No. 16-452

In The
Supreme Court of the United States

ROBERT R. BENNIE, JR.,
Petitioner,

v.

JOHN MUNN, in his official capacity as Director of the Nebraska Department of Banking and Finance, et al.,
Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, AND NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
BENBROOK LAW GROUP, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

Counsel for Amici Curiae

November 2016

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

MANUEL S. KLAUSNER
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Bldg.
601 West Fifth St.
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

Counsel for Reason Foundation

RAYMOND J. LAJEUNESSE, JR.
MATTHEW B. GILLIAM
NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
8001 Braddock Road, Ste. 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

Counsel for National Right to Work Legal Defense Foundation, Inc.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute, Reason Foundation, and National Right to Work Legal Defense Foundation, Inc. respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. All parties were provided with timely notice of *amici*'s intent to file as required under Rule 37.2(a). Counsel for the Petitioner consented to this filing. Counsel for Respondents have withheld consent.

The interest of *amici* arises from their shared mission to advance and support the rights that the Constitution guarantees to all citizens. *Amici* have participated in numerous cases of constitutional significance before this and other courts, and have consistently worked in defense of the constitutionally guaranteed rights of individuals and organizations throughout their activities.

This case is important to *amici* because it concerns the abuse of government power. "[T]he purpose behind the Bill of Rights, and of the First Amendment in particular" is "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). But despite the fact that "the First Amendment bars retaliation for protected speech," *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998), the application of the "ordinary firmness" test developed in the lower courts provides a safe harbor for government officials to penalize private citizens for exercising their First Amendment rights so long as a court determines that such retaliation would not objectively deter a person

from continuing to engage in protected activity—even though the government's actions undoubtedly inhibit, deter, and chill free speech. *Amici* offer this brief to explain the many ways that the "ordinary firmness" test does square with the Court's "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007).

Amici have no direct interest, financial or otherwise, in the outcome of this case. Their sole interest in filing this brief is to ensure that government actors are not permitted to retaliate with impunity against private citizens because of their exercise of constitutional rights.

For the foregoing reasons, the Cato Institute, Reason Foundation, and National Right to Work Legal Defense Foundation, Inc. respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
BENBROOK LAW GROUP, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

Counsel for Amici Curiae

November 2016

QUESTION PRESENTED

Is the "ordinary firmness" test's safe harbor—whereby government officials may retaliate against private citizens for engaging in protected speech up to the point where a hypothetical person of "ordinary firmness" would be chilled from continuing their speech activities—compatible with the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

---

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* curiae, their members, or their counsel made a monetary contribution to its preparation or submission. All parties were provided with timely notice of *amici*'s intent to file as required under Rule 37.2(a). Counsel for the Petitioner consented to this filing. Counsel for Respondents have withheld consent.

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, the freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have represented individual employees in many cases involving the right to refrain from joining or supporting labor organizations and have helped to establish important precedents under the First Amendment protecting employee rights in the workplace against compulsory unionism's abuses. Those cases include *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Robert Bennie has framed the question presented too narrowly. A question more fundamental and important than the proper standard of review pervades this case: Whether courts should condition a First Amendment retaliation claim *at all* on a finding that a government action taken against the plaintiff, in retaliation for their protected speech activity, "would chill a person of ordinary firmness from continuing" to engage in that speech. The answer is "No."

The "ordinary firmness" test interposes an arbitrary hurdle that plaintiffs must surmount even when they can show that a government actor retaliated against them because of their speech. The test was originally devised as a means of determining whether seemingly trivial allegations of retaliation could survive a motion to dismiss. In *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982), the government-employee plaintiff famously alleged that her superior made fun of her for bringing a birthday cake to work, among other "petty harassments." Whether a person of "ordinary firmness" would be deterred from engaging in protected activity as a result of these actions—and thus whether the actions should "count" as retaliation in the constitutional sense—would be treated as a question of fact. This was supposedly an application of the *de minimis non curat lex* doctrine.

This case demonstrates, however, that the lower courts do not use the "ordinary firmness" test to distinguish retaliation from trifling pushback. Rather, courts use it as an evidentiary threshold in claims involving government conduct that obviously consti-

tutes retaliation. Plaintiffs must show that the objectively "firm" person would have been deterred from continuing his protected activity, despite blatant government retaliation. In this formulation, government actors have a safe harbor within which to retaliate: if they can convince a factfinder that the plaintiff was insufficiently "firm," the plaintiff cannot recover. Here, the circuit court wrote that the government defendants committed "unconstitutional" retaliation, but it wasn't "severe enough to be actionable." *Bennie v. Munn*, 822 F.3d 392, 401 (8th Cir. 2016).

This test, to put it mildly, is incompatible with the Court's retaliation cases. The Court has never suggested that an objective materiality threshold—let alone a "severity" threshold—should be imposed on retaliation claims. Rather, it has stated flatly that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). "Official reprisal for protected speech 'offends the Constitution [*because*] *it threatens* to inhibit exercise of the protected right.'" *Id*. (emphasis added) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)) (italics added; bracket inserted in *Hartman*).

Accordingly, the "ordinary firmness" test actively undermines the Court's teachings because it requires a plaintiff to prove that government retaliation "would chill" the hypothetically "firm" citizen from continuing in the speech that led to the retaliation. *Bennie*, 822 F.3d at 397. Forcing private citizens to convince a jury (or even a judge) that obvious retaliation was "severe enough" that a hypothetical, objective citizen would submit to the pressure is foreign to this Court's First Amendment cases.

The Court granted certiorari in *Crawford-El* to examine—and reject—another judicially-imposed evidentiary hurdle on plaintiffs asserting retaliation claims. As the Court observed in that case, the system already provides ample means of weeding out trivial claims—a point the Court has bolstered in the interim. The Court should grant certiorari here and mothball this judicially-concocted safe harbor for government retaliation.

ARGUMENT

I. The "Ordinary Firmness" Test Originated In A Public Employment Retaliation Setting As A Means Of Determining Whether Seemingly "Trivial" Conduct Should Be Treated As Retaliation.

According to the Eighth Circuit, to establish his First Amendment retaliation claim, Bennie needed to show three things: "(1) he engaged in a protected activity, (2) the government official[s] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." 822 F.3d at 397 (citing *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004)). No one disputes that Bennie engaged in protected conduct here.

The "ordinary firmness" test can be traced to a single paragraph in the Seventh Circuit's decision in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). *See Thaddeus-X v. Blatter*, 175 F.3d 378, 396–98 (2nd Cir. 1999) (tracing test to *Bart*). *Bart* arose in a public employee retaliation case, where the plaintiff was appealing from the dismissal of her retaliation claim by the district court.

In *Bart*, a city employee told the sitting mayor she intended to run for mayor; in response, the mayor told her that she would have to take a leave of absence in order to do so. She alleged that this requirement constituted retaliation for running for office. The Seventh Circuit rejected this argument, noting first that plaintiff had no constitutional right to run for office. 677 F.2d at 624. Even if she did, the court concluded that defendant was "justified" in requiring the leave of absence, because "[d]iscipline is impossible to maintain when a subordinate is running for a position in which he would be the boss of his present superiors." *Id.*[2]

Ms. Bart asserted a second theory of retaliation, however. After she lost the race and returned to the office, she claimed the mayor's direction, in combination with a "campaign of petty harassments designed to punish her for having run for public office," violated her First Amendment rights. This campaign included "baseless reprimands" and ridiculing her for, among other things, bringing a birthday cake to work to celebrate another employee's birthday. *Id.*

Judge Posner posed the "ordinary firmness" concept as a way to determine *whether the government conduct complained of actually constituted retaliation*; it was not a situation (like here) where the gov-

---

[2] The court performed a *Pickering*-style balancing but didn't cite *Pickering v. Bd. of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563 (1968): "The balance is struck by the court's weighing general considerations rather than by its listening to witnesses. The impairment of free speech . . . is indirect and probably very slight; the benefits in preserving order, discipline, and efficiency in public employment strike us as much greater than the cost to First Amendment interests." *Bart*, 677 F.2d at 625.

ernment actor engaged in conduct that is universally recognized as retaliatory. He explained that "trivial" claims should not be treated as retaliation and therefore should not be allowed to survive a motion to dismiss:

> It is true that a certain air of the ridiculous hangs over the harassment allegations, in particular the allegation that we quoted earlier regarding the birthday cake. But we cannot say as a matter of law that the exercise of First Amendment rights by public employees cannot be deterred by subjecting employees who exercise them to harassment and ridicule through selective enforcement of work rules. [Citation] The effect on freedom of speech may be small, ***but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable***. Yet even in the field of constitutional torts *de minimis non curat lex*. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise—***that if the Mayor of Springfield had frowned at Miss Bart*** for running for public office he would be liable for damages (unprovable, of course) under section 1983.

Bart, 677 F.2d at 625 (emphasis added).

Indeed, even with the "air of ridiculous hang[ing] over" the seemingly "petty" allegations, the court concluded that the complaint should not have been

dismissed: "However, more is alleged here—an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983." *Id.*

Therein lies the first problem. *Bart* cited the "ordinary firmness" concept as a purported application of the ancient maxim that the law does not address trivial claims, and concluded that therefore a *fact-finder* should determine whether the conduct should qualify as retaliation. But *de minimis non curat lex* is an equitable maxim inherent in *judicial* power—juries do not "screen" cases. *See* Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 Mich. L. Rev. 537, 543–44 (1947) ("The function of the maxim is, therefore, as an interpretive tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure."); Jeff Nemerofsky, *What Is A "Trifle" Anyway?*, 37 Gonzaga L. Rev. 315, 341 (2002) (tracing maxim to the Court of Chancery; "[t]he disposition of a case, whether civil or criminal, by the application of the maxim '*de minimis non curat lex*' is an exercise of the judicial power, and nothing else") (quoting *State v. Park*, 525 P.2d 586, 592 (Haw. 1974)); *Hessel v. O'Hearn*, 977 F.2d 299, 303 (7th Cir. 1992) ("The maxim's 'design is to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors.'") (citation omitted).

It is a giant leap from trusting judges to round off the "sharp corners" of legal rules to asking juries (or even judges) to engage in so-called "objective" fact-finding about how much government harassment the "ordinary" or "average" person would withstand be-

fore caving to the coercion. *Bennie*, 822 F.3d at 400 (the "ordinary-firmness inquiry is at bottom 'an objective one, not subjective'") (quoting *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003)).

Yet the lower courts have embraced the "ordinary firmness" test as one "amenable to all retaliation claims." *Thaddeus-X*, 175 F.3d at 397; *see also id*. at 397 n.13 (noting that the standard requires a showing of injury greater than required to establish standing). And, since it is treated as an "objective" factual question, juries are routinely called on to make the "ordinary firmness" determination in cases involving harassment of private citizens for their speech. *Cf. Garcia*, 348 F.3d at 729 ("Ultimately, this sort of question [whether plaintiff business owner surmounted the "ordinary firmness" test when she received a series of parking tickets as retaliation for complaining about city's non-enforcement of sidewalk ordinance] is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person. The jury, after all, represents the conscience of the community."); *Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) (affirming denial of summary judgment and referring to "ordinary firmness" test as a jury question in case involving claim of retaliation against private business owner); *Feibush v. Johnson*, __ F. Supp. 3d ___, 2016 WL 4478775 *6 (E.D. Penn. Aug. 25, 2016) ("[w]hether the retaliatory conduct reaches the threshold of actionability is a question of fact for the jury" in case involving alleged retaliation against real estate developer).

Whereas the test was "intended to weed out only inconsequential actions," *Thaddeus-X*, 175 F.3d at 398, the result in this case demonstrates that the

test's formulation and application serve very different purposes that undermine the goals of the First Amendment.

II. This Case Shows The Ordinary Firmness Test Has Evolved Into A Safe Harbor For Government Retaliation Against Private Citizens With Valid Claims, Making It A Unique Vehicle For The Court To Reverse That Trend.

1. This case demonstrates that the "ordinary firmness" test does not operate just to screen out "trivial" claims so that "real" claims of retaliation may be redressed. Rather, it has become an evidentiary hurdle that constitutional plaintiffs must surmount, *even where the conduct is obviously retaliatory*.

This is untenable, particularly considering the absence of any countervailing government objective that may justify some minor level of infringement, as sometimes exists in the public employee context and usually exists in the prison context. *See*, *e.g.*, *Connick v. Myers*, 461 U.S. 138, 154 (1983) (recounting evolution of retaliation cases in public employment context; concluding that the "limited First Amendment interest" implicated by conduct at issue could not support claim for retaliation upon termination when superior "reasonably believed [speech] would disrupt the office, undermine his authority, and destroy close working relationships"); *Thaddeus-X*, 175 F.3d at 398 ("Prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse.").

The district court's decision reveals the perverse consequences of allowing factfinders to surmise what the hypothetical, objectively "firm" citizen should be forced to endure in order to prevail on a retaliation claim. After Bennie engaged in political speech critical of the President,[3] the Nebraska regulator "took an interest in the plaintiff's political speech." *Bennie v. Munn*, 58 F. Supp. 3d 936, 943 (D. Neb. 2014). The district court concluded that defendants "were bothered by the plaintiff, in no small part because of [his] political views, or at least the manner in which he expressed those views. And that antipathy was manifested in the Department's regulatory attention to the plaintiff." *Id.*

The Petition shows that this "regulatory attention" included repeated inquiries to Bennie's superiors to more closely "supervise" Bennie's political speech in order to give the regulators "some comfort." Pet. at 7. Closer supervision of Bennie's speech, the regulator said, "really [would be] in the best interest of the public." *Id*. This evidence of coercion caused the district court to find that the regulators targeted Bennie *because of* his speech. The state regulators "made regulatory inquiries of [Bennie's employer] that were motivated, to varying degrees, by the content of [his] speech"—indeed, they "were looking for reasons to go after" Bennie based on his speech. 58 F. Supp. 3d at 943.

---

[3] *Cf. Rankin v. McPherson*, 483 U.S. 378, 381 (1987) (19-year-old probationary clerk working in the constable's office could not be terminated for commenting on matter of public concern; when she learned President Reagan had been shot, she said, "if they go for him again, I hope they get him").

Despite this, the district court found that "even if there was a constitutional violation, it was *de minimis*" because "the adverse actions taken by the defendants would not chill a person of ordinary firmness from continuing constitutionally-protected conduct." 58 F. Supp. 3d at 943, 944. The Eighth Circuit recognized the incongruity of finding a constitutional retaliation that was not redressable:

> For the state regulators to allow their apparent disagreement with or even distaste for what Bennie had to say politically, or how he said it, to influence how the department treated him and his employer was wholly inappropriate—and absolutely inconsistent with the First Amendment. That inappropriate, unconstitutional conduct was wrong, regardless of whether the state regulators revealed their retaliatory motives to [Bennie's employer] or anyone else or whether the consequences of their actions were *severe enough to be actionable*.

822 F.3d at 401 (emphasis added). Rather than question whether the "ordinary firmness" test *itself* was to blame for this disconnect, the court simply chalked the problem up to the standard of review. *Id*. at 398.

In short, this case demonstrates how far the lower courts have traveled since the inception of the "ordinary firmness" test, where the *Bart* court said *de minimis non curat lex* barred trivial instances of retaliation, and the example given was a "frown." *Bart*, 677 F.2d at 625. The question is no longer *whether* retaliation took place, as originally suggested in *Bart*, but whether acknowledged retaliation is "severe enough." *Bennie*, 822 F.3d at 401.

2. Regardless of one's view of the significance of this particular instance of retaliation, this case stands out as a unique vehicle for presenting the issue because the district court's findings show that defendants engaged in *retaliation because of* plaintiff's protected conduct, but the "ordinary firmness" test provided a safe harbor for this "unconstitutional" conduct. Similarly, in *Crawford-El*, the Court's review was warranted "[d]espite the relative unimportance of the facts of this particular case." 523 U.S. at 584 (prisoner serving life sentence claimed retaliation for his litigiousness consisted of delay in shipping personal belongings when he was transferred). When the lower court in *Crawford-El* proposed a new "clear and convincing" evidentiary standard for retaliation plaintiffs to surmount in the face of qualified immunity claims, the Court decided that certiorari should be granted in light of the "importance of both the underlying issue and a correct understanding of" the "plaintiff's burden" in retaliation claims.[4] *Id.* This case likewise raises serious questions about a retaliation plaintiff's burden that deserves the Court's attention.

III. The "Ordinary Firmness" Test Is Incompatible With This Court's Retaliation Jurisprudence, And It Should Be Scrapped.

This Court has never endorsed or examined the "ordinary firmness" standard, let alone considered the circumstances where it should be applied. More to the point, the Court has never said that constitutional rights are enforceable only by the "firm"

---

[4] *Crawford-El* never discussed or addressed the "ordinary firmness" test.

among us or that plaintiffs must make any sort of materiality showing in order to assert their First Amendment rights. The lower courts' creation of the additional "ordinary firmness" element is inconsistent with and undermines the Court's retaliation precedents.

1. The Court has stressed that retaliation for protected activity itself—not the reaction of a hypothetical "ordinary" citizen—is the essence of the constitutional violation because retaliation *threatens* to chill speech. "Official reprisal for protected speech 'offends the Constitution [*because*] *it threatens* to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10 (noting this threat is the "reason why such retaliation offends the constitution") (italics added; bracket inserted in *Hartman*). "Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit." *Crawford-El*, 523 U.S. at 588 n.10 (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech")). *See also Wilkie v. Robbins*, 551 U.S. 537, 556 (2007) (noting that "prior retaliation cases" "turn on an allegation of impermissible purpose and motivation," with no reference to severity of retaliation).

If just the *threat* of chilling speech serves as the basis for the constitutional violation, it makes no sense to require all retaliation plaintiffs to *also* show that the adverse action "*would chill* a person of ordinary firmness from continuing" in the protected activity. *Bennie*, 822 F.3d at 397.[5] By its express terms,

---

[5] At one level, the district court recognized that the constitu-

the ordinary firmness test thus undermines the Court's teaching in *Hartman* and *Crawford-El*.

The only additional element—apart from the retaliation for protected activity itself—required by the Court for a retaliation claim is causation:

> Some official actions adverse to . . . a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution.

Hartman, 547 U.S. at 256 (citing *Crawford-El*, 523 U.S. at 593, and *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977)). *Cf. Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (in the context of a government employee claiming retaliatory termination, "[t]o prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating

---

tional violation actually turns on the retaliation rather than the hypothetical reaction to it:

> To prove retaliation, the plaintiff must show that the retaliatory motive was a "substantial factor" or "but-for cause" of the adverse action. In other words, the plaintiff must show he was singled out because of his exercise of constitutional rights. The retaliatory conduct itself need not be a constitutional violation: *the violation is acting in retaliation for the exercise of a constitutionally-protected right*.

58 F. Supp. 3d at 942 (internal citations omitted) (emphasis added). Because Bennie did not clear the "ordinary firmness" materiality hurdle, however, the district court decided the violation could not be redressed.

factor in the termination"); *Wilkie*, 551 U.S. at 556 ("In short, the outcome [in retaliatory termination cases] turns on 'what for' questions: what was the Government's purpose in firing him and would he have been fired anyway?").

Justice Ginsburg has written that the retaliatory motive element itself performs a screening function that prevents a flood of trivial claims. Dissenting in *Wilkie*, where the Court declined to recognize a new form of retaliation claim in the Fifth Amendment context based in part on a fear of excessive litigation, she observed:

> The Court's opinion is driven by the "fear" that a "*Bivens* cure" for the retaliation Robbins experienced may be "worse than the disease." This concern seems to me exaggerated. Robbins' suit is predicated upon the agents' vindictive motive, and the presence of this element in his claim minimizes the risk of making everyday bureaucratic overreaching fare for constitutional litigation.

Wilkie, 551 U.S. at 580–81 (Ginsburg, J., dissenting) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 566 (2000) (Breyer, J., concurring in result) ("In my view, the presence of [vindictive action] in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.") (internal cross-reference omitted)).

Because all First Amendment retaliation plaintiffs are required to convince factfinders that the retaliation they experienced was more than a hypothetical, "ordinarily firm" plaintiff could withstand, the constitutional test as described by this Court is not being honored in the lower courts.

2. A simple illustration reveals the wrong-headed nature of the "ordinary firmness" test as it has evolved. Patronage is the ultimate form of retaliation: you get fired or don't get hired if you don't pony up for the political party in power. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court analogized patronage to the conditioning of public benefits on limiting or punishing First Amendment rights, which it noted was "broadly rejected" in *Perry v. Sinderman*. *See Elrod*, 427 U.S. at 358–59 (noting "[p]atronage practice falls squarely" within *Perry*'s prohibitions); *see also Hartman*, 547 U.S. at 256 (citing *Perry* for the proposition that "the government may not punish a person or deprive him of a benefit on the basis of his 'constitutionally protected speech'"). Patronage and retaliation are two sides of the same coin, just as compelled speech and suppression are treated as the same sort of evil. *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance").

Imagine if an "ordinary firmness" standard applied to a patronage-based claim that compelled "donations" of five dollars each paycheck to a political party violated the First Amendment. It would be up to factfinders throughout the Nation to determine just how much money in forced payments a person of "ordinary firmness" would endure before their First Amendment interests should be recognized. Five dollars every two weeks might indeed seem trivial to many factfinders, including district court judges—many of whom were politically active before entering

the judiciary—earning $203,000 per year.[6] Likewise, juries in Manhattan or Alexandria might scoff at the notion that being forced to send $5 per paycheck to a political party is a big deal to the "ordinary" person—that's only one trip to Starbucks. Contrary to the assumption in *Garcia*, *supra*, that juries are best suited to determine whether to afford constitutional recognition to retaliatory conduct because they are the "conscience of the community," 348 F.3d at 729, the Court has recognized the First Amendment risks of relying on juries in other contexts, given the threat that juries will simply impose majority orthodoxy.[7]

---

[6] *See* Admin. Office of the U.S. Courts, *Judicial Compensation*, online at http://www.uscourts.gov/judges-judgeships/judicial-compensation.

[7] For instance, the "special protection" given to speech on a matter of public concern shields it from jury review in an intentional infliction of emotional distress claim:

> The jury here was instructed that it could hold [defendant] liable for intentional infliction of emotional distress based on a finding that [his] picketing was "outrageous." "Outrageousness," however, is a highly malleable standard with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." [*Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55 (1988)]. In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of . . . 'vehement, caustic, and sometimes unpleasan[t]'" expression. [*Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 510] (quoting [*New York Times v. Sullivan,* 376 U.S. 254, 270 (1964)]).

Snyder v. Phelps, 562 U.S. 443, 458 (2011).

In *Elrod*, however, the Court rejected the approach that the harm inflicted by the patronage system had to reach an objective threshold before rising to the level of a constitutional harm. Plaintiffs thus do not have to challenge compelled speech or other patronage schemes on a case-by-case basis:

> The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and *any assessment of his salary* is tantamount to coerced belief. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.

427 U.S. at 355–56 (emphasis added). In short, the government cannot compel orthodoxy "[r]egardless of the nature of the inducement." *Id.* at 356 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Likewise, the Court's agency-fee cases have never turned on the amount of the exaction taken to support political speech that the objecting employee opposes. In *Chicago Teachers Union v. Hudson*, the Court explained:

> The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In [*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)], we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves."

475 U.S. 292, 305 (1986) (footnote omitted).

It makes no more sense to say that a little bit of retaliation for protected speech isn't actionable, and factfinders should decide how much retaliation a "firm" citizen would withstand before he or she should be allowed to establish liability. But this is exactly what the "ordinary firmness" test demands. As *Elrod* and *Hudson* show, the Constitution protects citizens whose retaliation falls in the gray area between the minimal hurdle imposed by *de minimis non curat lex* and the higher hurdle imposed by some factfinders' conceptions of "ordinary firmness." Once retaliation beyond a *de minimis* standard is shown, at least as the *de minimis non curat lex* doctrine is supposed to apply, no further threshold needs to be overcome.

In sum, the "ordinary firmness" test sweeps far too broadly to shut out claimants who actually suffer retaliation for constitutionally protected conduct. The test should be scrapped as inconsistent with the First Amendment.

IV. The Judiciary Retains Multiple Tools To Screen "Trivial" Claims Without The "Ordinary Firmness" Test.

1. While the "ordinary firmness" test originally arose as a purported application of the *de minimis non curat lex* doctrine to "screen" or "weed out" cases that seem too "trivial" to merit constitutional recognition, no new or special test is required to serve that function, because *de mimimis non curat lex* always applies. Judges can apply it to weed out trivial retaliation claims.[8] Souping up the doctrine by turning it into an objective "severity" test is particularly inapt for resolution of a constitutional claim. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 576 (1975) ("The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.") (citing multiple cases); *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) ("to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake").

Ironically, Judge Posner returned to the issue in *Hessel*, *supra*, and wrote that *de minimis non curat lex* did not bar a § 1983 plaintiff from asserting a Fourth Amendment claim for illegally taking a can of soda in the course of a search: "It would be a strange doctrine that theft is permissible so long as the amount taken is small—that police who conduct

---

[8] In *Brown v. Runnels*, No. S-04-0055, 2006 WL 1305277 (E.D. Cal. May 11, 2006), for instance, the court used—but surely did not need—the "ordinary firmness" test to treat as *de minimis* a prisoner's claim that he suffered retaliation when a prison official delayed delivery of a typewriter ribbon to him.

searches can with impunity steal, say, $10 of the owner's property, but not more." 977 F.2d at 303. Put simply, "[t]he *de minimis* doctrine is not intended for definite losses, however small, inflicted by definite wrongs." *Id.* at 304.

2. When the Court rejected the "clear and convincing" evidentiary standard for retaliation claims in *Crawford-El*, it stressed that the judiciary already has many options to screen out "insubstantial" claims. The Court emphasized, for example, that the district courts' broad authority to manage discovery could be used to minimize the burden on government officials until a retaliation plaintiff establishes a prima facie case. 523 U.S. at 599–600. And, of course, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Id*. at 600.

In the meantime, moreover, the Court has recognized district court judges' authority to dismiss "implausible" claims at the pleading stage. The federal pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and requires a pleading to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This "plausibility" standard means that plaintiffs must come into court armed with more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id*. Government defendants thus have the ability to promptly test—and district courts have adequate means to screen out—truly *de minimis* retaliation claims.

3. In 1996, Congress enacted an additional layer of screening in prisoner cases, which are historically fertile ground for retaliation claims. Under 28 U.S.C. § 1915A, in prisoner cases, "[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer." 28 U.S.C. § 1915A(a). If the complaint "is frivolous" or "seeks monetary relief from a defendant who is immune from such relief," the court shall dismiss the complaint. *See Jones v. Bock*, 549 U.S. 199, 214 (2007) (discussing screening of prisoner litigation); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (observing that screening mechanisms "accord[ ] judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.") (citing 28 U.S.C. § 1915(d)).

4. It is worth noting that, in retaliation cases where a prior decision has not "clearly established" that the particular government conduct is actionable, qualified immunity will shield individual government actors from money damages and even the hassle of litigation. Indeed, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), itself involved a retaliation claim. Given that individual damage claims are often dismissed under *Harlow*'s objective test (would a reasonable person in the defendant's position have known that their conduct violated clearly established law?) for the qualified immunity defense, *id.* at 817, it is a perverse result indeed to impose as an element of a claim a separate objective test (would a person of "ordinary firmness" have been chilled?) that prevents

a plaintiff from even obtaining injunctive or declaratory relief.

5. Finally, we note that dumping the ordinary firmness test would not interfere in any way with constitutional retaliation claims whose tests expressly call for balancing of interests—that is a different question that courts have handled ever since *Pickering*.

CONCLUSION

For these reasons, and those stated by petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
BENBROOK LAW GROUP, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER
One Bunker Hill Bldg.
601 West Fifth St.
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

RAYMOND J. LAJEUNESSE, JR.
MATTHEW B. GILLIAM
NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Ste. 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

Counsel for Amici Curiae

November 2016