No. 16-452

In The

Supreme Court of the United States

ROBERT R. BENNIE, JR.,

Petitioner,

v.

JOHN MUNN, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*
AND BRIEF FOR *AMICUS CURIAE*
CENTER FOR COMPETITIVE POLITICS
IN SUPPORT OF PETITIONER

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

Pursuant to Rule 37.2(b) of the Rules of this Court, the Center for Competitive Politics moves for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the instant case. All parties were timely noticed, pursuant to Rule 37.2(a), of *Amicus*'s intention to file the attached brief. Petitioner has consented to the filing of this brief. Respondents have not.

The question at issue is whether the First Amendment requires independent review of constitutional facts when state actors retaliate against the subjects of state regulation for exercising their political speech and associational rights. This question is of critical interest to *Amicus* Center for Competitive Politics, which is a nonprofit corporation dedicated to the promotion and defense of the political rights protected by the First Amendment. *Amicus* often represents clients in state and federal courts, including before this Court, on matters substantially related to those presented here.

Accordingly, *Amicus* respectfully requests that this Court grant its motion for leave to file.

Dated: November 7, 2016

Respectfully Submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics ("CCP") is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education.

Amicus has participated in many of the notable political speech cases before this Court, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). *Amicus* has an interest in this case because it involves governmental retaliation against the exercise of fundamental First Amendment rights.

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[1] *Amicus* states that no contributions of money were made to fund the preparation or submission of this brief, which was authored entirely by counsel for *Amicus*. Petitioner has consented to the filing of this brief.

SUMMARY OF ARGUMENT

The First Amendment protects an individual's right to disagree with political leaders, and to associate with other like-minded citizens, even when one works in a heavily-regulated profession. Yet the Eighth Circuit has permitted Nebraska's Department of Banking and Finance to target Petitioner in retribution for his political activities, directly and explicitly pressuring his private employer to control his political activities.

Nevertheless, and despite admitting that the standard of review was likely dispositive, *Bennie v. Munn*, 822 F.3d 392, 398 (8th Cir. 2016), the Eighth Circuit disregarded its duty to independently review the constitutional facts in this case. It neglected even the protections afforded by regular standards of review, failing to find abuse of discretion in the district court's failure to consider Petitioner's employment in a heavily-regulated profession, and failing to review de novo the district court's misapplication of the ordinary firmness test.

In falling short of its duty of independent review, the Eighth Circuit failed to provide the protections, guaranteed by the First Amendment. That is unfortunate for Petitioner, of course, but it also undermines our national effort to build and sustain a thriving civil society. Such a society strengthens minorities and dissenting individuals, allowing them to protect themselves from the state and majorities acting outside the state. It is a catalyst for the diversity of ideas necessary for self-government. And the habit of association formed in such a society pulls us outside of our divergent

individual concerns, and binds us together as a people.

The State's attacks on Petitioners' speech and associational freedoms, and the Eighth Circuit's failure to properly police those attacks, consequently imperil interests of the highest importance. Certiorari is appropriate and should be granted.

ARGUMENT

I. THE EIGHTH CIRCUIT FAILED TO PROPERLY REVIEW THE DISTRICT COURT DECISION

A. The Eighth Circuit Failed to Independently Review Constitutional Facts

The Eighth Circuit disregarded its obligation to independently review the constitutional facts at issue here, namely, the evidence addressing whether the government's actions were sufficient to "chill a person of ordinary firmness from continuing in the [protected] activity."[2] Courts have an "obligation" to

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[2] This Court has not had the opportunity to decide whether ordinary firmness is the appropriate test. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court approved a standard for employer defendant cases, a standard some of the Courts of Appeal have found inappropriate for cases involving non-employer defendants. *See*, *e.g.*, *Worrell v. Henry*, 219 F.3d 1197, 1212-1213 (10th Cir. 2000) (collecting cases). The majority of circuits have more broadly applied the ordinary firmness test used in prisoner retaliation claims. *See*, *e.g.*, *id.*; *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000) (applying ordinary firmness test to employer defendant and prisoner

independently review constitutional facts "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995).

The Courts of Appeal agree.[3] Nonetheless, while acknowledging universal agreement that Mr.

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cases); *Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999) (applying ordinary firmness test to all retaliation claims). Plaintiffs' First Amendment rights are even stronger in cases like this, however, as the state is legally permitted to control some of a prisoner's First Amendment rights out of concern for prison safety, and similarly may limit some employees' First Amendment rights when speech is made as part of their governmental duties. No such exigent circumstances are available here, and greater scrutiny, and a thorough independent review, is required.

[3] *See*, *e.g.*, *Lund v. Rowan Cty.*, No. 15-1591, 2016 U.S. App. LEXIS 17064, at *9 (4th Cir. 2016) (reviewing "de novo a district court's findings of constitutional fact and its ultimate conclusions" (citation omitted) (internal quotation marks omitted)); *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) (noting that "factual findings, as well as the conclusions of law, are reviewed without deference" (internal quotation marks omitted)); *Flanigan's Enters. v. Fulton Cty.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (noting that review of "findings of constitutional facts . . . is de novo." (internal quotation marks omitted)); *Sullivan v. City of Augusta*, 511 F.3d 16, 24 (1st Cir. 2007) (requiring "plenary" review where "mixed law/fact matters . . . implicate core First Amendment concerns" (internal quotation marks omitted)); *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1056 (9th Cir. 2007), *overruled on other grounds by Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) (reviewing de novo "[m]ixed questions of law and fact").

"Bennie's speech was protected by the First Amendment," the Eighth Circuit concluded that it had no duty to independently review "the deterrent effect of the state regulators' actions." *Bennie*, 822 F.3d at 398 n.3. To the contrary, under any available test, the Eighth Circuit should have exercised independent review here.[4] The district court was not asked to decide, and the Eighth Circuit was not reviewing, questions of historical fact, such as who the regulators were, what they actually said, or when they said it. Instead, the facts on appeal went to why Mr. Bennie silenced himself after his firing and whether persons of ordinary firmness would likewise have done so. Thus, even if independent review of the entire case were not required, these are the "why" questions at the heart of the First Amendment controversy, and the Eighth Circuit failed in its duty to independently review them.

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[4] According to the Tenth Circuit, hewing closely to this Court's language, the First Amendment duty of independent review requires "an independent examination of the whole record," where "factual findings, as well as the conclusions of law, are reviewed 'without deference to the trial court.'" *Cressman*, 798 F.3d at 946 (quoting *Hurley*, 515 U.S. at 567) (citations omitted) (internal quotation marks omitted). The Eleventh Circuit has adopted a slightly more circumspect view of the demands of independent review, subjecting historical facts—"the who, what, where, when, and how of the controversy"—to clear error review, and subjecting "the 'why' facts" to independent review. *Flanigan's Enters.*, 596 F.3d at 1276. As discussed below, the Eighth Circuit's decision fails under either interpretation.

Moreover, the Eighth Circuit's error caused substantial harm because the standard of review was dispositive. *See Bennie*, 822 F.3d at 398 (noting choice of standard of review "likely is dispositive"); *cf. Salve Regina Coll. v. Russell*, 499 U.S. 225, 237-238 (1991) (noting that the difference between standards of review "is much more than a mere matter of degree" where independent review is required and the standard of review would be dispositive (internal quotation marks omitted)).

B. The Eighth Circuit Failed to Find Abuse of Discretion in the District Court's Failure to Account for Employment in a Heavily-Regulated Profession

In evaluating whether the Department's censorship attempts would have silenced a person of ordinary firmness, the district court failed to recognize the importance of Mr. Bennie working in a heavily-regulated profession. "A district court abuses its discretion if it . . . applies the law in an . . . incorrect manner [or] ignores or misunderstands the relevant evidence." *FTC v. Abbvie Prods. LLC*, 713 F.3d 54, 61 (11th Cir. 2013) (citations omitted) (internal quotation marks omitted); *see also McKinney ex rel. NLRB v. Creative Vision Res., L.L.C.*, 783 F.3d 293, 298 (5th Cir. 2015) (same).

"The essence of [First Amendment] protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required." *Denver Area Educ. Telcomms. Consortium v. FCC*, 518 U.S. 727, 740 (1996).

Individuals and groups do not give up their First Amendment rights when they go to work in regulated professions. Rather, in some of the most pivotal cases protecting freedom of speech and association, this Court has rejected attempts to violate a person's rights merely because she found her vocation in a regulated profession. *See In re Primus*, 436 U.S. 412, 423-424 (1978) (discussing *NAACP v. Button*, 371 U.S. 415 (1963)). For example, in *Button*, the state, in retribution for First Amendment-protected activity, accused the plaintiffs of violating business solicitation laws. This Court rebuffed the state, holding that the government could "regulate in the area [of core First Amendment expressive and associational conduct] only with narrow specificity." *Primus*, 436 U.S. at 424 (quoting *Button*, 371 U.S. at 433).

Moreover, as in *Button*, the Department has attempted to control political speech having nothing to do with the governmental interest in regulating financial advisors. That is, the Department has not tried to regulate professional speech related to financial advice, but has instead attempted to sidestep constitutional protections on *political* speech by misusing its financial regulatory powers. Thus, the "First Amendment [comes] into play [because] the government [has tried] to control public discourse through the regulation of a profession." *Nat'l Ass'n for the Advancement of Multijurisdiction Practice (NAAMJP) v. Lynch*, 826 F.3d 191, 196 (4th Cir. 2016); *see also Serafine v. Branaman*, 810 F.3d 354, 360 (5th Cir. 2016) (rejecting use of regulations for psychiatrists and

doctors to restrict communications with voters on campaign website). In such situations, a regulated professional's "speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

The district court's failure to properly consider the realities of Mr. Bennie's employment is important because such employees are particularly vulnerable to violations of their protected political speech. That is, once a profession is regulated, professionals are at the mercy of the state. Years of experience and investment in training and education, as well as an individual's livelihood and ability to support his or her family, may be lost in a moment because of a regulator's displeasure. In such situations, where so much is at stake, even the hint of a political test would be enough to substantially stifle speech.

Accordingly, courts must be even more wary—not more deferential—when addressing attempts to silence political speech by members of a heavily-regulated profession. The district court never recognized this. That is, in applying the person of ordinary firmness test, the district court failed to consider the heightened danger that a person will silence herself because her livelihood is unusually vulnerable to state action. Or, to put it another way, "the chilling effect of the department's actions must be evaluated in [the] context" of "a similarly situated ordinary person"—someone "employed in a profession heavily regulated and closely overseen by

the department"—and this the district court did not do. *Bennie*, 822 F.3d at 402 (Beam, J., dissenting) (internal quotation marks omitted). Similarly, while the Eighth Circuit noted "the threat . . . of continued and heightened regulatory scrutiny," *id*. at 399, it ignored the district court's failure to correctly understand the evidence and apply the law to that evidence. *See Abbvie Prods.*, 713 F.3d at 61 (noting abuse of discretion).

Therefore, this Court should grant certiorari to emphasize the importance of giving heightened protection to the political speech of individuals in heavily-regulated professions.

C. The Eighth Circuit Failed to Review De Novo the District Court's Misapplications of the Ordinary Firmness Standard

By failing to review de novo two separate misapplications of law, the Eighth Circuit failed to give Petitioner even the ordinary protections accorded in cases where constitutional rights are not at issue. *See*, *e.g.*, *Exim Brickell LLC v. PDVSA Servs.*, 516 F. App'x 742, 749 (11th Cir. 2013) (de novo review of misapplications of law); *United States v. Boyle*, 452 F. App'x 55, 56-57 (2d Cir. 2011) (de novo review); *Brown v. Ala. DOT*, 597 F.3d 1160, 1185 (11th Cir. 2010) (reviewing "without deference"); *United States v. Microsoft Corp.*, 253 F.3d 34, 118 (D.C. Cir. 2001) (holding that "Rule 52(a) does not compel" courts to accept misapplications of law). Indeed, the Eighth Circuit erred not only in failing to review de novo, but in failing to hold that the district court's

misapplications of the law *automatically* resulted in reversible error. *See Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 671 (5th Cir. 2000) (holding abuse of discretion "automatically inheres" for misinterpretation of law).

First, the person of ordinary firmness test "is an objective one." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003). Thus, because a retaliation case may involve an unusually resilient plaintiff, "[t]he question is not whether the plaintiff herself was deterred." *Id.* More fundamentally, the Eighth Circuit here recognized that Mr. Bennie *was* an "unusually resilient and determined" plaintiff. *Bennie*, 822 F.3d at 400. Nonetheless, the Eighth Circuit permitted "the district court [to] rel[y] entirely on [his] actions . . . as evidence of how a person of ordinary firmness would respond to the department's increased regulatory scrutiny." *Id.* at 401-02 (Beam, J., dissenting); *see Bennie v. Munn*, 58 F. Supp. 3d 936, 944 (D. Neb. 2014) (disregarding regulators' questions, including questions about the heightened supervision Petitioner's employer planned to impose upon Munn, only because they did not chill Petitioner before he was fired).

Second, the district court incorrectly understood the types of evidence that would be relevant to the ordinary firmness standard, and accordingly misapplied the standard to the evidence. After concluding that the only relevant evidence was that pertaining to Mr. Bennie's firing, the district court rejected even that evidence because of its mistaken interpretation of what the test required. *Bennie*, 58 F. Supp. 3d at 944. Instead of asking

whether a person of ordinary firmness would have been silenced by the belief that regulators were harassing her employer and trying to get her fired, the district court imposed a cause-in-fact test, demanding evidence that Mr. Bennie's firing in fact occurred because of regulators' actions.

But, when the ordinary firmness test is correctly applied as an objective standard, and not as a cause-in-fact test, the evidence demonstrates that a person of ordinary firmness would have been silenced. In a situation where an unusually resilient plaintiff is silenced, one can be certain that a person of ordinary firmness would have been as well. And Mr. Bennie, whom the Eighth Circuit described as an "unusually resilient" plaintiff, 822 F.3d at 400, silenced himself once he confirmed that Department regulators were targeting him for his political speech. Thus, the district court failed to recognize that a person of ordinary firmness would have been silenced, both because of its mistaken use of a cause-in-fact test and because it failed to recognize that an unusually resilient plaintiff's actions necessarily confirm what a person of ordinary firmness would have done in such circumstances.

Moreover, the district court erred in placing so much emphasis on the firing, at the expense of the Department's other incidents of harassment. State actions far short of firing are sufficient to find retaliation under the First Amendment. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990) (stating in dicta that the First Amendment protects against retaliatory acts even "as trivial as failing to hold a birthday party . . . when intended to punish [a

party] for exercising her free speech rights" (internal quotation marks omitted)); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (same); *see also Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583-584 (6th Cir. 2012) (holding that "any action that would deter a person of ordinary firmness from exercising protected conduct . . . includ[ing] harassment," would be sufficiently adverse (internal quotation marks omitted)); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) ("Harassment . . . violates the First Amendment unless the harassment is so trivial that a person of ordinary firmness would not be deterred" (quoting *Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989))); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (stating that harassment "need not be great in order to be actionable," but must meet ordinary firmness test).

Furthermore, the district court ignored the evidence of what happened when Mr. Bennie became aware of the regulators' political motivations, which was confirmed only after he was fired. As the dissent noted, the relevant time for determining whether state action would chill the speech of a person of ordinary firmness is after the individual "became fully aware of the department's retaliatory motivation." *Bennie*, 822 F.3d at 402 (Beam, J., dissenting). There would be no reason to look for self-censorship at a time when a person lacked knowledge of adverse state action, and mere, untethered suspicions might support self-censorship of a paranoid party, but not a person of ordinary firmness. Accordingly, the most relevant period was after mid-2011, when Mr. Bennie made his public

records request. *See id.* at 400 (noting that Mr. "Bennie suspected the department's inquiries were politically motivated, [but] he did not get confirmation . . . until he filed his records request"). And, at that point, what the Eighth Circuit called an "unusually resilient" plaintiff silenced himself. *Id.*; *see also id.* at 396 (noting that "he stopped arranging Tea Party events," "writing letters to the editor," and publicly criticizing the President).

The district court, however, "focused" on the period from February 1 to March 10, 2010, *Bennie*, 58 F. Supp. 3d at 941, ignoring the effect of the later records request that made Mr. Bennie aware of the regulators' political motivations. And the Eighth Circuit failed to review all these misapplications of the law de novo, instead affirming the district court's errors under the much more deferential clear error standard. Certiorari is necessary to repair this mistake and to emphasize that deferential standards of review are particularly unacceptable when reviewing mistaken applications of law in First Amendment cases.

II. THE EIGHTH CIRCUIT'S FAILURE TO PROPERLY POLICE THE DISTRICT COURT'S DECISION THREATENS A ROBUST CIVIL SOCIETY AND THUS THE POSSIBILITY OF A THRIVING DEMOCRACY

In falling short of the independent review demanded for constitutional facts, indeed in falling short of the standards of review required in generic cases, the Eighth Circuit failed to protect rights quintessential to our republican experiment. The

Department here went after Mr. Bennie because of his disagreements with the President and his association with the Tea Party movement. Allowing such state action to go unaddressed threatens all Americans' rights to both free speech and unfettered association.

A. A Robust Civil Society Enables a Thriving, Democratic Nation by Protecting Against Two Threats to Speech

Freedom of speech is critical both to generating ideas that will improve the lives of the people and to drawing them into the process of self-government. But this freedom is fragile. Governments may directly silence individuals by prohibiting or burdening speech, or a vocal majority may harass and intimidate individuals until they no longer dare to speak. A robust civil society empowers individuals and minorities to resist these attempts, but only if the courts vigorously protect fundamental rights by providing a robust and effective remedy when they are violated. This the Eighth Circuit has not done.

1. Civil Society as an Antidote to Direct Government Action

One generation may condemn those that came before for stoning the prophets of old. But the later generation often fails to understand that their forbearers did not see themselves as oppressing

others, but merely as protecting the community from harmful ideas and associations.[5] Thus, for example, it is easy to condemn the Puritans from our historical distance. Today, their communal goals and the dangers of living on a frontier beset by the Little Ice Age are far removed. But at the time their leaders felt that their very survival demanded unity. Accordingly, they did not see their actions against dissenters like Roger Williams and Anne Hutchinson as "persecution . . . but more along the lines of excluding someone with plague or other contagious fatal disease from one's borders, in order to safeguard the population." Andrew R. Murphy, *Conscience and Community: Revisiting Toleration and Religious Dissent in Early Modern England and America* 52-53 (2001).

Of course, in hindsight, we see these fears as overblown and the perceived need to violate fundamental principles in order to preserve them as tragic, but that realization does nothing to help those targeted at the time.[6] Fortunately, the democratic experiments undertaken in the colonies

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[5] *See*, *e.g.*, John Cotton, *The Bloudy Tenent, Washed, and Made White in the Bloud of the Lambe* 34 (1647) (comparing those that persist in dissent to willful murderers, robbing individuals of grace and "of the inheritance of glory hereafter").

[6] *Cf.*, *e.g.*, 3 Roger Williams, *The Bloudy Tenent of Persecution*, in *The Complete Writings of Roger Williams* 80-81, 138 (Samuel L. Caldwell ed. 1963) (1644) (arguing that the Calvinist doctrine of predestination—central to Puritan theology—made persecution ineffectual and wrong, as it attempted to usurp God's power).

and the early republic taught us that one of the most potent remedies for these errors, and thus the means to a secure and thriving polity, is a vibrant civil society.

In Federalist No. 51, James Madison explained the need to make the branches of government limit one another by means of individual ambition.[7] Nevertheless, he recognized that this solution was incomplete, since all the checks and balances enshrined in the Constitution must eventually fall away before the power of a determined majority. It is for this reason that Madison noted our system's unusual reliance upon the people's virtue. *See* Federalist Nos. 51, at 281; 55, at 304 (James Madison) (Michael L. Chadwick ed. 1987).

But our experience soon taught us another remedy. Our citizens' habit of forming political associations also maintains government of and for the people—rather than of and for tyrannical majorities. Alexis de Tocqueville, whose writings this Court has cited for their insights into our system, *see*, *e.g.*, *Powers v. Ohio*, 499 U.S. 400, 406-407 (1991); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n.80 (1982), eloquently noted the dangers

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[7] *See*, *e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (noting Federalist No. 51's discussion of the "structural protections against abuse of power" (internal quotation marks omitted)); *Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (Breyer, J., dissenting) (citing Federalist No. 51 on "the tripartite structure['s]" protection of individual liberty).

we faced without associations to amplify our individual strength:

> When a man or a party suffers an injustice in the United States, to whom can he turn? To public opinion? That is what forms the majority. To the legislative body? It represents the majority and obeys it blindly. To the executive power? It is appointed by the majority and serves as its passive instrument. To the police? They are nothing but the majority under arms. A jury? The jury is the majority vested with the right to pronounce judgment . . . So, however iniquitous or unreasonable the measure which hurts you, you must submit.

Alexis de Tocqueville, *Democracy in America* 252 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988). The solution we discovered was to transform associations from a source of instability and insurrection into a protection for minorities and a catalyst for involvement in community and politics. *See* Tocqueville, *supra*, at 192. That is, when "all public power [has] passe[d] into [one party's] hands," others "must be able to establish themselves outside it . . . [using] the whole of [their combined] moral authority to oppose the physical power oppressing" them. *Id.*

2. Civil Society as an Antidote to the Majority's Power over Thought and Speech

The civil society undermined by the Eighth Circuit's decision is just as critical in protecting against the majority's power outside the state, power it may use to silence the alternate views necessary for a free marketplace of ideas and thus a thriving nation.

As Justice Holmes wrote, experience has taught that "the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (noting First Amendment's purpose "to preserve an uninhibited marketplace of ideas" (internal quotation marks omitted)); *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (quoting *Abrams*); *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (noting that the First Amendment was "designed . . . 'to assure unfettered interchange of ideas'" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964))). This is because freely allowing ideas to compete allows us to test the truth, and such competition gives force and vitality to the truth tested. *See* J.S. Mill, *On Liberty and Other Essays* 21 (John Gray ed. 1998) (1859) ("If the opinion is right, they are deprived of the opportunity of exchanging error for truth [by the silencing of expression]: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier

impression of truth"); *see also id.* at 45-46 (noting the "living power" given to ideas from competition).

As discussed above, civil society strengthens individuals and minorities fighting against direct attempts to use the state to silence speech and thus close the marketplace of ideas. But associations are even more important in protecting the marketplace of ideas against what Tocqueville discussed as "tyranny of the majority." *See* Tocqueville, *supra*, at 250-56.

Unlike a mixed government, where various classes or institutions are separately represented, in a democracy like ours "there is only one authority, one source of strength and of success, and nothing outside it." *Id.* at 255. In analyzing the effect of the majority's dislike of opposition, Tocqueville in fact underestimated the majority's power and inclination to silence speech. He imagined a level of magnanimity from the majority:

> "You are free not to think as I do; you can keep your life and property and all; but from this day you are a stranger among us. You can keep your privileges in the township, but they will be useless to you, for if you solicit your fellow citizens' votes, they will not give them to you, and if you only ask for their esteem, they will make excuses for refusing that. You will remain among men, but you will lose your rights to count as one. When you approach your fellows, they will shun you as an impure being, and even those who believe in

> your innocence will abandon you too, lest they in turn be shunned. Go in peace. I have given you your life, but it is a life worse than death."

Id. at 255-56.

Unlike the America Tocqueville studied, we live in a time of great interdependence, where few have the independence of property necessary to survive apart. As shown by the reactions surrounding California's Proposition 8, for example, civility has to a significant degree left our public debates, and we fail to constrain our anger at those expressing contrary views about issues important to our communities. *See*, *e.g.*, *Citizens United*, 558 U.S. at 480-82 (Thomas, J., concurring and dissenting); *Doe v. Reed*, 561 U.S. 186, 208 (2010) (Alito, J., concurring) (noting the "vast" potential for harassment). There are many that believe contrary viewpoints must be stopped—to protect others' rights and our vision of the good—and if that means harassing speakers and even their employers until they are cut off, not just from society but even their livelihoods, then that is the price of a just society.

At best, such harassment will lead to the further polarization of our communities, as individuals flee to the protection of like-minded individuals in other areas. *Cf.*, *e.g.*, Cass R. Sunstein, *The Law of Group Polarization* University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 91 (December 1999), *available at* https://ssrn.com/abstract=199668 (describing group polarization in discussions between like-minded individuals). At worst, individuals will be denied the

ability to find and associate with those like them, and they will either seethe in silence or forego independent thought.

As Tocqueville noted, our experiences have shown that robust associations are a necessary remedy to these ills. In a democratic society where "citizens are independent and weak," where "[t]hey can do hardly anything" individually, individual citizens would "find themselves helpless if they did not learn to help each other voluntarily." Tocqueville, *supra*, at 514. But, by joining with others, they can give each other the moral strength necessary for freedom of thought and, concomitantly, speech. *See id.* at 193 (noting that associations "lessen the moral authority of the majority").

The civic function of associations goes beyond merely providing moral and political strength to minorities in danger of oppression, however. Tocqueville described the "knowledge of how to combine [as] the mother of all other forms of knowledge" in democratic nations. *Id.* at 517. The habits formed in building one association can lead to another and then still another. Eventually, "at the head of any new undertaking" you find an association, one "of a thousand different types." *Id.* at 513. And these associations draw us out of ourselves and our "own circle[s]," bridging "differences in age, intelligence, or wealth [that] naturally keep [us] apart." *Id.* at 521. Through this process, "[f]eelings and ideas are renewed, the heart enlarged, and the understanding developed [through] the reciprocal action of men one upon another." *Id.* at 515. We form

the ties that bind us as communities, and that in turn allows us to cooperate across our differences.

B. The Eighth Circuit's Decision Threatens the Possibility of a Civil Society that Can Carry Out These Functions

The Eighth Circuit's decision threatens the preconditions for a civil society that can protect minorities' freedoms and draw us together as a nation. Associations can only perform these salutary functions in the presence of a succession of freedoms: of speech, of assembly, and the liberty to take part in the political process. *See* Tocqueville, *supra*, at 190. In particular, "the right of association can almost be identified with freedom to write," and of speech more generally, because "[a]n association simply consists in the public and formal support of specific doctrines by a certain number of individuals." *Id.* But, if associations are to protect their members and their collective voices, they must have "means of talking every day without seeing one another and of acting together without meeting." *Id.* at 518.

Before the Department's actions, Mr. Bennie had become so active in organizing the Tea Party movement that a Lincoln, Nebraska, newspaper called him "Lincoln's tea party voice." *Bennie*, 58 F. Supp. 3d at 938. He was also publicly, and "sharply[,] critical of elected officials," *id.* at 939, including the President, *Bennie*, 822 F.3d at 395. After the regulators were done, and Mr. Bennie had become fully aware of their retaliatory actions, Mr. Bennie silenced himself. *See Bennie*, 822 F.3d at 402 (Beam, J., dissenting). In particular, "he stopped arranging

Tea Party events and writing letters to the editor and restrained himself from criticizing President Obama publicly." *Id.* at 396.

Like the Puritans and many others who have used the state's power to silence individuals and stifle the right to associate, the regulators here likely did not see themselves as persecutors or oppressors.[8] Rather, they saw themselves as protecting the state and the community from the spread of dangerous, inflammatory ideas. *See id.* at 395 (noting regulator who told Mr. Bennie's employer that "heightened supervision [would] be of some comfort to us and really is in the best interest of the public"). Based on this fear, the regulators moved to silence an individual and cut him off from the community he was helping to organize. And they succeeded. *See id.* at 396.

Of course, sometimes the danger of "imminent lawless action" may justify a restriction on speech. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969);

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[8] Those giving into this fear ignore that speech and the ability to associate create self-knowledge and hope, which together inoculate against the dangers of such speech and communication. First, free communication gives individuals hope that they can convince others. *See* Tocqueville, *supra*, at 193-94. Second, free communication prevents some individuals from developing the incorrect view that they are in the majority, and are only kept from changing national policy and culture by the state's coercive power. *Id.* at 195 ("[W]hat is more excusable than violence to bring about the triumph of the oppressed cause of right?"). Consequently, free communication helps groups recognize that they must work through persuasion.

Holder v. Humanitarian Law Project, 561 U.S. 1, 43-44 (2010) (Breyer, J., dissenting) (noting that "the First Amendment protects advocacy even of *unlawful* action" short of "inciting or producing *imminent lawless action*" (emphasis in original)). But that is not the case here. And thus this case demonstrates the importance of the duty to independently review constitutional facts. Absent such vigorous review by the courts, the state can stifle the communicative and organizational activity that is the lifeblood of civil society.

CONCLUSION

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

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