

No. 25-712

IN THE
Supreme Court of the United States

SANDRA HERNDEN,

Petitioner,

v.

CHIPPEWA VALLEY SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

This matter concerns whether a school board and its president (a government official without prosecutorial power) engaged in First Amendment retaliation for using an online threat reporting website (of another government official with prosecutorial power—here the Attorney General of the United States) to chill the speech of a parent who opposed the board’s policies.¹

1. Thus, this case differs from *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024), wherein the government official directly used her regulatory power over insurance companies to punish or suppress disfavored speech by stating that only those companies that provided coverage to the National Rifle Association would be investigated for certain insurance infirmities. There, a single government official was involved who both sought to punish or suppress speech and had the power to do so. Here, one government official is referring a potential prosecution to a second government official in the hope that threat of a prosecution or investigation will chill speech.

Vullo involved the question of whether the statements of the single government official with prosecutorial power was government speech or if it was coercion. In *Vullo*, this Court stated:

Ultimately, [*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)] stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf. See, e.g., 372 U.S., at 67–69, 83 S.Ct. 631; see also [*Backpage.com, LLC v. Dart*, 807 F.3d 229, 231] (holding that the First Amendment barred a sheriff from “using the power of his office to threaten legal sanctions against . . . credit-card companies for facilitating future speech”); *Okwedy v. Molinari*, 333 F.3d 339, 344 (CA2 2003) (per curiam) (holding that a religious group stated a

On page 27 of her Petition for a Writ of Certiorari, after showing that there is contradictory case law among circuits on whether the reporting official could show adverse action for a First Amendment claim, Petitioner Sandra Hernden stated:

Thus, there is circuit court conflict on the question whether a governmental official referring a protected speaker to another governmental entity for an investigation constitutes an adverse action for purposes of a First Amendment retaliation claim.

Respondents Frank Bednard (the reporting official) and Chippewa Valley School District filed a Response to the Petition for Writ of Certiorari almost entirely ignoring this circuit split.

First Amendment claim against a borough president who wrote a letter “contain[ing] an implicit threat of retaliation” against a billboard company displaying the group’s disfavored message); cf. *Penthouse Int’l, Ltd. v. Meese*, 939 F.2d 1011, 1016 (CADC 1991) (“[W]hen the government threatens no sanction—criminal or otherwise—we very much doubt that the government’s criticism or effort to embarrass the [intermediary] threatens anyone’s First Amendment rights”).

Vullo, 602 U.S. at 190-91. Thus, *Vullo* involved a single governmental official with prosecutorial power who made a statement. But this Court emphasized that it is when “the government threatens no sanction—criminal or otherwise” that there is no threat to an individual’s First Amendment rights. Here, we have an indirect threat of a criminal sanction.

Respondents ignored Petitioner’s citations of *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) and *Capp v. County of San Diego*, 940 F.3d 1046 (9th Cir. 2019), both of which allowed a claim where one governmental official lacked direct authority over the plaintiff, but threatened coercive state power nonetheless. Also ignored were *Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir. 1999) and *Reitz v. Woods*, 85 F.4th 780 (5th Cir. 2023), which disallowed claims of being subjected to and defending oneself from an investigation.²

Respondents took issue with: (1) this Court indicating in *Houston Community College System v. Wilson*, 595 U.S. 468 (2022), that it has not settled on an approach to “distinguish material from immaterial adverse actions.” *Id.* at 477; (2) whether those courts that apply an objective person of ordinary firmness test may rely on the subjective actions of a plaintiff; (3) whether the Sixth Circuit required a compensatory or economic harm to make a First Amendment retaliation claim; and (4) whether Petitioner erred by not raising arguments at the Circuit Court that were not raised by, nor a part of, the District Court’s dismissal decision. None of these are persuasive.

Respondents spend numerous pages arguing with this Court’s statement in *Houston Cmty. Coll. Sys.* that

2. Respondents did address *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), which Petitioner cited for the proposition that threats of prosecution chill speech and as a case against qualified immunity in the Sixth Circuit. The circuits have split on whether plaintiffs seeking preliminary injunctions can show standing. See generally, *Speech First, Inc. v. Sands*, No. 23-156, 601 U.S. ___, 144 S.Ct. 675 (2024) (J. Thomas dissenting from order vacating and remanding).

the circuits have differed on the tests to “distinguish material from immaterial adverse actions.” They attempt to disprove this Court’s holding that a circuit split exists. Respondents are incorrect.

Perhaps Respondents engage in this endeavor to avoid any questions about the person-of-ordinary-firmness test applied by the Sixth Circuit. An objective test would look at how a reasonable person would react, while a subjective one would focus on how one individual reacts. As noted in the Petition, the Ninth Circuit explained why the focus is not on the plaintiff:

Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks “whether an official’s acts would chill or silence a person of ordinary firmness from future First Amendment activities.” *Crawford–El v. Britton*, 93 F.3d 813, 826 (D.C.Cir.1996), *vacated on other grounds*, 520 U.S. 1273, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997) (internal quotation marks and citation omitted).

Mendocino Env’t Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999). Respondents cite this case as support that the ordinary-firmness test applies—but they entirely fail to address the Ninth Circuit’s indication that courts should not focus on whether the individual plaintiff’s speech was chilled. Objective and subjective are different. If, as Respondents seem to set forth, the circuits are intermixing these concepts, this Court could resolve the

split it identified in *Houston Cmty. Coll. Sys.* and clarify whether the test chosen considers whether an individual plaintiff is chilled.

On if the Sixth Circuit considered damages in determining whether there was an adverse action, the parties differ. Petitioner noted that, to the extent the Sixth Circuit seemed to require that a plaintiff show some type of compensatory or economic harm to establish an adverse action element of retaliation claim, it erred. Respondents countered the Sixth Circuit “never held—or even inferred—that some type of nominal damages were required.” Brief in Opposition at 9 (emphasis added). Respondents confuse physical and/or economic harm that lead to compensatory damages (implicitly required by the Sixth Circuit majority to support a finding of adverse action) with nominal damages. The Sixth Circuit seemed to imply that economic harm or physical injury were requirements for a First Amendment adverse action element, but neither are necessary. A plaintiff may suffer a First Amendment injury with neither and receive nominal damages. On this last sentence, the parties agree. Petitioner stated:

Thus, if Petitioner can show that a person of ordinary firmness would be chilled if a governmental official reported her to the U.S. Attorney General to chill her speech, then Petitioner would be entitled to \$1 in nominal damages from Respondent Bednard and \$1 in nominal damages from Respondent Chippewa Valley School District. Under [*Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021)], the Sixth Circuit could hold that one governmental

official attempting to chill speech by seeking an investigation from another governmental official is not adverse action as a matter of law, but it cannot do so due to alleged lack of compensatory harm to Petitioner. Nominal damages are always available for constitutional violations.

Petition for Writ of Certiorari at 21-22. Respondents meanwhile stated: “*Uzuegbunam* addressed nominal damages allowing standing for redressability on a claim of a *completed* violation of legal right.” Brief in Opposition at 9-10. At no point did Petitioner contend that the Sixth Circuit “held—or even inferred—that some type of nominal damages were required.”

Lastly, Respondents contend that Petitioner had an affirmative duty to raise an issue in its initial briefing at the Sixth Circuit—qualified immunity—that was not relied upon by the District Court in making its dismissal decision. The District Court held that, as a matter of law, Petitioner could not show adverse action and therefore could not make a First Amendment Retaliation claim against Respondents. App.33a-34a, App.38a-40a. The District Court did not address qualified immunity.

In support of its waiver claim, Respondents cite only to cases indicating that when an issue has been raised on appeal, an appellant cannot brief it in a barebones fashion thereby making the court do the research and decide the issue. No caselaw was provided for the proposition that an appellant must address any defense put forth in the trial court if that court did not rely on that defense in dismissing the matter. At the Sixth Circuit, Petitioner addressed

qualified immunity (i.e., whether the constitutional right was clearly established) in its response brief at pages 18-20 after Respondents had raised it in their appellate brief, pages 39-42, as an alternative means of affirming the District Court.

RELIEF REQUESTED

For the reasons stated in the Petition for a Writ of Certiorari and above, this Court should grant the writ of certiorari.

Respectfully submitted,

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