**No. 14-02360**

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**In the United States Court of Appeals**
**for the Fourth Circuit**

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**MELANIE LAWSON,**
***Plaintiff-Appellant,***

**v.**

**UNION COUNTY CLERK OF COURT WILLIAM F. "FREDDIE" GAULT and WILLIAM F. "FREDDIE" GAULT, individually,**
***Defendants-Appellees.***

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT SPARTANBURG

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# BRIEF OF COMMON CAUSE, THE BRENNAN CENTER FOR JUSTICE, AND THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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* Counsel would like to thank Sina Safvati, Anjelica Sarmiento, and Sabine Tsuruda, UCLA School of Law students who helped write this brief.

## RULE 26.1 DISCLOSURE STATEMENT

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# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Sources**

## INTEREST OF *AMICI CURIAE*[1]

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 400,000 members and supporters nationwide. Common Cause has long advocated for robust citizen participation in democracy and its representative institutions. Common Cause has publicly advocated for policies that reduce barriers for average ordinary Americans to seek public office.

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, nonpartisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

All parties have consented to the filing of this brief.

reflect diverse voices and interests that make for a rich and energetic democracy.[2]

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. For over fifteen years, the Pennsylvania Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics. The Pennsylvania Center believes that protecting government employees' First Amendment rights is vital to preserving public debate and competitive elections.

## SUMMARY OF ARGUMENT

Firing government employees for their political affiliation is presumptively unconstitutional. This is true not only because of employees' First Amendment interests, but because of everyone's interest in fostering competition, opportunity, and participation in democratic elections. Broad government power to demand employees' political allegiance "can result in the entrenchment of one or a few parties to the exclusion of

[2] This brief does not purport to convey the position of N.Y.U. School of Law.

others" and "decidedly impairs the elective process." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70, 75 (1990) (quoting *Elrod v. Burns*, 427 U.S. 347, 368-69 (1976) (plurality opinion)).

Of course, though employees generally may not be fired for political activity that competes with their superiors or the superiors' parties, a "narrow exception" has been recognized for certain job categories, so that officials can effectively implement the policies for which they were elected. *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (citing *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997) (en banc)); *see also Branti v. Finkel*, 445 U.S. 507, 518-19 (1980); *Elrod*, 427 U.S. at 367-68. (This brief will call this the "*Branti/Elrod* exception," since both those cases recognized the exception, though both also set forth the general rule of First Amendment protection.) A governor should be able to count on her speechwriters to accurately express her policy goals. Sheriffs need to trust their lieutenants to craft the right sorts of enforcement policies. In rare circumstances where political allegiance is an "appropriate requirement" for the job, democratic values may cut in favor of letting officials demand employees' political allegiance, rather than in

favor of forbidding such demands. *Bland*, 730 F.3d at 374-75 (quoting *Branti*, 445 U.S. at 518).

But Melanie Lawson's case is far from that. Lawson had an important job, but an administrative one. As a Deputy Clerk of Family Court, Lawson collected receipts, managed dockets, issued judges' orders, and aggregated and reported Family Court data. She worked under the daily supervision of several people. Lawson was a midlevel manager with little autonomy. And yet the district court found that hers was a job for which political allegiance was appropriate.

By extending the political allegiance exception to include Lawson, the district court's decision does not merely limit Lawson's First Amendment rights; it also shrinks political opportunity and chills democratic participation on a wider scale. The district court's holding lets the government unjustifiably deter some of the most qualified people from running for office—experienced government workers with the expertise and credibility to offer voters viable alternatives to incumbents. By allowing incumbents to threaten such would-be candidates with job loss, the district court's holding effectively excludes the most qualified newcomers from the political process and costs citizens the accountabil-

ity, efficiency, and opportunity that arise when incumbents face viable competition for election.

To be sure, some degree of tension between former campaign opponents is normal, and may sometimes reduce the efficiency of the office. But if the government's concern is efficiency, the district court should have balanced the value of Lawson's speech against any inefficiency caused by her speech. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). It should not have just rejected Lawson's claim before going through this *Pickering* balancing.

## ARGUMENT

### I. Broad Governmental Power to Demand Employees' Political Allegiance Undermines Democratic Self-Governance

The U.S. Supreme Court and this Court have rightly ruled that government employees should not fear being fired for their political affiliation. *See Branti v. Finkel*, 445 U.S. 507, 513-16 (1980); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion); *id.* at 374-75 (Stewart, J., concurring in the judgment); *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013). The "threat" of such dismissal "unquestionably inhibits protected belief and association, and [the] dismissal . . . only penalizes its exercise." *Elrod*, 427 U.S. at 359.

And such political dismissals do not merely implicate government employees' First Amendment interests, but everyone's interest in the "free functioning of the electoral process." *Elrod,* 427 U.S. at 356; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (noting that all voters have the right "to cast their votes effectively"). In particular, if elected officials have the power to fire employees for running for the same position as the official, incumbents can deter democratic participation and prevent electoral competition from the people who are most qualified for the position: those who have experience in the government agency, and at the same time live locally and are thus trusted by local voters. *Cf. Bullock v. Carter*, 405 U.S. 134, 144 (1972) (overturning a state law in part because it burdened voters' "opportunity to vote for a candidate of their choosing").

As the Supreme Court has noted, the power to demand employees' political allegiance "can result in the entrenchment of one or a few parties" or individuals, and "decidedly impairs the elective process." *Rutan*, 497 U.S. at 70, 75 (quoting *Elrod*, 427 U.S. at 368-69). This is especially

so if a Clerk of Court can fire his most experienced subordinates who dare to offer voters an alternative at the voting booth.

Finally, the power to restrict the political activity of supposedly highly placed employees also restricts those employees' speech about office inefficiencies or even corruption. As the Supreme Court and this Court have long recognized, government employees have inside knowledge about their office that the voters can benefit from hearing. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968); *Smith v. Gilchrist*, 749 F.3d 302, 311-13 (4th Cir. 2014). Government employees are thus uniquely placed to contribute to public debate about their offices. But demanding employees' political allegiance discourages and penalizes the very engagement with the democratic process that is necessary to help the public keep elected officials accountable for any inefficiencies or malfeasance.

## II. The Narrow *Elrod*/*Branti* Exception for Jobs as to Which Political Loyalty Is a Legitimate Qualification Does Not Apply Here

### A. Lawson Was a Midlevel Manager with Purely Ministerial, Administrative, and Apolitical Duties

Of course, this Court and the Supreme Court have acknowledged that "a narrow exception" to First Amendment protection is sometimes

needed "'to give effect to the democratic process' by allowing patronage dismissals of those public employees occupying policymaking positions." *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *Jenkins v. Medford,* 119 F.3d 1156, 1161 (4th Cir.1997) (en banc)). Newly elected officials should be able to implement their policies, "policies presumably sanctioned by the electorate," and this implementation sometimes requires dismissing some high-ranking employees who were instrumental to the old regime, or insisting on political loyalty from trusted lieutenants. *Elrod*, 427 U.S. at 367; *see also Bland*, 730 F.3d at 374-75; *Jenkins*, 119 F.3d at 1161.

But given the need to protect employee associational rights—and the voters' interest in political opportunity, democratic participation, and electoral competition—any such exception must indeed be seen as "narrow." *Bland*, 730 F.3d at 374. Practically any government employee may in some way affect the implementation of government policy, even, for instance, simply by working slightly slower or faster, or more or less creatively. In order for the "narrow exception" not to swallow the broad First Amendment protection, any demand of political allegiance must at least be logically related to a *political* function of the job.

This Court and the Supreme Court have accordingly concluded that, to trigger the *Branti/Elrod* exception, the government must prove that "political affiliation [or political allegiance] is an appropriate requirement for the effective performance of the" position. *Bland*, 730 F.3d at 375 (quoting *Branti*, 445 U.S. at 518). In particular, the employee's position must "involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation[.]" *Stott v. Haworth*, 916 F.2d 134, 141 (4th Cir. 1990) (citing *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (en banc)). This means that "the particular responsibilities of the position" must make it "resemble[] a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation [or political allegiance] is an equally appropriate requirement." *Id.* at 142 (quoting *Jimenez Fuentes*, 807 F.2d at 241-42). If the government cannot show this logical link between the employee's particular responsibilities and her political affiliation, the employee's job will not implicate any legitimate, "vital government interest[]" in political loyalty that could support democratic governance. *Rutan*, 497 U.S. at 74-75.

Political allegiance is not an appropriate requirement for Lawson's job. As a midlevel manager, Lawson did purely ministerial and administrative work in Family Court—collecting receipts, managing dockets, issuing the judge's orders, and aggregating and reporting Family Court data. These duties were limited by the Clerk of Court Manual, which was promulgated by the Chief Justice of South Carolina, and were focused on implementing the orders and decisions handed down by judges. *See* S.C. Code Ann. § 14-17-60 (2013); Administrative Order Adopting Clerk of Court Manual Revision, S.C. Sup. Ct. Administrative Order No. 2014-05-21-01 (May 21, 2014); Clerk of Court Manual, Introduction §§ I-III, Family Courts § 7 (2014), *available at* http://www.judicial.state.sc.us/clerkOfCourtManual/.

These tasks were not of the "broad," partisan "policymaking" nature that *Elrod* held would justify excluding the position from First Amendment protection. *Elrod*, 427 U.S. at 368 ("An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position."). On the contrary, the tasks were "routine and limited." *Knight v. Vernon*, 214 F.3d 544, 550 (4th Cir. 2000) (concluding that "political allegiance is not an appropriate job requirement

for a jailer," *id.* at 545). Lawson had very little (if any) discretion as Deputy Clerk of Family Court on partisan matters affecting the Union County Clerk's Office. Lawson's job duties—such as issuing judges' orders, aggregating court data, and collecting receipts—were quintessentially apolitical.

The Office of the Clerk's formal hierarchy also left Lawson with little discretion. Lawson was under the daily supervision of Gault and Family Court judges. *Cf. Fields v. Prater*, 566 F.3d 381, 387 (4th Cir. 2009) (internal citations omitted) (holding that local directors of county social services department had little discretion "to make important policy decisions," in part because they worked under several "masters"). Though she in turn supervised three other staff members, this Court has pointed out that mere supervisory authority does not vest employees with the kind of "significant discretion" for which political allegiance is appropriate. *Knight*, 214 F.3d at 551 (internal quotation marks omitted). "If having power over subordinates were a sufficient condition for exemption from the requirements of the First Amendment, only the most low-level government employees would be protected from politically-based hiring and firing." *Fields*, 566 F.3d at 387. What this Court said

in *Fields* equally applies here: "[i]t is not enough for defendants to show merely that local directors"—or, here, the deputy clerks—"make some policy; the ultimate question under *Branti* is whether [the employees] make policy about matters to which political ideology is relevant." *Id.* Whatever authority Lawson had was not of the sort for which political ideology would be relevant. *See Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993) ("[T]he low-level policymaking authority accorded a Superintendent does not outweigh the employee's First Amendment rights of political affiliation.").

Indeed, not only was Lawson's authority purely administrative—Gault's was, too. *See* S.C. Code Ann. § 14-17-210 *et seq.*; Clerk of Court Manual, at Introduction. Clerks of Court are principally "charged with docket management, receipt of fees, fines and costs, maintenance of all court records, and submission of reports to a variety of state and federal agencies." Clerk of Court Manual, at Introduction. Even Gault thus did not have the kind of partisan policymaking authority that would have fit within the *Branti*/*Elrod* exception had he been a nonelected employee. Gault therefore could not have relied on Lawson to implement any

such partisan policies through Lawson's supervision of the three other employees.

The Union County Clerk's Office was thus different from a sheriff's office, in which the sheriff might rely on a lieutenant or even on some line deputies to exercise substantial decisionmaking power in targeting particular kinds of criminal activity. *See Jenkins*, 119 F.3d at 1162 & n.44 ("'[D]eputies are often called upon to make on-the-spot split-second decisions effectuating the objectives and law enforcement policies which a particular sheriff has chosen to pursue.'") (citations omitted). Indeed, it is especially hard to see how Gault could have relied on Lawson this way, since no clerk—not even Gault—could substantially influence case outcomes, settlement outcomes, or the types of cases heard in Family Court. *See* Clerk of Court Manual, at § 7. Thus, not only were Lawson's duties narrowly defined, administrative, and ministerial, the County Clerk's hierarchy and the apolitical nature of that office further precluded her from exercising substantial autonomy based on partisan interests at work.

### B. The District Court Erred in Concluding that Lawson's Job Was a Policymaking Position That Fit Within the *Branti/Elrod* Exception

The District Court's conclusion that Lawson's job does fall within the *Branti/Elrod* exception rests on three related errors:

1. The District Court mistakenly relied on a statute that says that deputy clerks "may," as a general matter, share the same duties as the elected clerk. S.C. Code Ann. § 14-17-60; *Lawson v. Union County Clerk*, No. 7:13-1050-TMC, 2014 U.S. Dist. LEXIS 160796, at *12-13 (D.S.C. Nov. 14, 2014). But whether political affiliation is an appropriate requirement for the position ultimately turns on the duties of the *particular* position—here, the position of Deputy Clerk of Family Court, and not deputy clerks generally. *See Bland*, 730 F.3d at 375 (stating that the *Branti/Elrod* analysis must consider "the particular responsibilities of the position," and engage in a "concrete analysis of the specific position at issue" (citations and internal quotation marks omitted); *Knight*, 214 F.3d at 549 ("The central message of *Jenkins* is that the specific duties of the public employee's position govern whether political allegiance to her employer is an appropriate job requirement."); *Jenkins*, 119 F.3d at 1165 (limiting the holding of the case to a particular category of dep-

uties because "courts examine the job duties of the position, and not merely the title, of those dismissed"). And in this case, Lawson's duties were in fact not at all the same as the elected clerk's, since her duties were limited to Family Court. *See supra* p. 10.

Focusing on the particular job involved in each case is a necessary part of the *Branti*/*Elrod* analysis because such a focus is needed to show that firing the employee in question was "narrowly tailored" to the government's interest in the loyal implementation of its policies. *Cf. Rutan*, 497 U.S. at 74; *Branti*, 445 U.S. at 518. When the particular job is purely administrative and ministerial, and does not actually involve any of the (apolitical) discretion that an elected Clerk of Court may exercise, someone employed in that job maintains her First Amendment rights—even if someone employed in another, more political Deputy Clerk of Court position might not.

2. The District Court apparently misperceived what sort of "confidential" employment makes an employee fit within the *Branti*/*Elrod* exception. *See Lawson*, 2014 U.S. Dist. LEXIS 160796, at *13-14 & n.5 (stressing Lawson's handling of confidential records). "[C]onfidential employee[]," *Branti*, 445 U.S. at 511, refers to whether the officeholder

shared confidential political or policymaking information with the employee, *id.* at 518, not just whether the employee was privy to some citizens' confidential information.

Indeed, in *Branti*, the Supreme Court held that two assistant public defenders were improperly fired for their political affiliation, 445 U.S. at 508, even though of course the defenders had access to client confidential information, *id.* at 519. The Supreme Court thus found that such access had "no bearing whatsoever on partisan political concerns." *Id.* Likewise, Lawson's access to confidential information about litigants and other parties does not relate to "any partisan political interests," either. *Id.*

3. The district court similarly erred in finding that Lawson occupied a "public relations" position for which political allegiance is an appropriate requirement. *See Lawson*, 2014 U.S. Dist. LEXIS 160796, at *15-16. Though the Clerk of Court Manual required Lawson (along with all court employees) to play a "public relations" role, the particular duties listed under that provision simply required Lawson to develop "goodwill" and to be polite in her (limited) interaction with the public. *See* Clerk of Court Manual § 1.21 "Public Relations." In this respect, she

was no different from many government employees who are expected to interact well with the public, from postal carriers to Department of Motor Vehicles examiners to the football coaches mentioned in *Branti*, 445 U.S. at 518, as apolitical employees who are protected from political discharge.

Political allegiance is hardly relevant to being polite and building goodwill. Indeed, the sort of public relations roles that the *Branti* Court contemplated as falling within the exception were roles that required the employee to express and promote the official's *political platform*—not just a duty to treat the public courteously, and in a way that reflects well on the office.

In sum, the district court broadened what *Bland* rightly labeled a "narrow exception" into a doctrine that lets the government unjustifiably chill political participation, limit voter choice, and decrease officeholder accountability. The district court's position thus produces the very same evils that the Supreme Court sought to avoid by condemning patronage practices in *Branti*: the entrenchment of incumbents, the decline of competitive elections, the ensuing loss of incumbents' accountability to the voters, and the decline in efficiency that stems from the loss

of such accountability. *See Rutan*, 497 U.S. at 71-72 (citing *Branti*, 445 U.S. at 516; *Elrod*, 427 U.S. at 368-70).

## III. Lawson's Campaigning Activities Should Be Governed by *Pickering*

To be sure, there is always some risk that political competition will cause enduring tension that would interfere with the efficiency of the office. But the Supreme Court has left the government with ample means to prevent such interference, under *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). *See, e.g.*, *Bland v. Roberts*, 730 F.3d 368, 373-74 (4th Cir. 2013) (applying *Pickering* to determine whether a subordinate's political activity excessively disrupted workplace "harmony and discipline," and ultimately concluding that "nothing in the record in this case indicates that" such political activity "did anything in particular to disrupt the office or would have made it more difficult for [the speaker], the Sheriff, or others to perform their work efficiently"); *Smith v. Gilchrist*, 749 F.3d 302, 308-310 (4th Cir. 2014) (likewise applying *Pickering* to determine whether a subordinate's political activity excessively disrupted the workplace, and ultimately concluding that "[t]here simply was no evidence that Smith's public statements would cause problems with harmony or discipline in the DA's office such that the ef-

ficiency of the office would be expected to be adversely affected"). It is the *Pickering* test that deals with government employer concerns about *government efficiency*, even in situations where—as here—the government employer does not have an adequate interest in *political loyalty*.

In his testimony, Gault explained that he feared that Lawson's return would create "tension" at work. But Gault did not claim that Lawson's run for candidacy would prevent her from effectively implementing his policies. Indeed, Lawson had competed with Gault earlier, when both were being considered for an appointment to the County Clerk position. Yet after Gault prevailed in 2009, they worked cooperatively for three years, until Lawson was put on unpaid leave during the 2012 campaign. In fact, Lawson worked so well with him that Gault appointed her to be his deputy clerk in 2011.

Thus—contrary to the district court's determination—it was not "self-evident" that a second round of competition would impair the operation of the clerk's office. *Lawson v. Union County Clerk*, No. 7:13-1050-TMC, 2014 U.S. Dist. LEXIS 160796, at *11 n.4 (D.S.C. Nov. 14, 2014). Nor does Gault's unsupported prediction that Lawson might not

be *personally* loyal to him (in the absence of evidence of disruption) justify his violation of her (and voters') political rights.

To be sure, some degree of tension is an inevitable byproduct of competitive elections. But the prospect of competition has efficiency benefits as well as costs, because it helps keep elected officials on their toes and accountable to the public. When the logical alternatives to whom voters will turn are midlevel managers in the same office—because only those people have both relevant experience and a connection with local voters—the prospect of competition thus has to be understood as a feature of the job that officeholders need to accept.

After all, "the First Amendment interests at stake [in government employee cases] extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it," *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam), given "the necessity for informed, vibrant dialogue in a democratic society," *Garcetti*, 547

U.S. at 419. Here, there is great value to the public in a Deputy Clerk's ability to run for Clerk, without being deterred by the prospect of losing her current job as a result.

## CONCLUSION

For the foregoing reasons, the district court erred in finding that political allegiance is an appropriate requirement for a Union County Deputy Clerk of Family Court.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae*
Common Cause, the Brennan Center for Justice, and the Pennsylvania Center for the First Amendment

March 16, 2015

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,911 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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