Attorneys and Law Firms**

James E. Radford, James Radford, LLC, Decatur, GA, for Plaintiff-Appellant.

Donald Andrew Cronin, Jr., O'Quinn & Cronin, LLC, McDonough, GA, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before CARNES, MARTIN and JORDAN, Circuit Judges.

**Opinion**

JORDAN, Circuit Judge:

Following the 1860 election, President Abraham Lincoln chose a cabinet "comprised of enemies and opponents," including three men who had been his "chief rivals for the Republican nomination," because they "'were the strongest men in the party'" and he "'had no right to deprive the country of their services.'" DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE

POLITICAL GENIUS OF ABRAHAM LINCOLN 319 (2005). When she was elected in 2008 as superior court clerk of Lumpkin County, Georgia, Rita Harkins did not emulate President Lincoln; in her first official act as clerk, Ms. Harkins dismissed her co-worker and former political rival, Sarah Jane Underwood, whom she had defeated in the Republican primary.

The issue we address is whether this firing violated Ms. Underwood's First Amendment rights. In light of our precedent, we conclude, as did the district court, that it did not.

## I

Ms. Underwood sued Ms. Harkins under 42 U.S.C. § 1983, alleging that her termination was unconstitutional under the First Amendment because it was based on her candidacy. The district court granted summary judgment in favor of Ms. Harkins, so under Rule 56 we look at the evidence in the light most favorable to Ms. Underwood. *See, e.g., Curves, LLC v. Spalding County, Ga.,* 685 F.3d 1284, 1289 (11th Cir.2012).

### A

Under Georgia law, a superior court clerk like Ms. Harkins has a number of statutory responsibilities and duties: to keep and run the clerk's office; to attend the needs of the court; to issue and sign every

paper under authority of the court, including orders to show cause; to keep automated civil and criminal case management systems, as well a docket or file for recording all matters and documents evidencing title to real property; to keep all papers of the clerk's office with care and security; to keep all publications of federal and state law furnished by the state; to procure a substantial seal of office; to make out and deliver a correct transcript and/or any minutes, records, or files in the clerk's office, except for sealed matters; to make notation on all conveyances of real or personal property, including liens, of the date and time they were recorded; to attest deeds and other written instruments for registration; to administer oaths; to submit certain financing statements; to remit a portions of certain fees collected; to participate in the state-wide uniform automated information system; to participate in an authorized clerk's network for the transmission and retrieval of electronic information; to file and transmit all civil case filings and disposition forms, as well as certain data; to participate in agreements, contracts, and networks necessary for the performance of duties required by law; and to perform such other duties as required by law or as necessarily applicable to the office of clerk of superior court. *See* GA.CODE ANN. § 15-6-61(a)(1)-(21) (2012). A superior court clerk must execute a bond of $150,000 and is "liable to rule" if she does not "faithfully account" for any money received. *See* GA.CODE ANN. §§ 15-6-59(a), 15-6-83 (2012).

Georgia law gives each superior court clerk the power to appoint one or more deputies, and to require from them a "bond with good security." *See* GA.CODE ANN. § 15-6-59(b) (2012). It also provides that the "[p]owers and duties of deputy clerks shall be the same as those of [superior court] clerks." GA.CODE ANN. § 15-6-59(b) (2012). Thus, a deputy clerk like Ms. Underwood is statutorily authorized to carry out the same tasks as the clerk, who is her superior. *See Hendrick v. State,* 257 Ga. 17, 354 S.E.2d 433, 434 (1987) ("By statute, the deputy clerk has the same power and duties as those of the clerk of the court."); *Green v. State,* 49 Ga.App. 252, 175 S.E. 26, 27-28 (1934) (deputy clerks are empowered to take affidavits upon which warrants may be issued); *Ledbetter v. State,* 2 Ga.App. 631, 58 S.E. 1106, 1107 (1907) (deputy clerks can receive indictments).

In Lumpkin County, the position of superior court deputy clerk is not protected by the civil service system. That means that a deputy clerk is an at-will employee subject to discharge by the clerk. *See Thomas v. Lee,* 286 Ga. 860, 691 S.E.2d 845, 847 (2010) (a public employee who is not covered under the civil service system "lacks a protected property interest in her employment," and can "be terminated without cause").

**B**

In 2004, while Edward Tucker served as the elected superior court clerk for Lumpkin County, Ms.

Underwood became one of the two deputy clerks. By 2009, she and Ms. Harkins were two of the three deputy clerks working under Mr. Tucker.

As a deputy clerk, Ms. Underwood was the administrative assistant to Mr. Tucker, helping him create and maintain confidential personnel records and files – which Mr. Tucker kept under lock and key – and handling "any things he needed throughout the day as a secretary would do." Mr. Tucker was a very "hands-on" clerk who was "seldom out of the office," but if he was not available Ms. Underwood could do things like swear in notaries. Ms. Underwood did not set policies for the clerk's office. Nor did she perform duties statutorily assigned to Mr. Tucker.

Ms. Underwood also worked in the adoption and juvenile divisions of the clerk's office, and in 2006 she began handling accounting duties. As the accountant, Ms. Underwood paid jurors, handled the accounts receivable and accounts payable, received bonds and funds to be placed in escrow, maintained the office's general ledger, reconciled nine bank accounts, and assisted Mr. Tucker (who gave her general directions) with the budget. Ms. Underwood "reported mainly to Mr. Tucker."

Ms. Underwood and Ms. Harkins were cordial to each other, but they generally did not socialize. Their duties as deputy clerks did not overlap, as Ms. Harkins was in charge of the criminal court division, and the two therefore had little interaction at work.

**C**

In 2008, Mr. Tucker, who was a Republican, announced that he was not going to seek re-election as superior court clerk, a position he had held since 1973. Ms. Harkins and Ms. Underwood each decided to seek the Republican nomination for clerk, and they ran against each other, and two other candidates, in the Republican primary. This caused "some" tension in the clerk's office. One employee in the nine-person clerk's office publicly supported Ms. Underwood, while another employee publicly supported Ms. Harkins.

None of the candidates in the Republican primary for clerk won a majority of the vote; Ms. Underwood received one of the two lowest vote totals and was eliminated, while Ms. Harkins faced off against another candidate in a runoff she ended up winning. When no Democrat qualified to run in the election, Ms. Harkins became the superior court clerk by having won the Republican primary.

The primary contest in which Ms. Underwood and Ms. Harkins participated was "not contentious" and focused on the candidates' experience. Ms. Underwood did not make any statements critical of Ms. Harkins during the campaign, and Ms. Harkins likewise did not make any statements critical of Ms. Underwood. Ms. Underwood did not congratulate Ms. Harkins, or correspond with her, after learning that Ms. Harkins would be the new superior court clerk. Nor did she discuss her job situation with Ms.

Harkins, or tell her that she wished to remain working in the clerk's office (as a deputy or in any other position), because she assumed that, as Ms. Harkins had said (before learning that Ms. Underwood was going to be a candidate), no one in the clerk's office would be losing his or her job. As Ms. Underwood saw it, her relationship with Ms. Harkins remained the same after the campaign, except that maybe Ms. Harkins avoided coming by her desk.

In her first official act upon becoming clerk, Ms. Harkins fired Ms. Underwood. Ms. Harkins did not dismiss any other employee of the clerk's office. Though she did not give Ms. Underwood a reason for the termination, for purposes of summary judgment Ms. Harkins admitted that she fired Ms. Underwood because she had run for the office of clerk in the Republican primary.

## II

First Amendment jurisprudence in the area of firings based on political affiliation or candidacy is, at best, muddled. We do not pretend to eliminate all of the confusion with this opinion, but we hope that we can at least harmonize our existing cases and enunciate a workable and relatively predictable standard. We begin our discussion with Supreme Court precedent, and then turn to Eleventh Circuit precedent.

**A**

In *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the Supreme Court, by a 5-3 vote, ruled that a newly-elected county sheriff could not issue wide-ranging terminations for employees who were not sponsored by, or affiliated with, his political party. Justice Brennan's plurality opinion was only joined by Justices White and Marshall, so the concurrence penned by Justice Stewart for himself and Justice Blackmun provided the controlling rationale for the Court's decision: a "non-policymaking, non-confidential employee" cannot "be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375, 96 S.Ct. 2673 (Stewart, J., joined by Blackmun, J., concurring).[1]

Several years later, in *Branti v. Finkel,* 445 U.S. 507, 519, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Supreme Court ruled that the continued employment of an assistant public defender, whose duties were to "represent individual citizens in controversy with the state," could not be conditioned on his "allegiance to the political party in control of the county government." In the course of his opinion for the Court,

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[1] *See generally Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[ ] on the narrowest grounds.").

Justice Stevens wrote that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. 1287 (recognizing, for example, that the governor of a state "may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments"). Nevertheless, because Justice Stevens specifically addressed whether an assistant public defender was a "policymaking" and/or "confidential" employee, and concluded that the answer to each question was no, *see id.* at 519-20, 100 S.Ct. 1287, there is disagreement in the legal academy about whether the language in *Branti* purporting to substantively reformulate the *Elrod* standard is dicta. *See generally* C. Fenlon, *The Spoils System in Check? Public Employees' Right to Political Affiliation & the Balkanized Policymaking Exception to § 1983 Liability for Wrongful Termination,* 30 CARDOZO L.REV. 2295, 2310 & n. 61 (2009) (citing articles expressing both viewpoints).

More recently, the Supreme Court has summarized *Elrod* and *Branti* as standing for the proposition that "[g]overnment officials may not discharge public employees for refusing to support a political party or

its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question." *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712, 714, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996) (extending *Elrod* and *Branti* to independent contractors). In other words, a "government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 74, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990).

**B**

*Randall v. Scott,* 610 F.3d 701 (11th Cir.2010), is the only decision of ours addressing the First Amendment rights of a public employee who is fired for running as a candidate in a contested election. In that case, the chief of staff for a state district attorney alleged that he had been terminated – in violation of his First Amendment rights – because of his decision to run for chairman of the board of county commissioners, a position that the district attorney's husband also coveted. We first noted that "[p]recedent in the area of constitutional protection for candidacy can best be described as a legal morass." *See id.* at 710. After surveying the relevant Supreme Court and Eleventh Circuit cases – involving political patronage dismissals, candidate support dismissals, and restrictions on candidacy – we concluded that the appropriate standard for candidacy dismissals was "a

balancing test between a discharged employee's First Amendment right to support a candidate and the state's interest in office loyalty." *See id.* at 713 ("we conclude the constitutional-right-versus-the-state's-interest analysis to be no different for a restriction on candidacy than a restriction on candidate support").

Turning to the merits, we reversed the dismissal of the employee's complaint. We held that the "decision to run for office enjoys *some* First Amendment protection," though we declined to say exactly how much. *See id.* Nevertheless, the firing could be sanctioned only "if the state's interest in permitting the [district attorney] to fire [the employee] [was] of sufficient importance to justify the infringement of the [employee's] First Amendment right to run" for office. *See id.* Because the district attorney's "interest in firing [the employee] was, as alleged in the complaint, for purely personal reasons" – i.e., the "discharge was entirely related to [the district attorney's] husband, and [the district attorney's] personal relationship with her husband" – the state had "no interest whatsoever in preventing [the employee] from running for office." *See id.* We also said in dicta that, had the employee "decided to run against" his boss for the position of district attorney, she "would have good legal reason to discharge him due to the state's interest in office loyalty." *See id.*

So we know, after *Randall,* that although the decision to run for superior court clerk may be protected to "some" degree, Ms. Underwood's First Amendment interest in candidacy has to be balanced

against the interests of the state – here Ms. Harkins in her official capacity as clerk – in confidentiality and loyalty. And we know that, if the *Randall* dicta is persuasive, Ms. Harkins would have "good legal reason" to discharge Ms. Underwood after she became a political opponent in the election for clerk.

**C**

Because *Randall* held that candidacy dismissals are to be treated like candidate support dismissals, *see* 610 F.3d at 713, some of our prior candidate support cases are relevant here. We now turn to them.

One of the decisions we discussed in *Randall* was *Terry v. Cook,* 866 F.2d 373 (11th Cir.1989), a case in which a newly-elected county sheriff in Alabama decided to terminate all employees who had opposed him in the election. A number of employees who received a pink slip – deputy sheriffs, clerks, investigators, dispatchers, jailers, and process servers – sued the sheriff, arguing that he had violated their First and Fourteenth Amendment rights. The district court dismissed the complaint with prejudice.

On appeal, we affirmed the dismissal as to the deputy sheriffs, but otherwise reversed. Under Alabama law, we noted, a deputy sheriff is the "general agent of and empowered to enter into business transactions for the sheriff;" "[a]ny transaction within the scope of the sheriff's duties may be acted upon by the deputy;" and "the sheriff is civilly liable for actions

committed by a deputy done in the performance of his duty." *See id.* at 377. We then explained that the "closeness and cooperation required between sheriffs and their deputies necessitate[d] the sheriff's absolute authority over their appointment and retention." *See id.* Without looking to see what the deputy sheriffs actually did in the course of their everyday duties, or allowing the case to proceed to discovery on such matters, we held that the sheriff could dismiss them without violating the First Amendment because of the need for loyalty:

> Under the *Elrod-Branti* standard, loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff. Such a requirement strikes at the heart of the *Elrod-Branti* least restrictive means test which balances [F]irst [A]mendment rights of the deputies and the need for efficient and effective delivery of public services. We can find no less restrictive means for meeting the needs of public service in the case of the sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who did not support him.

*Id.*

We came to a different conclusion as to the other employees who had been dismissed, explaining that, as to them, the need for loyalty to the sheriff could not be determined as a matter of law: "It has not been

established that loyalty to an individual sheriff is an appropriate requirement for effective job performance for the remaining positions of clerk, investigator, dispatcher, jailer, and process server. This is a determination that depends on the actual responsibilities of each position and the relationship of each to the sheriff." *Id.* at 377-78.

An earlier candidate support case, not discussed in *Randall* or *Terry,* or cited by the parties or the district court here, is *Stegmaier v. Trammell,* 597 F.2d 1027 (5th Cir.1979), where a newly-elected county circuit court clerk in Alabama threatened to discharge the existing deputy clerk because she had not supported him (a Democrat) in the election for clerk and had instead supported her boss, the former incumbent clerk (an independent). The deputy clerk sued the clerk, alleging that the planned termination would violate her First Amendment rights to freedom of speech, belief, and association. The district court consolidated the preliminary injunction hearing with the trial on the merits, but strangely no testimony was heard, and the matter was "tried" solely on the deputy clerk's complaint and the clerk's answer and affidavit. *See id.* at 1029-31. The district court ruled in favor of the clerk, and the deputy clerk appealed.

We held in *Stegmaier* that a "public employee occupying a position of confidence, loyalty, and trust by virtue of her status as the single deputy and assistant to an elected official may be discharged solely on the ground of political affiliations without infringing her constitutional rights." *See id.* at 1030.

We rejected, as clearly erroneous, the district court's finding that a deputy clerk was a "policymaking" position within the meaning of *Elrod.* Under Alabama law policymaking decisions with regard to the clerk's office were made by the administrative director of the courts, and not by the clerk. And if the clerk did not have policymaking authority, neither did the deputy clerk. *See id.* at 1034-38. But we concluded that, due to the confidential relationship that existed between the two, the clerk – an elected official – could dismiss his deputy clerk without running afoul of the First Amendment. Because of the importance of that rationale here, we quote it at length:

> The public . . . does have the right under the Alabama Constitution to elect its Circuit Clerks and, presumably, attempts to elect capable and honest individuals when doing so. If there is any policy "presumably sanctioned by the electorate," *Elrod v. Burns, supra,* 427 U.S. at 367, 96 S.Ct. [2673], in its election of one individual as Circuit Clerk over another, it is that of honesty and integrity. This presumption is especially strong where the nature of the Circuit Clerk's position involves the handling of private and public litigant's fees and judgments. *See* Ala.Code tit. 12, §§ 12-17-93, 12-17-94 (1975)[.] When, by statute, a deputy clerk is empowered to conduct all business which the clerk is authorized to conduct, Ala.Code tit. 12, § 12-17-93(2) (1975), and when, by statute, the clerk is subject to civil liability and fines for failure to perform his statutory

> duties, *id.,* § 12-17-94(b), the Circuit Clerk must be afforded the opportunity to select his single deputy clerk; he must be able to select a deputy in whom he has total trust and confidence and from whom he can expect, without question, undivided loyalty.

*Id.* at 1040.

Although we had said earlier in the opinion that whether an employee holds a "policymaking" position is an issue of fact, *see id.* at 1034-35 & n. 8, we made no such statement in determining that a deputy clerk was a "confidential" employee under Alabama law. The portion of the opinion dealing with the confidential nature of the position of deputy clerk was devoid of any reference to factual findings or to the clearly erroneous standard of review. *See id.* at 1038-40.[2]

**D**

This is not a pure political patronage case. Nor is it a pure political affiliation case.[3] After all, both

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[2] Because it was decided by the former Fifth Circuit prior to October 1, 1981, *Stegmaier* is binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

[3] It is also not a case in which an employee was terminated because of things she said during an election. *Cf. Stough v. Gallagher,* 967 F.2d 1523, 1528 (11th Cir.1992) (applying standard from *Pickering v. Bd. of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), where sheriff fired

(Continued on following page)

Ms. Underwood and Ms. Harkins are Republicans, and there is no indication in this record that the two had different political ideologies. Nevertheless, the political patronage and political affiliation cases are helpful and, as in *Randall,* we turn to them for guidance where appropriate.

In *Randall* we said in dicta that an elected government official can dismiss a confidential subordinate for running against her in an election, without violating the subordinate's First Amendment rights. After consideration, we find this dicta persuasive because it is consistent with decisions like *Terry* and *Stegmaier,* which allowed elected officials to discharge those immediate subordinates who had not supported them in a contested election. Our holding, which stays within the confines of the case before us, is that an elected official may dismiss an immediate subordinate for opposing her in an election without violating the First Amendment if the subordinate, under state or local law, has the same duties and powers as the elected official. As the Second Circuit has put it, "'[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

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deputy sheriff for making political speeches on behalf of his political opponent).

stead.'" *Butler v. New York State Dept. of Law,* 211 F.3d 739, 744 (2d Cir.2000) (citation omitted).[4]

An immediate subordinate who has the same statutory powers and duties as the elected official for whom she works is the type of confidential employee who can be terminated under *Elrod, Branti*, and their progeny (i.e., cases like *Terry* and *Stegmaier*) if she runs in an election against her eventual superior. Without minimizing the First Amendment interest in candidacy, in this scenario the subordinate's constitutional rights lose out under a *Randall* balancing analysis. Given the substantial powers and duties that a deputy superior court clerk has under Georgia law – powers and duties which are identical to those of the clerk herself – a person holding that position is essentially the legal alter ego of the clerk. In our view, and as in *Stegmaier,* Ms. Harkins "must be able to select a deputy in whom [s]he has total trust and confidence and from whom [s]he can expect, without question, undivided loyalty." *Stegmaier,* 597 F.2d at 1040. *Cf. Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1334 (9th Cir.1997) ("We hold that Assistant [District Attorney] Fazio was a policymaker. While his powers under the San Francisco Charter

[4] Given that cases like *Elrod* and *Randall* employ a balancing test laced with a form of heightened scrutiny, we see no need to import a strict scrutiny standard from decisions addressing the constitutionality of laws imposing restrictions on candidacy. *See, e.g., Anderson v. Celebrezze,* 460 U.S. 780, 788-89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

are identical to those of a rank and file ADA, they are also nearly identical to those of the actual DA.").[5]

We recognize that Ms. Underwood's daily duties under Mr. Tucker, the former superior court clerk, did not involve the setting of policy or the exercise of unlimited discretion, and did not extend to the outer limits authorized by Georgia law. In our view, however, the actual everyday work performed by Ms. Underwood is not determinative. What matters in a case like this one is not what the subordinate actually does on a day-to-day basis, but rather what the subordinate is legally empowered to do under state or local law. In other words, we look at the position in the abstract and at what state or local law allows a person in that position to do, and not at a snapshot of the position as it is being carried out by a given person at a given point in time under a given elected official. *See, e.g., Fields v. Prater,* 566 F.3d 381, 386

[5] At least two circuits have held that a confidential or policymaking subordinate who challenges her current boss in an election (or plans to do so) can be terminated or placed on unpaid leave without an infringement of her First Amendment rights, on the theory that she has called into question her superior's fitness to hold office. *See Carver v. Dennis,* 104 F.3d 847, 852 (6th Cir.1997) (termination of deputy county clerk, who ran against the clerk and "was trying to take [her boss'] job," was "neutral in terms of the First Amendment"); *Wilbur v. Mahan,* 3 F.3d 214, 218 (7th Cir.1993) (where such a subordinate plans to run against his superior, the message is that "the boss is not administering the office properly," and "disruption or disturbance need not be proved"). We need not decide today whether this theory is a sound one.

(4th Cir.2009) ("examining the duties and responsibilities of a local director [for county social services department] under Virginia law," and noting that "'courts focus on the powers inherent in a given office'") (citation omitted); *Butler,* 211 F.3d at 744 ("We are not persuaded by Butler's argument that she was not a policymaker because she had to consult her superiors or clients on policy issues. The issue is not whether Butler independently made policy from day to day, but rather what the general required duties of her position were."); *Mummau v. Ranck,* 531 F.Supp. 402, 405 (E.D.Pa.) ("Plaintiff's attempt to narrowly define his employment function so as to exclude any policymaking/confidential position fails since the relevant inquiry focuses on the function of the 'public office' involved, *Branti v. Finkel,* 445 U.S. at 518, 100 S.Ct. [1287], not the function of the particular employee occupying the office."), *aff'd,* 687 F.2d 9, 10 (3d Cir.1982) ("We specifically reject appellant's contention that his function [as an assistant district attorney] was purely technical and ministerial and that therefore political affiliation would be an inappropriate criterion for employment. That an assistant district attorney 'could conceivably operate in such a legal/technical matter,' or that appellant in fact so limited himself to the role described is irrelevant."). *Cf. DiRuzza v. County of Tehama,* 206 F.3d 1304, 1309, 1310 (9th Cir.2000) (because California law does not provide that the title of "deputy sheriff" creates a "clear job category with consistent responsibilities," "the critical inquiry" under *Elrod* and *Branti*

"is the job actually performed" by an individual deputy sheriff).

Indeed, in *Cutcliffe v. Cochran,* 117 F.3d 1353, 1358 (11th Cir.1997) – a case in which deputy sheriffs claimed that their dismissals violated the First Amendment – we acknowledged the "broad holding" in *Terry* "that sheriffs have the authority to fire their deputies for political affiliation reasons." We accordingly recognized in *Cutcliffe* that, given the holding in *Terry,* the plaintiffs could not obtain a "factual determination" under *Branti* of "whether their positions implicate partisan political concerns in their effective functioning." *See id. See also Beauregard v. Olson,* 84 F.3d 1402, 1404 n. 5 (11th Cir.1996) (noting that "[t]he *Terry* court did not undertake a searching assessment of the individual deputies' actual duties").

This categorical approach, in addition to being consistent with our cases, makes practical sense. The fact that an elected official has not given a particular immediate subordinate 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. *See, e.g., Summe v. Kenton County Clerk's Office,* 604 F.3d 257, 269 (6th Cir.2010) ("[T]here is nothing in the record that prevents a Kenton County Clerk from employing a Chief Deputy in a way that requires confidentiality, and we hesitate to bind Kenton County Clerks to employ their Chief Deputies in ways they were employed in the past.");

*Regan v. Boogertman,* 984 F.2d 577, 581 (2d Cir.1993) (that tax collector "may not have delegated any duties to his deputy [tax receiver]" was not dispositive in determining whether firing of deputy for political reasons violated the First Amendment, as the tax collector might choose to "delegate duties to the [deputy] in the future"). A categorical approach also has the benefit of providing some predictability to legislative bodies, which can decide what powers to give to immediate subordinates of elected officials, as well as giving fair warning to such employees, who will have some notice that their jobs may be subject to termination if they challenge their current or eventual superior in an election or support their boss' electoral opponent.

We stress, however, that the label or title of the subordinate's position is not controlling. If state or local law does not give a so-called "deputy" or "assistant" the same powers as the elected official who is her superior, she is not the legal alter ego of the official, and whether she is a confidential employee from whom loyalty can be demanded will ordinarily need to be determined as a matter of fact. *See Gordan v. Cochran,* 116 F.3d 1438, 1441 (11th Cir.1997) ("Merely being an administrator or supervisor is not sufficient to show that political affiliation is an appropriate job requirement."). *Cf. McCabe v. Sharrett,* 12 F.3d 1558, 1572-73 (11th Cir.1994) (police chief could transfer his confidential secretary to a less desirable job for marrying one of his subordinates, without violating her First Amendment right to

intimate association, because of the need for loyalty and confidentiality).

For example, in *Barrett v. Thomas,* 649 F.2d 1193, 1200-01 (5th Cir. Unit A 1981), we reviewed, and upheld, a jury verdict in favor of deputy sheriffs who had been fired by a Texas sheriff for not supporting him in an election. We explained that the job duties of the more than 500 deputy sheriffs in the department "range[d] from clerical work to law enforcement" and noted that the sheriff had "offer[ed] no satisfying justification for demanding greater political loyalty from his deputies" than the sheriff in *Elrod* was entitled to expect from his employees: "In a sheriff's department with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship." *Id.* at 1201.

Here, unlike the situation in *Barrett,* Ms. Underwood was one of three deputy superior court clerks in an office of nine, and the Georgia Legislature chose to give persons holding her job the same powers and duties as the clerk herself. That allowed Ms. Harkins, when she became clerk, to dismiss Ms. Underwood. *See Randall,* 610 F.3d at 713; *Terry,* 866 F.2d at 377; *Stegmaier,* 597 F.2d at 1040.

## III

Ms. Harkin's termination of Ms. Underwood may well be emblematic of a "civil neighbourly country

[beset] with increasingly uncivil politics." *There Goes the Neighbourhood,* Lexington, THE ECONOMIST, Sept. 22-28, 2012, at 42. Nevertheless, the First Amendment, as interpreted by the Supreme Court and the Eleventh Circuit, did not require Ms. Harkins to graciously embrace and retain her political opponent after becoming superior court clerk of Lumpkin County. The district court's grant of summary judgment in favor of Ms. Harkins is affirmed.

**AFFIRMED.**

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MARTIN, Circuit Judge, dissenting:

I respectfully dissent. The majority makes a significant mistake when it comes to answering a crucial question about how to apply the Supreme Court's decisions in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).[1] That question is, in determining whether

[1] *Elrod* and *Branti* involved public employees who were discharged because of their political affiliation. *See Elrod,* 427 U.S. at 349, 96 S.Ct. at 2678 (plurality opinion); *see also Branti,* 445 U.S. at 508-11, 100 S.Ct. at 1289-91. Our precedent holds that the governmental interest in political loyalty recognized as valid in *Elrod* and *Branti* may also justify the discharge of a public employee who fails to support a particular candidate, *see Terry v. Cook,* 866 F.2d 373, 377 (11th Cir.1989); *see also Epps v. Watson,* 492 F.3d 1240, 1244-45 (11th Cir.2007), or who decides to run as a candidate herself, *see Randall v. Scott,* 610 F.3d 701, 713 (11th Cir.2010).

political loyalty is an appropriate requirement for the effective performance of a position held by a public employee – such that the employee can be terminated without violating the First Amendment – are the specific facts regarding the employee's *actual* job duties relevant? The majority here says that they are not. *See* Majority Op. at 1345-46. Rather, the majority claims, the only thing that needs to be examined is the Georgia statute that contains the formal job description for all deputy clerks in the state. *See id.*

Our precedent does not support the majority's conclusion that the inquiry is such a narrow and purely legal one. Indeed, in *Stegmaier v. Trammell,* 597 F.2d 1027 (5th Cir.1979), the former Fifth Circuit squarely held that whether a public employee holds a position from which she can be lawfully dismissed under *Elrod* is a "question of fact" that must be resolved in light of the specific evidence that is presented in a given case. *Id.* at 1034 & n. 8.[2] Further, "whether a particular public employee [can be lawfully terminated] can be answered only by analyzing the nature of [that] employee's responsibilities." *Id.* at 1035. This means that both "[t]he inherent powers *and* [the] actual job responsibilities of the position involved . . . should be part of the analysis." *Parrish v.*

[2] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. *Id.* at 1209.

*Nikolits,* 86 F.3d 1088, 1093 (11th Cir.1996) (emphasis added).[3]

I recognize that not all of our prior cases have been clear or consistent on this issue. *See, e.g., Cutcliffe v. Cochran,* 117 F.3d 1353, 1358 (11th Cir.1997) (construing our opinion in *Terry v. Cook,* 866 F.2d 373 (11th Cir.1989), to preclude a factual determination into the actual job responsibilities of deputy sheriffs in Florida). But the appropriate response to this is to apply our prior precedent rule and adhere to the holding of *Stegmaier. See Morrison v. Amway Corp.,* 323 F.3d 920, 929 (11th Cir.2003) (noting that, under our prior precedent rule, we look to the earliest relevant case in order to resolve a conflict among our decisions). The majority here fails to abide by this basic requirement.

I am also concerned that the majority opinion is not consistent with the thrust of Supreme Court precedent. I realize that, following *Elrod* and *Branti,* the Supreme Court has not had the chance to address the specific question presented by Ms. Underwood's case, and our sister circuits have adopted sharply conflicting views. *Compare, e.g., Jantzen v. Hawkins,* 188 F.3d 1247, 1253 & n. 1 (10th Cir.1999) (holding that the inquiry "must focus on the inherent powers

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[3] At least one of our sister circuits has understood *Stegmaier* to mean that the actual job responsibilities of a public employee are relevant. *See Dickeson v. Quarberg,* 844 F.2d 1435, 1442 (10th Cir.1988).

of the positions and the actual duties performed"), *and Horton v. Taylor,* 767 F.2d 471, 477 (8th Cir.1985) ("The *Branti* test is a functional one, focusing on the actual duties an employee performs."), *with, e.g., Nader v. Blair,* 549 F.3d 953, 961 (4th Cir.2008) (declining to examine "the actual duties" performed and focusing on the job description only), *and Gordon v. County of Rockland,* 110 F.3d 886, 888 (2d Cir.1997) (holding that the focus is on "the written job description" and not "the duties actually performed").

But the Supreme Court's decision in *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), casts doubt on the approach taken by the majority today. In *Garcetti,* the Supreme Court rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* at 424, 126 S.Ct. at 1961. In view of that, the Court established that "[t]he proper inquiry is a practical one." *Id.* The reason for this is obvious. "Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform." *Id.* at 424-25, 126 S.Ct. at 1962. Thus, while the formal job description might support a particular rationale for restricting an employee's First Amendment rights, the scope of her actual job might not do so. Relying on the formal job description can therefore result in the excessive restriction of an employee's constitutional rights.

Unfortunately for Ms. Underwood, her case illustrates this danger perfectly. The record here underscores a vast gulf between what is formally

provided under Georgia law and what is the reality on the ground.[4] The Georgia statutes state that deputy clerks have the "same" powers and duties as the clerk herself. O.C.G.A. § 15-6-59(b). However, this was not the reality for the deputy clerks serving under Mr. Tucker. *See* Majority Op. at 1345. Nor is this the reality for the deputy clerks serving under Ms. Harkins. Indeed, in her deposition, Ms. Harkins conceded that her deputy clerks have little discretion in their job and instead are required to follow specific instructions to execute limited, well-defined tasks. *See* Doc. 39 at 83-86. If "there's any uncertainty" about what to do, she indicated, the deputy clerk must go to her to obtain more specific instructions. *Id.* at 85-86.

Thus, the formal job description for the deputy clerks "bear[s] little resemblance" to their actual job. *Garcetti,* 547 U.S. at 425, 126 S.Ct. at 1962. The reality of this case is that the powers and duties of the deputy clerks depart from those set forth in O.C.G.A. § 15-6-59(b). *Accord Calvert v. Hicks,* 510 F.Supp.2d 1164, 1173 (N.D.Ga.2007) (finding, based on the record evidence, that "the roles of Clerk and deputy clerk" in Fulton County "are not the same," and that Georgia law only "nominally grants deputy clerks" the same authority as the clerk). At this stage

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[4] In reviewing the summary judgment ruling, I must look at the record in the light most favorable to Ms. Underwood. *See Curves, LLC v. Spalding County, Ga.,* 685 F.3d 1284, 1289 (11th Cir.2012).

of the litigation, Ms. Underwood has carried her burden of showing that, in her position as deputy clerk, she was a ministerial-level employee responsible for performing "limited and well-defined tasks." *Id.*

This is significant because binding precedent tells us that, insofar as such an employee exercises her First Amendment rights during an election, the governmental interest in political loyalty cannot justify her termination in the aftermath.[5] Indeed, under *Elrod* and *Branti,* the governmental interest in political loyalty can support the discharge of a public employee only if political loyalty is an appropriate requirement for that employee's job. *See Terry,* 866 F.2d at 378; *see also Epps v. Watson,* 492 F.3d 1240, 1245 (11th Cir.2007). And political loyalty is not an appropriate requirement for positions that involve "limited objectives and defined duties and [that] do not require those holding them to function as the alter ego of the [elected official] or ensure that the policies and goals of the office are implemented." *Terry,* 866 F.2d at 378.[6]

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[5] Of course, "employees may always be discharged for good cause, such as insubordination or poor job performance." *Elrod,* 427 U.S. at 366, 96 S.Ct. at 2686 (plurality opinion). However, Ms. Harkins admitted for the purpose of her summary judgment motion that she fired Ms. Underwood because Ms. Underwood chose to exercise her First Amendment right to be a candidate. Majority Op. at 1339.

[6] In *Terry,* we clarified that "[a]lthough it can be said that each job in [an] office implements the policies of the office,"

(Continued on following page)

The majority's decision to rely only on the formal statutory job description of the deputy clerks to uphold Ms. Underwood's termination has the effect of burdening Ms. Underwood's First Amendment rights beyond that which the Constitution allows. This is precisely the kind of danger that the Supreme Court warned about in *Garcetti*. *See* 547 U.S. at 424-25, 126 S.Ct. at 1961-62.

* * *

Unlike the majority, I do not think that we can ignore the facts regarding the scope of Ms. Underwood's actual duties, and in view of those facts, I think Ms. Underwood should be allowed to proceed to trial with her claim. Because the majority refuses to let her do so, I respectfully dissent.

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political loyalty is not an appropriate requirement for positions that involve "limited and defined roles." 866 F.2d at 378.

2011 WL 2457680
United States District Court,
N.D. Georgia,
Gainesville Division.

Sarah Jane UNDERWOOD, Plaintiff,
v.
Rita HARKINS et al., Defendant.

Civil Action No. 2:10-CV-20-RWS. | June 16, 2011.

**Attorneys and Law Firms**

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**Opinion**

***ORDER***

RICHARD W. STORY, District Judge.

This case comes before the Court on Defendants' Motion for Summary Judgment [34]. After considering the record, the Court enters the following Order.

**Background**

From 1973 to 2008, Edward Tucker ("Tucker") served continuously as the Lumpkin County Superior Court Clerk. (Defendants' Statement of Material Facts Upon Which There Exists No Genuine Issue To Be Tried ("DF"), Dkt. No. [34-2] at ¶ 2; Plaintiff's Response to Defendants' Statement of Material Facts

("Response to DF"), Dkt. No. [41-2] at ¶ 2). Plaintiff Sarah Jane Underwood ("Plaintiff" or "Underwood") began working for the Clerk's Office in 1999, and Tucker promoted her to Deputy Clerk in 2004. (DF at ¶¶ 1, 8; Response to DF at ¶¶ 1, 8). Beginning in January 2005, Defendant Rita Harkins ("Harkins") also served the Clerk's Office as a Deputy Clerk. (Plaintiff's Statement of Material Facts ("PF"), Dkt. No. [41-1] at ¶ 5; Defendants' Response to Plaintiff's Statement of Material Facts ("Response to PF"), Dkt. No. [45] at ¶ 5).

In early May 2008, Tucker announced that he no longer would seek reelection for his position. (PF at ¶ 7; Response to PF at ¶ 7). Harkins announced the next day that she would run for the Republican nomination for Lumpkin County Superior Court Clerk. (DF at ¶ 4; Response to DF at ¶ 4). Shortly thereafter, Underwood announced that she would also seek the Republican nomination. (DF at ¶ 6; Response to DF at ¶ 6). Four individuals ran in the Republican primary, which was not contentious by all accounts. (DF at ¶¶ 9, 11; Response to DF ¶¶ 9, 11). Although Plaintiff finished last in the primary, Harkins advanced to a primary runoff, which she won. (DF at ¶¶ 10, 13, 15; Response to DF ¶¶ 10, 13, 15). Harkins proceeded to win the general election on August 5, 2008, uncontested by any Democratic challenger. (PF at ¶ 16; Response to PF at ¶ 16). Harkins alleges that Plaintiff afterward did not congratulate her or affirmatively offer her support, but instead only conversed with Harkins about work

matters. (DF at ¶¶ 19-24; Response to DF at ¶¶ 19-24).

At the time Harkins filled the Superior Court Clerk vacancy, Plaintiff's primary role was as office accountant. (DF at ¶ 29; Response to DF at ¶ 29; PF at ¶ 2; Response to PF at ¶ 2). As office accountant, she was responsible for paying jurors, all monthly accounts receivable, accounts payable, and general ledger; reconciling nine checking accounts on a monthly basis; receiving funds paid to the Clerk's Office; and, depositing funds into a local bank. (DF at ¶¶ 30-32; Response to DF at ¶¶ 30-32). Harkins views this position as a "high priority" position because she believes money issues are the most likely to plague the government office. (DF at ¶ 35; Response to DF at ¶ 35). Accordingly, Harkins – acting as the new Court Clerk – interacts with the office accountant on a daily basis and requires the accountant to seek direction from her whenever a problem is encountered for which the Deputy Clerk has not been given specific instructions. (DF at ¶¶ 34, 36; Response to DF ¶¶ 34, 36). Plaintiff asserts that her roles as Deputy Clerk and accountant were primarily ministerial in nature with clearly-defined duties and no policymaking function. (PF at ¶¶ 3, 21; Response to PF at ¶¶ 3, 21).

On January 2, 2009, Harkins' first official act as Clerk was to terminate Plaintiff from employment. (PF at ¶ 19; Response to PF at ¶ 19). At the time, the Clerk's Office consisted of nine employees under Harkins' supervision. (DF at ¶ 37; Response to DF at ¶ 37). Plaintiff believes that she was terminated

because she ran against Harkins. (DF at ¶ 27; Response to DF at ¶ 27). Although Harkins had claimed she terminated Plaintiff because of her attitude and work performance, she has since embraced Plaintiff's theory for termination for the purposes of this motion. (PF at ¶ 23; Response to PF at ¶ 23).

On February 23, 2010, Plaintiff filed her Complaint [1] against Lumpkin County and Harkins in both her individual capacity and official capacity as the Lumpkin County Superior Court Clerk. (Dkt. No. [1] at 1). She alleged pursuant to 42 U.S.C. § 1983 that her termination from employment was "in retaliation for the exercise of her [First Amendment] rights of political association, to speak on matters of public concern, and to participate in the political process." (*Id.*) On October 26, 2010, Defendants filed their Motion for Summary Judgment [34]. Plaintiff filed her Brief in Opposition To Defendants' Motion for Summary Judgment [41] on November 17, 2010. On December 6, 2010, Defendants filed their Reply Brief in Support of Their Motion for Summary Judgment [44].

## Discussion

### I. Threshold Matters

In Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment [41], Plaintiff concedes that Harkins is not liable in her individual capacity because she is entitled to qualified immunity, and that Lumpkin County is not liable because

Harkins was not acting on its behalf. (Dkt. No. [41] at 3). Therefore, the only claim for the Court to address on this motion for summary judgment is whether Harkins is liable in her official capacity as Clerk.

## II. Summary Judgment Standard

Federal Rule of Civil Procedure 56 requires that summary judgment be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "The moving party bears 'the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Hickson Corp. v. N. Crossarm Co.,* 357 F.3d 1256, 1259 (11th Cir.2004) (alteration in original) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) (internal quotation marks omitted). Where the moving party makes such a showing, the burden shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("[T]he [non-movant] must present affirmative evidence in order to defeat a properly supported motion for summary judgment.").

The applicable substantive law identifies which facts are material. *Id.* at 248. A fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law. *Id.* An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 249-50.

In resolving a motion for summary judgment, the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Patton v. Triad Guar. Ins. Corp.,* 277 F.3d 1294, 1296 (11th Cir.2002). But, the court is bound only to draw those inferences which are reasonable: "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir.1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50 (internal citations omitted); *see also Matsushita,* 475 U.S. at 586 (once the moving party has met its burden under Rule 56(c), the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

## III. Liability Under § 1983 Against Harkins in Her Official Capacity

Patronage practice has a long history in American politics and government. *See Elrod v. Burns,* 427 U.S. 347, 353, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("[Patronage practice] has existed at the federal level at least since the Presidency of Thomas Jefferson. . . ."). The practice comes in a variety of forms, including appointing loyal supporters to government jobs, providing non-officeholders lucrative government contracts, and favoring certain wards over others for improved public services. *Id.* The practice at issue here is the dismissal of public employees seeking candidacy for an elected position.

The Supreme Court in *Elrod* directly addressed the issue of whether "individual public workers' employment conditioned on supporting a political party" is constitutional. *Randall v. Scott,* 610 F.3d 701, 711 (11th Cir.2010). The Court held that "conditioning the retention of public employment on the employee's support of the in-party . . . must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* (omission in original) (quoting *Elrod,* 427 U.S. at 363). Although the Court recognized vital governmental needs for efficiency, effectiveness, and assurance that policies which the electorate has sanctioned are effectively implemented by loyal employees, "such dismissals are on balance not the least restrictive

means for fostering" those ends and are not sufficient "to override their severe encroachment on First Amendment freedoms." *Elrod,* 427 U.S. at 372-73. In effect, whether a government employee is protected by the First Amendment from dismissal is determined by balancing the constitutional rights of employees with government interests in effective performance of job functions. This holding was reaffirmed in *Branti v. Finkel,* 445 U.S. 507, 518, 520, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). In balancing these interests, whether a position requires policymaking or confidentiality is relevant to the determination, but "the ultimate inquiry . . . is whether the hiring authority can demonstrate that . . . affiliation is an appropriate requirement for the effective performance of the public office involved."[1] *Id.* at 518.

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[1] The Supreme Court announced a parallel analysis for free expression principles in *Connick v. Myers,* 461 U.S. 138, 150-51, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and *Pickering v. Bd. of Educ.,* 391 U.S. 563, 574-75, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Overlap between the tests may occur, but the Eleventh Circuit has "emphasized the need to 'retain the distinctions between' the two types of cases." *Taylor v. Bartow County,* 860 F.Supp. 1526, 1539 (N.D.Ga.1994) (quoting *Terry v. Cook,* 866 F.2d 373, 377 (11th Cir.1989)). Indeed, there seems to be an ambiguity on which test to apply in the context of party candidacy. "[I]t appears that the political patronage analysis applies to situations involving *en masse* discharge, while the *Pickering/Connick* balancing test applies when only a single employee is affected." *Id.* Other courts distinguish the two lines of inquiry so that "the *Elrod-Branti* standard [applies] for discrimination based on political affiliation and [the other] balancing test [applies] for discrimination based on political speech." *Cutcliffe*

(Continued on following page)

For decades, whether First Amendment protection extended to political candidacy was an uncertain issue. *See Randall,* 610 F.3d at 710 ("Precedent in the area of constitutional protection for candidacy can be best described as a legal morass."). The Eleventh Circuit in *Randall,* however, extended *Elrod* and *Branti* so that candidacy is indeed entitled to protection. *Id.* at 713. That case arose after an employee of the Clayton County District Attorney entered the Clayton County Board of Commissioners' Chairman race, a position also sought by the District Attorney's husband. *Id.* at 703. Although it was acknowledged that there was no circuit precedent that squarely fit the facts of that case, the Eleventh Circuit concluded that "[a]n interest in candidacy . . . lies at the core of values protected by the First Amendment." *Id.*

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*v. Cochran,* 117 F.3d 1353, 1355 (11th Cir.1997). Both tests, however, require a court to "reach the most appropriate possible balance of the competing interests." *Connick,* 461 U.S. at 150; *see also Elrod,* 427 U.S. at 363 (requiring a court to balance interests). For the purpose of this motion for summary judgment, the Court will use the *Elrod-Branti* test because it was briefed by the parties and the Eleventh Circuit used it in *Randall* to analyze the amount of First Amendment protection afforded to an individual employee's candidacy. *Randall,* 610 F.3d at 711-14. Furthermore, "public employment . . . absolutely conditioned upon political allegiance and not upon the content of expressions of political beliefs" makes "the *Elrod-[B]ranti* analysis . . . the appropriate one." *Terry,* 866 F.2d at 377. Here, given that the campaign was not contentious and did not involve much political discourse, the *Elrod-Branti* analysis is more appropriate to analyze the case. (DF at ¶¶ 9, 11; Response to DF at ¶¶ 9, 11).

Therefore, "the constitutional-right-versus-the-state's-interests analysis [is] no different for a restriction on candidacy than a restriction on candidate support." *Id.* The Eleventh Circuit cited a number of candidate support (rather than actual candidacy) cases to find all such employees are entitled to *some* constitutional protection, although the degree of loyalty required for effective job performance "depends upon the actual responsibilities of [a given] position and the relationship . . . to the [supervisor]." *Id.* at 712-13 (quoting *Terry v. Cook,* 866 F.2d 373, 377-78 (11th Cir.1989)). Therefore, the Court must determine whether Harkins can show that Plaintiff's loyalty as Deputy Clerk and the office accountant was sufficiently important to outweigh Plaintiff's constitutional rights.

In Defendants' Brief in Support of Their Motion for Summary Judgment [34-1] and Defendants' Reply Brief in Support of Their Motion for Summary Judgment [44], Harkins argues that "summary judgment is appropriate in this matter even if one embraces Plaintiff's theory of the case, *i.e.,* that Superior Court Clerk Harkins terminated Plaintiff as a result of her seeking the office of Superior Court." (Dkt. No. [34-1] at 2). Harkins justifies her decision through the "viper in the nest" argument, i.e., termination was justified because of "the 'potential' problems attendant with the successful candidate retaining the losing candidate." (Dkt. No. [44] at 13). In effect, Harkins argues that the fact Harkins and Underwood were political opponents justified Plaintiff's termination because

Plaintiff might otherwise be able to "sabotage" Harkins' management of the office, thus adversely affecting Harkins' candidacy in the future. Harkins claims her suspicions were further supported because Plaintiff "never congratulated Harkins on her victory," "at no time communicate[d] that she wanted to work for her," and "never communicated that she would support Ms. Harkins." (Dkt. No. [34-1] at 7-8). Plaintiff responds that her termination was unjustified because her roles as accountant and Deputy Clerk did not require confidentiality or policymaking and emphasizes "that Underwood did not challenge Harkins for an office currently held by Harkins" at the time of the campaign. (Dkt. No. [41] at 17-18). For the reasons discussed below, the Court finds Harkins' interest in office loyalty to outweigh the First Amendment protection of Underwood's candidacy.

Several courts have addressed whether an employee can be reprimanded for running against a newly-elected supervisor rather than an incumbent. For example, in *Myers v. Dean,* the plaintiff unsuccessfully campaigned for the position of county clerk, which was filled by the defendant after the incumbent's resignation and until a new clerk could be elected. 216 F. App'x 552, 553 (6th Cir.2007). After the defendant won the election, he terminated the plaintiff. *Id.* Although the court acknowledged that candidacy might deserve greater protection, Sixth Circuit precedent compelled it to hold that the plaintiff's candidacy was not protected by the First Amendment from retaliation. *Id.* at 554-55. Similarly, in *Summe v.*

*Kenton County Clerk's Office,* the Eastern District Court of Kentucky held that the newly-elected county clerk was not liable under § 1983 for his termination of the plaintiff, a deputy clerk who had run against the defendant during the campaign. 626 F.Supp.2d 680, 683-84, 693 (E.D.Ky.2009). The court found significant in determining the appropriateness of political affiliation for patronage dismissal "(1) the inherent duties of the position in question and (2) the duties that the new holder of that position will perform as envisioned by the newly elected official."[2] *Id.* at 686 (quoting *Hoard v. Sizemore,* 198 F.3d 205, 212 (6th Cir.1999)) (internal quotation marks omitted).

Precedent within the Eleventh Circuit also cautions against extending First Amendment protection for candidacy too far. In *Stamps v. Watson,* No. 3:05-CV-40(CAR), 2005 WL 1926604, at * 1 (M.D.Ga. Aug.11, 2005), a clerk in the Madison County Tax Commissioner's Office lost in her campaign against her supervisor for the position of Tax Commissioner. After losing the election, the new Tax Commissioner terminated the clerk on the grounds of insubordination.

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[2] Another basis for not finding the plaintiff's candidacy protected was that Sixth Circuit precedent compells a determination that candidacy is not protected absent "political beliefs, expressions, affiliations, or expression of opinion." *Summe,* 626 F.Supp.2d at 692. In contrast, Eleventh Circuit precedent provides candidacy *some* First Amendment protection. *Randall,* 610 F.3d at 703, 712. As discussed below, however, the First Amendment's protection of Plaintiff's candidacy is insufficient to outweigh Harkins' interest in office loyalty.

*Id.* The court held that "Defendant . . . did not violate Plaintiff's First Amendment rights in terminating . . . an employee who had challenged her for the position currently held by Defendant." *Id.* at *4. The court reasoned that, "[d]ue to the close working relationship between the parties" in the same office and the necessity for frequent communication about office matters requiring a decision, there was a "great potential for actual or threatened disruption of the fulfillment of the responsibilities and duties of the office." *Id.*

Furthermore, the Eleventh Circuit in *Randall* referenced a situation similar to the one here: "[I]f [Plaintiff] decided to run against [the district attorney] for [the district attorney's position], [the district attorney] would have a good legal reason to discharge him due to the state's interest in office loyalty." 610 F.3d at 714. It is uncertain whether this hypothetical applies only to a situation where the supervisor is an incumbent. However, given that *Randall* involved a case in which the plaintiff ran against a non-incumbent, it is reasonable to infer that the Eleventh Circuit meant its language to reference the present situation. Therefore, Underwood's attempt to limit the applicability of the "viper in the nest" theory to only situations where an employee runs against her supervisor fails. Indeed, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate, and an employer need not allow events to unfold to the extent that the disruption

of the office and . . . working relationships is manifest before taking action." *Stamps,* 2005 WL 1926604, at *3 (citing *Connick v. Myers,* 461 U.S. 138, 152, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).[3]

Although Plaintiff argues that Defendant lacked a significant interest to terminate Plaintiff and that loyalty is not an appropriate job requirement because the accountant position *before* her termination lacked policymaking or confidentiality requirements, Harkins is entitled to envision new duties of the position and not be bound by the *status quo ante. See Summe,* 626 F.Supp.2d at 686 (reasoning that

[3] Plaintiff's attempt to compare the case to *Calvert v. Hicks,* 510 F.Supp.2d 1164 (N.D.Ga.2007), is unpersuasive. In *Calvert,* the county clerk terminated a deputy clerk for supporting the defendant's political adversary. *Id.* at 1167. The court used the *Elrod-Branti* test to hold that political loyalty is not an appropriate requirement for deputy clerks because (I) the Fulton County civil service code prohibited the plaintiff's dismissal except for cause and (II) the plaintiff's position was not one "of particular trust and confidence, [but rather] was closely supervised." *Id.* at 1173-74. *Calvert* is distinguishable. First, Plaintiff admits that her position was not protected by the Lumpkin County's civil service system. (Dep. Underwood, Dkt. No. [35] at 94:22-23). Second, candidacy was not the issue in *Calvert,* so the *Calvert* court's determination that the supervisor's interest in loyalty did not sufficiently outweigh the plaintiff's interest in *supporting* a candidate does not apply here. Also, as discussed below, Harkins, as the newly-elected County Clerk, was entitled to alter the responsibilities of her deputy clerks. A determination that deputy clerks in one county do not have sufficient responsibilities to justify patronage dismissal does not preclude a determination that the responsibilities of deputy clerks in other counties under different supervision justify political loyalty.

whether political loyalty is required for a position is partially determined by the position's duties as a newly-elected supervisor so envisions). Indeed, under Georgia law, deputy clerks are employees of the clerk of the superior court rather than county employees, so there is significant deference for a county clerk to set her own employment procedures and job requirements. *See Taylor v. Bartow County,* 860 F.Supp. 1526, 1536 (N.D.Ga.1994) (noting that employment policies for deputy clerks are set by county clerks); O.C.G.A. § 15-6-59(b) (2010) (stating that "clerks of the superior courts shall have the power to appoint a deputy or deputies . . . [, whose] powers and duties shall be the same as those of the clerks, as long as their principals continue in office and not longer"). There is no dispute that the new accountant works with Harkins daily and that they communicate frequently. (DF at ¶¶ 33-36; Response to DF at ¶¶ 33-36).

Like in *Stamps,* 2005 WL 1926604, at *4 (citing *Connick,* 461 U.S. at 152), this appears to be a situation in which there is a close working relationship that creates a "great potential for actual or threatened disruption of the fulfillment of the responsibilities and duties of the office." The small number of employees in the office only exacerbates the potential for disruption. *See Carver v. Dennis,* 104 F.3d 847, 849, 853 (6th Cir.1997) (holding a deputy clerk in a two-person office was not protected from dismissal when she ran against the only other person in the office, the county clerk); *Warren v. Gaston,* 55

F.Supp.2d 1230, 1232, 1236 (D.Kan.1999) (finding the plaintiff's interest in candidacy outweighed by "the county's interest in avoiding conflict in the small-office environment of the clerk's office," which was made up of around six employees). Accordingly, Harkins was entitled to act on her belief that retaining Underwood would compromise "the effective performance of the public office involved." *Calvert,* 510 F.Supp.2d at 1169 (quoting *Branti,* 445 U.S. at 518).

**Conclusion**

For the aforementioned reasons, Defendants' Motion for Summary Judgment [34] is **GRANTED.** The clerk shall close the case.

**SO ORDERED.**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

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No. 11-13117-CC

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SARAH JANE UNDERWOOD,

Plaintiff-Appellant,

versus

RITA HARKINS,
in her official capacity as
Clerk of Superior Court of
Lumpkin County, Georgia,
LUMPKIN COUNTY, GEORGIA,

Defendants-Appellant.

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On Appeal from the United States District Court
for the Northern District of Georgia

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(Filed Jan. 15, 2013)

Before: CARNES, MARTIN and JORDAN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[Illegible]
UNITED STATES CIRCUIT JUDGE

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(6/95)