No. 24-1842

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANDRA HERNDEN

Plaintiff-Appellant,

v.

CHIPPEWA VALLEY SCHOOLS BOARD OF EDUCATION; FRANK BEDNARD, in his official capacity as former President of Chippewa Valley Schools and in his individual capacity; and ELIZABETH PYDEN, in her official capacity of former Secretary of Chippewa Valley Schools and in her individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan
Docket No. 22-cv-12313
The Honorable Mark A. Goldsmith

BRIEF OF APPELLANT SANDRA HERNDEN

Stephen A. Delie (P80209)
Derk Wilcox (P66177)
Patrick Wright (P54052)
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 49640
(989) 631-0900—voice
(989) 631-0964—fax
delie@mackinac.org

Attorneys for Plaintiff-Appellant

Dated: November 21, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellant makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   Answer: No, Plaintiff-Appellant is not a subsidiary or affiliate of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   Answer: No.

Respectfully Submitted,

/s/ Stephen Delie

Stephen Delie (P80209)
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
(989) 698-0900
delie@mackinac.org

Attorneys for Plaintiff-Appellant

Dated: November 21, 2024

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STATEMENT REQUESTING ORAL ARGUMENT

This appeal presents substantial questions regarding the application of the First Amendment's protections against retaliation by public officials, including the potential chilling effects of retaliatory acts that cause only nominal damages. If the District Court is correct, public officials would face no liability for retaliatory acts in cases where a reasonable person is objectively chilled but suffers no damages. Given the importance of the constitutional right at stake, and the number of citizens potentially impacted, Appellant Hernden respectfully submits that this Court's decision-making process would be aided by oral argument.

JURISDICTION

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. This is an appeal from the District Court's final judgment and order (Opinion and Order, R. 37, Page ID # 514; Final Order, R. 38, Page ID # 525) entered on September 30, 2024, denying Appellant Hernden's Motion for Summary Judgment (Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 220) and granting Appellees' Motion for Summary Judgment (Defendants' Motion for Summary Judgment, R. 25, Page ID # 279).

STATEMENT OF ISSUES

During the COVID-19 pandemic, public policy choices relating to the education of children became a core focus of public discourse. That discourse generally fell into two categories: those who supported in-person instruction, and

those who defended the need for remote learning. These divisions were intense, often leading to clashes between citizens and public officials over what was best for children.

This case arises out of one such dispute. Appellant Hernden repeatedly objected to Appellee Board's COVID-19 policies and encouraged a return to in-person learning. In response, Appellee Pyden (then-Secretary of Appellee School Board) complained to Appellant Hernden's boss, a police chief, which lead to an internal investigation into her behavior at school board meetings. That investigation ultimately cleared Appellant Hernden of all wrongdoing and (as a person of extraordinary firmness) did not deter her from continuing to advocate for her position at Appellee Board's meetings.

Over the course of 2020 and 2021, parents continued to protest what they viewed as overly restrictive COVID-19 policies at school board meetings. In response to these protests, and concerns raised by school boards, Attorney General Merrick Garland issued a memorandum indicating the Department of Justice (the "DOJ") was willing to investigate citizens for potential criminal charges for their behavior at school board meetings. The day after that memorandum was published, Appellee Bednard (then-President of Appellee School Board) filed a complaint with the DOJ specifically asking the it to take action to curb Appellant Hernden's

behavior. Upon information and belief, no further investigation by the DOJ occurred.[1]

The ultimate question this Court must resolve is: When does a threat that fails to give rise to compensatory damages still adequate to trigger nominal damages, which this Court has clearly identified as an available remedy for First Amendment retaliation claims? To answer this overarching question, this Court must address two specific issues:

1. Was the District Court correct that Appellee Pyden's complaint to Appellant Hernden's supervisor did not represent a credible threat to her economic livelihood and therefore was not an adverse action?

   The District Court would answer: "Yes"

   Appellant Hernden would answer: "No"

   Appellees would answer: "Yes"

2. Was the District Court correct in ruling that the threat of a criminal investigation by the U.S. Department of Justice was not a sufficiently adverse act to justify a First Amendment Retaliation Claim because no investigation occurred?

   The District Court would answer: "Yes"

[1] Appellant Hernden has no knowledge of any ongoing DOJ investigation. It remains possible that an investigation occurred, or is ongoing, but there is no evidence of that at this time.

Appellant Hernden would answer: "No"

Appellees would answer: "Yes"

STATEMENT OF THE CASE

This case arose due to disputes about the proper way to educate children during the COVID-19 pandemic. Appellant Hernden is a police officer and the mother of a special-needs child that was attending school within the Chippewa Valley School District when the pandemic struck. Complaint, R. 1, Page ID # 2. The District, like many others at the beginning of the pandemic, chose to move to virtual (and eventually hybrid) arrangements as opposed to traditional in-person learning. Complaint, R. 1, Page ID # 5. The failure to provide a fully in-person option in the fall of 2020 led to an impassioned debate between those who believed the risks of COVID-19 to children were being overstated, and those who believed the virus posed a significant risk to the health of both students and school employees.

Appellant Hernden was one of the parents within the Chippewa Valley School District who firmly believed the risk COVID-19 posed to school children did not outweigh the damage virtual and hybrid learning was doing to their education. As a result, Appellant Hernden began to speak at the public comment periods of Appellee Board's meetings. Complaint, R. 1, Page ID # 3. The general tenor of Appellant Hernden's complaints was that Appellee Board had made poor decisions and was motivated by politics rather than the needs of students or scientific evidence.

Complaint, R. 1, Page ID # 4. At that time, Appellant Hernden's comments became heated, although they stopped short of any actual threat. Complaint, R. 1, Page ID ## 18-22.

One particularly passionate exchange occurred via an e-mail that was initially sent to each member of the Appellee Board, but eventually became a one-on-one correspondence between Appellant Hernden and Appellee Pyden. *Id.* The parties exchanged emails on December 10 and 11, 2020, with Appellant Hernden accusing Appellee Pyden of failing to uphold her responsibilities to the public by making politically motivated decisions that were damaging students' ability to learn. *Id.* Both parties vigorously argued their respective positions, and at times the correspondence fell into invective. *Id.*

Following this exchange, Appellee Pyden forwarded the relevant e-mails from her Chippewa Valley Schools e-mail account to her personal e-mail account. Complaint, R. 1, Page ID # 17. She then forwarded those e-mails to Appellant Hernden's Supervisor, Chief Vince Smith, with the following message:

> Dear Chief Smith:
>
> I am writing with a concern regarding how one of your officers conducts herself in her own community. As you know, return to school has been a hotly contested issue, however, we must do what is best for the community at large. I have noticed that in fact your city hall has closed indefinitely to assist in stopping the community spread. As an elected official, I do expect criticism. I also expect people to disagree with me. However, I do not expect the level of disrespect, even after being asked to stop, that has been shown by one of your public safety

> officers, Sandra Hernden. As a public servant, more is expected. I do not believe that you would like anyone expressing this level of anger, disrespect and veiled racism in your community.[2] I have attached the exchange below. There have also been calls into our meeting, although I do believe there may have been some connection issues. I am disappointed that this type of behavior has been repeatedly rewarded with service awards. While I do not expect you to take any adverse action, I do believe that it is important for you to know how one of your officers is conducting herself within the community and perhaps offer some guidance.
>
> Thank you for your attention to this matter. May you and your family have a blessed holiday season.

Complaint, R. 1, Page ID # 17 (errors original).

Upon receiving Appellee Pyden's e-mail, Chief Smith directed a colleague, Chief Stager, to investigate Appellant Hernden's conduct. Complaint, R. 1, Page ID # 16. Chief Stager concluded that Appellant Hernden's conduct did not violate any departmental rules, and she was not disciplined. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 251. Appellant Hernden would later state, however, that she faced the stigma of being labelled a "veiled racist" at a time when police were uniquely susceptible to such claims following the death of George

[2] Appellee Pyden's basis for this statement is unknown. Upon information and belief, all parties involved in this matter are Caucasian. Further, there is no indication in the record of Appellant Hernden having made any derogatory statements based on race or national origin. As far as Appellant Hernden can best surmise, Appellee Pyden is attributing statements to her that, if they occurred at all, were made by third parties over which Appellant Hernden exercised no control.

Floyd. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID ## 251-253; See N. 5, *supra*.

Appellant Hernden was undeterred by these developments and continued to advocate for a return to in-person learning. Complaint, R. 1, Page ID # 4. Months later, the ongoing clashes between parents and school boards across the country continued, with Attorney General Merrick Garland eventually issuing a memo in response on October 4, 2021. Complaint, R. 1., Page ID # 28. That memo indicated that the U.S. Department of Justice would be willing to investigate whether parents' behavior at school board meetings rose to the level of criminality, and, if so, prosecute the responsible parents. *Id.* That same day, Appellant Hernden sent Appellees the following message:

> Once again, law on parents side. Maybe a lil more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me.
>
> 1st 2 were free…

Complaint, R. 1, Page ID # 26 (errors original, spacing cleaned up). Appellant Hernden then provided a hyperlink to an article discussing *Ison v. Madison Local School District Board of Education*, 3 F.4th 887 (6th Cir. 2021), which held that certain school board rules were an unconstitutional form of viewpoint discrimination. Appellant Hernden maintains that she provided this link because she believed the Appellee Board was violating her First Amendment rights by

preventing her from speaking at its meetings, and she intended to counsel the Appellee Board against continuing to violate her rights. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID ## 239-240.

The following day, Appellee Bednard sent the DOJ a message via a tip line available on the DOJ's website. Plaintiff Hernden's Motion for Summary Judgment R. 24, Page ID # 263. Appellee Bednard's message read:

> Hello DOJ,
>
> I appreciate your looking into these groups of people who bring such threats to anybody that stands in their way. The email I included below is from Sandra Hernden. This woman, Sandra Hernden, comes to every meeting to harass our board, administration, and community who oppose her views. She is over dramatic, and refuses to listen to any direction I may give her about her inappropriate and threatening comments. Last week she compared the tattoos Nazi Germany gave Jewish people to identify them in WW2 to Masking mandate of today (even though mask are not mandated in our district). We understand that Sandra has no children in our schools,[3] is not a resident of our district, and goes around to school board meetings throughout the tri county area to promote her agenda in any way that she can including threats and intimidation. She is part of a group called, "Mothers of Liberty" that attend our meetings. This group of people attend every meeting, and because their threats and demeanor are so intimidating, no community members who oppose their message will come to the meeting to speak because they are afraid of what this group would do to them for standing up to them.
>
> Our school district has over 15,000 students. We know that they have not gained any traction as it is the same 10-15 people that

[3] It should be noted that this allegation was factually incorrect. Appellant Herden originally sent three of her children to Chippewa Valley Schools, but at all relevant times, had at least one child in attendance. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 249.

> show up every meeting to intimidate, threaten, and harass. Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community.
>
> Thank you!

Complaint, R. 1, Page ID # 26 (errors original).

Appellant Hernden was not aware of this communication immediately—she later learned of it through a friend, who had received it via a Michigan Freedom of Information Act request. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 255. To date, Appellant Hernden has not been contacted by the DOJ, nor has she obtained any evidence that an investigation is ongoing. Plaintiff Hernden's Motion for Summary Judgment R. 24, Page ID # 256.

The parties filed cross motions for summary judgment. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID ## 220-278; Defendants' Motion for Summary Judgment, R. 25, Page ID ## 279-423. On September 30, 2024, the District Court entered an opinion granting Defendants-Appellees' Motion for Summary Judgment and denying Plaintiff-Appellant's Motion for Summary Judgment. Opinion and Order, R. 37, Page ID # 514. That opinion held that neither Appellee Pyden nor Appellee Bednard committed a sufficiently adverse action against Appellant Hernden to give rise to liability for First Amendment retaliation. Opinion and Order, R. 37, Page ID # 524. As a result, the Court also concluded that Appellee Board could not be found liable for these actions pursuant to *Monell v.*

Department of Social Services of the City of New York, 436 U.S. 658 (1978). Opinion and Order, R. 37, Page ID # 524.

SUMMARY OF THE ARGUMENT

Appellant Hernden contends that both Appellee Pyden and Appellee Bednard improperly retaliated against her for engaging in activity protected by the First Amendment. With respect to Appellee Pyden, Appellant Hernden contends that despite language in Appellee Pyden's e-mail to the contrary, the accusations made to her employer were intended to result in an adverse employment action that would discourage her from continuing to speak out at Appellee Board's meetings. Similarly, Appellant Hernden contends that Appellee Bednard's correspondence with the DOJ was an attempt to trigger a criminal investigation, also with the goal of discouraging Appellant Hernden from continuing to challenge Appellee Board's policies. Finally, given that Appellee Board's bylaws specifically designated Appellee Bednard as its spokesperson, and given that the language of his correspondence was drafted as though it were on behalf of the Board, Appellant Hernden contends that the Board as a whole should be held liable for his actions as a matter of Board policy under *Monell*.

Appellant Hernden admits that, even should she prevail on these claims, she has not suffered any compensatory damages. While Appellant Hernden contends that Appellees have violated her constitutional rights by retaliating against her for

engaging in protected First Amendment activity, she acknowledges she would only be entitled to nominal damages (along with attorney's fees under 29 U.S.C. § 1988(b)) should she prevail. She further recognizes that Appellee Pyden's and Appellee Bednard's conduct did not have a chilling effect on her but argues that said conduct would deter a person of ordinary firmness from continuing to exercise his or her First Amendment rights.

STANDARD OF REVIEW

> "A district court's grant of a motion for summary judgment is reviewed de novo. *Tepper v. Potter*, 505 F.3d 508, 513 (6th Cir. 2007). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists if, taking the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor, 'a reasonable jury could return a verdict for the nonmoving party.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
>
> Parties must go "beyond the pleadings" in advancing, or defending against, a summary judgment motion. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2721 (4th ed. June 2024 Update). Movant and opponent alike 'must support their factual positions either by directing the court's attention to materials in the record or by showing that the cited materials do not establish the presence or absence of a genuine dispute or that the opposing party cannot produce any admissible evidence to support the fact.' *Id.*; *see Viet v. Le*, 951 F.3d 818 (6th Cir. 2020). 'Conclusory statements unadorned with supporting facts' will not do. *Id.* at 823 (quoting *Alexander v. CareSource*, 576 F.3d 551 (6th Cir. 2009)). 'Just as a plaintiff may not rely on conclusory allegations to proceed past the pleading stage, so too a plaintiff may not rely on conclusory evidence to proceed past the summary-judgment stage.' *Id.* (citations omitted). Ultimately, the court must 'examine the pleadings to ascertain what issues of fact they present and then consider

> the affidavits, depositions, admissions, interrogatory answers and similar material to determine whether any of those issues are real and genuine.' Wright & Miller, *supra*, § 2721."

DeVore v. Univ. of Kentucky Bd. of Tr., 118 F.4th 839, 844-45 (6th Cir. 2024). The District Court's holdings were each in response to cross motions for summary judgment, and as such, this standard of review applies to all issues relevant to this appeal.

The elements of a First Amendment retaliation claim are: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). The District Court resolved this matter on only the second element.

ARGUMENT

This is an edge case, which tests a key question regarding liability in First Amendment retaliation cases: Can a plaintiff recover nominal damages when he or she has suffered no injury giving rise to compensatory damages because a defendant's attempt at retaliation fails to achieve the intended effect? Appellant Hernden suffered no loss of employment, no criminal prosecution, and no cognizable emotional damages. Despite this, the evidence demonstrates that

Appellees attempted to retaliate against Plaintiff for exercising her First Amendment rights. In order for constitutional violations that do not give rise to compensatory damages to be actionable, this Court must reverse the District Court's decision. It cannot be the case that the standard for adverse action in First Amendment retaliation cases ultimately depends on whether that retaliation is successful.

The District Court erred in concluding that neither Appellee Pyden nor Appellee Bednard engaged in conduct that resulted in an adverse action being taken against Appellant Hernden. While Appellant Hernden was able to resist the chilling effects these actions had on her speech, a person of ordinary firmness would have been dissuaded from continuing to exercise his or her First Amendment rights if faced with the potential loss of employment or a potential criminal investigation. This Court and the United States Supreme Court have made clear that nominal damages are recoverable when a litigant's First Amendment rights have been violated, even absent any other injury. *Parrish v. Johnson*, 800 F.2d 600, 606-07 (6th Cir. 1986), citing *Walje v. City of Winchester, Kentucky*, 773 F.2d 729, 731-32 (6th Cir. 1985); see also *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 802 (2021).

I. The District Court improperly concluded that neither the actions of Appellee Pyden nor Appellee Bednard were sufficiently adverse to the degree they would deter a person of ordinary firmness from engaging in conduct protected by the First Amendment.

While the District Court correctly outlined the elements of a First Amendment retaliation claim, it evaluated only one of those elements; namely,

whether Appellees' actions would have deterred a person of ordinary firmness from continuing to engage in conduct protected by the First Amendment.[4] In doing so, the District Court improperly indicated that a lack of compensatory damages necessarily means a *de minimis* injury for which no cause of action can lie. Should that opinion stand, future plaintiffs will only be able to recover damages for violations of their constitutional rights when defendants are successful in their attempts to retaliate against protected conduct, thereby triggering compensatory damages. The First

[4] The District Court noted that Appellees have contested whether Appellant Hernden's conduct was protected by the First Amendment but refused to reach a conclusion as to that issue. But Appellant Hernden's conduct was clearly protected by the First Amendment, as she was engaged in open criticism of the policy choices being made by public officials. This is core First Amendment activity, and any contention to the contrary would strip the First Amendment of any meaning. See, Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID ## 229-232; 239-240. See also, *Anders v. Cuevas*, 984 F.3d 1166, 1176 (6th Cir. 2021) ("In order to conclude that speech addresses a matter of public concern, this court must be able to be fairly characterize the expression as relating to any matter of political, social, or other concern to the community.") (citations omitted); *Block v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) ("The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'"), quoting *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

As to the third element of a retaliation claim, there is no plausible argument that Appellees' retaliatory conduct was not connected to Appellant's protected activity. As Appellant Hernden previously noted, both Appellee Pyden and Appellee Bednard specifically attached Appellant Hernden's communications to their respective complaints, and those complaints almost solely focus on those communications. Plaintiff's Motion for Summary Judgment, R. 24, Page ID ## 236-238, 241-242. No reasonable jury could conclude that Appellees' complaints related to anything other than Appellant Hernden's protected activity.

Amendment's protections against retaliatory conduct by public officials cannot be limited based on whether those official's attempts are successful, or there would be no purpose for recognizing nominal damages in cases where the First Amendment has been violated.

A. The District Court erred in concluding that Appellee Pyden's report to Appellant Hernden's supervisor was not a credible threat to her economic livelihood.

The District Court erred in concluding that Appellee Pyden could not have reasonably foreseen that her report could have led to Appellant Hernden being disciplined or terminated from her employment. The increased risk of these two outcomes is, itself, actionable.

The District Court concluded that a complaint to a citizen's employer by a public official could only give rise to a retaliation claim in two circumstances. In the first instance, a retaliation claim can succeed when "the defendant exerted 'pressure' on the employer to take action. Opinion and Order, R. 37, Page ID # 520, citing *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 725 (6th Cir. 2010). In the second instance, a complaint to a plaintiff's employer can be actionable under the First Amendment when "the defendant could 'reasonably [have] foreseen' that the complaint would lead to discipline because the defendant exercised some 'authority'

or influence over the employer." Opinion and Order, R. 37, Page ID # 520, citing *Paige v. Coyner*, 614 F.3d 273, 282 (6th Cir. 2010).[5]

The District Court misconstrued the legal requirements for a First Amendment retaliation claim by improperly importing an "authority" requirement into the foreseeability examination. Opinion and Order, R. 37, Page ID # 520. That requirement is found nowhere in *Paige v. Conyer*, which the District Court cited as the authority for that proposition. In *Paige*, a public official contacted the plaintiff's employer after she spoke out against a proposed road construction project. *Paige,* 614 F.3d at 276. The plaintiff's employer in that case did business with the county, and upon learning of plaintiff's outspoken opposition to the road construction plan, terminated her. *Id.* at 277.

In evaluating the *Paige* plaintiff's First Amendment retaliation claim, this Court explicitly separated the issues of whether an adverse action occurred and the injury it caused. The Court stated "As discussed above, Paige contends that, by calling her employer and making false statements regarding Paige's public speech,

[5] The District Court's opinion appears to combine these two standards for when a public official's complaint to a publish employer will constitute an adverse action. Without specifically analyzing either test in detail, the District Court instead focused on Appellee Pyden's lack of authority or influence over Appellant Hernden's employer and Appellant Hernden's lack of actual damages. Ultimately, however, the relevant question is whether Appellee Pyden could have reasonably foreseen her report as creating a threat to Appellant Hernden's economic livelihood. As such, this brief focuses on the foreseeability issue.

Coyner took an adverse action against her. The injury that Paige alleges was caused by this adverse action was her termination from Bunnell Hill." *Id.* at 281. Thus, even though Appellee Pyden's e-mail to Appellant Hernden's supervisor did not cause any actual injury, it can still be considered an adverse action.

This Court then turned its attention to whether the public official who reported Paige should have reasonably foreseen that she would be terminated due to his report. *Id.* at 281. At no point did this Court discuss the need for a public official to exercise some degree of authority or control over the private employer. *Id.* at 282. The only inquiry was whether a jury could find whether it was reasonably foreseeable that Paige's employer would respond to Coyner's report by firing her. *Id.* While a state actor must provide "significant encouragement, either overt or covert" to a private party in order to be liable for First Amendment retaliation, the *Paige* court did not endorse a requirement of authority or control. *Id.* at 279. Because the state actor "initiated the entire chain of events," it was appropriate to hold him accountable for Paige's ultimate injury so long as the result of that chain of events "was a reasonably foreseeable consequence" of his actions. *Id*. at 280.

Here, while Appellee Pyden's e-mail expressly disclaims the desire that Appellant Herden face an adverse employment action, a reasonable jury could nevertheless conclude that an adverse action was reasonably foreseeable. Accord, *Id.* at 280 ("Coyner could thus be liable not because the firing itself was state action,

but because a jury might find that the firing was a reasonably foreseeable consequence of the action taken by Coyner."). The District Court concluded that Appellee Pyden's correspondence failed to threaten Appellant Hernden's economic livelihood because Appellee Pyden's correspondence explicitly declared that she "did not expect the department to take any adverse action" in response to her letter. R. 1, Page ID # 17. This decision is in error, as it inherently requires a credibility determination, which is a question of fact for a jury. *Boutros v. Canton Reg'l Transit Auth.*, 997 F.2d 198, 202 (6th Cir. 1993) ("Moreover, it is not the function of the trial court but rather that of the jury to make credibility determinations on disputed questions of fact."). A jury that views the exchange between the parties could very well conclude that the disclaimer contained within Appellee Pyden's message to Chief Strager was nothing more than an attempt to retaliate while simultaneously avoiding liability for that retaliation. See, e.g., Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 270.

This factual conclusion would be particularly reasonable in light of the surrounding circumstances. Appellee Pyden's correspondence explicitly accused Appellant Hernden, a police officer, of engaging in "veiled racism" less than six months after the death of George Floyd.[6] Complaint, R. 1, Page ID # 17. Further, as

[6] George Floyd was killed on May 25, 2020. Press Release, United States Department of Justice, Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022), available

the District Court noted, the employers of other parents who had received complaints about those parents' conduct had subsequently terminated those parents' employment. Opinion and Order, R. 37 Page ID # 521, citing Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 234.[7] In that environment, it would have been reasonable for Appellee Pyden to foresee that her letter could have caused meaningful damage to Appellant Hernden's livelihood. And, contrary to the District Court's opinion, questions of foreseeability are generally reserved for the finder of fact. *Paige*, 614 F.3d at 282, quoting *Kerman v. City of New York*, 374 F. 3d 93, 127 (2d Cir. 2004). While Appellant Hernden maintains that the evidence is sufficient to demonstrate foreseeability as a matter of law, a jury should resolve this question if this Court disagrees.

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at: https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death. Appellee Pyden's complaint occurred on December 11, 2020.

[7] As Appellant Hernden previously outlined, a parent in a neighboring county had been fired after a school board president contacted her employer to complain about her opposition to COVID-19 policies. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 234, n. 5. The parent sued, and the issue was extensively covered by both state and national media. *Id.* Appellee Pyden's complaint to Appellant Hernden's supervisor was filed a mere seven days before the other parent's termination, and that firing would have been fresh in Appellant Hernden's mind upon later learning about Appellee Pyden's complaint. *Id.* Appellant Hernden's concerns were not, therefore, a nebulous and abstract anxiety about potential adverse employment consequences, but instead were grounded in concrete evidence that reports like Appellee Pyden's complaint had specifically resulted in adverse employment actions against other similarly-situated parents.

The District Court failed to recognize the factual issue relating to the credibility of Appellee Pyden's disclaimer because it conflated the two standards under which a public official's complaint to an employer can give rise to liability as a single standard. After relying on Appellee Pyden's disclaimer to dismiss the issue of whether her correspondence with Chief Stager was an attempt to exert pressure on Appellant Hernden's employer, the District Court further concluded that Appellee Pyden did not exercise "authority or influence" over the actions of Appellant Hernden's employer. Opinion and Order, R. 37, Page ID # 520. But the relevant question is whether Appellee Pyden could have reasonably foreseen her complaint leading to an adverse employment action against Appellant Hernden. By not addressing the foreseeability issue, the District Court avoided a factual question which is exclusively the province of a jury.

The District Court also places inappropriate weight on the fact that Appellant Hernden was cleared of wrongdoing, as well as the fact that Appellee Pyden's complaint and the subsequent internal investigation did not deter Appellant Hernden from continuing to engage in protected conduct. Opinion and Order, R. 37, Page ID # 521, citing *Whiting v. City of Athens*, 699 F. Supp. 3d 652, 660-61 (E.D. Tenn. 2023) and *Wurzelbacher v. Jones-Kelley*, 675 F. 3d 580, 585 (6th Cir. 2012). This holding confuses lack of compensatory damages for lack of injury. As Appellant Hernden has repeatedly pled, she is suing only for nominal damages, and she fully

admits that she has suffered no compensatory damages. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 267. To succeed in a First Amendment retaliation claim, a plaintiff need not show that an adverse action actually chilled her protected activity, but must only demonstrate that the adverse conduct would chill a person of ordinary firmness. *Kubala v. Smith*, 984 F. 3d 1132, 1139-40 (6th Cir. 2021). The violation of a constitutional right, even without further damages, is actionable so long as it meets this standard. See, *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Parrish*, 800 F.2d at 606-07; *King v. Zamiara*, 788 F. 3d 207, 213 (6th Cir. 2015) (recognizing the validity of claims for constitutional injuries distinct from mental, emotional, or physical injuries). Absent the ability to recover nominal damages, courts would be forced to countenance repeated constitutional violations, so long as those violations did not achieve their intended effect. This would create an absurd result that functionally eliminates the prospect of nominal damages in suits under 42 U.S.C. § 1983. Yet this is precisely what the District Court's opinion would accomplish due to it having conflated the requirement for an injury with the requirement that a plaintiff suffer compensatory damages.

By way of example, envision a scenario in which a public official requires a private citizen to spin a roulette wheel, in which she can only keep her job if the ball lands on red. No reasonable person would want to take this bet, yet, under the District Court's holding, a citizen who "wins" by not being fired is not injured by the

unrealized threat of a loss of employment. Because of Appellee Pyden's actions, Appellant Hernden's odds of being fired were greater than zero. What percentage chance of economic harm is a person of ordinary firmness supposed to accept? Twenty percent? Fifty percent? Any risk, so long as no economic harm actually occurs? This cannot be the standard. The purpose of nominal damages is to allow citizens to hold public officials accountable even when they suffer no compensable damages from a physical or mental injury. *Uzuegbunam*, 141 S.Ct. at 801.

The District Court also overemphasized the fact that Appellant Hernden's First Amendment activity was not chilled in reaching the conclusion that Appellee Pyden's complaint would not have deterred a person of ordinary firmness from continuing to engage in protected conduct. Opinion and Order, R. 37, Page ID # 522. While this factor can be used to support a conclusion that a retaliatory action did not have a sufficiently adverse effect to trigger liability, it is insufficient to conclude the analysis. "[T]he Sixth Circuit has never required that an individual plaintiff actually be chilled in the exercise of his First Amendment rights to succeed on a retaliation claim." *Hazel v. Quinn*, 933 F.Supp.2d 884, 891 (E.D. Mich 2013), citing *Ctr. for Bio-Ethical Reform Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007). Furthermore, while Appellant Hernden's speech was not chilled, "the issue is whether a person of ordinary firmness would be deterred, not whether the plaintiff himself was actually deterred." *Holzemer v. City of Memphis*, 621 F.3d 512, 525 (6th

Cir. 2010) (citation omitted). This Court has recognized that "a threat to take action tangibly affecting employment status" is an adverse action sufficient to give rise to liability for First Amendment retaliation when those threats were designed to threaten one's economic livelihood. *Fritz*, 592 F.3d at 728, citing *Samad v. Jenkins*, 845 F.2d 660 (6th Cir. 1988); see also *Kubala*, 984 F. 3d at 1140 ("We have held that "threats alone can constitute adverse action if the threat is capable of deterring a person of ordinary firmness from engaging in protected conduct."), citing *Hill v. Lappin*, 630 F.3d 468, 474 (6th Cir. 2010). It has also recognized that the ultimate outcome of such a threat is "not directly relevant to whether [public] officials took actions that are cognizable as an adverse action." *Id.* A contrary holding would penalize those of particularly resilient constitutions, while overly compensating those uniquely sensitive to the impacts of retaliatory acts.

Although Appellee Pyden's complaint denied that it was intended to cause Appellant Hernden an adverse employment action, all evidence to the contrary suggests a retaliatory motive. By reporting Appellant Hernden as a "veiled racist" who was engaged conduct unbecoming of a police office, Appellee Pyden put Appellant Hernden's economic livelihood at significant risk. While, thankfully, Appellant Hernden ultimately avoided any adverse employment action, the mere threat to her livelihood is nevertheless actionable.

B. The District Court erred in concluding that Appellee Bednard's referral of Appellant Hernden to the United States' Department of Justice was not an adverse action that would deter a person of ordinary firmness from engaging in protected conduct.

The District Court's conclusion regarding Appellee Bednard's referral to the DOJ is equally suspect. The District Court incorrectly determined that for Appellee Bednard's referral to be actionable, it must have resulted in an actual criminal investigation. Opinion and Order, R. 37, Page ID # 523. This is not the appropriate legal standard. As the District Court noted, an investigation can give rise to liability if the plaintiff can identify a "'specific present objective harm *or threat of a future specific harm*' stemming from an 'exercise of governmental power that [is] regulatory, proscriptive, or compulsory in nature, and [where] the complainant was either presently *or prospectively* subject to the regulations, proscriptions, or compulsions that he was challenging.'" Opinion and Order, R. 37, Page ID # 523, citing *Laird v. Tatum*, 408 U.S. 1, 11, 14 (1972) (emphasis added).

Unlike the examples cited by the District Court, Appellant Hernden was subjected to significantly more than mere intelligence gathering activities or the potential of having to face an inconsequential investigation. Appellant Hernden, upon learning of Appellee Bednard's report, was immediately subject to the possibility of a prospective criminal investigation by federal law enforcement. Attorney General Merrick Garland's memo, issued a mere day before Appellee Bednard's complaint, specifically committed to using the DOJ's "authority and

resources to discourage these threats, identify them when they occur, *and prosecute them when appropriate.*" Complaint, R. 1, Page ID # 28 (emphasis added). This memo was issued as a response to a letter from the National School Board Association to President Biden, which specifically asked the DOJ, the Department of Homeland Security, and the Federal Bureau of Investigation to investigate whether parents' protests at school board meetings constituted domestic terrorism in violation of the PATROIT Act.[8] From Appellant Hernden's perspective, she had not only been reported to a law enforcement agency, but a law enforcement agency that had expressly indicated a willingness to investigate and criminally prosecute parents for their conduct at school board meetings. She had no way to know whether this prospective criminal investigation could, or would, become actualized into a current investigation, but a reasonable person in Appellant Hernden's position would have presumed that a report to a law enforcement agency that had expressly invited referrals relating to parents' behavior at school board meetings would be eager to investigate those referrals.

[8] See, Laura Meckler, *National School Boards Association Stumbles Into Politics and is Blasted Apart*, WASHINGTON POST (Jan. 13, 2022), https://www.washingtonpost.com/education/2022/01/13/school-board-association-domestic-terrorism/, citing Letter from Viola M. Garcia, Nat'l Assoc. of Sch. Bd. President, to Joseph R. Biden, President of the United States (Sep. 29, 2021), available at: https://defendinged.org/press-releases/full-nsba-letter-to-biden-administration-and-department-of-justice-memo/.

This time, the penalty for losing on the roulette wheel spin triggered by the public official's bad-faith action is prison (or at least the cost of defending oneself from a prosecution) as opposed to job loss. Appellee Bednard's referral to the DOJ placed Appellant Hernden under "threat of a specific future harm" well beyond that of the mere filing of a police report. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019), citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).[9] While no investigation appears to have materialized, the relevant question is whether Appellant Hernden faced a sufficiently adverse action to chill a person of ordinary

[9] The District Court's citation to *Blick v. Ann Arbor Public School District* is distinguishable. 674 F.Supp.3d 400, 432 (E.D. Mich. 2023) ("*Blick II"*). *Blick II* involved an allegation that a school district had placed prior restraints on the speech of one of its *employees*, rather than a parent. The case was ultimately resolved through a review of the *Pickering* factors applicable to restrictions on public employees' speech, with the court concluding that the district's interests in avoiding disruptions to the learning environment and investigating budget irregularities outweighed the plaintiff's interest in unfettered speech. *Blick II*, 674 F.Supp.3d at 427, 431, citing *Pickering v. Board of Ed. Of Twp. High Sch. Dist. 204, Will Cnty. Illinois*, 391 U.S. 563 (1968). While the Court did state that "the filing of a police report is not an adverse action," it did so in dicta, referring exclusively to the decision of another District Court judge in a parallel case without further analysis. *Blick II*, 674 F.Supp.3d at 431, citing *Blick v. Ann Arbor Pub. Sch. Dist.*, 516 F.Supp.3d 711, 723 (E.D. Mich. 2021) ("*Blick I*"). That underlying case also fails to conduct a meaningful analysis, instead concluding that the plaintiff had offered no legal support for the contention that the filing of a police report constituted an adverse *employment* action. *Blick I*, 516 F.Supp.3d at 723. Here, Appellant Hernden is not claiming that Appellee Bednard's complaint to the DOJ constituted an adverse *employment* action (a damages matter), but instead is arguing it constituted adverse action (a liability matter). Thus, the reasoning of *Blick I* and *Blick II* are inapplicable to this case. Even if the logic of the *Blick* cases were relevant to this matter, those cases are non-binding on this Court, and need not be adopted given the differing factual circumstances of this matter.

firmness from continuing to engage in protected activity at the time she learned of Appellee Bednard's correspondence with the DOJ. What reasonable person wants to be subjected to this? How likely does a prosecution need to be before it deters speech?

Schlissel is particularly illuminating with respect to when an injury arises from prospective future activity involving a third party. In *Schlissel*, Speech First Inc. sued on behalf of students at the University of Michigan who argued that the University's bias response team initiative intimidated students and chilled their speech. 939 F.3d at 762. The bias response team had no punitive authority but could refer students to law enforcement or internal University officials with the authority to discipline students who were suspected of having engaged in biased speech. *Id.*

In *Schlissel*, this Court expressly noted that future harm can give rise to liability when a plaintiff is under threat of punishment from an official who appears to have punitive authority:

> The regulation need not amount to a "direct prohibition against the exercise of First Amendment rights" to be constitutionally objectionable. Still, there must be something more than "the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." We have noted that "the mere existence, *without more*, of a government investigative and data-gathering activity" is insufficient to present anything more than the allegations of a subjective chill of First Amendment speech. "In order to have standing, therefore, a litigant alleging chill must still establish that a concrete harm—i.e., enforcement of a challenged statute—occurred or is imminent. That an official or regulator lacks actual

> authority to punish an individual, although relevant to the question of concrete harm, is not dispositive. Even if an official lacks actual power to punish, the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill. Governmental activity constitutes an injury-in-fact when "the challenged exercise of government power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging."

Id. at 764-765 (emphasis original) (citations omitted).

This Court then analyzed the bias response team's function, ultimately concluding that the team "act[ed] by way of implicit threat of punishment and intimidation to quell speech," despite lacking the ability to directly or formally punish students. *Id.* at 765. In doing so, this Court specifically noted that the bias response team's ability to make referrals to law enforcement and internal University officials with the ability to issue discipline was "a real consequence that objectively chills speech." *Id.* The Court stated:

> The referral itself does not punish a student—the referral is not, for example, a criminal conviction or expulsion. But the referral subjects students to processes which could *lead* to those punishments. The referral initiates the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality.

Id. (emphasis original) (citation omitted).

The fact that no student had faced discipline due to the bias response team did not render its actions any less chilling. *Id.* at 766. This Court rejected the University's

contention that the lack of any student discipline abrogated the bias response team's role in creating a "concrete and objective threat of harm." *Id.*

Schlissel is analogous to Appellee Bednard's referral to the DOJ. Like the bias response team, Appellee Bednard had no authority to investigate or discipline Appellant Hernden. But his referral to the DOJ could have led to a criminal investigation and subsequent charges. As with the bias response team, Appellee Bednard's referral created "the threat of punishment from a public official who *appears* to have punitive authority," which is sufficient to chill speech. *Id*. And, as with the bias response team's referrals, the fact that no investigation occurred does not indicate that Appellee Bednard's referral failed to create the credible threat that Appellant Hernden would be subject to criminal investigation and possible prosecution. *Id.* Here, Appellee Bednard took a specific action that supported Appellant Hernden's objective fear of punishment by the DOJ, and as such, created an actionable injury. *Id.*, distinguishing *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008).

Unlike in *Laird*, this case is not one in which mere investigative and data-gathering activity is alleged. 408 U.S. at 10. As the Supreme Court noted in *Laird*, those activities "without more" do not violate First Amendment rights. *Id.* Here, however, Appellant Hernden faced a distinct and cognizable fear of an investigation by the DOJ, which the DOJ explicitly invited. Complaint, R. 1, Page ID # 28. The

District Court is correct that, for the period Appellant Hernden was unaware of Appellee Bednard's complaint, she would have no cause of action for First Amendment retaliation. Opinion and Order, R. 37, Page ID ## 523-24. But upon learning of that complaint, a person of reasonable firmness would have had sufficient motivation to stop engaging in protected First Amendment conduct. The desire to avoid a criminal prosecution or investigation that a federal law enforcement agency had specifically indicated a willingness to investigation and prosecute is a reasonable justification for curbing the exercise of protected activity. See, *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1025 (6th Cir. 2024) (finding the threat of a criminal prosecution "significantly heightens the risk of chilled expression."). Upon learning that Appellee Bednard had requested the DOJ's intervention, a person of reasonable firmness could very well choose to cease engaging in protected conduct to prevent additional complaints and potential criminal liability.

Appellee Bednard's referral to the DOJ specifically requested that it take action to curb Appellant Hernden's protected activity. That referral occurred almost immediately after the DOJ, as the agency with the authority to investigate and potentially prosecute Appellant Hernden, expressed its willingness to investigate the very behaviors Appellee Bednard accused her of having committed. A person of reasonable firmness would have been chilled by Appellee Bednard's complaint in light of the imminent exposure to criminal liability it created.

RELIEF REQUESTED

For the reasons stated above, this Court should reverse the decision of the District Court and instruct it to grant Appellant Hernden's motion for summary judgement. If, however, this Court determines that factual issues prevent the granting of that motion, it should remand this case to the District Court for further proceedings.

Respectfully Submitted,

/s/ Stephen Delie
Stephen A. Delie (P80209)
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
989-631-0900
delie@mackinac.org

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Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(b). The foregoing brief contains 7,817 words of Times New Roman 14-point proportional type beginning with the Jurisdictional Statement (Fed. R. App. 32(f)) and ending with counsel's signature block and 8,766 words of Times New Roman 14-point proportional type in total. The word processing software used to prepare this brief was Microsoft Word 2016.

Dated: November 21, 2024

/s/ Stephen A. Delie
Stephen A. Delie (P80209)
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
989-631-0900
delie@mackinac.org

Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This certifies that Appellant's Brief was served on November 21, 2024, by electronic mail using the Sixth Circuit's Electronic Case Filing system on all counsel of record.

Dated: November 21, 2024

/s/ Stephen A. Delie
Stephen A. Delie (P80209)
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
989-631-0900
delie@mackinac.org

Attorneys for Plaintiff-Appellant

ADDENDUM

Doc. Entry No.	Date Entered	Page ID # Range	Description of Doc.
R. 1	9/29/2022	Page ID ## 1-28	Complaint
R. 24	10/18/2023	Page ID ## 220-278	Plaintiff's Motion for Summary Judgment
R. 25	10/25/2023	Page ID ## 279-423	Defendants' Motion for Summary Judgment
R. 37	9/30/2024	Page ID ## 514-524	District Court's Opinion
R. 38	9/30/2024	Page ID #525	District Court's Judgment
R. 39	10/02/2024	Page ID # 526	Notice of Appeal