NO. 07-5934

In the
United States Court of Appeals
for the Sixth Circuit

Linda Wells Back, Plaintiff-Appellee

vs.

Keith A. Hall, Defendant-Appellant

On Appeal from the United States District Court
For the Eastern District of Kentucky (Frankfort Division)

PROOF BRIEF OF APPELLANT

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COUNTERSTATEMENT OF FACTS

Appellee Back agrees with much of the substance of the facts presented in both Schrader and Hall's briefs. However, Back takes exception to Schrader's characterization of Back having received a "promotion" after she expressed concerns about Schrader's use of partisan politics in the administration of Kentucky's Office of Homeland Security ("OHS"). (Schrader's Brief, p.3). As fully stated in her Complaint, Back reluctantly accepted another merit position that more closely reflected her job duties at that time. Back accepted this position pursuant to the advice of OHS Executive Director Erwin Roberts. (R.1, ¶ 29, Apx. pg. _____). Also pursuant to Roberts' advice, Back specifically avoided taking a position that would require regular contact with Schrader.[1] *Id.*

Additionally, Back takes exception to Schrader's interpretation of Ky. Rev. Stat. Ann. 18A.111 and 18A.140 as implying that probationary employees are not protected from political discrimination. (Schrader's Brief, pp.3-4). Schrader's point is argumentative and not at all undisputed. This point is considered more fully in § III(A), *infra*. Furthermore, Schrader's assertion that Back "does not allege any facts which support her conclusion that she was fired for her political

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[1] Appellant believes, and intends to prove, that Roberts advised Back not to take the position because he was aware of the unethical and illegal activities in which Schrader was involved. This fact may be established via the discovery process, which has been successfully avoided by Schrader and Hall thus far. See § I(A), *infra*.

affiliation" is a major point of Appellants' arguments. (Schrader's Brief, p.4, Apx. pg. _____) It is clearly a contested point of law, and not a statement of fact. This point is developed further in § II, *infra*.

Finally, it is important to Back's argument that this Court be aware of the scope of her allegations. As stated in Back's Response to the Merits of Hall's Motion to Reconsider (R.47, Apx. pg. ____), Back's position is that Hall and Schrader wrongfully terminated her or approved her termination because of her political affiliations, pursuant to a conspiratorial arrangement designed to eliminate Democrats from state government.[2] The issues involved in this litigation cannot be framed as simply as Appellants would have this Court believe.

SUMMARY OF ARGUMENT

In this appeal, the only constitutional violation under consideration is Back's surviving First Amendment freedom of association claim. Hall and Schrader claim that Back cannot maintain such a claim, and they are entitled to qualified immunity even if she can. The issue of Back's ability to make a *prima facie* case

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[2] This allegation is supported more fully by exhibits submitted in *Duncan v. Nighbert, et al,* No. 3:06-CV-34, a case that was originally consolidated with the instant case, but settled before Appellee Duncan's brief was filed. Most significant in that case was a list of Democrats in various positions throughout Kentucky government who were slated for termination based on their political affiliation. While Back was not named specifically in the "hit list," and it is not yet part of the record in this case, Back believes that this conspiracy by Governor Ernie Fletcher's administration, which penetrated the ranks of the Kentucky Transportation Cabinet, affected OHS as well.

for political patronage dismissal is not properly before the Court because it was never raised at the district court level, nor could it have been as a result of the stay on discovery. For the same reason, the disputed issues of fact regarding Hall and Schrader's qualified immunity defense are also not properly before the Court. Therefore, if there are any appropriate issues to be decided by this Court in the instant case, they are (1) whether *Garcetti v. Ceballos,* 126 S. Ct 1951 (2006), operates to dispose of Back's patronage dismissal claim as a matter of law, and/or (2) whether *Miracle v. Gable,* 452 S.W.2d 399 (1970), entitles them to qualified immunity. These are the only claims based on abstract issues of law raised by Appellants in their briefs, and thus the only issues conceivably appropriate for appellate review. *Garcetti* is not on point, as it has nothing to do with political patronage or with a plaintiff's First Amendment right to freedom of association. Similarly, *Miracle* cannot realistically be depended upon to grant qualified immunity to defendants engaging in political patronage termination.

ARGUMENT

I. ISSUES RAISED BY SCHRADER AND HALL ARE NOT PROPERLY BEFORE THE COURT

Because of the unusual procedural steps taken in this case, certain issues raised in this appeal are not properly before the Court. First, it should be noted neither Appellant actually moved for summary judgment on the basis of qualified immunity. Hall moved to dismiss under Fed. R. Civ. Proc. 12(b) early in the

proceedings, arguing that Back's Complaint failed to allege that Hall had the authority to terminate her. (R. 7, Apx. pg. ___) When this Motion was denied by Judge Caldwell, Hall filed an Answer. (R. 13, Apx. pg. ___) Hall then made a motion for a protective order to avoid giving a deposition. (R. 25 & 26, Apx. pp. ___). Hall's motion was granted the next day; Back was not given the opportunity to respond.[3] Hall then moved for and received an order to stay discovery altogether (R. 35 & 42, Apx. pp. ____). He then made a "Motion to Reconsider" his Motion to Dismiss when the case was transferred from Judge Caldwell to Judge Hood. (R. 40) Judge Hood construed Hall's Motion to Reconsider as a "Motion for Qualified Immunity." (R. 44).

Schrader also moved for a 12(b)(6) dismissal early in the proceedings, and was denied in part. (R. 8 & 12) Schrader eventually filed an Answer. (R. 14) Over a year after his 12(b)(6) motion, Schrader moved for judgment on the pleadings based on the Supreme Court's decision in *Garcetti v. Ceballos*, 126 S. Ct 1951 (2006), and added a paragraph at the end casually mentioning qualified immunity. (R. 46, Apx. pg. ___) In his Motion, Schrader only addressed the impact of *Garcetti* on Back's ability to state a claim for a First Amendment freedom of *speech* violation. In Back's response, she pointed out that a First Amendment

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[3] Judge Caldwell recused herself after issues were raised about her issuance of protective orders within hours of motions by defendants, both in this case and in *Duncan v. Nighbert* (see n.2, *supra*), and her personal involvement in the political career of Governor Ernie Fletcher. (R. 31, Apx. pg. ___).

freedom of *association* claim could still survive pursuant to precedent regarding political patronage dismissals. (R. 51, Apx. pg. ___) Appellants did not move for summary judgment on the issue of qualified immunity, nor on the issue of whether Back made a *prima facie* case for freedom of association. The issues brought to this Court by Appellants were brought *only* in motions under Rule 12. Having failed on these motions, Appellants apparently seek a more favorable outcome in this Court without having to submit to trial or even to discovery procedures.[4] There are sound reasons why the Court should not consider portions of these arguments, as discussed below.

A. PORTIONS OF APPELLANTS' QUALIFIED IMMUNITY ARGUMENT ARE NOT PROPERLY BEFORE THE COURT

Behrens v. Pelletier, 516 U.S. 299 (1996), effectively held that appellate courts may only consider "abstract issues of law" in deciding an interlocutory appeal of qualified immunity on a motion to dismiss. Although Appellants never moved for summary judgment, there are disputed issues of fact inherent in Appellants' qualified immunity arguments. These arguments are not properly before the Court at this time.

At the district court level, Hall argued in his Motion to Reconsider that Back

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[4] On this point, Appellee notes that Hall's Brief raises a multitude of issues regarding *Garcetti* and Back's ability to make a *prima facie* case, but devotes almost no energy to discussing the issue of qualified immunity, which is supposedly the basis for this interlocutory appeal.

was in a policymaking position of political significance within the meaning of *Branti v. Finkel,* 445 U.S. 507 (1980), or *McCloud v. Testa,* 97 F.3d 1536 (6th Cir. 1996). (R. 40 p.3, Apx. pg. ___) Although Hall avoided making the same argument to this Court, Schrader appears to have adopted the argument in his brief. (Schrader's Brief, pp.15-16) The *McCloud* court explained that the "significance of a lack of factual clarity would be that [the defendant's] claim of qualified immunity may not be resolvable until after trial, at which time it may even merge into a determination on the merits of the plaintiffs' constitutional claim." 97 F.3d, at 1556.

> When . . . a governmental employee may be nothing more than a supervisor with a glorified title who is simply performing functions over which he or she has no discretion, or no discretion of political significance, then this court cannot grant qualified immunity . . . . In these circumstances, resolution of the qualified immunity issue will need to await further proceedings.

Id., at 1559. See also *Caudill v. Hollan*, 431 F.3d 900, 913-14 (6th Cir. 2005). The issue of Back's job duties is obviously a disputed issue of fact bearing directly on the issue of qualified immunity, and cannot properly be decided without discovery.

In *Noble v. Schmitt*, 87 F.3d 157, 161 (6th Cir. 1996), this Court held that appellants were not entitled to qualified immunity as a matter of law because there were disputed factual issues regarding whether they had violated the appellee's protected liberty interests. The Court cited *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), in stating that a claimant will defeat a qualified immunity defense if he can

produce sufficient evidence *after discovery* to prove the existence of genuine issues of material fact regarding the issue of immunity, or if the undisputed facts show that defendant violated his clearly established rights. Back has not been given the opportunity to do so.

In this case, Hall and Schrader successfully avoided discovery and never moved for summary judgment; they simply appended arguments regarding qualified immunity to their Rule 12 motions. This strategy is a novel way of circumventing the civil rules, as Appellants now seek to argue the new issue of whether Back has made a *prima facie* case for political patronage dismissal to this Court. *See Neuens v. City of Columbus*, 303 F.3d 667 (6th Cir., 2002) (In general, appellate court has jurisdiction to decide the merits of a *prima facie* case in an interlocutory appeal of qualified immunity denial). The only "abstract issue of law" raised with regard to qualified immunity is whether *Miracle v. Gable,* 452 S.W.2d 399 (Ky. 1970), operates to immunize Hall and Schrader as a matter of law. This issue is considered at length in § III, *infra*.

B. APPELLANTS' *PRIMA FACIE* FREEDOM OF ASSOCIATION ARGUMENT IS NOT PROPERLY BEFORE THE COURT

Assuming this Court finds the issue of qualified immunity is properly before it and affirms the district court on this issue, it cannot rule on the merits of Schrader and Hall's argument regarding Back's *prima facie* case for violation of her freedom of association. While a district court's dismissal of a complaint pursuant

to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo*, *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997), a denial of such dismissal is not immediately appealable. Furthermore, no such argument was properly raised before the district court. Even if it were proper for the Court to consider it here for the first time, it would be impossible to determine the factual issues underlying a *prima facie* case for a freedom of association violation.

1. *The Issue of Back's Prima Facie Claim for Freedom of Association Was Not Raised by Schrader or Hall in the District Court*

Generally, the court of appeals will not review issues raised for the first time on appeal. *Barner v. Pilkington N. Am.,* 399 F.3d 745, 749 (6th Cir.2005). "[T]he failure to present an issue to the district court forfeits the right to have the argument addressed on appeal." *Armstrong v. City of Melvindale*, 432 F.3d 695 (Fed. 6th Cir., 2006) (citing *Legg v. Chopra*, 286 F.3d 286, 294 (6th Cir.2002); *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir.1993)). *See also League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 529 (6th Cir., 2007).

Following Back's Response to Schrader's Motion for Judgment on the Pleadings (R. 51), the district court allowed her claim to go forward. The first challenge to Back's *prima facie* case for political patronage dismissal was made in Appellants' briefs to this Court. Even in Schrader's Reply to Back's Response to Motion for Judgment on the Pleadings, her ability to make such a *prima facie* case was not impugned, although the issue had been brought to Schrader's attention.

Schrader merely insisted that "all of Plaintiff's First Amendment activities are inextricably intertwined with her employment activities," and therefore should all fail as a matter of law based on the *pleadings alone*. (R. 54 pp. 1-2, Apx pg. ___).

2. *This Court Cannot Determine the Evidentiary Sufficiency of Back's Prima Facie Case at This Time*

Hall and Schrader boldly assert: "Ms. Back has not met her burden of proving a *prima facie* case of patronage dismissal . . . . Therefore, Mr. Hall is entitled to qualified immunity." (Hall's Brief, p.11). As with the issue of qualified immunity, the bar against discovery in this case precludes a decision against Back on this issue; she has not even had an opportunity to make a *prima facie* case.

Appellants would have this Court believe that Back's Complaint did not specifically spell out a claim for political patronage dismissal, and therefore her *prima facie* case must fail. (Hall Brief, pp.12-13). As explained in § II(B)(1), *infra*, Back's Complaint is sufficient. Nonetheless, Appellants' claim is one of evidentiary sufficiency, which is not properly before this Court at this stage in the proceedings.[5]

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[5] Hall appears to assert that Back herself has rested her entire case on her Complaint. His belief appears to be rooted in the fact that Back "made no argument to demonstrate a *prima facie* case of patronage dismissal" in her response to Hall and Schrader's *Motions to Dismiss*. (Hall's Brief p.12). As discussed in § I(B)(1*), supra*, Back's ability to make a *prima facie* case for patronage dismissal was not even raised by Hall or Schrader in their Motions to Dismiss. Hall then makes a rather strained argument that Back's entire case should be decided on the basis of her Complaint because she asserted in a

Behrens v. Pelletier, 516 U.S. 299 (1996), held that appellate courts do not have jurisdiction to review "determinations of evidentiary sufficiency. . . if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred," but instead only have jurisdiction over "summary judgment determinations... [that] resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity... typically, the issue of whether the federal right allegedly infringed was 'clearly established. . . ." 516 U.S., at 313 (internal citations omitted).

In *Hoard, Et Al v. Sizemore, Et Al*, 198 F.3d 205 (6th Cir., 1998) the district court held that a genuine issue of material fact exists as to whether political affiliation motivated the defendant. This Court held:

> Where the district court holds that there is a genuine issue of material fact as to defendant's motivation . . . we must assume for the purpose of considering the qualified immunity question that the motivation issue would be resolved in favor of the plaintiffs if submitted to a jury. . . . We could not have proceeded to ask whether the defendant might reasonably have acted on a proper basis in light of the information in front of her when she made her personnel decision, as defendant in this case proposes. [W]e do not have jurisdiction to consider the purely factual issue of motivation.

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responsive pleading that the complaint "states an abundance of facts from which a reasonable trier of fact could infer [that] she was fired as a result of her political affiliation." (Hall brief pp.12-13). While this is true, it does not mean that Back has waived any opportunity to properly establish a *prima facie* case, whether through discovery or any other appropriate means. Disputed issues of fact abound in this case, and judgment on the face of the pleadings is simply not permissible.

Id., at 218.

According to their own briefs, Appellants' motivations are precisely what is at issue here. Hall states: "To establish a *prima facie* case of patronage dismissal . . . Back must show that her political affiliation was a substantial or motivating factor for whatever role Mr. Hall played in her dismissal." (Hall's Brief, pp.8, 12, Apx. pg. ____; Schrader p.9, Apx. pg. ___) Hall and Schrader cite to this Court's opinion in *Kreuzer v. Brown*, 128 F.3d 359, 363 (6th Cir. 1997) as support for this position. The cited passage explains that a "plaintiff must show that her political affiliation was a 'substantial' or 'motivating' factor behind the adverse employment action. This showing may be made by direct or circumstantial evidence." (Hall's Brief p.12, Schrader's Brief p.9) Obviously, little "direct or circumstantial evidence" can be discerned in the absence of discovery. Accordingly, under *Hoard,* this Court cannot decide this "purely factual" issue.

Similarly, Hall and Schrader also assert that Back's *prima facie* case must fail because her Complaint does not specifically assert that Hall or Schrader knew of Back's political affiliation at the time of her dismissal. (Hall's Brief, p.14, Schrader's brief, p.10). Both Appellants cite to *EEOC v. Avery Dennison Corp*., 104 F.3d 858 (6th Cir. 1997), to show that a plaintiff must prove that her "exercise of [her] civil rights was known by the defendant" in order to make a *prima facie*

case of discrimination under Title VII.[6] (Hall's Brief, p.14). Appellants point out that Back does not specifically state in her Complaint that Hall or Schrader knew of her political affiliation, but fail to specifically assert that they did *not* have such knowledge. Presumably (if they were ever to submit to questioning), Appellants would assert that they did not know of Back's affiliation, while Back would assert the opposite, thus creating another disputed issue of fact unsuitable for appellate review. *See Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998) ("We hold that in order for such an interlocutory appeal based on qualified immunity to lie, the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case. . . .").

After setting forth several pages of disputed issues of fact, Hall concedes that "sufficiency of evidence is not an issue on this appeal." (Hall's Brief, p.17). Hall then speculates further regarding when and where Back complained about Schrader's activities, and whether Hall could have known of these complaints. (*Id*., pp.19-20). Yet Appellants still somehow conclude that it is appropriate for this Court to decide – in the context of an interlocutory appeal based on qualified immunity – whether Back has presented enough evidence to prove their knowledge of her political affiliation and motivation for terminating her. These arguments

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[6] Hall concedes that the instant case is not a Title VII case, and in fact sets forth a completely different standard for *prima facie* patronage dismissals two pages before citing the standard in *Avery*. (Hall's Brief, p.12) Nonetheless, *Avery* is offered as definitive proof that Back's entire case must appear in her Complaint.

turn on issues of fact; they have no bearing on an issue of "abstract law" for qualified immunity purposes. *Behrens,* 516 U.S. at 313. Appellants have appended these arguments to their qualified immunity argument in order to circumvent proper appellate procedures. See *Berryman* 150 F.3d, at 564 ("We have learned by experience that defendants sometimes attempt simply to protract the litigation and manipulate the fact-law distinction . . . to create the appearance of jurisdiction").

On this point, *Lucas v. Monroe County Sheriff*, 203 F.3d 964 (6th Cir., 1999), is instructive. In that case, this Court held that a *prima facie* case of political patronage was established based on the *evidence* presented following discovery. This evidence included deposition testimony by the defendant. The Court specifically stated that "the circumstantial evidence detailed above would allow the jury to infer a less proper motive." *Id*., at 976. Similarly, a wealth of discovery information was gathered in *Hoard, supra*, before the issues of qualified immunity and motivation were presented to the appellate court. 198 F.3d 205, at n.2. Back has had no opportunity to gather such evidence, and thus a determination of this issue by this Court would be improper.

II.APPELLEE HAS SHOWN A VIOLATION OF A CONSTITUTIONALLY PROTECTED RIGHT

Whether a constitutional violation has occurred is a threshold issue. *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006). Appellants

mistakenly contend that the Supreme Court's holding in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), indicates that no constitutional violation has occurred here. Hall and Schrader also mistakenly conclude that Back has not adequately stated a claim for relief in her Complaint or otherwise. These issues are dealt with below.

A. THE SUPREME COURT'S DECISION IN *GARCETTI* DOES NOT ABROGATE PRIOR JURISPRUDENCE REGARDING POLITICAL PATRONAGE DISMISSALS

Schrader and Hall both rely on *Garcetti v. Ceballos*, 126 S.Ct 1951 (2006), as support for the proposition that Back cannot state a claim for violation of her freedom of association rights. From the Court's pronouncement that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," *Id*., at 1960, Hall leaps to the conclusion that "a governmental employee *loses his or her status as a citizen protected by the First Amendment* when making statements pursuant to official duties." (Hall's Brief p.25 (emphasis added)). This has no support in prior jurisprudence, *Garcetti* itself, or any case following *Garcetti*.

The constitutional right to freedom of political association is derived from a long line of cases which do not intersect with the Supreme Court's holding in *Garcetti*. The instant case is perfectly in line with federal jurisprudence regarding political patronage dismissals, a practice described concisely by the Supreme Court over 30 years ago:

> Under that practice, public employees hold their jobs on the condition that they provide . . . support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise.

Elrod v. Burns, 427 U.S. 347 (1976). In light of the above definition, the vast body of jurisprudence concerning political patronage dismissals, and the facts alleged in the pleadings here, it cannot seriously be argued that *Garcetti* is dispositive of this case.

The central holding of *Garcetti* is that public employees are not speaking as citizens when they are speaking to fulfill a responsibility of their job. 126 S. Ct., at 1960. Therefore, restrictions over such communications do not violate an employee's free speech rights, since the speech in question "owes its existence to a public employee's professional responsibilities." *Id*., at 1958. The plaintiff in that case, a former deputy district attorney, generated a memo addressing the impropriety of a particular prosecution, and was properly terminated. No allegations of political discrimination were made, nor of restrictions on the plaintiff's freedom of association.

In the instant case, Back alleges that a scheme of improper political employment actions was enacted, and that both her objections thereto *and* her party affiliation played a role in her wrongful termination. Obviously, this case is quite different from the retaliatory dismissal of an employee for the generation of an

internal memo decrying a particular (apparently apolitical) decision made by an office, as was the case in *Garcetti*.

Indeed, the precedent upon which *Garcetti* was founded, i.e., *Pickering v. Bd. Of Educ. Of Twp. H.S. Dist*., 391 U.S. 563 (1968) (requiring speech to touch a matter of public concern before being protected by the First Amendment, and establishing a balancing test between the employee's interest in the protected speech and the state's interest in providing efficient services), and *Connick v. Meyers*, 461 U.S. 138 (1983), does not play an important role in any of the Supreme Court's prior decisions regarding political patronage dismissals. To apply the *Garcetti* holding to a case involving freedom of association – particularly *political* association within the context of public employment – would be to abrogate decades of jurisprudence regarding political patronage dismissals. *See, e.g.,* (*United States v. Robel*, 389 U.S. 258 (1967); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elrod v Burns,* 427 U.S. 347 (1976), *Branti v Finkel,* 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145 (1st Cir. 2006); *Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005); *Hager v. Pike County Bd. of Educ.*, 286 F.3d 366 (6th Cir. 2002) (A public employee's rights to political expression and association are protected by First Amendment, and even practices that only potentially threaten political association are highly suspect);

Mauk v. Pennington, 30 Fed. Appx. 516 (6th Cir. 2002); *Beattie v. Madison County School Dist*., 254 F.3d 595 (5th Cir. 2001) (A public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services); *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000); *DiRuzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000); *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999); *Wren v. Jones,* 635 F.2d 1277 (7th Cir. 1980), *cert. den*. 454 U.S. 832 (stating that if political affiliation appears to be the sole basis for dismissal, then a strict scrutiny analysis should be applied in accordance with *Elrod v. Burns* and *Branti v. Finkel*). Obviously, the Supreme Court did not intend such a result; *Garcetti* does not expressly or implicitly overrule any of the above cases.

Hall appears to concede that *Garcetti* does not supplant the *Elrod* line of cases, but nonetheless dismisses Plaintiff's First Amendment freedom of association claim as equivalent to her free speech retaliation claim. (Hall's Brief p.23). To do so, Hall engages in a neat bit of sophistry: He asserts that since "Back's speech is both protected and unprotected depending on the claim being made," and at the time of her dismissal "no such dichotomy exi[s]ted in the law," her freedom of association claim was not clearly established. (*Id*.). Hall criticizes the district court for "creating a new precedent by elevating speech that relates to . . . political affiliation above other speech . . ." (*Id*., p.24). Actually, there is

nothing particularly novel about the district court's approach. This Court has referred to "a government official firing a public employee who spoke out in opposition to the official or his policies" as "the classic political patronage First Amendment violation." *Lucas v. Monroe County Sheriff*, 203 F.3d 964, 977 (6th Cir., 1999). *Lucas* goes on to explain:

> Indeed, by promptly removing his most vociferous critics from the tow call list, the Sheriff inevitably sent a clear message to the County's other wrecker services about the importance of maintaining a positive relationship with the Sheriff's Department. Accordingly, we find that Plaintiffs have presented sufficient evidence to create a genuine issue of material fact on their political patronage claim, and, therefore, summary judgment was inappropriate.

Id. Nor is there anything novel about the "dichotomy" created by pleading two separate causes of action from the same set of facts and circumstances. *See Wysong v. Dow Chemical Company*, 503 F.3d 441 (6th Cir. 2007). Although both of Back's First Amendment claims arise from the same Constitution and the same statutory authority, a freedom of association claim is based upon one's *freedom to associate* – not one's freedom to speak. The district court did not hold that "speech concerning political affiliation is one rung higher in the hierarchy of First Amendment values"; it simply understood the difference between two distinct First Amendment claims, and ruled accordingly. (Hall's Brief pg. 25). Hall's argument would invalidate political patronage dismissal claims in any situation in which a plaintiff's political association is surmised by a defendant from the plaintiff's

speech. *Garcetti* would thus give *carte blanche* to public employers who wish to terminate merit employees based on their political beliefs in the event that those beliefs had been voiced by that employee at some point during the employment relationship. This result would be entirely unprecedented and unsound.

Furthermore, Plaintiff's decision to be a registered Democrat was a decision made in her capacity as a private citizen – not as a public employee pursuant to any official duties. Therefore, even if *Garcetti* may somehow apply to freedom of association claims, it clearly cannot apply to undermine the privately-held political beliefs of government employees in merit positions.

Instructive is *Adkins v. Board of Education of Magoffin County*, 982 F.2d 952 (6th Cir. 1993), in which the Sixth Circuit held that a high school secretary had stated a cause of action against a superintendent under 42 U.S.C. § 1983 solely for infringement of her right of association. Nowhere in the court's opinion was the issue of "public concern" raised, nor was the balancing test articulated by *Pickering*, for the simple fact that that line of free speech jurisprudence (including *Garcetti*) does not wholly apply to freedom of association claims in the context of public employment.

B. THE RECORD SUPPORTS AN INFERENCE THAT BACK WAS DISMISSED BECAUSE OF HER POLITICAL AFFILIATION

As stated above, Schrader and Hall argue that Back has not set forth a sufficient *prima facie* case for violations of her right to freedom of association.

Regardless of whether the issue is properly before this Court, it is clear that Back has presented allegations adequate to overcome Schrader and Hall's argument, even without the benefit of discovery.

1. Back's Complaint Adequately States a Cause of Action

Appellants appear to argue that Back's Complaint, despite its specific reference to freedom of association (R. 1, ¶ 40, Apx. pg. ___), does not sufficiently plead such an action. Surprisingly, neither Schrader nor Hall refers to the recently-discussed standard in *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1974 (2007). Admittedly, *Twombly* appears to have altered the familiar "no-set-of-facts" formulation used to evaluate complaints in the past. *Id.,* at 1974. This Court considered *Twombly* in *Weisbarth v. Geauga Park District*, No. 06-4189 (6th Cir. 8/24/2007) (6th Cir., 2007). *Weisbarth* states:

> The Second Circuit in *Iqbal* [*v. Hasty,* 490 F.3d 143 (2d Cir. 2007)] closely analyzed the text of *Twombly* and determined that it is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*. *Id.* (emphasis in original). *Iqbal* thus held that *Twombly*'s plausibility standard did not significantly alter notice pleading or impose heightened pleading requirements for all federal claims. Instead, *Iqbal* interpreted *Twombly* to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief.

This Court recently noted that in "*Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), decided after *Twombly,* the Supreme Court

reaffirmed that Rule 8(a) 'requires only a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Lindsay v. Yates,* 498 F.3d 434, n.6 (6th Cir., 2007). See also *Midwest Media Property, L.L.C. v. Symmes Township*, Ohio, 503 F.3d 456 (6th Cir. 2007). *Compare Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006) (dismissal was appropriate under 12(b)(6) where the complaint contained "no specific information . . . to alert the defendants `to the precise misconduct with which they are charged'" (brackets removed) (quoting *United States ex. rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002)).

Contrary to Hall's assertion, Back has no obligation to state specifically in her Complaint that Appellants knew of her political affiliations. Nor did she have an obligation to segregate the facts so as to draw specific boundaries around each claim in her complaint. On this point, this Court's recent decision in *Wysong v. Dow Chemical Company*, 503 F.3d 441 (6th Cir. 2007), is instructive. In that case, the district court found that the plaintiff's complaint stated only a retaliation "claim" under the FMLA, and refused to consider her FMLA claim under the interference theory. In its decision granting summary judgment for Dow, the district court determined that the plaintiff did not make her *prima facie* case for retaliation. This Court reversed on the interference issue, stating:

> Under our system of notice pleading a complaint need only provide "the defendant [with] fair notice of what the . . . claim is and the

> grounds upon which it rests." The district court's rejection of Wysong's interference-theory argument evidences an overly rigid approach which stands in conflict with our notice-pleading system. A defendant looking at Wysong's complaint would be on sufficient notice . . . that her FMLA claim could encompass either the interference theory, the retaliation theory, or both theories. . . . The claim has always been the same one: that Dow's actions violated the FMLA. Although we analyze an FMLA claim based on the interference theory differently from one based on the retaliation theory, notice pleading does not box plaintiffs into one theory or the other at the complaint stage . . . . [Internal citations omitted.]

Id., at 446. The same logic should apply to constitutional claims. The argument that the facts of Back's Complaint did not sufficiently plead a freedom of association claim and, therefore, did not make a *prima facie* case, is a red herring. *See also League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir., 2007) (holding that affidavits sufficiently *implied* individual plaintiffs' membership in plaintiff organization, and therefore established organizational standing). Back's Complaint sets forth adequate information from which a trier of fact could infer she was terminated for political reasons.

2. The Record Otherwise Shows a Violation of Back's Rights

The Supreme Court has instructed that "the precise requirements of a *prima facie* case can vary depending on the context and were `never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

> In *Swierkiewicz*, the Supreme Court unanimously held that a plaintiff who asserted federal employment-discrimination claims was not

> required to plead facts establishing a *prima facie* case to state a claim for relief. The Court stated that "[t]he *prima facie* case under McDonnell Douglas . . . is an evidentiary standard, not a pleading requirement." Thus, the Court held that an employment-discrimination plaintiff satisfies her pleading burden by drafting "a short and plain statement of the claim" consistent with Federal Rule of Civil Procedure 8(a). Provided that the plaintiff "`give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests,'" the complaint must be upheld.

Lindsay v. Yates, 498 F.3d 434, 439 (6th Cir., 2007) (internal citations omitted). The logic of *Swierkiewicz* has been extended to other areas of discrimination, *Lindsay* at 439 (citing *Meyer v. Bear Rd. Assocs.*, 124 Fed.Appx. 686, 688 (2d Cir. 2005); *Edwards v. Marin Park, Inc*., 356 F.3d 1058, 1061-63 (9th Cir. 2004)) and should apply here. Back has alleged a statutory basis and has set forth the factual predicate of her claims in her Complaint, *Lindsay*, at 440, and has bolstered those facts in subsequent filings. See Response to Merits of Defendant's Motion to Reconsider, R. 47 at pp. 3, 8, Apx. pp. ___) (alleging an illegal scheme within the OHS of hiring and firing based on political views).

If the district court had dismissed Back's freedom of association claim, it would have been reversible error, as evidenced by *Lucas v. Monroe County Sheriff*, 203 F.3d 964, 976 (6th Cir., 1999):

> The district court placed undue emphasis on Plaintiffs' failure to present evidence that the Sheriff had formally solicited them for a campaign contribution or that they had been vocal opponents of the Sheriff before 1995. . . . [T]he United States Court of Appeals for the First Circuit explained that "a plaintiff need not produce direct evidence of discriminatory treatment (a so-called 'smoking gun') to

> establish a *prima facie* case of politically discriminatory [employment action]." . . . To the contrary, we have held, time and again, that circumstantial evidence alone can support a finding of political discrimination." [Internal citations omitted.]

By contrast, in this case, this district court did exactly what it was required to do, i.e., view the applicable facts in favor of the plaintiff. *Cooper v. Parrish*, 203 F.3d 937, 944 (6th Cir. 2000).

III. SCHRADER AND HALL ARE NOT ENTITLED TO QUALIFIED IMMUNITY

In general, when the law is unclear, public officials performing discretionary functions are entitled to immunity in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, officials are "shielded from liability [and, indeed, from suit] for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Cope v. Heltsley*, 128 F.3d 452, 457 (6th Cir. 1997) (*citing Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Saylor v. Bd. of Educ. of Harlan Cty.,* 118 F.3d 507, 512 (6th Cir. 1997); *Pray v. City of Sandusky*, 49 F.3d 1154, 1157-58 (6th Cir. 1995)). "Thus, individual capacity defendants in § 1983 cases receive some benefit from legal doubt about the clarity of existing law." *McCloud v. Testa*, 97 F.3d 1536, 1542 (6th Cir. 1996).

Here, Schrader and Hall argue that Back's dismissal for her political beliefs was not a constitutional violation, and even if it were, that her rights to privately-

held political beliefs and associations were not "clearly established."

A. BACK'S DISMISSAL VIOLATED HER CLEARLY ESTABLISHED RIGHTS

Back's position is that Hall and Schrader wrongfully terminated her from her merit-based civil service position because of her political affiliations, pursuant to a conspiratorial arrangement designed to eliminate Democrats from state government. Back's termination violated her statutory rights under Ky. Rev. Stat. Ann. Chapter 18A, and her constitutional rights to freedom of association and belief under the First Amendment, as articulated in *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality), and subsequent cases. Under federal law, where a government seeks to justify practices of political patronage with regard to public employment, it must satisfy a standard akin to strict scrutiny. Specifically, "unless the government can demonstrate 'an overriding interest,' 'of vital importance,' requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment." *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) (internal citations omitted).

The Supreme Court in *Branti* expanded the general rule by holding that, although patronage dismissals were generally unconstitutional, "party affiliation may be an acceptable requirement for some types of government employment." *Id*.. at 517. The *Branti* court indicated that the plaintiff must make out a *prima*

facie case that he or she was discharged because of his or her political affiliation. The defendant then must show that the plaintiff's job is of the type that would qualify for an exception to the general rule. *Id*. *See also Caudill v. Butler,* 431 F.3d 900, 908 (6th Cir. 2005). It is this exception (hereinafter, the "*Branti* exception") that Schrader seeks to exploit by suggesting that Plaintiff's position was sufficiently political to warrant termination based solely on differences in political beliefs.

In *Cope v. Heltsley*, 128 F.3d 452, 460 (6th Cir. 1997), this Court set forth the appropriate criteria for the *Branti* exception:

> [T]o determine whether political considerations are appropriate in making personnel decisions for a certain position, [one] must examine the inherent duties of that position and the duties that the new holder of that position will perform." . . . "If this examination reveals that the position is inherently political in nature, then political affiliation is an appropriate requirement for the job." [Internal citations omitted.]

Under the standards set forth by the U.S. Supreme Court, this Court, Kentucky statutory law, Appellants' own arguments, and common sense, the argument that Back's position was "political" within the meaning of *Branti* is patently absurd. Back was hired for a merit-based position pursuant to a competitive interview process, and selected based on her qualifications and her long history of civil service. Pursuant to the advice of Executive Director Roberts, Back changed her position from one merit position to another primarily to avoid the illegal partisan political scheme perpetuated by Appellants.

The Kentucky legislature is in accord with Plaintiff's stance regarding the non-political nature of her former position. Back's former post falls within Ky. Rev. Stat. Chapter 18A, which governs Kentucky state personnel. Back's termination violated the clear mandate of KRS 18A, which prohibits political patronage dismissals for civil servants. KRS 18A, in proscribing discrimination based on political affiliation, does not prefer employees with "status" to probationary employees. The applicable portions of the chapter are as follows:

> KRS 18A.005(14) defines "employee" to be ". . .a person regularly appointed to a position in the state service for which he is compensated on a full-time, part-time, or interim basis."
>
> KRS 18A.005(19) defines "initial probation," as:
>
> . . . the period of service following initial appointment to any position under KRS 18A.010 to 18A.200 . . . which must be passed successfully before status may be conferred as provided in KRS 18A.110 and by the provisions of this chapter.
>
> KRS 18A.005(36) defines "status" as ". . .the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period . . . ."
>
> KRS 18A. 111 reads in pertinent part, as follows:
>
> (1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position . . . and shall not have a right to appeal, except as provided by KRS 18A.095.
>
> * * *
>
> An employee who satisfactorily completes the initial probationary

> period for the position to which he was initially appointed to the classified service shall be granted status and may not be demoted, disciplined, dismissed, or otherwise penalized, except as provided by the provisions of this Chapter.
>
> KRS 18A.095(15)(a) provides that "(A]ny employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board,"
>
> KRS 18A.140(1) provides:
>
> No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions or affiliations or ethnic origin or sex or disability. No person over the age of forty (40) shall be discriminated against because of age.

(Emphasis added). KRS 18A.140(1) and/or KRS 18A.095(15)(a) were obviously violated by Back's termination. Despite a statutory scheme that protects even *applicants* from political discrimination (*see* KRS 18A.095(15)(a), reproduced *supra*), Appellants insist that discrimination against an employee without "status" should be permissible. The language of the statute is broadly inclusive and is clearly meant to protect public employees from the kind of arbitrary termination to which the Plaintiff was subjected. It does not say that the "person" must have "status," though the legislature certainly could have restricted it thusly. It is unquestionable that if Back had been dismissed because of her sex or ethnic origin, such dismissal would have clearly violated not only KRS 18A, but also the state and federal constitutions, regardless of whether Back had "status." The prohibition

against political discrimination appears in the *same sentence* of KRS 18A.140, *supra*, as the prohibition against discrimination based on race and sex. Under Schrader and Hall's interpretation, they could have fired Back for being Mexican, Jewish, or handicapped without violating KRS 18A.140. The legislature clearly did not intend such an outcome.

Furthermore, the argument that Back is not entitled to relief because she had not attained "status" is squarely at odds with the Kentucky Court of Appeals' decision in *Bunch v. Personnel Bd.,* 719 S.W.2d 8, 10 (Ky. App. 1986), in which the court criticized the Personnel Board for applying "a technical requirement of its policies to relieve the appellant of his statutorily created rights." Presciently, the court followed up by stating: "It would be safe to assume that the same technicality could be used in a similar way with persons in situations like the appellant's." *Id.* This technicality is precisely what Appellants attempt to exploit; despite Back's lengthy term as a civil service employee, and the fact that she was encouraged to change positions by the Executive Director of OHS, Appellants assert they are entitled to qualified immunity protection. Schrader and Hall thus illegally discriminated against Back solely on the basis of her political beliefs and now seek to avoid liability on the basis of a situation which *they created*.

Additionally, Schrader cites what is referred to in *McCloud* as the "*Rice* canon" (so named for *Rice v. Ohio Dept. of Transportation*, 14 F.3d 1133, 1142-43

(6th Cir. 1994) which the *Cope* court formulated thusly:

> [T]he principle is this: Where the legislature has classified a particular job as political, choosing not to accord it civil service protection, the 'appropriate requirement' exception to the *Elrod-Branti-Rutan* rule 'is to be construed broadly, so as presumptively to encompass positions placed by the legislature outside of the 'merit' civil service.' . . . 'Even after *Elrod* and *Branti*, the legislature's decision as to whether a particular job should be classified as political or nonpolitical is at least entitled, as the First Circuit has said, to 'some deference.'

Cope, 128 F.3d, at 459-460 (internal citations omitted). It is beyond any semblance of rational thought to suggest that this canon applies in favor of Appellants, or that it applies at all. Back's position was, of course, not placed "outside of the 'merit' civil service" by the legislature; on the contrary, it was specifically designated a merit position and given all the statutory protections that adhere thereto. This canon is typically invoked in cases in which a legislature has improperly designated a job as political, in violation of the Constitution. Still, if one must stretch the judicial imagination to a rather painful breaking point by applying the *Rice* canon to the instant case, the deference owed to the legislature clearly cuts in favor of the Plaintiff. *See* Ky. Rev. Stat. Ann. 18A.140.

B. BACK'S DISMISSAL WAS OBJECTIVELY UNREASONABLE

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken. *Anderson v. Creighton*, 483

U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In order to conclude that the right which the official allegedly violated is "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* Under this test, the subjective views of the official on the legality of their official actions are irrelevant. *Anderson,* 483 U.S., at 641; *See also Cope*, 128 F.3d, at 458. Appellants assert that even if all of Plaintiff's allegations are true, a reasonable person would not have realized that participating in a criminal conspiracy wherein Democratic civil servants are systematically fired and replaced by Republican "insiders" would result in a violation of the constitutional rights of those terminated solely on the basis of their privately-held political opinions.[7] Appellants seem to understand the concept of "objective reasonableness" as one which would absolve them of wrongdoing in the event that *any* decision in *any* court says *anything* even remotely favorable regarding political patronage dismissals.

While it is true that the right in question must have been "clearly established" in a "particularized" sense, *Anderson*, 483 U.S. at 639-40, this rule does not mean, as Appellants have suggested, that the very same fact situation must

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[7] Appellee notes that high-ranking Fletcher Administration officials, including Fletcher himself, were indicted on criminal charges involving allegations factually similar to those presented by Back in the instant case.

have been previously held unconstitutional by a binding authority before an official can be said to have acted unreasonably. Such a rule would never provide relief to a Plaintiff bringing a § 1983 claim with even a marginally novel fact pattern. In *Caudill*, the Sixth Circuit clearly addressed this issue:

> The specific act . . . need not have been held unconstitutional for the right to be clearly established. *See Hope v. Pelzer,* 536 U.S. 730, 741 (2002) ("Officials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Anderson*, 483 U.S. at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.").

Caudill at 912 (parallel cites omitted). Thus, in *Caudill*, the aggregate holdings of three prior cases with different fact patterns (*Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1996), *Heggen v. Lee*, 284 F.3d 675 (6th Cir. 2002), and *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996)) sufficiently satisfied the Supreme Court's requirement that the law "clearly establish in a more particularized sense" that the act was unconstitutional. *Id.,* at 913. In light of this rule, Appellants cannot seriously assert that a reasonable person would not have known that their activities would result in a constitutional violation. It does not take a legal scholar to spot the unconstitutionality of firing merit system employees because of their previous affiliation with a different political party in clear violation of KRS 18A.140. Numerous factors lead to the inevitable conclusion that Back's termination was objectively unreasonable. The more salient of these factors are discussed below.

First, as discussed *supra*, it has long been the view of federal courts that political patronage dismissals are generally unconstitutional. In *Elrod v. Burns*, 427 U.S. 347 (1976), Justice Brennan delineated the practice and its ills thusly:

> Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection. And regardless of how evenhandedly these restraints may operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains.

Elrod, without more, should provide sufficient notice to a public official that patronage dismissals ought to be approached with extreme caution in order to avoid constitutional violation, even where a position is not afforded statutory protections such as those in KRS 18A.140. Naturally, thirty subsequent years of judicial opinions condemning the practice should make it more than obvious that patronage dismissals are unconstitutional. Even before *Elrod*, the Supreme Court found constitutional violations for adverse employment actions based on an employee's affiliation with the Communist Party (*United States v. Robel*, 389 U.S. 258 (1967); *Wieman v. Updegraff*, 344 U.S. 183 (1952)) and "subversive" organizations (*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). The Sixth Circuit has held that even different factions of the *same political party* are entitled to protection from the "objectively reasonable" qualified immunity defense

(*McCloud*, *supra.*) Yet, Schrader maintains that it was perfectly reasonable to fire Back simply because she was a Democrat.

As a corollary to this first point, the Court's attention is again invited to *Caudill v. Hollan,* 431 F.3d, at 911, wherein the court discussed situations in which a right is so "clearly established" that its violation is automatically considered to be objectively unreasonable. The court reasoned that "[t]he purpose of the clearly established prong of the qualified immunity analysis is to insure that the officials were on notice that their conduct was unconstitutional." *Id.* The question is whether the state of the law at the time of the alleged violation gave the defendant sufficient warning of the unconstitutionality of his acts. *Id.* (citing *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)). Given the long history of cases and statutes prohibiting the activity in which Hall and Schrader engaged, this Court should properly conclude that Back's rights were so "clearly established" at the time of her dismissal that the "objective unreasonableness" of her termination may be assumed.

The instant case is factually similar to *Caudill*. In that case, the defendant County Clerk received a memo that specifically warned new county executives not to use patronage dismissals. The defendant provided written notice to plaintiffs, deputy clerks, of her decision not to rehire them two months after receiving the memo. The defendant argued that she deserved qualified immunity, because the

law regarding patronage dismissals of Kentucky deputy county clerks was not clearly established. *Caudill*, 431 F.3d, at 903. This Court rejected this argument, holding that the defendant was not entitled to qualified immunity because the law in the Sixth Circuit with respect to patronage dismissals was clearly established at that time. *Id*., at 913. Furthermore, the memo placed defendant on notice that patronage dismissals, in general, were prohibited. *Id.,* at 914. In this case, Appellants had a *statute* – not just a memo – proscribing their unconstitutional activities.

Cope v. Heltsley, 128 F.3d 452 (6th Cir. 1997), is heavily relied upon by Schrader, but is easily distinguished. *Cope* involved a county clerk who was sued by former deputy clerks after they were passed over for reappointment when appellant took office. This Court found that the defendant was entitled to qualified immunity not because there was no constitutional violation, but because the law with regard to deputy clerks was not "clearly established" in 1993 so as to provide the defendant with sufficient notice. *Id.,* at 461. First, deputy county clerks had no statutory civil service protections under Ky. Rev. Stat. Ann. Chapter 18A. Moreover, *Cope* itself, along with subsequent cases finding constitutional violations for similar employment actions, had obviously not been available to the *Cope* defendant prior to her failure to reappoint the plaintiffs. The *Caudill* court, in denying qualified immunity under similar circumstances, addressed this very point

at some length:

> *Cope* is, at this point, of limited value as precedent. In *Cope*, this court assumed that a constitutional violation was present, but granted qualified immunity on the basis that the law was not clearly established in 1997. In general, it is of little consequence that this court held that a right was not clearly established at an earlier date. . . . A right not clearly established in 1994 [*sic*]. . . may become clearly established in the intervening time before 2002. Thus, relying almost exclusively on a case that held that a right was not clearly established many years ago is not conclusive or persuasive. . . .

Caudill, 431 F.3d, at 914 (emphasis added, internal citations and footnotes omitted).

For the same reasons, *Miracle v. Gable*, 452 S.W.2d 399 (Ky., 1970), held up as a sacred cow by Schrader (and, until recently, by Hall) in this action, is inapposite. Schrader reasons that it would be objectively reasonable to terminate someone in Back's position because *Miracle* "holds" that a probationary status employee can be terminated for political reasons. In truth, the "holding" of *Miracle* relates to the "timeliness and sufficiency" of a notice of discharge for unsatisfactory work performance. *Id.,* at 400. The relevant passage from *Miracle* is reproduced in context below:

> All parties to this appeal agree that Personnel Department Rule 11.3, entitled "Separation During the Probationary Period," defines the duties of appellee and the rights of appellant with respect to the discharge of appellant. This Rule is quoted: "If at any time during the probationary period, the appointing authority determines that the services of the employee have been unsatisfactory, an employee may be separated from his position without the right of appeal or hearing. The appointing authority shall notify the employee in writing at least

> ten (10) working days prior to the effective date of separation of the reasons for the separation."
>
> Obviously some "ambiguity exists" in Rule 11.3 as admitted by appellee. But when the two sentences are read together, we conclude that the second sentence is directory as to time.
>
> Under this Rule appellee had a right to terminate appellant's employment for any reason, political or otherwise, during the first six months of her employment, and that right continued up to the last day, the last hour, and the last minute of the six-months period "without the right of appeal or hearing" to appellant. Well it may be that in event notice of "separation" were given on the last day of the probationary period, appellant would have ten days in which to try to dissuade the "separation" arrangement. But in the present case, appellant was paid for the last four days of her probationary period, plus six additional days. That is all to which she was entitled. Although numerous cases and other authorities are cited by appellant and appellee and in the trial court's findings of fact and conclusions of law, we do not find any of them directly in point on the specific question here presented.
>
> Appellant contends, as noted above, (1) she was entitled to notice of separation "at least ten working days prior to the effective date of separation," and (2) the notice to her was insufficient in that no reason was given for the separation.

452 S.W.2d, at 400-401. Nowhere in the opinion does an allegation of a political patronage dismissal appear, nor is there any reference to anything "political" whatsoever aside from the court's singular use of the word early in the opinion. The passage referred to is merely dicta from a state court, and is of no precedential value when the intervening thirty-seven years of case law on this subject is taken into account.

In order to have relied reasonably on *Miracle* in terminating Back,

Appellants would have to have read *only the above passage* and ignored the intervening four decades of federal and state cases and statutes which roundly decry political patronage dismissals. *See, e.g., Elrod v Burns,* 427 U.S. 347 (1976), *Branti v Finkel,* 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145 (1st Cir. 2006); *Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005); *Hager v. Pike County Bd. of Educ.*, 286 F.3d 366 (6th Cir. 2002) (A public employee's rights to political expression and association are protected by First Amendment, and even practices that only potentially threaten political association are highly suspect); *Mauk v. Pennington*, 30 Fed. Appx. 516 (6th Cir. 2002); *Beattie v. Madison County School Dist*., 254 F.3d 595 (5th Cir. 2001); *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000); *DiRuzza v. County of Tehama*, 206 F.3d 1304 (9th Cir. 2000); *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999); *Wren v Jones,* 635 F2d 1277 (7th Cir. 1980), *cert den* 454 U.S. 832. Such deliberate ignorance of intervening case law is not allowed under the Sixth Circuit's holding in *Caudill, supra.*

Moreover, *Miracle* is not about any kind of discrimination at all. At issue in *Miracle* was the *sufficiency of notice* given to plaintiff/appellant prior to her termination. The court's *holding* in that case, in part, was that it was not incumbent on plaintiff's employer to provide her with an adequate reason for her termination during her probationary period. In this case, Back does not contend that she could

not have been legitimately fired for a benign reason (or no reason at all) during her probationary period; rather that she simply could not legally have been subject to political discrimination. It cannot seriously be argued that the *Miracle* case could be construed as holding that state officials have *carte blanche* to fire merit employees for their political affiliations. It is far more likely that Hall and Schrader understood the simple rule that Federal law (and common sense) dictates: political patronage dismissals are *patently unconstitutional*. By the same token, the legislature's reenactment of the provisions of 18A did not tacitly approve the Kentucky Supreme Court's "holding" that employees could be fired for political reasons, because no such "ruling" exists.

> Judge Hood's Opinion perhaps offers the best summation of *Miracle*:
>
> > Unreliable and not on point, the *Miracle* case is more than thirty years old, has never been cited to by a Kentucky court in a published opinion, and interpreted a personnel department rule rather than the merit system statute. Moreover, the statement that a merit employee with probationary status could be fired for political reasons is dicta because the case addressed the timeliness and notice, not the justification, of the employee's termination.

(R. 55 pg.8, Apx. pg. _____) Contrary to Schrader's assertion, this passage alone provides sufficient justification for the district court's ruling regarding qualified immunity. The defendant has the burden of presenting some sort of initial justification for a qualified immunity defense, *Poe v. Haydon,* 853 F.2d 418, 425 (6th Cir. 1988), *cert. denied,* 488 U.S. 1007 (1989)), and Appellants chose to hang

their hats on one hook, i.e., the *Miracle* case. Having duly deflated *Miracle*, the district court was not obliged to address Appellants' arguments any further, since they had put forth no other justification that would entitle them to immunity for committing such an obvious violation of Back's constitutional rights. Schrader also comments on the difficulty in distinguishing dicta from "controlling authority," (Schrader's Brief pp.27-28) but does so disingenuously; no reasonable person, whether a "highly-skilled jurist" or not (*Id.*), would read the supposedly critical passage in *Miracle* as anything but dicta.

CONCLUSION

For the foregoing reasons, the district court's opinion denying qualified immunity to Appellants Hall and Schrader should be affirmed.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitation requirements of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. It contains 10,170 words according to the word count function of the software used to create the brief.

_____
THOMAS E. CLAY, P.S.C.

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of January, 2008, the foregoing brief was served via U.S. Mail on the following recipients:

DESIGNATION OF APPENDIX CONTENTS