No.

In the Supreme Court of the United States

BILLY A. MERRIFIELD,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Connick* v. *Myers*, 461 U.S. 138 (1983), and *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011), this Court held that a public employee's speech or petitioning activity is protected by the First Amendment's Speech and Petition Clauses only if the speech or petition involves a matter of "public concern." The lower courts have reached conflicting conclusions regarding the applicability of the public concern requirement to violations of a public employee's right to freedom of association under the First Amendment, and this Court has never addressed that issue.

The question presented is:

Whether a public employee discharged in retaliation for consulting with a private attorney may establish a violation of his constitutional right of association only if his association with the attorney involved a matter of public concern.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Billy A. Merrifield respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2011, and a timely petition for rehearing was denied on August 19, 2011 (App., *infra*, 38a-39a). On November 8, 2011, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 16, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

The courts of appeals are sharply divided over whether and how the public concern requirement—which this Court held applicable to public employees' claims of retaliation based on speech and petitioning activity in *Connick* v. *Myers*, 461 U.S. 138 (1983), and *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011)—applies to a public employee's claim of retaliation for associational activity protected under the First Amendment.

The Tenth Circuit held in this case that the public concern requirement extends to a claim alleging retaliation against an employee's confidential association with a lawyer in connection with a proceeding to impose disciplinary measures on the employee.

That holding effectively precludes all association-related retaliation claims in the context of workplace disciplinary and discharge proceedings, because they will always concern a purely personal matter: the individual's own employment.

The Fifth and Eleventh Circuits, by contrast, have held that the public concern requirement does *not* apply to association claims. The Third, Seventh, and Ninth Circuits apply the public concern requirement but only to association claims that are based on the same conduct as an accompanying speech claim; if a public employee's association claim is unrelated to speech, these courts will not require the employee to show that the association related to a matter of public concern. In these five circuits, therefore, a public employee claiming unconstitutional retaliation for hiring or otherwise associating with an attorney would not have to prove that the association related to a matter of public concern.

Four courts of appeals—the Second, Fourth, Sixth, and now the Tenth Circuits—apply the public concern requirement to all association claims (except for a few narrowly-drawn situations involving intimate association). In these circuits, a public employee may be fired merely for consulting an attorney outside of the workplace, even regarding a private matter.

In view of the breadth of the freedom of association, the question presented is extraordinarily important. Moreover, in the context of pre-termination employment proceedings, the holding below produces a peculiar and unjustifiable result: even in situations in which a government employer must grant an employee a pretermination hearing as a matter of due process (see *Cleveland Board of Education* v. *Lou-*

dermill, 470 U.S. 532 (1985)), it may fire the employee for seeking the most basic legal advice about what such a hearing entails and how she can most effectively exercise her rights. Review is warranted to resolve the clear conflict among the lower courts and to clarify the legal standard that applies in this oft-recurring context.

A. Factual Background

In 2007, petitioner was employed by the County of Santa Fe, New Mexico, as a Youth Services Administrator in Santa Fe's Youth Development Program, an arm of the County's youth correctional facility. App., *infra*, 2a. On January 22, 2007, he electronically transmitted an inappropriate image to a subordinate, a violation of County policies. *Ibid.* Petitioner's superiors commenced an investigation, and petitioner was placed on administrative leave on January 25, 2007. *Id.* at 3a.

On or about that date, petitioner spoke with his direct supervisor, Greg Parrish, and informed him that he wished to retain an attorney to advise him. Parrish replied, "[Y]ou go and do that Billy, all you're going to do is piss off the County and you're as good as gone." App., *infra*, 31a.

On February 22, 2007, Annabelle Romero, the County's Director of Corrections, issued a letter recommending petitioner's termination. App., *infra*, 3a. According to affidavits filed by several former County employees, Romero had stated in the past that "if an employee would hire an attorney in a disciplinary matter, that employee's days with the County would be numbered." *Id.* at 33a (quoting Affidavit of Sandra Urioste). By this point, however, petitioner already had retained an attorney who, among other things,

wrote a letter to Bernadette Salazar, the County Human Resources Director, requesting evidence the County had gathered regarding petitioner's alleged violations of County policy. *Id*. at 3a.

Petitioner received a pre-termination hearing on March 8, 2007, which he attended with his lawyer. App., *infra*, 4a. Salazar confirmed Romero's recommendation to terminate petitioner's employment, at which point he appealed the decision to County Manager Roman Abeyta, who rejected the appeal and terminated petitioner on March 21, 2007. *Ibid*.

With the assistance of his lawyer, petitioner pursued a final administrative appeal before a County Hearing Officer, who upheld the termination on June 19, 2007 under an arbitrary-and-capricious standard. App., *infra*, 4a-5a. However, the Officer added that, if she had considered the matter de novo, she would have punished petitioner with demotion and a five-week suspension without pay. *Id*. at 5a.

B. Proceedings Below

On February 4, 2008, petitioner filed a complaint in the United States District Court for the District of New Mexico against several defendants, including the County of Santa Fe, Parrish, Romero, Salazar, and Abeyta, alleging that the County and the named officials denied him due process and unconstitutionally retaliated against his First Amendment association right to retain counsel to provide advice regarding the disciplinary process. App., *infra*, 5a-6a. He sought injunctive relief and damages under 42 U.S.C. § 1983.

The district court granted summary judgment for defendants on the First Amendment claim. App., *infra*, 27a, 36a-37a. It was uncertain whether the pub-

lic concern requirement applied, in light of the longstanding division among the courts of appeals regarding the issue and the absence of any ruling by the Tenth Circuit. *Id*. at 30a. It avoided the issue by finding that the defendants did not retaliate against petitioner. *Ibid*.

The court of appeals affirmed on different grounds. App., *infra*, 26a. It recognized that "[a]ssociation with an attorney can be protected as [a First Amendment] right," and assumed that petitioner's "retention of an attorney for his disciplinary proceedings amounted to associating with an attorney to exercise his speech and petition rights in the employment dispute." *Id*. at 15a. It nevertheless held that "the public-concern requirement applies to a claim that a government employer retaliated against an employee for exercising the instrumental right of freedom of association for the purpose of engaging in speech, assembly, or petitioning for redress of grievances." *Id*. at 16a. It identified only two narrow types of association where the public concern requirement would not apply: intimate associations, such as marriage; and religious associations protected under the Free Exercise Clause. *Id*. at 15a.

The Tenth Circuit acknowledged that "two circuits have ruled to the contrary" but was "not persuaded by those opinions." App., *infra*, 2a (citing *Hatcher* v. *Bd. of Pub. Ed.*, 809 F.2d 1546 (11th Cir. 1987) and *Coughlin* v. *Lee*, 946 F.2d 1152 (5th Cir. 1991)). The court instead sided with "the majority of our fellow circuits that have addressed the issue [and] have also concluded that the public-concern requirement applies to claims that a government employer retaliated for exercise of the instrumental right of association." *Id*. at 19a (citing *Cobb* v. *Poz-*

zi, 363 F.3d 89 (2d Cir. 2004); *Edwards* v. *City of Goldsboro,* 178 F.3d 231 (4th Cir. 1999); *Griffin* v. *Thomas,* 929 F.2d 1210 (7th Cir. 1991); *Boals* v. *Gray,* 775 F.2d 686 (6th Cir. 1985)).

The Tenth Circuit offered several explanations for its determination. First, it analyzed the freedom of association cases cited in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), this Court's first attempt to delineate the limits of public employees' speech rights, and concluded that those cases implicitly applied a public concern requirement. App., *infra*, 17a-18a. Second, the court reasoned that "eschewing the public-concern requirement" for association claims "would violate the Supreme Court's teaching that the 'political' First Amendment rights should be treated equally, at least in the government-employment context." *Id.* at 18a (citing *McDonald* v. *Smith*, 472 U.S. 479 (1985)).

Relying largely on the fact that *Connick* and *Guarnieri* already had applied the public concern requirement to claims arising under the Speech and Petition Clauses, the Tenth Circuit concluded that this Court would impose a public concern requirement on association claims given its general "concern about the practical consequences of using different rules for evaluating [different] retaliation claims based on different clauses of the First Amendment." App., *infra*, 19a.[1]

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[1] The district court ruled in petitioner's favor on his state-law claim seeking review of the hearing officer's determination, but the court of appeals held that the claim should have been dismissed under 28 U.S.C. § 1367(c) and asserted in state court. App., *infra*, 24a-26a. The district court granted summary judg-

REASONS FOR GRANTING THE PETITION

The courts of appeals are deeply divided over whether the "public concern" requirement applies to retaliation claims by public employees alleging violations of the First Amendment right to freedom of association. Two courts of appeals have held that a public employee need not establish that the association relates to a matter of public concern, while seven others apply some form of public concern requirement. Courts in the latter category again divide: four circuits apply the public concern requirement to all association claims (except for narrowly-defined exceptions such as intimate associations), and three circuits apply the public concern requirement when the association at issue is essentially coextensive with speech activity.

The confusion among the lower courts stems from their differing interpretations of *Connick* v. *Myers*, 461 U.S. 138 (1983), which held that generally a public employee's speech must "touch upon a matter of public concern" to receive First Amendment protection. *Id.* at 149.

Applying *Connick* to freedom of association claims ignores the fundamental differences between the right to freedom of association and the rights under the First Amendment's Speech and Petition Clauses. This case provides a vivid example of those distinctions: *Connick*'s primary rationale—protecting legitimate government interests in the context of an employment relationship—is simply inapplicable when the association in question is an employee's private consultation with an attorney before a pre-

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ment to defendants on petitioner's due process claim, and the court of appeals affirmed. *Id.* at 8a-10a.

termination discharge hearing that is constitutionally required under the Due Process Clause. Such a private consultation, and other sorts of constitutionally-protected associations as well, raise none of the concerns about workplace disruption or other interference with government that underlie *Connick* and its progeny.

This Court should grant review to clarify the legal standard governing public employees' First Amendment right of association claims.

A. The Courts Of Appeals Disagree Sharply About Whether *Connick*'s "Public Concern" Requirement Applies To Claims Of Retaliation For Exercise Of The First Amendment Right Of Association.

The courts of appeals are deeply divided on the question of when, if ever, *Connick*'s public concern requirement applies to freedom of association claims. Many court of appeals decisions, including the opinion below, expressly acknowledge the conflicting authority. See, *e.g.*, App., *infra*, 20a. (listing supporting authority and recognizing that circuits have "ruled to the contrary"); *Cobb* v. *Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004) (acknowledging that the parties took "positions that mirror a split in the circuits"); *Balton* v. *City of Milwaukee*, 133 F.3d 1036, 1040 (7th Cir. 1998) ("[w]e note a split in the circuits on the question"); *Boddie* v. *City of Columbus, Miss.*, 989 F.2d 745, 749 (5th Cir. 1993) (noting the courts of appeals' division, but arguing that the confusion did not arise until after the conduct at issue); *Sanguigni* v. *Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393 (3d Cir. 1992) (public employee's "free association claim touches on an issue on which the circuits are in disagreement"—the applicability of the public con-

cern standard); *Griffin* v. *Thomas*, 929 F.2d 1210, 1212-1213 (7th Cir. 1991) ("the circuits are split over the issue of whether *Connick*'s public concern requirement applies to freedom of association").

Because of this conflict, the availability of a cause of action to a public employee injured by employer retaliation for the employee's exercise of First Amendment association rights depends on where in the country the retaliation occurs. This Court should grant review to eliminate that intolerable result.

1. Two circuits do not apply Connick*'s public concern requirement to any association claims.*

The Fifth and Eleventh Circuits have held that a public employee plaintiff need not establish that the association involved a matter of public concern in order to assert a claim of retaliation in violation of the right of association.

In *Coughlin* v. *Lee*, 946 F.2d 1152 (5th Cir. 1991), the Fifth Circuit differentiated between speech and association claims—in the context of a complaint based on retaliation for political speech—and concluded that a public employee's political affiliation is "not subject to the threshold public concern requirement" applicable to speech claims. *Id.* at 1158. The Fifth Circuit's later decision in *Boddie* extended that ruling to encompass a firefighter's association with union members, holding that the law was clearly established that "no independent proof of public concern is required in a freedom of association claim arising from union organization activity." *Id.* at 749.

More recently, in *Breaux* v. *City of Garland*, 205 F.3d 150 (5th Cir. 2000), the Fifth Circuit confronted an alleged retaliation for reporting corruption in a

local police department. There, the court noted that "[t]he only difference between the requirements for a retaliation claim predicated on free speech and one predicated on free association is that the latter 'is not subject to the threshold public concern requirement.'" *Id.* at 157 n.12 (quoting *Boddie*, 989 F.2d at 747).

The Eleventh Circuit has also held that *Connick*'s public concern requirement does not apply to freedom of association claims. In *Hatcher* v. *Board of Public Education & Orphanage*, 809 F.2d 1546 (11th Cir. 1987), the court addressed a claim of retaliation based on association with protestors and a minister. The panel held that "*Connick* is inapplicable to freedom of association claims." *Id.* at 1558. State action that may curtail the freedom of association is "'subject to the closest scrutiny'" regardless whether it pertains to "'political, economic, religious, or cultural matters.'" *Ibid.* (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460-461 (1958)).

The Eleventh Circuit reaffirmed that conclusion in *Cook* v. *Gwinnett County School District*, 414 F.3d 1313, 1320 (11th Cir. 2005), a case involving a school bus driver's association with a union-like employee association. The court determined that the law is clearly established that public employees have a First Amendment right to engage in associative activity without retaliation," and the court again declined to "apply the public concern portion of the *Pickering* analysis." *Id.* at 1320. See also *VanCamp* v. *McNesby*, 2008 WL 2557539 (N.D. Fla. 2008) (applying this principle in context of a claim involving right of association with legal counsel).

2. Three circuits apply the public concern requirement but only in the context of associations coextensive with speech.

The Seventh and Ninth Circuits limit the public concern requirement to "hybrid" associational/speech claims, where the alleged association is coextensive with the employee's public speech or petitioning.

In *Carreon* v. *Illinois Department of Human Services*, 395 F.3d 786 (7th Cir. 2005), the Seventh Circuit found that "a governmental employee's right to association with his lawyer extend[ed] to matters of private concern" and therefore was not limited by *Connick*'s public concern requirement. *Id.* at 796. See also *Denius* v. *Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000) ("[T]he right to obtain legal advice does not depend on the purpose for which the advice is sought."). The *Carreon* court ultimately held that, while there is a general right to association with a lawyer, that right does not require a public employer to allow the employee's lawyer to accompany the employee to an interview in a nonpublic forum. 395 F.3d at 797. The Seventh Circuit later enlarged the *Carreon* holding in *Montgomery* v. *Stefaniak*, 410 F.3d 933 (7th Cir. 2005), concluding that "[t]he *Connick/Pickering* test's requirement that the plaintiff's association relate to a matter of public concern is inapplicable to a claim based solely on intimate association." *Id.* at 937.

The Seventh Circuit has applied the public concern requirement, however, in the context of claims in which the alleged associational conduct was essentially an act of speech and/or petitioning. Thus, in *Griffin* v. *Thomas*, 929 F.2d 1210 (7th Cir. 1991), the court confronted the case of an assistant principal who claimed retaliation for filing a union grievance.

The court acknowledged the split in the circuits and ultimately found "no rational reason for discriminating * * * among the rights of speech petition, and association in applying *Connick* to first amendment claims" within the circuit. *Id.* at 1214. See also *Klug* v. *Chicago School Reform Board*, 197 F.3d 853 (7th Cir. 1999); *Marshall* v. *Allen*, 984 F.2d 787, 798 (7th Cir. 1993) ("[T]he Supreme Court has refused to institute a hierarchy of the rights protected under the First Amendment.").

The Ninth Circuit in *Hudson* v. *Craven*, 403 F.3d 691 (9th Cir. 2005), adopted a similar hybrid approach. The court found that "[t]he speech and associational rights [which the plaintiff there alleged] are so intertwined that we see no reason to distinguish this hybrid circumstance from a case involving only speech rights." *Id.* at 698. The court did, however, qualify its finding by noting that "the application of the *Connick* public concern test [was] much easier [there] because the association in question involve[d] a discrete event with a political orientation," indicating that future free-standing association cases may not be subject to a public concern test at all. *Ibid.*

Although the Third Circuit has not explicitly ruled on this issue, it addressed the application of *Connick* in *Sanguigni*. Then-Judge Alito reviewed plaintiff's claim that her statements in a newspaper that "intended to organize faculty opposition to the school administration" prompted retaliation. 968 F.2d at 400. After acknowledging the division among the courts of appeals, the court held "only" that "*Connick* governs [plaintiff's] freedom of association claim because that claim is based on speech that does not implicate associational rights to any signifi-

cantly greater degree than the employee speech at issue in *Connick*." *Ibid.*

3. Four circuits apply the public concern requirement to all associational claims other than narrowly-defined categories such as intimate associations.

The Second, Fourth, Sixth, and now the Tenth Circuits have applied a public concern requirement to all First Amendment associational claims, subject only to narrowly-drawn exceptions involving "intimate association" claims arising out of certain types of close personal relationships or in the context of union membership.

The Second Circuit in *Cobb* held that "a public employee bringing a First Amendment freedom of association claim must persuade a court that the associational conduct at issue touches on a matter of public concern." 363 F.3d at 102. The court found that "it would be anomalous to exempt [freedom of association] from *Connick*'s public concern requirement and thereby accord it an elevated status among First Amendment freedoms," including the freedoms to speak and petition the government. *Id.* at 105.

District courts in the Second Circuit thus have applied the public concern requirement to a broad range of association-related retaliation claims, including in cases involving associations with attorneys or union representatives, finding the requirement not met. See, *e.g.*, *Rutherford* v. *Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 251 (S.D.N.Y. 2009) ("[I]t is far from clear that union membership by itself touches on a matter of public concern."); *Rutherford* v. *Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 243 (S.D.N.Y. 2009) (con-

sultation with a union representative not of public concern); *Maglietti* v. *Nicholson*, 517 F. Supp. 2d 624, 635 (D. Conn. 2007) (finding that union membership "can be an associational activity that touches on a [matter of] public concern"); *Brown* v. *Reg'l Sch. Dist. 13*, 328 F. Supp. 2d 289, 293 (D. Conn. 2004) (representation by a lawyer in an employment dispute not of public concern).

The Fourth Circuit has held that "logically, the limitations on a public employee's right to associate are 'closely analogous' to the limitations on his right to speak." *Edwards* v. *City of Goldsboro*, 178 F.3d 231, 249 (4th Cir. 1999). Although the association claim in *Edwards* "closely parallel[ed]" a speech claim, district courts in the Fourth Circuit have extended the principle to all associational claims. See, *e.g.*, *Conley* v. *Town of Elkton*, 381 F. Supp. 2d 514, 521-522 (W.D. Va. 2005) (applying *Connick* to association with a neighborhood watch group), aff'd on unrelated grounds, 190 F. App'x 246 (4th Cir. 2006); *Sheaffer* v. *Cnty. of Chatham*, 337 F. Supp. 2d 709, 719 & n.2 (M.D.N.C. 2004) (applying *Connick* to association with a group of library patrons).

The Sixth Circuit, too, applies the *Connick* test to all associational claims. In *Boals* v. *Gray*, 775 F.2d 686, 692 (6th Cir. 1985), the court "perceive[d] no logical reason for differentiating between speech and association in applying *Connick* to first amendment claims." It has since required that claims involving violations of the right of association with numerous private persons and organizations satisfy the public concern requirement. See, *e.g.*, *Akers* v. *McGinnis*, 352 F.3d 1030, 1036 (6th Cir. 2003) ("State employees' freedom of expressive association claims are analyzed under the same standard as state em-

ployees' freedom of speech claims."). Having said that, the Sixth Circuit has not applied *Connick* to "intimate association" claims. In *Adkins* v. *Board of Education*, 982 F.2d 952 (6th Cir. 1993), for example, the court found a prima facie case for a constitutional violation in a suit brought by a teacher whose employment allegedly had been terminated due to her marriage. *Id*. at 955-956.

With the decision below, the Tenth Circuit joined these courts of appeals in generally applying *Connick* to associational claims. But the Tenth Circuit has exempted claims of union association from the public concern test. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1139 (10th Cir. 2006); *Butcher* v. *City of McAlester*, 956 F.2d 973, 979-980 (10th Cir. 1992). It justified that result on the ground that the employer had already accepted the legitimacy of the union and its employees' membership in it by signing a collective bargaining agreement. *Shrum*, 449 F.3d at 1139.

Finally, although the court below expressly declined to decide whether the public concern requirement reaches claims of intimate association, it earlier expressed doubt on that question: "In some constitutionally protected associations, 'public concern' may be an inapt tool of analysis. For example, a public school teacher fired for being married would have a colorable freedom of association claim against her employer, but would likely not satisfy the public concern test." *Schalk* v. *Gallemore*, 906 F.2d 491, 498 n.6 (10th Cir. 1990).

B. The Question Presented Is A Frequently Recurring Issue Of Substantial Importance.

The frequency with which plaintiffs assert freedom of association claims in employment retaliation suits underscores the need for this Court's immediate intervention. Indeed, a review of the federal judicial opinions applying the *Connick* test since 2000, reveals that well more than one hundred have involved freedom of association claims.

That number is not surprising, given the approximately 24 million government employees in the United States.[2] And during the twelve months ending in August 2011, governments laid off or discharged 104,000 individuals. Bureau of Labor Statistics, Economic News Release, "Job Openings and Labor Turnover," tbl. C, available at http://tinyurl.com/yhlgmfk.

Moreover, this case is an ideal vehicle for deciding whether employees have a constitutionally protected right not to be retaliated against for their associations. First, it clearly presents a freedom of association claim disentangled from any freedom of speech claims. By contrast, many associational claims are essentially coextensive with a free speech claim, as where a person discharged for engaging in speech also claims to have associated with others in

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[2] See Historical Federal Workforce Tables, United States Office of Personnel Management, available at http://tinyurl.–com/yaak7na (federal employees); Press Release, United States Census Bureau, State and Local Governments Employ 16.6 Million Full-Time Equivalent Employees in 2010 (Aug. 30, 2011), available at http://tinyurl.com/8x24bsv (state and local employees).

order to communicate that message. These are the "hybrid" claims to which the Seventh and Ninth Circuits apply the *Connick* standard. See, *e.g.*, *Hudson* v. *Craven*, 403 F.3d 691, 697-98 (9th Cir. 2005); see also *Schalk*, 906 F.2d at 498 (noting that plaintiff's claimed "right of 'political association' is indistinguishable from her right to free speech," as "[t]he 'association' that she seeks is nothing more nor less than an audience for her speech").

There is no hybrid claim here. Merrifield hired legal counsel to represent him in the County's investigation of him and to protect his due process rights, not to be his audience or megaphone for engaging in political speech.

Second, the intrusion upon freedom of association involved here highlights the stark difference between associational claims and claims grounded in speech or petitioning activity. It is exactly the type of associational interest that, absent a public concern requirement, would be likely to survive the *Pickering* balancing test. On one side of the balance, it is an association of considerable value. The right to hire and consult an attorney has been recognized by this Court as an essential tool for the for the vindication of individual rights. *E.g.*, *United Mine Workers* v. *Ill. State Bar Ass'n,* 389 U.S. 217, 221-222 (1967) (right of unions to secure legal representation for their members under the First and Fourteenth Amendments). More generally, the right to vigorous advocacy in one's self defense is a pillar of constitutional law. *NAACP* v. *Button*, 371 U.S. 415, 429 (1963) ("[T]he First Amendment * * * protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.").

On the other side of the balance, the state's interest in promoting workplace order and efficiency—*Connick*'s rationale for applying the public concern requirement to speech claims, 461 U.S. at 147-148—is *de minimis* as applied to an employee's retention of an attorney for consultation outside the workplace. Here, petitioner's attorney did not intrude into the investigation, never setting foot inside the County office or disobeying any directives from the County.

C. The Tenth Circuit's Decision Is Wrong.

This Court has recognized that the First Amendment protects freedom to "enter into and maintain" important personal relationships as a "fundamental element of personal liberty." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 617-618 (1984). The varied nature of the associations that receive constitutional protection makes the association right fundamentally different from the speech and petition rights embodied in the First Amendment. While speaking and petitioning are by their very nature public activities, associations can be personal, private, or public.

Given that distinction, applying the *Connick* standard in the associational context makes as much sense as forcing a square peg into a round hole. That is why the lower courts have reached conflicting conclusions regarding the question presented when the association claim does not simply duplicate a claimed infringement of speech or petitioning rights—as in the context of union membership, personal associations, and confidential consultation with an attorney. In those situations, the public concern requirement should not apply.

The result here demonstrates why. This Court has recognized that the First Amendment protects

access to legal advice. *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977). But the decision below, if permitted to stand, creates a categorical restriction on a public employee's freedom to seek personal legal counseling.

1. The right to consult with a lawyer is an association protected by the First Amendment.

The First Amendment protects the right to seek legal advice. Both the majority and dissent in *In re Primus*, 436 U.S. 412 (1978), recognized this principle, which rests on a long line of this Court's precedents holding "'that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" *Id.* at 426 (quoting *United Transp. Union* v. *State Bar of Mich.*, 401 U.S. 576, 585 (1971) (union's right to provide legal counsel to members); and citing *United Mine Workers*, 389 U.S. at 222-224 (union's right to hire an attorney on a salaried basis to advise its members); *Bhd. of R.R. Trainmen* v. *Va. Bar*, 377 U.S. 1, 7-8 (1964) (union's right to advise members to seek counsel from certain attorneys); *Button*, 371 U.S. at 438-440 (organization's right to advise members to seek counsel from certain attorneys)).

In *Bates*, the Court reaffirmed "the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them." 433 U.S. 350, 376 n.32 (1977). The lower courts thus repeatedly have held that "the right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition" (*Mothershed* v. *Justices of the*

Supreme Court, 410 F.3d 602, 611 (9th Cir. 2005) (quoting *Denius*, 209 F.3d at 953)) and "[t]he right to retain and consult an attorney * * * implicates * * * clearly established First Amendment rights of association and free speech." *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).[3]

2. Connick*'s public concern requirement makes no sense in the context of associational claims such as the right to legal consultation.*

The public concern requirement stems from this Court's general admonition that courts should not intrude upon the internal affairs of the government workplace. "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 138-139 .

Yet the workplace disruption rationale is wholly inapplicable in lawyer association cases such as this one. To provide advice, an attorney need never set foot in the workplace or represent the employee in

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[3] To be sure, this Court has declined to allow individuals to have counsel *present* in a small number of situations, such as during administrative hearings where there is a substantial interest in keeping the proceedings "as informal and non-adversarial as possible." *Walters* v. *Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 323-324 (1985). But here, petitioner sought only to speak with an attorney on his own time, outside of the workplace environment, on a matter of central personal importance. He did not assert any right to have his lawyer present during administrative proceedings.

formal or informal proceedings; the employer may never even know that the employee has retained counsel. To be sure, a lawyer may ultimately speak or initiate a lawsuit on the employee's behalf, but—as *Guarnieri* makes clear—it is that *subsequent* exercise of First Amendment rights that would be subject to the public concern requirement should it form the basis for later retaliation.

The mismatch between *Connick*'s public concern requirement and associational activities is apparent for other reasons as well. Some associations with lawyers may in fact *promote* office efficiency and stability, such as when a lawyer counsels a public employee with a meritless case *against* pursuing litigation or other disruptive recourse. This is precisely the sort of contextual consideration that the Seventh Circuit has observed that *Connick* does not account for: "because *Connick*'s public concern test grew out of a speech case, it may not appropriately recognize the important distinction between speech and association," which "may lead, it can be persuasively argued, to insufficient protection of the associational rights of public employees." *Balton*, 133 F.3d at 1040.

Moreover, the public concern requirement would operate as an absolute shield against liability for retaliation in circumstances such as these. Personal legal advice is arguably *never* a matter of "public concern," regardless of the reasons for which it is sought. Cf. App., *infra*, 23a (characterizing the petitioner's association as concerning an "everyday employment dispute"). That is true even where, as here, employees seek legal advice regarding a pretermination hearing to which he is constitutionally entitled under the Due Process Clause. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985); see

also App., *infra*, at 8a. ("[I]t is undisputed that the Merrifield possessed a protected interest in his employment.").

Competent legal advice often is crucial to the vindication of constitutionally-protected rights. That is especially true when such advice is sought in connection with an adverse employment action undertaken by the government itself. Yet the rule adopted by the court below perversely permits government employers to terminate employees merely for seeking legal counsel regarding their own termination hearings (or for any other purpose, for that matter), entirely outside of the workplace and on their own time. That consequence cannot be squared with the guarantee embodied in the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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