No. 17-307

IN THE
Supreme Court of the United States

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; SYLVIA JONES; ANN SHEPPARD; THIERRY NETTLES,

Petitioners,

v.

PATRICK L. BOOKER,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Fourth Circuit correctly construed its own precedent in concluding that no binding Fourth Circuit decisions squarely addressed whether prison officials violate an inmate's First Amendment rights when they retaliate against him for filing a prison grievance.

2. Whether inmates possess a clearly established First Amendment right to file prison grievances free from retaliation, in light of the consensus view of ten circuits recognizing this right in published decisions, together with express language in prison regulations instructing Petitioners not to engage in such retaliation.

3. Whether the doctrine of qualified immunity should be reconsidered.

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INTRODUCTION

The decision below held that it was clearly established law that government officials violate an inmate's First Amendment rights when they retaliate against him for filing a prison grievance. In reaching that conclusion, the Fourth Circuit reasoned that (i) although no "cases of controlling authority" from the Supreme Court, Fourth Circuit, or Supreme Court of South Carolina squarely addressed the constitutional right at issue, (ii) the right was clearly established by a "consensus of cases of persuasive authority," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), including ten circuits which had expressly recognized the right in published decisions and none of which held to the contrary. This Court should deny review for four principal reasons.

First, the thrust of Petitioners' argument is that the Fourth Circuit misconstrued its own precedent in concluding that no Fourth Circuit decisions squarely addressed the asserted constitutional right. That issue is not worthy of this Court's review. This Court generally does not police courts of appeals in construing and determining the scope of their own decisions. Moreover, because the decision below assessed the state of the law only within the Fourth Circuit, any decision by this Court would apply only in the Fourth Circuit and only to cases predating the decision below.

Second, the decision below was correct. The Fourth Circuit accurately found that while none of its own published decisions squarely addressed the asserted constitutional right, the unanimous view of every other circuit that had addressed the issue

clearly established that right. Although Petitioners cite a handful of unpublished circuit opinions and district court decisions suggesting otherwise, this meager collection of nonbinding authority is not sufficient to render the law unclear in the face of the overwhelming authority establishing the constitutional right at issue.

Third, despite Petitioners' claims to the contrary, the decision below neither created nor implicates a conflict among the circuits. Petitioners' claim of a circuit split is based on their assertion that the Fourth Circuit adopted a categorical rule barring the consideration of district court decisions in determining whether the law is clearly established. But the Fourth Circuit adopted no such rule. All the decision below held is that the few district court decisions Petitioners had identified could not overcome the unanimous view of ten circuits. There is plainly no circuit split on whether this fact-bound, context-specific decision was correct.

Fourth, this case would make a poor vehicle for resolving any of the alleged ambiguities in the law that Petitioners purport to identify. This case is in an interlocutory posture, and ongoing proceedings in the district court have already led to Petitioners retracting one of the factual assertions they make before this Court. Moreover, the principal theory that Petitioners advance here—that the Fourth Circuit's prior precedent resolved the constitutional issue in their favor—was never presented to the district court, but was instead raised for the first time on appeal. Accordingly, Petitioners forfeited it.

For all of these reasons, the petition should be denied. If, however, the Court were to grant review, it should add a question presented to reconsider the doctrine of qualified immunity. Just last Term, Justice Thomas suggested the Court do so in an appropriate case, and in this case Respondent has preserved a challenge to the doctrine.

STATEMENT

Patrick L. Booker—an inmate of the South Carolina Department of Corrections ("DOC")—filed this civil action under 42 U.S.C. § 1983 against DOC, Sylvia Jones, Ann Sheppard, and Thierry Nettles ("Petitioners"). Among other things, Booker alleged that Petitioners violated his First Amendment rights by retaliating against him for filing a prison grievance. On Petitioners' motion, the district court granted summary judgment based on qualified immunity on the ground that no controlling authority clearly established the relevant right. The Fourth Circuit reversed, holding that while no controlling authority spoke to the asserted constitutional right, a "consensus of persuasive authority" clearly established a First Amendment right to file prison grievances free from retaliation.

1. This case arises out of Booker's objections to the treatment of his legal mail. In November 2010, while incarcerated at Lieber Correctional Institution, Booker noticed that a piece of his legal mail had been opened. Dist. Ct. Dkt. No. 1-1, at 5–6. In response to this discovery, Booker initiated a grievance pursuant to DOC's Inmate Grievance System. The grievance procedure consists of several steps, the first of which

required an inmate to file a "request to staff member" form "to attempt to informally resolve a complaint." Dist. Ct. Dkt. No. 43-2, at 1. Adhering to this requirement, Booker submitted a Request to Staff Member directed to the "mail room," which made its way to Petitioner Jones, the mail room supervisor. Dist. Ct. Dkt. No. 46-3. It stated that Booker's legal mail had been tampered with, and that he intended to pursue legal remedies, including "civil remedies" and "criminal prosecution," if he found his mail tampered with again. *Id*.

2. Less than two hours after receiving Booker's Request to Staff Member, Jones submitted an "Incident Report" recommending that he be charged with an "809" disciplinary offense. Dist. Ct. Dkt. No. 46-3, at 3. An 809 offense, entitled "Threatening to Inflict Harm on/Assault [a Prison] Employee," is a serious offense within the DOC's Inmate Disciplinary System, and carries penalties including time in a "Special Management Unit," loss of accrued good behavior time, and loss of visitation, telephone, and other privileges. Dist. Ct. Dkt. No. 43-3, at 17–19. In relevant part, Jones' Report stated: "Upon reading the request [to staff member] several accusations and allegations were made. These statements were threatening in nature." Dist. Ct. Dkt. No. 46-3, at 3. The Report identified no incident other than the Request to Staff Member, and identified no specific statements in the Request that Jones considered threatening.

Based on Jones' report, Booker was formally charged with the 809 offense. Dist. Ct. Dkt. No. 156 at 2. Less than a month later, Booker was acquitted

on the ground that he had not made any physical threats. Dist. Ct. Dkt. No. 43-5.

3. In June 2012, Booker, proceeding *pro se*, filed a complaint in the McCormick County, South Carolina, Court of Common Pleas. Dist. Ct. Dkt. No. 1-1, at 2. The complaint alleged claims under federal law, principally a First Amendment claim of unlawful retaliation based on the false disciplinary charge, as well as various state law claims.

Petitioners removed the case to the U.S. District Court for the District of South Carolina and later moved for summary judgment. Dist. Ct. Dkt. No. 1. In support of summary judgment, Petitioners submitted several affidavits, including one from Jones. In her affidavit, Jones claimed for the first time that when Booker saw that his legal mail had been opened, "he became irate, yelling at [her] that he was going to sue [her], file criminal charges against [her], and have her fired." Dist. Ct. Dkt. No. 43-4, ¶ 10. The Incident Report that Jones had submitted at the time mentioned no such verbal altercation. Dist. Ct. Dkt. No. 46-3. In response to the motion, Booker filed his own affidavit, in which he denied yelling at or having any verbal interaction with Jones concerning the mail issue. Dist. Ct. Dkt. No. 46-1, ¶ 7.

The district court, accepting a recommendation made by the magistrate judge, granted the motion and held that Booker had failed to suffer sufficient adversity to establish a retaliation claim. On appeal, the Fourth Circuit vacated and remanded as to the retaliation claim, concluding that "disputes of material fact

undermine the district court's finding that Booker suffered no cognizable injury from Jones' actions." *Booker v. S.C. Dep't of Corr.* ("*Booker I*"), 583 F. App'x 43, 44 (4th Cir. 2014) (per curiam). The panel expressed "no opinion as to whether" Booker satisfied the remaining elements of his claim, i.e., "whether Booker has engaged in protected speech." *Id.* at 44–45.

4. On remand, Petitioners again moved for summary judgment. Accepting a recommendation by the magistrate judge, the district court granted summary judgment, this time on grounds of qualified immunity. Specifically, the court held that Booker's asserted right was not clearly established because "there has been no published case law from the Supreme Court of the United States, the Fourth Circuit Court of Appeals, or the Supreme Court of South Carolina that squarely establishes Plaintiff's proffered speech as protected speech." Pet. App. 51. Booker timely appealed.

5. On appeal, the Fourth Circuit again vacated the district court's grant of summary judgment and remanded. Pet. App. 28. At the outset of its analysis, the court clarified that "Booker did *not* allege in his complaint that he had an absolute right to file prison grievances pursuant to the First Amendment. Rather, Booker alleged that he has a First Amendment right to be free from retaliation when he does file a grievance pursuant to an existing grievance procedure." Pet. App. 11.

Having defined the right at issue, the court then turned to whether the case law clearly established

that right. The court first considered whether any "cases of controlling authority"—decisions from the Supreme Court, Fourth Circuit, or Supreme Court of South Carolina—had addressed the asserted right. Pet. App. 14. While the parties agreed that no decision by the United States Supreme Court or Supreme Court of South Carolina had explicitly discussed the right, Petitioners contended, for the first time on appeal, that the Fourth Circuit had done so in *Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994). Pet. App. 14.

The Fourth Circuit rejected Petitioners' argument, finding that "*Adams* does not speak to the right at issue" in this case. Pet. App. 17. Finding that no cases of controlling authority established the asserted right, the Fourth Circuit then turned to whether a "consensus of persuasive authority" from other circuits did so. Pet. App. 19–20.

The Fourth Circuit found that a "consensus of persuasive authority" did clearly establish the First Amendment right to file grievances free from retaliation. Pet. App. 21. As the Court explained, the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits had all recognized in published decisions that inmates possess a First Amendment right to be free from retaliation in response to filing a prison grievance. Pet. App. 21–24. No circuit had held (or has held) otherwise in a published decision.

Thus, the court of appeals concluded that "a reasonable person would have known" that it was unlawful to retaliate against a prisoner simply for filing a grievance. Pet. App. 25 (quoting *Hope v. Pelzer*, 536

U.S. 730, 744 (2000)). This conclusion was "buttressed" by the fact that DOC policy "expressly provides that '[n]o inmate will be subjected to reprisal, retaliation, harassment, or disciplinary action for filing a grievance or participating in the resolution of a grievance'." *Id.* at 25–27 (noting that under *Hope*, "prison regulations in combination with case law" are relevant to "determin[ing] whether an individual had fair warning").

Having found that Booker's right to file a prison grievance free from retaliation was clearly established, the Fourth Circuit vacated the district court's grant of summary judgment based on qualified immunity, and remanded for further proceedings. Pet. App. 28.

6. The Fourth Circuit issued its mandate on June 5, 2017. Since then, the parties have conducted discovery and pre-trial proceedings. Notably, Jones has recanted much of her account. In August 2017, Jones submitted a new affidavit in which she now admits that Booker made his complaint about her through a written grievance, Dist. Ct. Dkt. No. 200-1, ¶¶ 10–11, and she no longer claims that Booker became irate and yelled at her, claiming that a review of notes has "refreshed [her] recollection," *id.* at ¶¶ 12–14. Petitioners nonetheless repeat before this Court their now-retracted claims about Booker's conduct. *See* Pet. 3.[1]

[1] Petitioners' trial counsel recently informed the district court that they advised Petitioners' Supreme Court counsel of the change in Jones' testimony in advance of the filing of the certiorari petition. *See* Dist. Ct. Dkt. No. 237, ¶ 5.

REASONS FOR DENYING THE PETITION

The petition should be denied for four principal reasons.

First, the petition presents no issue worthy of this Court's review. Petitioners primarily argue that the Fourth Circuit misconstrued *its own* precedent. As this Court has recognized, however, a court of appeals generally determines the meaning and scope of its own decisions. Additionally, insofar as the decision below assessed the state of the law only within the circuit, any decision by this Court would apply only within the Fourth Circuit and nowhere else. And because the right at issue is now unquestionably established within the circuit, any decision by this Court would have no prospective effect, but would apply only to events pre-dating the decision below.

Second, even if the Court were inclined to police a court of appeals' interpretation of its own precedent, the decision below was correctly decided. The Fourth Circuit accurately construed its own opinions in determining that the no published decision in the Fourth Circuit squarely addressed the asserted right. It also correctly held that a "consensus of persuasive authority" from other circuits clearly established that right. Petitioners' argument that a handful of nonbinding lower court decisions rendered the law unclear is unavailing.

Third, the decision below did not create and does not implicate any conflict among the circuits. Petitioners attempt to manufacture such a split by asserting that the decision created a categorical rule barring the consideration of district court opinions. But the

decision below does not even suggest the rigid rule Petitioners attribute to it. More fundamentally, the Fourth Circuit in fact considered the very district court cases that Petitioners presented to it and explained that those decisions did not change the result.

Fourth, this case would make a poor vehicle for resolving any of the alleged ambiguities in the law that Petitioners purport to identify. In addition to the interlocutory posture of this case, Petitioners forfeited the principal theory that they advance here—that the Fourth Circuit's prior precedent resolved the constitutional issue in their favor—by failing to present it to the district court, instead raising it for the first time on appeal.

Finally, if the Court were to nonetheless consider this case worthy of review, the Court should add a question presented permitting it to reconsider the doctrine of qualified immunity, as Justice Thomas recently suggested the Court should do.

I. Petitioners' Disagreement With The Fourth Circuit's Reading Of Its Own Decision Does Not Warrant This Court's Review.

Petitioners first contend that the Fourth Circuit erred in rejecting its own decision in *Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994), as "controlling authority" on the relevant constitutional right. The Fourth Circuit did consider *Adams*, but ultimately found it "silent on the issue in this case—whether an inmate's First Amendment right is violated when he is *retaliated against* for submitting a grievance pursuant to

an existing grievance procedure." Pet. App. 15.[2] Petitioners take issue with that reading. They maintain that *Adams* not only addressed the same constitutional right presented in this case, but also affirmatively held that inmates have no First Amendment right to file prison grievances free from retaliation. Pet. 6.

Whether or not the Fourth Circuit read *Adams* correctly—which, as explained below, it did—Petitioners' disagreement does not call for this Court's intervention. It is well established that a court has "an undoubted right to construe its own decision … and to declare what the judgment rendered therein really meant, and to define the scope thereof." *Newport Light Co. v. City of Newport*, 151 U.S. 527, 538 (1894); *see also Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 753 F.2d 824, 827 (10th Cir. 1985) ("We believe that the Supreme Court of New Mexico should interpret its own decisions…."); *Brown v. Lanyon*, 148 F. 838, 841 (8th Cir. 1906) (discussing the Supreme Court's "undoubted right to construe its own decisions"); *Lohman v. Kan. City S. Ry. Co.*, 33 S.W.2d 112, 116 (Mo. 1930) (the rendering court "alone has the power to speak authoritatively concerning the scope and effect of one of its own decisions"); John Leubsdorf, *Deconstructing the Constitution*, 40 Stan.

[2] It is clearly established that prison officials violate an inmate's constitutional rights when they retaliate against him for exercising his First Amendment rights. *See, e.g.*, *Pinson v. U.S. Dep't of Justice*, 246 F. Supp. 3d 211, 225 (D.D.C. 2017) (explaining that "a prisoner's right not to be retaliated against for First Amendment activity" is clearly established). The question presented by Booker's appeal was whether filing a prison grievance is protected First Amendment activity.

L. Rev. 181, 200 (1987) ("A common law court construes its own decisions whenever it applies them; it keeps control of its words.").

For this reason, the Supreme Court rarely chooses to police another court's reading of its own decisions. *See Davis v. Scherer*, 468 U.S. 183, 192 n.9 (1984) ("We see no reason to doubt, as does the partial dissent, that the Court of Appeals ... had full knowledge of its own precedents and correctly construed them."); *Great N. Ry. Co. v. Minnesota*, 216 U.S. 206, 231 (1910) ("We accept that view of the state court as to the scope of its own decisions."). Petitioners present no compelling reason for the Court to depart from this noninterventionist policy here.

Furthermore, because this case implicates nothing more than the Fourth Circuit's interpretation of its own precedent and its assessment of the state of the law within the circuit, the effect of any decision by this Court would be curtailed both geographically and temporally. The issue here is whether the asserted right was clearly established within the Fourth Circuit. As such, a Supreme Court decision in this case would apply only within the Fourth Circuit and nowhere else. This Court grants certiorari to resolve conflicts among the circuits, not within them. *See* S. Ct. R. 10. And whatever the state of the law was before this case, the decision below erased any doubt that inmates have the right to file prison grievances free from retaliation. Accordingly, even if this Court granted certiorari and held that the asserted right was not clearly established during the events in ques-

tion, the Court's ruling would have no prospective effect, but would instead apply only to cases predating the decision below.

The absence of any compelling reason to upset the Fourth Circuit's reading of its own precedent, combined with the limited effect any decision would have in this case, weigh decisively against granting the petition.

II. The Decision Below Was Correctly Decided.

Petitioners' disagreement with the Fourth Circuit's decision is in any event wrong.

A. The Fourth Circuit Correctly Found That Its Own Precedent Did Not Squarely Address The Asserted Constitutional Right.

A cursory reading of *Adams* quickly reveals that it did not squarely address the First Amendment right to file grievances free from retaliation. There, an inmate claimed that prison officials had retaliated against him not for filing grievances, but for requesting protective custody. *Adams*, 40 F.3d at 73–74. On appeal, the plaintiff tried to "recast[ ] his protective custody request as an exercise of a 'right to inform' prison officials of dangerous prison conditions … incident to his Eighth Amendment right to be free from the deliberate indifference of prison officials." *Id.* at 75. Rejecting this claim, the Fourth Circuit held that the plaintiff was not entitled "to a particular grievance procedure." *Id. Adams* did not involve any claim

that prison officials had retaliated against an inmate for filing grievances, nor did it consider—or even mention—the First Amendment.

Petitioners' point to dicta in *Adams*, which state that "there is no constitutional right to participate in grievance proceedings" and "the Constitution creates no entitlement to grievance procedures or access to any procedure voluntarily created by a state." 40 F.3d at 75. According to Petitioners, these passing statements "establish[ ] that a prisoner has no protected First Amendment right to be free from retaliation for filing a prison grievance." Pet. 6. But these passages cannot bear the weight Petitioners place upon them.

As the decision below explained, courts recognize a distinction between "the right of access or entitlement to a grievance process and the right to be free from retaliation for filing a grievance." Pet. App. 16. It is entirely consistent to recognize "that (1) an inmate possesses a First Amendment right to be free from retaliation for filing a grievance, while simultaneously recognizing that (2) an inmate does not have a due process liberty interest in access to a grievance procedure." *Id.* (quotation marks, citations, and alterations omitted). Indeed, as the Fourth Circuit pointed out, several circuits hold that while inmates do not have a right of access or entitlement to grievance procedures, inmates do have a right to file grievances free from retaliation. *See, e.g.*, *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989) (holding that "[p]rison officials cannot properly bring a disciplinary action against a prisoner for filing a grievance" even though

"the Constitution does not obligate the state to establish a grievance procedure"); *see also* Pet. App. 16–17 (collecting cases).

Adams addressed only one side of this distinction. It held that an inmate does not have a constitutional right of access to a particular grievance process. It left unanswered and unaddressed whether an inmate has a First Amendment right to file grievances free from retaliation. Thus, as the decision below correctly surmised, "*Adams* does not speak to the right at issue" in this case. Pet. App. 17.

The evolution of Petitioners' reading of *Adams* during the proceedings below undermines the interpretation they now advance. When Petitioners first moved for summary judgment in this case, they conceded (correctly) that "it has been clearly established that a prison official may not retaliate against an inmate … complaining about a prison official's conduct." Dist. Ct. Dkt. No. 48, at 8. Only when they moved for summary judgment a second time did Petitioners backtrack, stating (still correctly) that "the Fourth Circuit has not issued a published opinion on the question of whether the filing of a grievance by a prisoner implicates the First Amendment." Dist. Ct. Dkt. No. 131-1, at 7. Only on appeal for the second time in the Fourth Circuit did Petitioners claim that *Adams* considered and rejected the First Amendment right in this case, in contradiction to Petitioners' earlier statements.

Petitioners had it right the first time: *Adams* does not address whether prison officials violate an inmate's First Amendment rights when they retaliate

against him for filing a prison grievance and therefore does not constitute controlling authority. The decision below correctly reached the same conclusion.

B. The Handful Of Nonbinding Lower Court Decisions Cited By Petitioners Do Not Undermine The Fourth Circuit's Conclusion.

Finding that no binding precedent addressed the relevant constitutional right, the Fourth Circuit then considered decisions from other circuits. The court quickly concluded that a "consensus of persuasive authority" clearly established the First Amendment right to file grievances free from retaliation. As the court explained, the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits had all recognized in published decisions that inmates possess a First Amendment right to be free from retaliation in response to filing a prison grievance. Pet. App. 21–24.[3] No circuit had held (or has held) otherwise in a published decision.

Petitioners do not contest the fact that every circuit that had addressed the issue—ten in total—held

[3] *See Franco v. Kelly*, 854 F.2d 584, 589 (2d Cir. 1988); *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003); *Bibbs v. Early*, 541 F.3d 267, 271 (5th Cir. 2008); *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000); *Powers v. Snyder*, 484 F.3d 929, 933 (7th Cir. 2007); *Dixon v. Brown*, 38 F.3d 379, 379 (8th Cir. 1994); *Brodheim v. Cry*, 584 F.3d 1262, 1266, 1269–72 (9th Cir. 2009); *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991); *Boxer X v. Harris*, 437 F.3d 1107, 1112 (11th Cir. 2006); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584–85 (D.C. Cir. 2002).

that inmates have a First Amendment right to file prison grievances free from retaliation. Nor do they contest that such a consensus is sufficient to clearly establish a constitutional right. *See Wilson*, 526 U.S. at 617. Instead, Petitioners contend that a handful of district court decisions and one unpublished circuit opinion that expressed doubts about this right rendered the law unclear in the Fourth Circuit. Petitioners are wrong.

As an initial matter, Petitioners wrongly suggest that this Court has held that disagreements expressed by district court decisions and unpublished circuit opinions renders the law unclear within a single circuit. The two Supreme Court decisions Petitioners cite do not support that proposition. Indeed, both cases discussed existing *circuit splits*, not disagreements within a circuit and not disagreements among district judges. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009) (discussing conflict among the Ninth, Sixth, and Eleventh Circuits); *Wilson*, 526 U.S. at 618 (acknowledging "a split among the Federal Circuits," including the Second, Eighth, and Ninth Circuits).

Even if widespread disagreement among district court decisions and unpublished circuit opinions could render the law unclear, Petitioners argument would fare no better. In support of their view that "fervent disagreement" existed in this case, Petitioners point to just three published district court decisions—all out of the Western District of Virginia—that rejected an inmate's claim of retaliation for filing grievances based on *Adams*. *See* Pet. 10, 13–16; *see also Davis v.*

Lester, 156 F. Supp. 2d 588 (W.D. Va. 2001); *Boblett v. Angelone*, 942 F. Supp. 251 (W.D. Va. 1996); *Brown v. Angelone*, 938 F. Supp. 340 (W.D. Va. 1996). But these non-binding decisions largely predate the consensus of out-of-circuit cases that *Booker II* found clearly established the asserted right. *See supra*, 16 n.3. Accordingly, these cases do not conflict with the proposition that a later-developed consensus of cases clearly established the right at issue here. Moreover, two of the decisions, like *Adams*, do not even mention the First Amendment.

Petitioners also point to a handful of more recent unpublished district court decisions, which they maintain rejected the right at issue here based on the fact that "[t]he Fourth Circuit ha[d] not addressed in a published opinion whether inmates have a First Amendment right to be free from retaliation for filing grievances relating to misconduct by prison officials." *Hendrick v. Bishop*, No. TDC-14-2544, 2016 WL 1060212, at *6 (D. Md. Mar. 15, 2016); *see also Venable v. Mathena*, No. 7:14-cv-00295, 2015 WL 5602670, at *8 (W.D. Va. Sept. 23, 2015); *Stokes v. Johnson*, No. 3:16-cv-127-FDW, 2016 WL 3921155, at *2 (W.D.N.C. July 19, 2016); C*obb v. Ozmint*, No. 0:08-3978-HFF-PJG, 2010 WL 2943073, at *5 (D.S.C. July 1, 2010), *report and recommendation adopted*, 2010 WL 2990013 (D.S.C. July 27, 2010).[4] However, one of

[4] Notably, these decisions undermine Petitioners' claim that *Adams*, a published opinion, addressed the right at issue in this case. According to the decisions Petitioners themselves cite, *Adams* did not address that question. *See also* Dist. Ct. Dkt. No. 71, at 16 n. 7 ("[T]he Fourth Circuit has not issued a published

these decisions actually accepted an inmate's First Amendment retaliation claim based on a consensus of out-of-circuit authority. *See Stokes*, 2016 WL 3921155, at *2 ("Although the Fourth Circuit has not issued a published opinion on the question of whether the filing of a grievance by a prisoner implicates the First Amendment, *other circuits have held that prison officials may not retaliate against a prisoner for filing grievances*." (emphasis added)). And in any event, this handful of unpublished district court decisions does not constitute a "fervent disagreement," certainly not one sufficient to render the law unclear given the overwhelming consensus of persuasive authority from other circuits. And while Petitioners criticize the panel below for failing to expressly cite these cases in its decision, Pet. 15–16, Petitioners made no mention of these unpublished decisions in their responsive appellate brief. *See* 4th Cir. Dkt. No. 36-1. The Fourth Circuit can hardly be criticized for failing to discuss cases that Petitioners did not bring to its attention.

Petitioners also cite an unpublished Fourth Circuit opinion, *Daye v. Rubenstein*, 417 F. App'x 317 (4th Cir. 2011), which cited *Adams* for the proposition that prisoners do not enjoy the right to file grievances free from retaliation, again suggesting that the decision rendered the law unclear. Pet. 13. As the Fourth Circuit explained, however, unpublished circuit decisions "cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity." Pet.

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opinion on the question whether the filing of a grievance by a prisoner implicates the First Amendment….").

App. 18–19 (quoting *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (en banc)). Petitioners do not challenge that holding, but instead state in passing that the unpublished opinion they cite "reflected the 'state of the law' when it was decided." Pet. 13. Petitioners fail to mention that other unpublished Fourth Circuit decisions found that an inmate *can* bring a First Amendment claim alleging retaliation for filing a grievance. *See, e.g.*, *Wright v. Vitale*, 937 F.2d 604 (4th Cir. 1991) (unpublished table opinion); *Gullet v. Wilt*, 869 F.2d 593 (4th Cir. 1989) (unpublished table opinion). If unpublished decisions reflect the state of the law, then the unpublished decisions here supported the asserted right.

Petitioners also point to the fact that the decision below provoked a dissent as evidence of "fervent disagreement." *See* Pet. App. 29–43 (Traxler, J., dissenting). Petitioners do not seriously contend, nor could they, that a single dissenting opinion in a qualified immunity case renders the law unclear. Were that the case, a single panel member would have the power to render the law unclear in every case. To state the proposition is to disprove it. As Petitioners themselves acknowledge, "[T]he fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear." Pet. 13 (quoting *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 378–79).

Finally, Petitioners' claim that the law was unclear is belied by the fact that DOC's own internal policies forbade retaliation against inmates for filing

grievances. As the Fourth Circuit noted, DOC's "detailed policy document concerning the 'Inmate Grievance System' expressly provides that '[n]o inmate will be subjected to reprisal, retaliation, harassment, or disciplinary action for filing a grievance or participating in the resolution of a grievance." Pet. App. 26–27 (alteration in original). And as the Fourth Circuit further noted, prison regulations like this one may be considered in evaluating the state of the law. *See* Pet. App. 26; *see also Hope*, 536 U.S. at 741–45 (considering Alabama Department of Corrections regulation in determining right was clearly established); *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013) ("[R]egulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established"). Here, DOC's internal policy—in combination with the overwhelming consensus of persuasive authority—gave Petitioners fair warning that retaliating against inmates for filing grievances was unlawful.

As the decision below held, the state of the law in 2010 was clear. Ten circuits had held that inmates enjoy a First Amendment right to file grievances free from retaliation. None held to the contrary. And while Petitioners may not have known about those cases (or the handful of district court decisions they more recently discovered), they certainly knew that retaliation for filing grievances was prohibited by DOC's own policy. A few non-binding decisions is not sufficient to undermine the unanimous consensus of persuasive authority present here.

III. The Decision Below Did Not Create And Does Not Implicate a Conflict Among The Circuits.

The Fourth Circuit's decision neither created nor implicates a circuit split. Petitioners maintain that this Court and six circuits have held that district court decisions should be considered in assessing the state of the law, and that the Fourth Circuit created a conflict with those holdings by establishing a *per se* rule barring the consideration of district court decisions. Petitioners' argument misreads the decision below, the decisions of other circuits, and the decisions of this Court.

A. Supreme Court Precedent Does Not Command Circuit Courts To Consider District Court Decisions.

Petitioners first argue that the Fourth Circuit's "failure to consider district court decisions … is contrary to United States Supreme Court precedent." Pet. 16. In support, Petitioners cite this Court's decision in *Pearson v. Callahan*, which stated that "[p]olice officers are entitled to rely on *existing lower court cases* without facing personal liability for their actions." 555 U.S. 223, 244–45 (2009) (emphasis added). Taking this quote out of context, Petitioners assert that *Pearson* held that government officials are entitled to rely on federal district court decisions for purposes of qualified immunity.

Petitioners' reliance on *Pearson* is misplaced. To begin with, the quoted sentence does not mean what

Petitioners say it does. Read in context, the Court's reference to "existing lower court cases" clearly denotes decisions from federal courts of appeals and state supreme courts, *not* federal district courts. In the paragraph preceding the quoted text, the Court notes that the constitutional doctrine in play "had gained acceptance in the lower courts" and then proceeds to describe the decisions of three federal circuits and two state supreme courts. *Id.* at 244.

What is more, the Court's opinion in *Pearson* did not cite or quote a single federal district court decision in assessing the state of the law, but instead reasoned that the officers could rely on decisions from federal circuits and state supreme courts other than the officers' own (which had not addressed the relevant constitutional doctrine prior to the underlying events). *Id.* at 243–45.

Simply put, *Pearson* does not hold or even suggest that public officials may rely on district court decisions to defeat an otherwise overwhelming consensus of persuasive authority for purposes of qualified immunity.

B. The Circuit Court Decisions On Which Petitioners Rely Do Not Hold That District Court Decisions Must Be Considered In Assessing The State Of The Law.

Petitioners next contend that the Fourth Circuit's decision conflicts with an approach followed by the Second, Third, Fifth, Seventh, Eight, and Ninth Cir-

cuits. Once again taking quotes out of context, Petitioners assert that these six circuits all hold that appellate courts should consider district court decisions "to assess whether the law is not clearly established." Pet. 21. Once again, Petitioners' reliance on these decisions is misplaced. While it is true these circuits say that in the absence of binding precedent from the Supreme Court, federal courts of appeals, or state supreme courts, district court decisions may be relevant in determining the state of the law, a cursory review shows that these statements are dicta or that the cases are otherwise distinguishable from the decision below.

Four of the decisions cited by Petitioners say in passing that district court decisions could be relevant in evaluating whether the law is clearly established. *See Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) (explaining that district court decisions "are evidence of the state of the law"); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988) ("To determine whether a right is clearly established, in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits and district courts...." (quotation marks omitted)); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993) (same); *Doe v. Delie*, 257 F.3d 309, 321 (3d Cir. 2001) ("[I]n this case, the absence of binding precedent in this circuit, the doubts expressed by the most analogous appellate holding, *together with* the conflict among a handful of district court opinions, undermines any claim that the right was clearly established in 1995." (emphasis added)). But not one of these decisions relies on federal district

court decisions to conclude that the law was or was not clearly established. Two decisions conclude that the law was clearly established based on existing circuit-level precedent, *Tribble*, 860 F.2d at 325; *Norfleet*, 989 F.2d at 293, while the other two expressly rejected the plaintiffs' argument that district court decisions could clearly establish a constitutional right, *Anderson*, 72 F.3d at 525; *Doe*, 257 F.3d at 320 (rejecting the plaintiff's argument that district court decisions clearly established the relevant right because "all of the[ ] opinions are factually and legally distinguishable from the present case").

One decision independently concludes that the law was not clearly established based on a dearth of binding precedent governing the constitutional right at issue; the decision then cites disagreement among the district courts only to bolster that conclusion. *See Richardson v. Selsky*, 5 F.3d 616, 623 (2d Cir. 1993) (explaining that "disparate rulings in [district court] cases *further confirm* our conclusion that the issue was not clearly established within this Circuit as of March 1985" (emphasis added)). The decision does not rely on district court decisions to determine whether or not the law was clearly established. Moreover, the disagreement among the district courts in that case did not concern *whether* the relevant right was clearly established in the circuit, but *when* the right was established: district courts had reached disparate results, respectively finding that the relevant right was established in 1984, 1986, 1987, and 1989. *Id.* It was only against that backdrop that the court concluded that the relevant right was not clearly established in 1985. *Id.*

The final decision on which Petitioners rely, *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), is likewise distinguishable and does not conflict with the decision below. There, the issue was whether the law clearly established that a public university's anti-solicitation policy violated the First Amendment. *Id.* at 125. Tacitly acknowledging that neither Supreme Court nor circuit-level precedent (from any circuit) controlled the issue, the Fifth Circuit cited a single district court decision that upheld a similar policy, explaining that because "the regulations upheld in [that prior district court decision] were sufficiently similar to the regulations at issue here, … it cannot be said that defendants violated clearly established law at the time that they enforced the University's anti-solicitation policy…." *Id.* at 125. The Fifth Circuit did not discuss the propriety of considering a district court decision. In any event, however, the lack of binding precedent or any persuasive authority from other circuits was sufficient to show that the right at issue was not clearly established.

In short, none of the decisions cited by Petitioners holds that a court of appeals must consider district court decisions in assessing the state of the law for purposes of qualified immunity.

C. Even If Other Circuits Had Held That District Court Decisions Must Be Considered In Assessing The State Of The Law, The Decision Below Does Not Conflict With Those Holdings.

Even assuming that other circuits had held that district court decisions must be considered in assessing the state of the law, Petitioners' argument would still fail. Petitioners maintain that the Fourth Circuit created a conflict by establishing a categorical rule "clearly reject[ing] any consideration of district court decisions." Pet. 21. They also assert that the Fourth Circuit erred in failing to consider relevant district court decisions. *Id.* at 24. Petitioners are wrong on both counts.

First, the Fourth Circuit simply did not establish a rigid rule barring consideration of district court decisions in assessing the state of the law. To the contrary, the Court stated that "it is *unclear* whether we should include district court opinions in the balancing of 'persuasive authority.'" Pet. App. 25 (emphasis added). The decision left that broader methodological question for another day.

Second, and again contrary to Petitioners' characterization, the Fourth Circuit in fact considered relevant district court decisions, but explained that they did not alter the court's decision. As the Fourth Circuit stated:

> [E]ven if we classify published district court opinions as relevant "persuasive authority," they are

> "no match for the Circuit precedents." *Hope*, 536 U.S. at 747. When weighed against the circuit precedents, there is still an overwhelming "consensus of persuasive authority" that inmates possess a First Amendment right to be free from retaliation for filing a grievance.

Pet. App. 25. While Petitioners quibble with the Court's citation to *Hope*, Pet. 19–21, the point remains: The Fourth Circuit considered the district court decisions that Petitioners supplied and found that they did not render the law unclear within the circuit given the overwhelming body of persuasive authority from other circuits.

Ultimately, no novel qualified immunity ground was broken here. Petitioners' quarrel is not with a methodology that categorically excludes district court decisions from the analysis, but with a context-specific, fact-bound qualified immunity analysis finding that the particular district court decisions cited could not carry the day.

* * *

In sum, Petitioners' argument that the decision below created a conflict among the circuits relies on a misreading of existing Supreme Court and circuit-level decisions, as well as the decision below. The Fourth Circuit's application of settled qualified immunity principles to the specific constellation of authorities at issue in this case does not come close to warranting this Court's review.

IV. This Case Is A Poor Vehicle For Clarifying Any Purported Ambiguities In This Court's Qualified Immunity Doctrine.

Even if this case presented any ambiguities or disagreements concerning this Court's qualified immunity doctrine, it would nonetheless provide a poor vehicle for resolving those issues.

To start, this appeal is at an interlocutory stage. This Court generally prefers to review final judgments with sufficiently developed factual records. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 663 n.3 (1989) (Stevens, J., dissenting) ("Because I perceive no urgency to decide these disputed questions at an interlocutory stage of such a factually complicated case, I believe the Court should have denied certiorari and allowed the District Court to make the additional findings directed by the Court of Appeals." (quotation marks and citation omitted)); *Gray v. Sanders*, 372 U.S. 368, 389 (1963) (Harlan, J., dissenting) ("But I think a formulation of the basic ground rules in this untrod area of judicial competence should await a fully developed record. This case is here at an interlocutory stage."); *see also U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 202 (1945) ("It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review.").

The interlocutory status of this case is a particularly strong factor counseling against review in light of the factual record's state of flux. As previously noted, when Petitioners first moved for summary judgement, they submitted a sworn affidavit from Jones in which she alleged that when Booker saw that his legal mail had been opened, "he became irate" and yelled at her. Dist. Ct. Dkt. No. 43-4, ¶ 10. Jones has since recanted much of that telling, submitting a new affidavit in which she now admits that Booker made his complaint about her in writing, Dist. Ct. Dkt. No. 200-1, ¶¶ 10–11, and she no longer claims that Booker became irate and yelled at her, *id.* at ¶¶ 12–13. Yet in their present petition, Petitioners continue to repeat Jones's now-retracted claims that Booker yelled at her. *See* Pet. 3. Petitioners' own confusion about the facts of this case counsel against review. *See Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., concurring in the denial of certiorari) ("The convoluted history of this case makes it a poor vehicle for reviewing the important question it presents….").

Furthermore, waiver issues loom large in this case. As noted above, Petitioners did not argue in the district court that *Adams* had held that prisoners lack a First Amendment right to file grievances free from retaliation. Instead, as the Fourth Circuit itself noted, Petitioners originally "agreed with Booker that 'it has been *clearly established* that a prison official may not retaliate against an inmate for … complaining about a prison official's conduct.'" Pet. App. 14 n.5 (alteration in original). On remand from *Booker I*, Petitioners again did not argue that *Adams* had addressed the asserted right, but instead maintained

that "the Fourth Circuit has not issued a published opinion on the question of whether the filing of a grievance by a prisoner implicates the First Amendment." Dist. Ct. Dkt. No. 131-1, at 7. Only on appeal in *Booker II* did Petitioners argue that *Adams* had not only addressed the First Amendment right to file grievances free from retaliation, but held that no such right exists.

By failing to present this theory to the district court and instead raising it for the first time on appeal, Petitioners forfeited their argument that *Adams* resolved the constitutional issue in their favor. *See Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." (quotation marks omitted)); *United States v. Foster*, 824 F.3d 84, 90 (4th Cir. 2016) ("A theory presented for the first time on appeal is generally considered waived or forfeited."). This Court should not grant a petition premised on a legal theory Petitioners did not first present to the district court.

V. If The Court Grants Review, It Should Add A Question Presented To Reconsider The Doctrine Of Qualified Immunity.

Finally, although certiorari is not warranted, if the Court were to grant the petition it should add a question presented to consider whether to adhere to the doctrine of qualified immunity. Justice Thomas has recently suggested that the Court reconsider the doctrine, and this case presents an appropriate vehicle in which to do so.

Section 1983 makes liable "[e]very person" who violates another's constitutional rights under the color of state law. 42 U.S.C. § 1983. Although the statute does not mention immunity, this Court has held that Section 1983 implicitly adopts common law defenses that existed when the statute's predecessor was enacted in 1871. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)).

Members of this Court have warned that qualified immunity doctrine has slipped from these historic moorings. *See Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards."); *Burns v. Reed*, 500 U.S. 478, 498 n.1 (1991) (Scalia, J., concurring in the judgment and dissenting in part) (explaining that in prior cases, the Court "extended qualified immunity beyond its scope at common law").

Just last Term, Justice Thomas expressed "growing concern with our qualified immunity jurisprudence," based on its "diverge[nce] from the historical inquiry mandated by the statute." *Ziglar v. Abbasi*,

137 S. Ct. 1843, 1870–71 (2017) (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas suggested that the Court stop granting immunity "to any officer whose conduct 'does not violate clearly established statutory or constitutional rights,'" and instead ask "whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim." *Id.* at 1871 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 101, 115–16 (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896508, cited in *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and concurring in the judgment).[5]

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[5] *See also* David P. Stoelting, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. Cin. L. Rev. 243, 262 (1989) ("[T]he Supreme Court should abolish qualified immunity for police officers in excessive force cases and thereby reaffirm section 1983 as a guarantor of constitutional rights."); Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 Fordham Urb. L.J. 743, 757 (2010) ("If we abolish qualified immunity (which was as unknown to the founders as the exclusionary rule), we might come closer to optimal deterrence."); Evan Bernick, *To Hold Police Accountable, Don't Give Them Immunity*, Foundation for Economic Education (May 6, 2015), https://fee.org/articles/to-hold-police-accountable-dont-give-them-immunity/ (arguing that qualified immunity "must be abolished"); NAACP Legal Defense Fund, *LDF Statement on the Non-Indictment of Cleveland Police Officers in the Shooting Death of Tamir Rice* (Dec. 28, 2015), http://www.naacpldf.org/press-release/ldf-statement-non-indictment-cleveland-police-officers-shooting-death-tamir-rice ("We invite our civil rights colleagues to join us in re-examining the legal standards governing officer misconduct, including … qualified immunity."); Hon. Jon O. Newman, *Here's a better way to punish the police: Sue them for*

Justice Thomas concluded that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in the judgment). This is such a case. Litigants rarely preserve challenges to this existing doctrine, but Respondent has done so. *See* 4th Cir. Dkt. No. 26, at 21 ("In addition to the argument presented in this brief, Plaintiff has instructed counsel to inform the Court that he wishes to preserve his alternative position that the doctrine of qualified immunity should be abolished."). While the present petition should be denied, if the Court decides to grant certiorari it should add a question presented permitting it to revisit the doctrine of qualified immunity as a potential alternate ground for affirmance.[6]

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

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money, Washington Post (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html ("[T]he defense of qualified immunity should be abolished.").

[6] On September 27, 2017, Respondent Booker filed a *pro se*, conditional cross-petition, docketed as No. 17-6285, asking that if this Court grants review in No. 17-307, it should also reconsider the doctrine of qualified immunity. If the Court were inclined to grant Defendants' petition, it could decide to add the question of reconsidering the doctrine of qualified immunity as an additional question presented, which could be addressed as an alternate ground for affirmance. *See Nw. Airlines, Inc. v. Cty. of Kent, Mich.*, 510 U.S. 355, 364 (1994).

Respectfully submitted,

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