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

REPLY BRIEF OF APPELLANT SANDRA HERNDEN

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SUMMARY OF THE ARGUMENT

While Appellant Hernden suffered no actual damages, the violation of her constitutional rights constitutes an injury which entitles her to nominal damages. While de minimis injuries cannot support a First Amendment retaliation claim, nominal damages can support such a claim if they relate to an injury that is not de minimis. Appellee Pyden's and Appellee Bednard's respective actions put Appellant Hernden's livelihood and liberty at significant risk, thereby constituting an adverse action against her.

Appellees can only be held liable for retaliating against Appellant Hernden if they were acting in their official capacities. Whether Appellee Pyden was acting in her official capacity is a question of credibility that should be resolved by a jury. Appellee Bednard, however, was acting in his official capacity as Appellee Board's spokesperson, pursuant to an express delegation of authority by Appellee Board. That delegation also renders Appellee Board liable for Appellee Bednard's actions, regardless of whether it approved of them. Sixth Circuit case law has also clearly established that school board members cannot retaliate against a parent for her views on matters of a public concern, thereby overcoming Appellees' claims to qualified immunity.

REPLY

As mentioned in Appellant Hernden's principal brief, this is an edge case in which the boundaries of First Amendment retaliation law must be determined. This brief is offered to clarify the scope of the issues before this Court and identify the areas in which the contours of First Amendment retaliation law must be refined.

The question that this Court must ultimately answer is whether a plaintiff in a First Amendment retaliation action can maintain that action while only suffering nominal damages. A First Amendment retaliation claim has three elements: 1) plaintiff was engaged in protected activity; 2) the government (or a government official) took an adverse action against the plaintiff that was capable of deterring a person of ordinary firmness from continuing to engage in that activity; and 3) there was a causal connection between the adverse action taken and the plaintiff's protected activity. *Thaddeus-X v. Blatter*, 175 F.3d 378, 387 (6th Cir. 1999). Of those elements, only the second meaningfully is at dispute.

The District Court determined the Appellant Hernden, as someone who suffered no actual damages, had not faced an adverse action that would have deterred a person of ordinary firmness from continuing to exercise her First Amendment rights. Opinion and Order, R. 37, Page ID # 522-523. This ruling improperly conflates the requirement that First Amendment retaliation cannot be premised on a de minimis injury with Supreme Court case law recognizing that nominal damages

are an independent and cognizable injury. *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021); Appellant Hernden's Brief on Appeal, page 13. Should this ruling stand, it will incentivize more retaliation against citizens, as only retaliation creating compensatory damages will give rise to liability. This Court should reverse the District Court, as a person of ordinary firmness in Appellant Hernden's position would have been deterred from engaging in further First Amendment conduct even though Appellant Hernden was not.

I. Appellant Hernden has established a First Amendment violation.

The parties contest whether Appellant Hernden has established that Appellees Pyden and Bednard have violated her First Amendment rights. On this question, Appellant Hernden largely stands on the arguments advanced in her principal brief, but she offers the following for additional clarity.

Appellees' Brief does not appear to challenge the position that Appellant Hernden's engagement with Appellees, either through e-mail or by making statements during the public comment portion of Appellee Board's meetings, constituted conduct protected by the First Amendment.[1] Instead, Appellees argue

[1] While Appellees' principal brief does not appear to raise this issue, Appellant Hernden notes that this was a matter under contention before the District Court. Defendants' Motion for Summary Judgment, R. 25, Page ID ## 309-310. To the extent Appellees challenge the protected nature of Appellant Hernden's conduct, Appellant Hernden incorporates by reference the arguments she made before the District Court. Plaintiff Hernden's Motion for Summary Judgement, R. 24, Page ID ## 6-9, 16-17.

that Appellant Hernden faced no adverse action that would deter a person of ordinary firmness from engaging in First Amendment activity, and that neither Appellee Pyden's nor Appellee Bednard's retaliatory acts were motivated by Appellant Hernden's speech.[2] See generally, Appellees' Principal and Response Brief. For the reasons that follow, none of these contentions have merit.

A. Appellees Pyden and Bednard were each acting in their official capacities when they subjected Appellant Hernden to an adverse action via their respective threats to her economic livelihood and personal liberty.

i. Appellee Pyden's and Appellee Bednard's complaints were adverse actions against Appellant Hernden.

In order to prevail in a First Amendment retaliation action, a plaintiff must demonstrate that defendant(s) took an adverse action against her that is "'*capable* of deterring a person of ordinary firmness' from exercising the constitutional right in question." *Rudd v. City of Norton Shores*, 977 F.3d 503, 514 (6th Cir. 2020), citing *Hill v. Lappin*, 630 F.3d 468, 472 (6th Cir. 2010) (emphasis original). The deterrence caused by a constitutional violation "need not be great" to

[2] Although Appellees purport to contest the causal connection between Appellee Pyden's and Appellee Bednard's actions, their argument relies primarily on the position that the lack of an adverse action makes it unnecessary to address the causal connection element. Appellees' Principal and Response Brief, pages 38-39. For the reasons outlined in Section I(B), infra, Appellees' own briefing essentially concedes causation.

be actionable, as nothing justifies "harassing people for exercising their constitutional rights," but nor can it be inconsequential. *Thaddeus-X v. Blatter*, 175 F.3d at 472.

Appellees emphasize the fact that Appellant Hernden has admitted to suffering no actual damages and argue that neither Appellee Pyden's nor Appellee Bednard's actions were legally sufficient to constitute an adverse action capable of supporting a First Amendment retaliation claim. But the test for First Amendment is an objective one, evaluating whether a hypothetical person of ordinary firmness would be chilled from engaging in further protected activity. *Holzemer v. City of Memphis*, 621 F.3d 512, 525 (6th Cir. 2010) ("[T]he issue is whether a person of ordinary firmness would be deterred, not whether the [plaintiff] himself actually was deterred.") (quoting *Harris v. Bornhorst*, 513 F.3d 503, 519 (6th Cir. 2008)). The test is *not* one that examines individualized plaintiffs; indeed, it cannot be a subjective test, or the First Amendment would necessarily provide different levels of protection for everyone.[3] Appellant Hernden admits that she was not actually

[3] While the test is an objective one, it can differ based on a plaintiff's classification as a citizen, public employee, or prisoner. See *Thaddeus-X*, 175 F.3d at 398 ("Like the definition of protected conduct, however, the definition of adverse action is not static across contexts. Prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse. The benefits of such a standard are that it is an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening the most trivial of actions from constitutional cognizance.").

chilled by the actions of Appellee Pyden and Appellee Bednard. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 267. While the lack of an actual chill is relevant to determining whether her constitutional rights have been violated, it is not determinative. Compare *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 585 (6th Cir. 2012) with *Holzemer*, 621 F.3d at 525. The test for retaliation relies on a determination of whether a person of ordinary firmness would have been deterred from continuing to engage in protected conduct. *Thaddeus-X*, 175 F.3d at 394. That necessarily recognizes that there are people of extraordinary firmness, as well as those who are mentally or emotionally less resilient than the ordinary person. Instead of engaging in case-by-case, plaintiff-by-plaintiff analysis, this Circuit has chosen to rely on a test which employs an objective person of ordinary firmness to determine whether a plaintiff's Constitutional rights have been violated. *Holzemer*, 621 F.3d at 525. Whether Appellant Hernden faced actual chill, while one relevant consideration, is not dispositive.

Appellees are correct that the mere subjective chilling of a plaintiff, absent other injury, cannot support a First Amendment retaliation claim. *Samad v. Jenkins*, 845 F.2d 660, 663 (6th Cir. 1988). They are also correct that Appellant Hernden has made no compensatory or punitive damages claim. That does not, however, mean that Appellant Hernden was not injured by Appellees' actions—Appellant Hernden pled, and has continued to assert, that she is entitled to nominal damages for the

violations of her rights. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 267. As the U.S. Supreme Court has noted, "Whenever a right is violated, that violation 'imports damage in the nature of it' and 'the party injured is entitled to a verdict for nominal damages.'" *Uzuegbunam v. Preczewski*, 592 U.S. at 290 (citation omitted). In addressing the relationship between nominal and compensatory damages, the Supreme Court stated:

> The argument that a claim for compensatory damages is a prerequisite for an award of nominal damages also rests on the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff. This contention is not without some support. But this view is against the weight of the history discussed above, and we have already expressly rejected it. Despite being small, nominal damages are certainly concrete. The dissent says that "an award of nominal damages does not change [a plaintiff's] status or condition at all." But we have already held that a person who is awarded nominal damages receives "relief on the merits of his claim" and "may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages." Because nominal damages are in fact damages paid to the plaintiff, they "affec[t] the behavior of the defendant towards the plaintiff" and thus independently provide redress.

Uzuegbunam, 592 U.S. at 290-91 (internal citations omitted).

How then, should this Court resolve the internal tension within *Thaddeus-X* that, while a plaintiff in a First Amendment retaliation action must demonstrate more than a de minimis injury, a plaintiff's injury "need not be great to be actionable," while also recognizing *Uzuegbunam*'s holding that nominal damages are an independent injury? *Thaddeus-X*, 175 F.3d at 397 (quoting *Bart v. Telford*, 677 F.2d

622, 625 (7th Cir. 1982)). The answer can be found in the elements of a retaliation claim. A de minimis injury is one which, as a matter of law, would not deter a person of ordinary firmness from engaging in protected activity. If the injury is nominal but would nevertheless deter a person of ordinary firmness from engaging in protected activity, it is actionable.

This approach preserves what *Thaddeus-X* recognized as the essential balance between the courts' need to redress constitutional violations, and the need to avoid "triviliz[ing] the First Amendment [by holding] that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise…." *Thaddeus-X*, 175 F.3d at 397 (quoting *Bart*, 677 F.2d at 625). As Appellant Hernden argued in her principal brief, both Appellee Pyden's and Appellee Bednard's actions would deter a person of ordinary firmness from engaging in protected activity. See, Appellant Hernden's Brief on Appeal, pages 15-30. Appellee Pyden's e-mail to Appellant Hernden's supervisor occurred at a time when police were under intense public scrutiny, and at a time when parents had been fired for opposing school board policies. *Id.*, pages 18-19. That correspondence specifically accused Appellant Hernden of "veiled racism," and while Appellee Pyden specifically disclaimed any desire for Appellant Hernden to suffer an adverse employment action, a reasonable jury could nevertheless conclude that the foreseeable (and, depending on their view of Appellee Pyden's

credibility, desired) outcome of the e-mail would be some negative employment action against Appellant Hernden. *Id*. Appellee Bednard's correspondence, meanwhile, made a criminal referral at a time when the Department of Justice ("DOJ") specifically indicated a willingness to criminally investigate parents for their behavior at school board meetings. Complaint, R.1, Page ID # 28. In both instances, for the reasons identified in Appellant Hernden's principal brief, the actions taken were sufficient to give a person of ordinary firmness a reasonable fear of actual or imminent harm to his or her livelihood or liberty.

Again, the question this Court must answer is how much risk a plaintiff must be willing to accept before an action by a government official can be considered adverse. Appellant Hernden's Brief on Appeal, pages 21-22, 26-27. If Appellee Pyden's e-mail to Appellant Hernden's supervisor carried with it an 80% chance she would have been disciplined, would that be sufficiently adverse? If Appellee Bednard's report to the DOJ created only a 50% chance that Appellant Hernden was criminally investigated, would that constitute an adverse action? What risk of ruin on the roulette wheel goes too far? Clearly, there is some level of risk that a citizen should not be expected to tolerate from a retaliatory act that is ultimately unsuccessful in inflicting injury. Appellant Hernden maintains that while that level of risk cannot be de minimis, a threat to livelihood or liberty can deter a person of

ordinary firmness from engaging in constitutionally protected activity, even if that threat fails to result in actual harm.

ii. Appellees Pyden and Bednard were acting in their official capacities when they filed their respective complaints.

Appellees go beyond arguing that their actions against Appellant Hernden were not sufficiently adverse, however, by arguing that Appellee Pyden's and Appellee Bednard's complaints are not actionable because they were protected by their own First Amendment rights as private citizens. Appellees' Principal and Response Brief, pages 28-33. While it is true that public employees do not forfeit the entirety of their First Amendment rights when they choose to work for the government, those rights are not are not unfettered. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998). Public employees, particularly those who have the authority to act on behalf of a public body, must refrain from retaliating against others' exercise of their First Amendment rights. *Crawford El v. Britton*, 523 U.S. 574, 588 n. 10 (1998) (citations omitted).

Appellees Pyden and Bednard argue that their respective acts were undertaken solely in a private capacity and are therefore not actionable. Appellees' Principal and Response Brief, page 33. Appellees are correct that, if these actions were undertaken as private citizens, they cannot be found liable for First Amendment retaliation. *Mackey v. Rising*, 106 F.4th 552, 558 (6th Cir. 2024). If, on the other hand, Appellees

Pyden and Bednard were acting in their official capacities, they, as well as Appellee Board, can be found liable for First Amendment retaliation. *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658, 690 (1978) ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."). The relevant legal issue, therefore, is the extent to which Appellees Pyden and/or Bednard were acting under color of state law in their respective capacities as members of the Appellee Board when engaging in the behavior that Appellant Herden claims is retaliatory.

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988), quoting *U.S. v. Classic*, 313 U.S. 299, 326 (1941). "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *West*, 487 U.S at 49-50, citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (overruled on other grounds). "Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50. (citations omitted).

Appellee Pyden and Appellee Bednard engaged in two separate acts, each of which must be analyzed independently. Appellant Hernden maintains that, as a matter of law, Appellant Bednard was acting on behalf of Appellee Board pursuant to Board policy. As noted by the District Court, Appellee Bednard's correspondence repeatedly made use of plural pronouns in phrases such as "our Board," "We understand," "our schools," "our district," "our meetings," "Our school district," "We know," and "Anything that could be done to curb this behavior by these people would be greatly appreciated by *our Board, administration, and community*." Opinion and Order Granting/Denying Defendants' Motion to Dismiss, R. 23, Page ID # 213 (emphasis added). This language, coupled with the fact that Appellee Bednard was expressly delegated the authority to speak on behalf of Appellee Board via the Board's own Bylaws, clearly indicates that Appellee Bednard was acting in his official capacity when he reported Appellant Hernden to the DOJ. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 278; *Mackey*, 106 F.4th at 561 ("If the State does assign an official a duty to engage in an action as part of the official's state responsibilities, '[i]t is irrelevant that he might have taken the same action had he acted in a purely private capacity[.]'") (citation omitted).

The question of whether Appellee Pyden was acting in her individual or official capacity, meanwhile, is a question of fact that should be resolved by a jury. Under Federal Rule of Civil Procedure 56, "[s]ummary judgment is proper if there

is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Maben v. Thelen*, 887 F.3d 252, 258 (6th Cir. 2018), citing Fed. R. Civ. P. 56(a). The District Court did not reach the question of whether Appellee Pyden was acting in her official capacity, as it concluded that her complaint to Appellant Hernden's supervisor was not an adverse action that could give rise to liability. Opinion and Order, R. 37, Page ID # 524. But there is a genuine issue of material fact as to whether Appellee Pyden was acting in her official capacity.

Appellee Pyden's e-mail to Appellant Hernden's supervisor could be interpreted as a purely private act, as Appellee Pyden sent the correspondence from her private e-mail account and did not employ plural pronouns. Complaint, R. 1, Page ID # 16. A jury could reasonably conclude that this evidence suggests a private, rather than an official act. At the same time, Appellee Pyden's correspondence forwarded e-mails sent to her Board account, identified Appellee Pyden as an elected official, and discussed Appellant Hernden only in the context of how she had interacted with Appellee Board and its members. *Id*. A jury could also reasonably conclude that the substance of Appellee Pyden's correspondence, coupled with her education as an attorney, indicates that Appellee Pyden's e-mail was an attempt to avoid liability for acting in her official capacity while only complaining of problems related to her position with Appellee Board. Appellees' Principal and Response Brief, page 5. The question should be resolved by a finder of fact, who is best

positioned to make the necessary credibility determination. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

The manner in which Appellees Pyden and Bednard reacted to Appellant Hernden's behavior further suggests that they were acting in their official capacities. Faced with Appellant Hernden's criticism, Appellees Pyden and Bednard could have outlined their opposition to Appellant Hernden's views, tone, criticisms, or demeanor via an op-ed, a letter to the editor, through their own public comments at Appellee Board's meetings, or through the use of countless other forums in which debates over public policy occur. Instead, Appellee Pyden contacted Appellant Hernden's employer to privately accuse her of conduct unbecoming of a police officer at a time when police were under heightened public scrutiny and when other parents speaking out at school board meetings had been fired for doing so. Appellant Herden's Brief on Appeal, pages 18-19. Appellee Bednard, meanwhile, wrote to the DOJ using language that indicated he was acting on behalf of Appellee Board, and suggested that the chief law enforcement office of the federal government curb the behavior of parents who disagreed with Appellee Board's policy positions a mere day after the DOJ indicated a willingness to launch criminal investigations into the same. *Id.* at pages 24-25. In taking these acts, Appellees Pyden and Bednard went beyond merely engaging in a public debate about the merits of Appellee Board's

COVID policies; they specifically targeted Appellant Hernden, in response to her protected speech, in an attempt to silence her.

B. Both Appellee Pyden's and Appellee Bednard's retaliatory acts were causally connected to Appellant Hernden's protected activity.

For Appellees Pyden and Bednard to be held liable for the adverse actions they took against Appellant Hernden, those adverse actions must have been casually connected to Appellant Hernden's protected activity. *Thaddeus-X v. Blatter*, 175 F.3d at 387. Appellees appear to concede the causal connection element, as they only argue that, in the absence of an adverse action, there is no need to determine whether Appellees Pyden and Bednard were motivated by Appellant Hernden's protected activity. Appellees are correct that, to prevail on a claim of retaliation, Appellant Hernden is required to demonstrate that her protected activity was a substantial or motivating factor behind the adverse actions taken against her. Appellees' Principal and Response Brief, page 38, citing *Sensabaugh v. Halliburton*, 937 F.3d 621, 629 (6th Cir. 2019). But the question of whether an adverse action occurred is separate from the question of what motivated the adverse act. Appellees' briefing clearly demonstrates that if this Court determines Appellee Pyden's and Appellee Bednard's complaints constitute adverse actions, those actions were motivated by Appellant Hernden's protected conduct.

Appellees state that Appellees Pyden and Bednard undertook their respective actions because they "were concerned that Plaintiff's actions and words were escalating and could constitute legal harassment or threatening behavior." Appellees' Principal and Response Brief, page 39. They continue, arguing that, unlike others who spoke at Appellee Board's meetings, Appellant Hernden's words and actions invoked fear in Appellees Pyden and Bednard. *Id*. These statements make clear that Appellant Hernden's conduct *was* the motivating factor behind Appellee Pyden's and Appellee Bednard's actions. These statements do not demonstrate that Appellees Pyden and Bednard were motivated by something other than Appellant Hernden's conduct but instead appear to be an attack on whether Appellant Hernden's conduct falls within the protections of the First Amendment. That is a separate legal question. Put simply, Appellees appear to admit that their conduct was motivated by Appellant Hernden's behavior, but challenge whether that behavior constituted protected conduct.[4]

Appellee Pyden argues that her correspondence cannot be interpreted as retaliatory due to her express disclaimer that she was not asking for any adverse

[4] This issue was not extensively briefed by the parties on appeal, although it was addressed by the parties at the District Court level. See, Appellant Hernden's Principal Brief, page 14, n. 4.

action to be taken against Appellant Hernden. Appellees' Principal and Response Brief, page 23. In doing so, Appellees seeks to transform a question of fact into conclusion of law. See, Appellant Hernden's Brief on Appeal, pages 17-19. The disclaimer itself, is, in fact, a double-edged sword. It is certainly true that a reasonable jury could conclude that Appellee Pyden's disclaimer was a genuine expression of her intent, which would weigh against a conclusion that her actions were retaliatory. But the reverse is also true—a reasonable jury could determine that Appellee Pyden's background as an attorney, when coupled with the general political environment at the time, indicates that Appellee Pyden attempted to retaliate against Appellant Hernden while simultaneously inoculating herself against the accompanying liability. Ultimately, the question is one of credibility—can Appellee Pyden's disclaimer be believed? That determination is a question of fact, and it would be improper to reach the legal conclusion that Appellee Pyden's actions were not motivated by retaliatory intent based solely on her self-interested disclaimer.

As the District Court recognized, the language of Appellee Bednard's message to the DOJ strongly suggests that he was acting on behalf of Appellee Board. Opinion and Order Granting/Denying Defendants' Motion to Dismiss, R. 23,

Page ID # 213. It explicitly noted the purpose of the correspondence,[5] and called on the DOJ to act by stating "Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration and community." Complaint, R.1, Page ID # 26. The evidence demonstrates, that, as a matter of law, Appellee Bednard's actions were clearly motivated by Appellant Hernden's protected conduct.

C. Appellees' respective complaints violated Appellant Hernden's clearly established First Amendment rights.

Appellant Hernden has the burden of demonstrating that Appellee Bednard's and Appellee Pyden's actions violated her First Amendment rights in a way that has been clearly established as unlawful. *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("*Creighton*"). There are two paths that Appellant Hernden may rely upon to show that a right is clearly established. The first is to demonstrate circumstances "where the violation was sufficiently 'obvious' under the general standards of constitutional care that the

[5] Although Appellees refer to Bednard's correspondence with the DOJ as being "alleged," Bednard admitted to submitting his complaint to the DOJ via an electronic submission through the DOJ's website. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 239-240.

plaintiff need not show a 'body' of 'materially similar case law.'" *Lyons v. City of Xenia*, 417 F.3d 565, 579 (6th Cir. 2005), citing *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Nevertheless, a plaintiff must demonstrate that the obviousness of the violation is established by prior cases. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005). The second is "where the violation is shown by the failure to adhere to a 'particularized' body of precedent that 'squarely govern[s] the case here.'" *Id.* In examining whether a right is clearly established, a plaintiff need not demonstrate that "the very action has been previously held unlawful," but the unlawfulness "must be apparent" from pre-existing law. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) citing *Creighton*, 483 U.S. at 640.

Sixth Circuit precedent has "clearly established at a low level of generality that a school official may not retaliate against the parent for the content of his speech." *McElhaney v. Williams*, 81 F.4th 550, 559 (6th Cir. 2023) (citing *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 588 (6th Cir. 2008). It has also been clearly established that the protections of the First Amendment extend to "a parent's criticism of the ways in which school employees treat the parent's child at school." *Id.* While Appellant Hernden's criticism of Appellee Board's COVID-19 policies related to a general matter of public concern, they also directly affected her son, and thus also constituted criticism of how the Board was treating him specifically. Complaint, R. 1, Page ID ## 3-4. Subsequent decisions have recognized that that

such protections have been clearly established since at least 2008. *Place v. Warren Loc. Sch. Dist. Bd. of Educ.*, No. 2:21-CV-985 (S.D. Ohio Mar. 6, 2024) (Slip Opinion) at *5,[6] citing *McElhaney*, 81 F.4th at 557-559.

Thus, under Sixth Circuit law, Appellant Hernden's right to criticize Appellee Board and its members without fear of retaliation is clearly established. The question in this case is not whether Appellant Hernden has the clearly established right to express her opinions without fear of retaliation, but whether Appellee Bednard's and Appellee Pyden's conduct constituted First Amendment retaliation under the standards outlined in *Thaddeus-X*. See *McElhaney* 81 F.4th at 559 (distinguishing between whether a right has been clearly established and the issue of whether a constitutional violation has occurred). If so, Sixth Circuit precedent indicates that Appellees Pyden and Bednard should have been aware that such retaliation was improper under clearly established law.

II. Appellee Bednard's DOJ complaint gives rise to *Monell* liability, as he was delegated policymaking authority by the Appellee Board's bylaws, and the Appellee Board can be held liable for his policy decisions.

Appellees argue that Appellant Hernden cannot establish that the constitutional violation she alleges stems from an official policy of Appellee Board, thereby exempting the Board from liability even if Appellees Pyden or Bednard acted unlawfully. Appellees' Principal and Reply Brief, pages 33-38. Appellees

[6] Also available at: 2024 WL 964253.

overlook, however, the fact that Appellee Bednard's complaint to the DOJ was taken in his capacity as Appellee Board's official spokesperson, as established by the Board's own bylaws. Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ## 244, 278. Appellee Board delegated Appellee Bednard the authority to speak on its behalf, and he did so, without following any of the requirements that needed to be followed to clarify that he was speaking in an individual capacity. *Id.* Further, it is clearly established that public officials cannot use their authority to try to punish private citizens for policy differences. See Section I(C) *supra*. Because Appellee Bednard violated Appellant Hernden's constitutional rights while acting in his official capacity as Appellee Board's spokesperson, the Board can be held liable for his actions under *Monell*, even if it did not approve of that conduct in advance.

Appellees continue to maintain that, as a matter of law, Appellee Board may only act through adopted resolutions taken at Board meetings. Appellees' Principal and Reply Brief, page 37. But as the District Court noted in its opinion on Appellees' Motion to Dismiss:

> The Court agrees with Hernden that the District cannot escape allegations that the Board made a final decision potentially subjecting it to Monell liability merely because there is no vote or resolution on record. Under Michigan law, a local government body like the Board can reach an official 'decision' even if it does not follow prescribed procedures.

Opinion and Order Granting/Denying Defendants' Motion to Dismiss, R. 23, Page ID # 212.

While Appellees argue that Appellee Bednard's correspondence falls outside the type of authority typically vested in school board members, that position becomes irrelevant given that Appellee Board *explicitly* vested Appellee Bednard with the authority to act as the Board's spokesperson as a matter of official Board policy. Appellees' Response Brief, page 2, citing *Mackey*, 106 F.4th at 558; Plaintiff's Hernden's Motion for Summary Judgment, R. 24, Page ID # 278. In exercising that delegated authority, Appellee Bednard exposed Appellee Board to liability for his acts. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."); see also *Clemens v. Mount Clemens Cmty. Sch. Dist.*, 305 F.Supp.3d 759, 768 (E.D. Mich. 2018), citing *Cady v. Arenac Cnty.*, 574 F.3d 334, 345 (6th Cir. 2009). Because Appellee Bednard was acting pursuant to the Appellee Board's bylaws, his "acts and edicts may be fairly said to represent official policy," and can therefore render the Board liable for his acts. *Pembaur*, 475 U.S. at 480 quoting *Monell*, 436 U.S. at 694.

To the extent Appellee Bednard was not acting as Appellee Board's spokesperson, he was required by the Board's bylaws to "make it clear that [his] views do not necessarily reflect the views of the Board or of their colleagues on the Board." Plaintiff Hernden's Motion for Summary Judgment, R. 24, Page ID # 278. The lack of such a disclosure, coupled with language suggesting Appellee Bednard

was acting on the Appellee Board's behalf, indicates that he was acting pursuant to an official policy of Appellee Board.

The Appellee Board may not have been aware of Appellee Bednard's action, and individual members of the Board may have disapproved of it.[7] Even if this were true, it is ultimately irrelevant—Appellee Bednard possessed the lawful authority to speak on Appellee Board's behalf, and he did so. If the Board had an issue with how Appellee Bednard exercised the authority it had delegated to him, it could have done precisely what Appellees contend is necessary for Board action—taken a vote to disavow his communication, censure him, or take some other action to make clear that they did not approve of how he exercised the authority to speak on their behalf. It did not do so.

Appellee Board delegated the authority to speak on its behalf to Appellee Bednard. Appellee Bednard sent correspondence that purported to speak on their behalf, pursuant to that policy. Thus, in sending the correspondence to the DOJ, Appellee Bednard was acting pursuant to an official policy of Appellee Board and within his delegated policymaking authority, thereby exposing the Board to liability for his actions. *Pembaur*, 475 U.S. at 480.

[7] Upon information and belief, Appellee Board itself never voted to approve or disapprove of Bednard's decision.

CONCLUSION

The ultimate question this Court must decide is whether a plaintiff, who only suffered nominal damages, may nevertheless maintain a cause of action for First Amendment retaliation. To reach that question, this Court must also decide the elements of the underlying First Amendment claims, namely, whether Appellant Hernden was engaged in protected conduct, whether Appellee Pyden's and Appellee Bednard's actions would deter a person of ordinary firmness from engaging in that conduct, and whether those actions were casually related to Appellant Hernden's protected conduct. The Court must also determine whether Appellee Bednard was acting under color of state law when he sent his complaint to the DOJ in such a way as to give rise to Appellee Board's liability under *Monell*. Appellant Hernden respectfully requests that this Court find in her favor on each of the above issues.

Respectfully Submitted,

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March 27, 2025

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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 5,711 words of Times New Roman 14-point proportional type beginning with the Summary of the Argument and ending with counsel's signature block and 6,252 words of Times New Roman 14-point proportional type in total. The word processing software used to prepare this brief was Microsoft Word 365.

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This certifies that Appellant's Brief was served on March 27, 2025, by electronic mail using the Sixth Circuit's Electronic Case Filing system on all counsel of record.

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ADDENDUM

Doc. Entry No.	Date Entered	Page ID # Range	Description of Doc.
R. 1	9/29/2022	Page ID ## 3-4, 16, 26, 28	Complaint
R.23	06/22/2023	Page ID ## 212-213	Order Granting/Denying Defendants' Motion to Dismiss
R. 24	10/18/2023	Page ID ## 229-232, 239-240, 244, 267, 278	Plaintiff Hernden's Motion for Summary Judgment
R. 25	10/25/2023	Page ID ## 309-310	
R. 37	9/30/2024	Page ID ## 522-524	District Court's Opinion