ORAL ARGUMENT NOT YET SCHEDULED

Case Nos. 20-5183 & 20-5208

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LISA GUFFEY and **CHRISTINE SMITH**,

Plaintiffs-Appellees/
Cross-Appellants,

v.

ROSLYNN R. MAUSKOPF, in her official capacity as
Director of the Administrative Office of the United States Courts,

Defendant-Appellant/
Cross-Appellee.

Appeal from the U.S. District Court for the District of Columbia
(No. 1:18-cv-01271)

REPLY BRIEF FOR APPELLEES/CROSS-APPELLANTS

Scott Michelman
Arthur B. Spitzer
Michael Perloff
American Civil Liberties Union
Foundation of the District of Columbia
915 15th Street NW, Second Floor
Washington, DC 20005
(202) 601-4267
smichelman@acludc.org

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GLOSSARY

AO	Administrative Office of the United States Courts
FEC	Federal Election Commission
JA	Joint Appendix
NTEU	*United States v. Nat'l Treas. Employees Union*, 513 U.S. 454 (1995)

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's response and reply brief adds little to its case, instead mainly reiterating its plea to lower its burden under the applicable First Amendment standard and rehashing its speculative theories about how all of the Challenged Restrictions are needed to prevent harms that have never occurred in more than eight decades (including in the era of social media) and for which it provides no evidence.

Regarding the cross-appeal, the government makes (or, mainly, repeats) three errors relevant to the Driving and Organizing Restrictions: It applies the wrong standard to two of its interests that it claims justify all of the Challenged Restrictions. *See* Part I below. It persists in unrealistic speculation about the danger of AO employees' political activities generally, insisting that it should not be held to "rigid chains of logical inference" when it deprives its employees of their First Amendment rights. *See* Part II below. And it tries to defend the district court's reasoning on the Driving and Organizing Restrictions by mischaracterizing that reasoning and relying on precedents that have been eclipsed by the Supreme Court's modern First Amendment jurisprudence. *See* Part III below.

ARGUMENT

I. The Government's Plea To Water Down The Applicable Standard Finds No Support In Precedent Or Logic.

In arguing that the district court should have lowered the government's burden to show that its asserted Inter- and Intra-branch Interests justify all nine of the

Challenged Restrictions, the government never addresses the fundamental hole in its argument: that such a ruling would be inconsistent with the standard set by the Supreme Court in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"). and recently reiterated in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448 (2018). This standard—which the government misleadingly refers to as "intermediate scrutiny," Gov't Resp. & Reply 5, even though the Court has explained that it "more closely resembles exacting scrutiny," *Janus*, 138 S. Ct. at 2472—requires the government to "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government," which may include the appearance of impropriety. *NTEU*, 513 U.S. at 468, 473 (cleaned up). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475 (cleaned up).

As the district court explained, it lowered the bar as to the government's asserted Public Perception Interest only because the court was following the lead of the Supreme Court's decision in *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015)—a case about the public perception of judicial integrity. JA 210-14. The district court rightly recognized that no Supreme Court or D.C. Circuit decision

justifies any modification of the *NTEU* standard for the other interests at issue here. *Id.* at 213-14.

The government attempts to cobble together pieces of *Weaver v. U.S. Information Agency*, 87 F.3d 1429 (D.C. Cir. 1996), and *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), to support its view, but these cases cannot bear the weight the government places on them. *Weaver* concerned prepublication review of employee speech that was related to their employment, where the employees had access to classified information and other "material of official concern" whose publication could harm national security or foreign relations. *See* 87 F.3d at 1435-36, 1439, 1442. Crucially, the regulation in *Weaver* prohibited no speech and imposed no penalty for speaking. *See id.* at 1440 ("[T]he regulation ... requires only that employees submit to a process of prepublication review. No speech is forbidden."). Indeed, "[i]f … the regulation were read to authorize punishment for publication … then the regulation would raise serious constitutional issues." *Id.* at 1436. The government tries to squeeze out of *Weaver* the notion that pure conjecture can suffice outside the *Williams-Yulee* context, but it does so mainly by making inferences from the concerns of the *dissent*, not citing anything in the majority's analysis requiring that result. *See* Gov't Resp. & Reply 9. The only point for which the government cites the *Weaver* majority opinion is that the government's declarant could establish the important factual proposition that the low-level employees can come into contact

with classified information without knowing it. *See id.* (citing 87 F.3d at 1441). Accepting that factual generalization about access to classified information is a far cry from what the government does here, which is to make guesses without evidence about the hypothetical future reactions of high-level government officials to hypothetical future situations precipitated by other employees' hypothetical future actions. Nothing in *Weaver* supports this method of carrying a First Amendment burden, much less in a situation where a speech prohibition (rather than mere delay) is at stake and where the government could have come forward with direct evidence of the high-level officials' concerns (if they actually existed) but did not.

As to *Blount*, the government argues that the concrete examples the government used to meet its burden in that case did not count because the court preceded a discussion of these examples with the words "in any event"—which the government takes to mean that what followed was unnecessary to the court's conclusion. *See* Gov't Resp. & Reply 10 (citing 61 F.3d at 944-45). Common usage indicates the opposite: that what followed "in any event" was the court's bottom-line rationale regardless of what preceded it. *See* "In any event," Merriam-Webster.com Thesaurus, https://www.merriam-webster.com/thesaurus/in%20any%20event (accessed Mar. 6, 2021) (defining "in any event" to mean "whatever else is done or is the case"). The government's curious interpretation of this phrase is far too thin a reed to support a departure from the governing standard set forth by the

Supreme Court. And the discussion preceding the phrase "in any event" does not prove the government's point, either. The conflict-of-interest concern that underlay the government's challenged regulation was one that the challenger "himself remarked on national radio" was a real one. *Blount*, 61 F.3d at 945. No such concession is available to the government here; Plaintiffs have, throughout this litigation, strenuously objected to the government's multi-layered speculation about the supposedly harmful nature of Plaintiffs' speech.[1]

As in its opening brief, the government cites *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), and *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017), and it now adds *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000), but these cases could not water down the *NTEU* standard because they were not about the *NTEU* standard at all. To the extent the government is trying to make a point about the malleability of First Amendment evidentiary requirements in general, it backfires, because right after

[1] The government also tries to pit Plaintiffs' arguments about *Weaver* and *Blount* against each other, arguing that at least one of them must be wrong because Plaintiffs' theory is that "this Court declines to require proof of past harm when obtaining such proof is either easy *or* hard." Gov't Resp. & Reply 11. That framing, though rhetorically clever, compares apples to oranges, because *Weaver* was not about a *prohibition* on speech. Moreover, *Weaver* did not suggest (nor do Plaintiffs) that the government's burden in that case was lessened—only that it was easily met where (as noted above) the government's evidence supported the connection between the employee speech to be reviewed and the government's interest, and where the court understandably concluded that "advance review is plainly essential to preventing dissemination of the information." *Weaver*, 87 F.3d at 1442.

recognizing in *Nixon* that the precise quantum of evidence required is not fixed, the Supreme Court set a very clear floor that undercuts the government's position as to *all* of its interests: "We have never accepted mere conjecture as adequate to carry a First Amendment burden[.]" 528 U.S. at 392. Against the backdrop of such a categorical statement, combined with the specific requirements of *NTEU*, the district court was quite right not to venture beyond the narrow exception it created to the usual standard in light of the specific holding in *Williams-Yulee*.

Moving beyond the case law, the government's two other arguments in favor of its diluted standard are either unsupported or demonstrably wrong. The government asserts, first, that providing evidence from witnesses with first-hand knowledge would be "extraordinary" because these witnesses could be judges or congressional staff or members, Gov't Resp. & Reply 12, and second, that the Inter- and Intra-branch Interests "cannot be neatly segregated from" the Public Perception Interest, *id.* at 14. But the government never explains *why* a judge or member of Congress—or a former judge or congressional staffer—could not provide a declaration to attest to the need for the restrictions that the government claims are so important. Indeed, far more "extraordinary" than providing a declaration from a high-ranking witness would be for the government to be able to strip 1100 employees of their First Amendment rights without any evidence at all. And the government's claim that all of its interests are "intertwined," *id.*, is belied by the fact

that the government did not even dream up its alleged Inter- and Intra-branch Interests until the briefing on summary judgment—a year into this litigation and even longer after it first proposed and promulgated the new Code. *See* Pls.' Principal Br. 6-7 (recounting the evolution of the government's claimed interests).

The district court applied the correct standard to evaluate the government's asserted interests.

II. The Government Reiterates Its Reliance On Unrealistic Speculation And Tries To Dress Up Guesses About Future Third-Party Reactions To Hypothetical Events As "Evidence."

As to the reasonableness of the government's hypotheticals—which underpin the government's case as to the Driving and Organizing Restrictions (along with the other Challenged Restrictions)—the government insists over and over that it has "evidence" (or "uncontroverted evidence") that its feared harms are real. Gov't Resp. & Reply 24-25, 29, 34, 37, 47. But by "evidence" all the government means here is declarations containing predictions about what individuals other, often unspecified, individuals will think about a general category of hypothetical future events. *See* Pls.' Principal Br. 34-35. That is not evidence within the meaning of Rule 701, because it is not based on the declarants' actual "perception" of anything. *See* Fed. R. Evid. 701(a). The court rightly treated these statements not as stating "facts" but as predictions that are only as persuasive as they are realistic. *See* JA 218-23. Ultimately, what the government offers as "evidence" are guesses by lay

witnesses, and the fact that the lay witnesses have sworn to these guesses does not make them any less guesses.

And these guesses remain unrealistic, as the district court rightly found. In the face of a scandal-free eighty-year history and sworn declarations (from its own declarants, no less) attesting to the AO's strong reputation for non-partisanship even in the era of social media, *see* Pls.' Principal Br. 32-34, the government repeats its unconvincing comparisons of AO staffers to servicemembers of the U.S. Navy, *see* Gov't Resp. & Reply 21, 23, 30, and its logical leap from a recent controversy over a Judicial Conference recommendation *by a judge* to its hypotheses about the possible effects of political activities *by AO staffers*. *Compare id.* at 24 (referring to a "controversy over a draft advisory opinion" leading to a "congressional request to the AO for information"), *with* Pls.' Principal Br. 38 (noting that the controversy stemmed from the actions of the Judicial Conference itself, not the AO, with particular attention to the conduct of a judge). To those, the government adds new and equally unrealistic arguments, comparing AO staffers, for instance, to former President Trump's senior advisor Kellyanne Conway, *see* Gov't Resp. & Reply 43, and imagining for the first time that AO staffers might be doxxed, because anyone can be doxxed, *see id.* at 18-20. Of course, Kellyanne Conway is well-known; the AO is not. And the fact that anyone can be doxxed does not demonstrate that malevolent political actors would have an incentive to dox *AO staffers in particular*

(something that the government made no record of ever having happened, either before the new Code or while it was enjoined). Indeed, the government's argument, if accepted, would justify applying its Code to every federal employee. Again, the fundamental point is that there is no reason to believe that propagandists, foreign or domestic, who are attempting to sow doubt about the integrity of one of our branches of government, would seek out as examples the off-duty conduct of the least-known and least-powerful people in that branch. *See* Pls.' Principal Br. 36-42.

The parties can go back and forth about the government's hypotheticals, but at the heart of the government's theory remains its chain of speculation that is both too long and too implausible to serve as a legitimate basis for stripping AO employees of their rights. *See id.* at 29-30 (detailing and defending the district court's reasoning in this regard). Having conceded that the AO is "not well known," Gov't Resp. & Reply 22, the government never justifies its perfect-storm hypothesis that the public would both—in the words of the district court—be "so attuned to the inner workings of the federal judiciary that they have heard of the AO" but "at the same time misapprehend its basic role." JA 221. The government also never explains why "the public would interpret routine acts of political expression—such as making a $100 donation or wearing a button or putting up a yard sign—as evidence of *such extreme partisanship that the AO employees would choose to subvert the processes of judicial decision-making*." *Id.* (emphasis added).

Ultimately, the government gives the game away when it asks the Court to reach beyond "rigid chains of logical inference" to accept its leaning tower of assumptions. Gov't Resp. & Reply 21. If that characterization of its own arguments does not demonstrate that the government's feared harms are "conjectural" rather than "real," *NTEU*, 513 U.S. at 475, then the *NTEU* standard means nothing.

Trying to add up controversies arising from *non*-AO employees' activities, together with the general existence of social media and partisanship, to reach the conclusion that political activities of *AO employees in particular* will undermine faith in the judiciary, the government argues that the AO is inseparable from the rest of the judicial branch, whose reputation will remain only as strong as the perceived political neutrality of its most obscure member. *See, e.g.*, Gov't Resp. & Reply 17, 22. That view defies both common sense and precedent. The government suggests that the judicial branch as a whole is special in its need for neutrality, but in fact it is *judges* who are special in that regard, because of their job of adjudicating cases. *See Williams-Yulee*, 575 U.S. at 445-47 (discussing the unique role and history of judges as impartial adjudicators). The government's error in conflating AO employees with judges themselves and with other judicial-branch employees more closely associated with adjudications undercuts its attempt to posit a slippery slope from AO employees' political activities to judges' political activities. *See* Gov't Resp. & Reply 45.

The same error pervades the government's analogy to the courthouse code. The government cites a few sentences in one of its declarations comparing AO and courthouse employees regarding a few functions. *See id.* at 40-41. But without having made a record comparing the various functions performed by employees of each group and comparing the government's rationales in limiting the speech of each, the government cannot carry its "heavy" burden, *NTEU*, 513 U.S. at 466, to justify its sweeping restrictions here by reference to restrictions (whose constitutionality remains untested) on a different group of employees.

The conflation problem also undermines the government's attempt to dismiss Plaintiffs' comparisons to the Hatch Act. Plaintiffs do not dispute that the importance of *judges'* own neutrality is on par with the most sensitive executive branch officials. But it is simply not the case that all employees of a single branch are alike in terms of their roles and the restrictions that may constitutionally be applied to them. The Court recognized as much in *NTEU*, where it rejected the view that assumptions made about "judges or high-ranking officials in the Executive Branch" could be "reasonably extend[ed] ... to all federal employees below grade GS-16, an immense class of workers with negligible power to confer favors." 513 U.S. at 473. A similar recognition led Congress to relax the scope of many of the Hatch Act's prior restrictions. *See* Pls.' Principal Br. 61 n.9. Although the government posits the existence of certain executive branch officials for whom the

"further restricted" designation might be weaker than others, *see* Gov't Resp. & Reply 49-50, that is not a matter on which the government made any record below, either in terms of what those officials do or what interests might or might not justify their inclusion in the "further restricted" category. The government's failure to make a record in the district court does not give it a green light to introduce new speculation on appeal.

The government's response to Plaintiffs' reliance on the holding of *NTEU* is to adopt a seriously blinkered view of that decision, reducing it to a ruling about whether the government could justify the precise contours of the speech restriction at issue there on the grounds of "administrative convenience." Gov't Resp. & Reply 31-32. In fact, the Court's discussion of the inadequacy of "administrative convenience" as a First Amendment rationale arose only because the Court had first rejected the government's primary defense of its law: that the ban on the receipt of honoraria for speech activities by low-level employees was necessary to prevent the appearance of impropriety. The Court took on that rationale squarely, rejecting a government interest built (like the one here) on inference rather than evidence:

> The Government's underlying concern is that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities. This interest is undeniably powerful, but the Government cites no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16.

NTEU, 513 U.S. at 472. Only because the Court did not find Congress's main justification convincing did it turn to consideration of administrative convenience. *See id.* at 474. In concluding its constitutional analysis, the Court returned to the primary government interest asserted—like here, a public-perception interest—and found that the government was relying on the wrong assumptions:

> We recognize our obligation to defer to considered congressional judgments about matters such as appearances of impropriety, but on the record of this case we must attach greater weight to the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants.

Id. at 476. Thus, *NTEU* provides not only the applicable legal standard for this case but also a powerful reminder that the mere assertion of an appearance-of-impropriety concern does not, by itself, carry the government's heavy burden to justify blanket rules restricting government employees' core First Amendment speech.[2]

The government unpersuasively asks the Court to discount the significance of decades of history during which AO staffers participated in partisan politics during off-duty hours and away from the workplace without compromising the reputation of their agency—even in the social media era. The government's argument is that some of the same activities at issue here were restricted to some extent (i.e.,

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[2] The government is correct that Plaintiffs' other authorities did not concern judicial-branch employees, but the reasoning of these cases, like *NTEU*, supports the district court's appropriate skepticism of conjectural interests here—a point the government does not answer. *See* Gov't Resp. & Reply 33.

concerning candidates for federal office only). *See* Gov't Resp. & Reply 13, 26. But the fact remains that all of the activities prohibited by the Challenged Restrictions were permitted to at least some degree for decades, as the Code reflects. JA 83-86 (2016 AO Code of Conduct) § 260(b)(1)-(2), (c)(1), (c)(8), (c)(10), (e)(1), (e)(2)(C); *see also* JA 192-93 (decision below, describing the extent of political activities allowed under the prior Code). And the government has no answer at all to the question why, if off-duty partisan political participation by AO staffers were such a threat to the integrity of the judiciary, it cannot point to any incident of concern involving AO employees in the past two and a half years—a period when most of the Challenged Restrictions were enjoined as to federal, state, and local campaigns alike, and during a Presidential election subject to the same conditions of social media and partisanship that exist today. Had malevolent propagandists been inclined to try to undermine the reputation of the nation's judiciary by amplifying on social media the partisan political activities of AO employees, one would expect them to have done so during the 2020 election cycle.

More fundamentally, even if AO employees were a plausible target for a campaign to discredit the judiciary, the threat of disinformation campaigns could not justify stripping 1100 people of their First Amendment rights. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society." *United States v. Alvarez*, 567 U.S. 709, 727 (2012). The government's alternative—

a ban on political participation—grants the ill-intentioned and ill-informed a heckler's veto. The government's response to this problem is to return to its concern with "partisan or ideological agendas," Gov't Resp. & Reply 36, but the district court rightly concluded that "the First Amendment freedoms of fair and dedicated professionals should not be sacrificed at the altar of partisan myopia." JA 230. The government also contends that Plaintiffs do not take issue with the reasonableness of the government declarants' hypotheses about hypothetical peoples' hypothetical reactions to hypothetical events, *see* Gov't Resp. & Reply at 36, but that claim just ignores entire sections of Plaintiffs' prior brief, *see* Pls.' Principal Br. 36-45 (detailing the flaws and unrealistic assumptions in the government's logic).

Finally, the government's attempt to justify its sweeping restrictions on the ground that it has imposed a "correspondingly smaller" burden on the 1100 employees of the AO than if it would have had it applied its restrictions to a larger agency like the Navy, Gov't Resp. & Reply 25, is doubly misguided. It is true that the size and obscurity of the AO affects how realistic the government's predictions of harm are, but the government cannot avoid that problem by positing that it is imposing a "correspondingly smaller" burden because it is regulating a smaller agency. The plausibility of the government's hypotheticals and the seriousness of the burden it is imposing are simply not correlated at all. And the suggestion that a burden is somehow less serious because it affects "just" 1100 people—as if that is a

small number of people to strip of core First Amendment rights—is fundamentally mistaken as a matter of first principles, as the district court recognized. JA 215 ("[T]here is no requirement that a speech prohibition affect a threshold number of government employees before the more onerous *NTEU* test kicks in."). Rather, as the district court rightly concluded, restrictions that "entirely ban some 1,100 citizens from engaging in bedrock First Amendment expression—even though the activities would occur on the employees' own time, without the use of any government resources, and without a readily identifiable link to [their employer]" are just not "severe," but "as serious as they come." *Id.* The government has not come close to carrying its heavy burden to justify them.

III. The Government Misreads The District Court's Analysis On The Driving And Organizing Restrictions And Relies On Cases From A Bygone Era Of Lesser Concern For Restrictions On First Amendment Rights.

The government's defense of the district court's reasoning on the Driving and Organizing Restrictions does not withstand scrutiny.

First, the government tries to creatively reinterpret the district court's reasoning to cover the court's obvious error of law about what the Hatch Act provides. On the government's reading, the court, in relying on the provisions of the Hatch Act to justify the Driving and Organizing Restrictions, was merely describing the Hatch Act provisions *as they were upheld by the Supreme Court 50 years ago,* not as they are today. *See* Gov't Resp. & Reply 49. The district court's opinion

reveals otherwise, using present-tense verbs twice to refer to what the court clearly believed the Hatch Act *currently* provides. *See* JA 224 (topic sentence of the paragraph: "These two restrictions mirror those that the Hatch Act *places* on all executive-branch employees, who *are* prohibited from 'tak[ing] an active part in political management or political campaigns.'" (quoting 5 U.S.C. § 7323(b)(2)(A); alteration by the court; emphasis altered by Plaintiffs)). As Plaintiffs have explained, the court's understanding of the Hatch Act was mistaken. *See* Pls.' Principal Br. 57-58. Thus, the district court's reasoning begins with a faulty premise.

Second, the government fails in its attempt to defend the district court's reliance on outdated precedents—which either depend on premises utterly inconsistent with modern First Amendment law, like the deference to Congress reflected in *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) ("*Letter Carriers*"), or which predate entirely the Court's recognition that the First Amendment protects employee speech rights at all, like *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). *See* Pls.' Principal Br. 59-61. The government has no response to Plaintiffs' modern Supreme Court authority that is squarely at odds with the reasoning of *Letter Carriers* and *Mitchell*. *See id.* Instead, the government notes that modern cases continue to cite *Letter Carriers* and *Mitchell*. These citations do not demonstrate very much. It is true that *Letter Carriers* has not been overruled, but the Challenged Restrictions go far beyond the restrictions of the Hatch Act that

Letter Carriers upheld under a lower First Amendment standard. And the government's invocation of cases citing an aspect of *Letter Carriers* that has not been called into doubt—namely, its identification of the government's interests, *see* Gov't Resp. & Reply 50-51 (citing *Wagner*, 793 F.3d at 9, and *Citizens United v. FEC*, 558 U.S. 310, 341 (2010))—does not rehabilitate the decision's outdated approach to scrutinizing speech restrictions under the First Amendment. The rest of the government's citations on this point, which are to cases continuing to rely on the holdings of *Letter Carriers* and *Mitchell*, *see* Gov't Resp. & Reply 51, show only that these cases have not been overruled, not that their reasoning is still current.[3]

Third, the government tries to bolster the district court's speculation about the importance of the Driving and Organizing Restrictions by dismissing as irrelevant the piece of speculation that is weakest—the notion that AO employees will be observed and recognized performing the activities at issue. *See* Gov't Resp. & Reply 47-48. But the district court's conclusion that the Driving and Organizing

[3] One possible exception is *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1316 (Fed. Cir. 2003), which stated that *NTEU* did not "upset[] ... the balance recognized in *Letter Carriers*." Gov't Resp. & Reply 51 (internal quotation marks omitted). But that opinion, which concerned restrictions on running for office—a political activity not at issue in this case—is best read as discussing the relationship between *NTEU* and *Letter Carriers* regarding that specific activity. Otherwise, it would obviously be incorrect, as *NTEU* did explicitly change the balance regarding blanket employee speech restrictions *See NTEU*, 513 U.S. at 467-68 (identifying the limits of the *Letter Carriers* reasoning and introducing a "greater" burden on the government to justify "a sweeping statutory impediment to speech").

Restrictions "demonstrate a partisan tie so enduring that it could inspire an AO employee to inject partisan affiliations into her performance of day-to-day duties," JA 225, depends entirely on the presumption of observability: If it is unrealistic to imagine that AO employees will be spotted performing these activities and associated with their employer, then these activities cannot "demonstrate" to anyone the feared "partisan tie." Indeed, a key part of the court's justification for its holding was that these restrictions "involve more committed and *visible* participation in elections and campaign management" as compared with the other Challenged Restrictions. *Id.* (emphasis added).

The government halfheartedly ventures that perhaps some of these activities are observable, but its basis for this view consists entirely of speculation about what tends to be posted on social media and who is observable to whom at events. *See* Gov't Resp. & Reply 48. Even former AO Director Duff, the architect of the Challenged Restrictions, did not suggest that there were different reasons for the Driving and Organizing Restrictions than for the other Challenged Restrictions. On the contrary, he thought they were justified by the same considerations as the restrictions on attending partisan fundraisers, making political contributions to a party or partisan candidate, and being a member of a partisan political organization, *see* JA 152-53 ¶ 43—measures the district court rightly struck down as unjustified.

Ultimately, then, clearing away the district court's misreading of the Hatch Act and the government's reliance on defunct reasoning, the government can justify the Driving and Organizing Restrictions only with the same long chain of unrealistic speculation that the district court rightly held was insufficient as to the other Challenged Restrictions. *See* Part II above. The First Amendment does not permit the government to ban so much political speech and association based on so little.

CONCLUSION

The Court should hold that all nine of the Challenged Restrictions are unconstitutional.

March 22, 2021

Respectfully submitted,

/s/ Scott Michelman
Scott Michelman
Arthur B. Spitzer
Michael Perloff
American Civil Liberties Union
Foundation of the District of Columbia
915 15th Street NW, Second Floor
Washington, DC 20005
(202) 601-4267
smichelman@acludc.org

Attorneys for Plaintiffs-Appellees/Cross-Appellants Guffey and Smith

CERTIFICATE OF WORD COUNT

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) for a cross-appeal, because it contains 4,957 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word.

/s/ Scott Michelman
Scott Michelman