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 Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

GENE SUMMERLIN
STEVE GRASZ
MARNIE JENSEN
MARK D. HILL
Husch Blackwell LLP
13330 California St., Ste. 200
Omaha, Nebraska 68154
Telephone: (402) 964-5000
Facsimile: (402) 964-5050

DAMIEN M. SCHIFF*
**Counsel of Record*
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org
E-mail: wfa@pacificlegal.org

Counsel for Petitioner

QUESTION PRESENTED

Robert Bennie, a successful financial advisor, was one of the leaders of the Lincoln, Nebraska, Tea Party. Because Bennie called President Obama "a communist" in a prominent newspaper, state regulators pressured Bennie's employer to impose heightened supervision, conduct unannounced audits, and levy other sanctions to provide them with "some comfort."

The Constitution prohibits government officials from retaliating against individuals for protected speech. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To prevail on a First Amendment retaliation claim, a plaintiff must show, among other things, that a person of "ordinary firmness" would have declined to speak in light of the government's adverse action. The courts of appeals have split on whether a trial court's determination on this issue is subject to clear error or de novo review. The question presented, which the court below viewed as "likely [] dispositive," is:

In light of the First Amendment's strong speech protections, are "ordinary firmness" decisions reviewed on appeal solely for clear error, as the Third, Sixth, and Eighth Circuits hold, or are they reviewed de novo, as the First, Ninth, Tenth, Eleventh, and D.C. Circuits hold?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 3

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER THE STANDARD OF REVIEW OF A TRIAL COURT'S ORDINARY FIRMNESS DETERMINATION 3

A. The Eighth Circuit's Decision Exacerbates a Circuit Split 3

B. The Regulators' Opposition Underscores the Need for Review Because It Highlights That Circuit Courts May Give More Speech Protection to Government Employees than to Private Citizens 5

II. BENNIE'S CASE IS A GOOD VEHICLE TO ADDRESS THIS CIRCUIT SPLIT 6

A. The Issue Presented Was Raised Below and Addressed by the Eighth Circuit 6

B. The Regulators' Attempt To Deprive the Court of Jurisdiction Lacks Merit 7

TABLE OF CONTENTS—Continued

Page

III. THE REGULATORS ESSENTIALLY CONCEDE THAT THIS CASE PRESENTS A RECURRING QUESTION OF NATIONWIDE IMPORTANCE 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Beckwith v. City of Daytona Beach Shores, Fla.
58 F.3d 1554 (11th Cir. 1995) 4

Belcher v. City of McAlester, Okla.
324 F.3d 1203 (10th Cir. 2003) 3

Bistrian v. Levi
696 F.3d 352 (3d Cir. 2012) 4

Connick v. Myers
461 U.S. 138 (1983) 3

Davignon v. Hodgson
524 F.3d 91 (1st Cir. 2008) 4

Garcetti v. Ceballos
547 U.S. 410 (2006) 2, 5

Lebron v. National R.R. Passenger Corp.
513 U.S. 374 (1995) 6

Monsanto Co. v. Geertson Seed Farms
561 U.S. 139 (2010) 7

Pickering v. Bd. of Educ. of Twp High Sch. Dist.
391 U.S. 563 (1968) 2-5

Posey v. Lake Pend Oreille Sch. Dists.
546 F.3d 1121 (9th Cir. 2008) 4

Powell v. Gallentine
992 F.2d 1088 (10th Cir. 1993) 4

Tao v. Freeh
27 F.3d 635 (D.C. Cir. 1994) 4

TABLE OF AUTHORITIES—Continued

Page

Thaddeus-X v. Blatter
175 F.3d 378 (6th Cir. 1999) 3

United States v. National Treasury Employees Union
513 U.S. 454 (1995) 3

United States v. Williams
504 U.S. 36 (1992) 6

Wurzelbacher v. Jones-Kelley
675 F.3d 580 (6th Cir. 2012) 4

Yee v. Escondido
503 U.S. 519 (1992) 6

Miscellaneous

Hall, W. Wendell, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045 (1993) 8

Michel, Paul R., *Effective Appellate Advocacy,* 24 Litig. 19 (1998) 8

INTRODUCTION

Respondents John Munn, *et al.* (the Regulators), retaliated against Petitioner Robert Bennie for sharing his political views in a local newspaper. App. B-10. The Regulators spend 25 pages of their 38-page opposition trying to wash their hands of their unsavory behavior. Yet both the district court and circuit court held that the Regulators responded improperly to Bennie's constitutionally protected speech. App. B-14 (Regulators' inquiries were motivated by "plaintiff's political activities"); App. A-16 n.9 (Regulators' inquiries reflect a "troubling misunderstanding" of the Department's ability to punish political speech).[1]

And although the Regulators recite the district court judgment like a mantra, that court ruled against Bennie only because it determined that the Regulators' actions would not have chilled a person of ordinary firmness from speaking—not because the Regulators did no wrong. The issue presented in this case, however, is the standard of review used to scrutinize that determination. Here, the Eighth Circuit acknowledged that its decision to review the district court's judgment for clear error, rather than applying *de novo* review, was likely outcome-determinative.[2] App. A-9.

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[1] The Regulators' conditional cross-petition is docketed as *Munn v. Bennie*, 16-623. The Regulators do not ask this Court to reconsider the district court and circuit court findings that the Regulators retaliated against Bennie for exercising his free speech right.

[2] The dissent bolstered that conclusion by observing that Bennie should have won even under a more deferential standard. App. A-9.

In applying clear-error review, the Eighth Circuit exacerbated a split among the circuit courts. *See* Pet. 15-18 (detailing the split). The Regulators attempt to paper over this circuit split by drawing irrelevant distinctions between speech by government employees and speech by private citizens. *See* Opp. 25-29. Just as the "ordinary firmness" analysis is an explicit factor in retaliation lawsuits brought by the citizen-speaker, it is an implicit factor in the *Pickering* balancing test, which deals with retaliation lawsuits brought by government employees. *Pickering v. Bd. of Educ. of Twp High Sch. Dist.*, 391 U.S. 563, 568 (1968). What is more, any difference *supports* review. After all, private citizens have *more* latitude to speak than government employees. *See Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006). Yet if government employees need not make the same "ordinary firmness" showing as a private citizen claiming retaliation, then the First Amendment is bizaarely reduced to a mere benefit of government employment.

The Regulators do not, and cannot, rebut the fact that the issue presented is recurring and of national importance. The right to be free from government retaliation for protected speech is a cherished right. The standard of review comes up in every First Amendment appeal—and likely determined the outcome here. App. A-9. The significance of this issue prompted eight states, prominent law professors, and many other interested organizations to join Bennie in urging this Court to grant review.

The petition for a writ of certiorari should be granted.

ARGUMENT

I

THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER THE STANDARD OF REVIEW OF A TRIAL COURT'S ORDINARY FIRMNESS DETERMINATION

A. The Eighth Circuit's Decision Exacerbates a Circuit Split

The Regulators contend that the cases applying *de novo* review do not "involve a 'person of ordinary firmness' analysis" because they "were filed by government employees" Opp. 27. That is incorrect. *Pickering* does not instruct courts to ignore the chilling effect of government retaliation, but rather to balance such effect with special consideration for the government as an employer. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (taking into account the chilling effect of an honoraria ban for federal employees within the context of the *Pickering* test); *Connick v. Myers*, 461 U.S. 138, 144-45 (1983) (inquiring, in a *Pickering* case, "whether government employees could be . . . chilled" by government retaliation) (internal quotation marks omitted). "Implicit in the *Pickering* test is a requirement that the public employer have taken some adverse employment action against the employee." *Belcher v. City of McAlester, Okla.*, 324 F.3d 1203, 1207 n.4 (10th Cir. 2003) (discussing the "chilling effect" of a government employer's actions). An action is adverse if it "would deter a person of ordinary firmness from the exercise of the right at stake." *Thaddeus-X v.*

Blatter, 175 F.3d 378, 396 (6th Cir. 1999) (internal quotations marks omitted). Thus, just as courts explicitly make the ordinary firmness determination in retaliation cases involving private citizens, they implicitly make the same determination in cases involving government employees when they balance the interests of the employee with "the interest of the State, as an employer, in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568.

The circuit courts disagree over the proper standard of review of these implicit or explicit "ordinary firmness" determinations. Several circuit courts review a district court's conclusions *de novo*. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994); *Davignon v. Hodgson*, 524 F.3d 91, 100 (1st Cir. 2008); *Posey v. Lake Pend Oreille Sch. Dists.*, 546 F.3d 1121, 1128 (9th Cir. 2008); *Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993); *Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1560 (11th Cir. 1995). Others agree with the Eighth Circuit, and review a district court's "ordinary firmness" determination for clear error. App A-10 (Eighth Circuit); *Bistrian v. Levi*, 696 F.3d 352, 376 (3d Cir. 2012); *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583-84 (6th Cir. 2012). This Court should intervene to resolve an entrenched split among the circuit courts.

B. The Regulators' Opposition Underscores the Need for Review Because It Highlights That Circuit Courts May Give More Speech Protection to Government Employees than to Private Citizens

If anything, the Regulators' opposition underscores the need for review. There is no good reason why an implicit "ordinary firmness" determination under the *Pickering* balancing test should be reviewed *de novo*, but the same explicit determination under a non-*Pickering* retaliation analysis should receive more deference. Because *de novo* review corrects erroneous deprivations of free speech rights, Pet. 19-20, the Regulators' argument would have appellate courts afford greater First Amendment protection to government-employee speakers than to private citizens. That has it backwards. If there is any type of First Amendment retaliation plaintiff who is *most* deserving of the protections that run from independent appellate review, it is the private-citizen plaintiff in this case. *See Garcetti*, 547 U.S. at 411 (a government entity has "broader discretion to restrict speech" when it acts as an employer). All said, the Regulators should not get the extra latitude they need to silence Bennie just because he does not work for them. Opp. 28. The Court should grant review to correct any inconsistency in circuit court precedent that affords government employees, but not private citizens, the benefits of *de novo* review.

II

BENNIE'S CASE IS A GOOD VEHICLE TO ADDRESS THIS CIRCUIT SPLIT

A. The Issue Presented Was Raised Below and Addressed by the Eighth Circuit

The Regulators contend that the case is unsuitable for Supreme Court review because the argument was "not properly raise[d]" in the Eighth Circuit. Opp. 32. Yet the traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Bennie's contention that the circuit should have applied *de novo* review is not a new claim as Bennie argued for *de novo* review of the ordinary firmness conclusion in his briefing. Reply Br. 9-10, Doc. No. 14-3473 (8th Cir. filed Feb. 20, 2015). Alternatively, Bennie's demand for independent review is an additional "argument to support what has been his consistent claim" that the Regulators violated his First Amendment rights and that this Court should not defer to the district court on its ordinary firmness conclusion. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (a party can make any argument in support of a claim raised below).

Finally, Supreme Court review would be proper even if the claim had not been raised by Bennie below, because no one disputes that "it was addressed by the court below." *Id.* This Court's practice "permit[s] review of an issue not pressed so long as it has been passed upon." *Id.* (quoting *United States v. Williams*,

504 U.S. 36, 41 (1992)). As the Regulators concede, the Eighth Circuit addressed the standard of review in its opinion. Opp. 32 (citing App. A-10 n.3).

B. The Regulators' Attempt To Deprive the Court of Jurisdiction Lacks Merit

The Regulators repeat many of the same arguments in their conditional cross-petition in attempting to manufacture a standing problem. Opp. 33-36. Those arguments were rejected by the Eighth Circuit and further debunked in Bennie's response to the cross-petition.

The Regulators cite the district court's decision to argue that Bennie was not chilled and therefore was not injured in a way that establishes Article III standing. Opp. 36. But the Regulators miss the fact that the standing inquiry is not a determination on the merits. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 150 n.1 (2010) ("The question whether petitioners are entitled to the relief that they seek goes to the merits, not to standing."). Bennie continues to argue that he was chilled by the Regulators' repeated inquiries, which one regulatory attorney summarized as "regulation through harassment." Pet. 7. If this Court holds that the proper standard is *de novo*, it will remand the case to the Eighth Circuit, which found that the standard of review was "likely [] dispositive." App. A-9.

Second, the Regulators repeat arguments from their cross-petition that injunctive and declaratory relief is unavailable here. Opp. 33-35. As noted in Bennie's response to the cross-petition and in the decision below, prospective relief *is* available because there is a threat of future retaliation. App. A-7.

Further, the requested injunction against First Amendment retaliation is "sufficiently specific for the state regulators to know what they were not allowed to do." App. A-8.

III

THE REGULATORS ESSENTIALLY CONCEDE THAT THIS CASE PRESENTS A RECURRING QUESTION OF NATIONWIDE IMPORTANCE

The Regulators do not dispute that this case presents a recurring question of nationwide importance. That is for good reason. A Westlaw search reveals that dozens of First Amendment retaliation cases have been decided in federal courts all over the country in just the last two months. The standard of review is immensely important and arises in every First Amendment appeal. *See* Paul R. Michel, *Effective Appellate Advocacy* 24 Litig. 19 (1998) ("Jurisdiction is an issue in every appeal. So is the standard of review."); W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 St. Mary's L.J. 1045, 1049 (1993) ("It is difficult to overstate the practical significance of the standard of review."). In some of those cases — including this case — the standard of review decides the outcome of the case. App. A-9.[3]

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[3] The Regulators also contend that the Eighth Circuit's decision was correct. Opp. 36-38. That, of course, is a question for the merits. For now, it is worth noting that even the Regulators are confused about why clear error review should be the correct standard. *Compare* Opp. 32 (deference is justified based on a trial judge's expertise), *with* Opp. 37 (arguing that the jury, a cross-

(continued...)

CONCLUSION

The Eighth Circuit noted that the Regulators' actions "reflect a troubling misunderstanding of the—nonexistent—role that political speech . . . should play in the department's investigatory and enforcement activities." App. A-16 n.9. The circuit court withheld relief, however, because it reviewed the trial court's "ordinary firmness" determination for clear error, rather than applying *de novo* review. The circuit courts are divided on the applicable standard of review in First Amendment retaliation cases—an issue of substantial importance. The standard of review is important in many of these cases; here, it was "likely [] dispositve." App. A-9.

The petition for writ of certiorari should be granted.

DATED: December, 2016.

Respectfully submitted,

DAMIEN M. SCHIFF
Counsel of Record
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org
E-mail: wfa@pacificlegal.org

Counsel for Petitioner

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[3] (...continued)
section of 12 ordinary people, is preferable over a judge, one ordinary person), and 38 (noting that a bench trial was conducted in this case). In all events, Professor Volokh has ably demonstrated that the decision below was wrong. *See* Amicus Br. of Nine Law Professors Who Write About Appellate Review at 5-11.