NO. 19-____

In the Supreme Court of the United States

GERALD SENSABAUGH,

Petitioner,

—v—

KIMBER HALLIBURTON,
INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS
DIRECTOR OF SCHOOLS; AND THE
WASHINGTON COUNTY BOARD OF EDUCATION,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a retired NFL football player. After his retirement as a player, he became the head football coach at a public high school in Tennessee. In his first season as coach, the team had one of the most successful starts in school history. Around mid-season, petitioner made two Facebook posts criticizing certain school district policies. A short time after petitioner's social media posts, the district school director imposed a series of disciplinary measures upon him and eventually terminated petitioner as coach.

Although the courts below held that petitioner's Facebook posts were protected speech, a Sixth Circuit panel affirmed the dismissal of petitioner's First Amendment retaliation claim on qualified immunity grounds.

THE QUESTIONS PRESENTED ARE:

1. Whether the Court should reconsider its qualified immunity jurisprudence to accord with the official's burden of establishing immunity entitlement at common law in 1871.

2. Whether placing a guidance letter in a public employee's personnel file would chill further protected speech.

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 18-6329

Gerald Sensabaugh, Plaintiff-Appellant v.
Kimber Halliburton, Individually and in Her Official Capacity as Director of Schools; Washington County Board of Education, Defendants-Appellees.

Date: August 27, 2019

United States District Court,
Eastern District of Tennessee

No. 2:18-CV-11

Gerald Sensabaugh,Plaintiff v.
Kimber Halliburton, Individually and in Her Official Capacity as Director of Schools; Washington County Board of Education, Defendants.

Date: November 19, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

SOCIAL MEDIA POSTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald Sensabaugh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit panel opinion (App.1a) is reported at 937 F. 3d 621 (6th Cir. 2019). The Eastern District of Tennessee memorandum opinion (App.18a) is unreported but available at 2018 WL 6050587.

JURISDICTION

The judgment of the Sixth Circuit court of appeals was entered on August 27, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case is an attractive vehicle for the Court to reconsider its qualified immunity jurisprudence. On a fundamental level, the Court's current qualified immunity doctrine does not comport with historical immunity principles at common law in 1871, when the current version of 42 U.S.C. § 1983 was enacted. This civil rights statute is commonly referred to as "Section 1983" and was enacted by Congress to provide a legal vehicle for citizens to vindicate their constitutional rights against public officials.

At its core, present-day qualified immunity fails to hold a public official to the same evidentiary burden as the common law in 1871, when an official claims immunity as an affirmative defense to Section 1983 lawsuits. Indeed, controlling qualified immunity law requires the plaintiff to carry both the burden of proving the elements of a "constitutional tort violation" as is traditionally required of a plaintiff and that the defendant official violated "clearly established law."

This hybrid legal framework of modern qualified immunity is contrary to the traditional burden allocation assigned solely upon a defendant asserting an affirmative defense.

Additionally, the Court's qualified immunity precedents accord broad immunity entitlement indiscriminately to virtually any "official" regardless of the discretionary function performed. This departure from the underpinning of common law immunity analysis has created a "freewheeling" approach where virtually any "public official" or "state actor" is shielded from suit by the armor of qualified immunity, without conducting a proper analysis into the historical discretionary function performed by the defendant official.

As a result, immunity entitlement continues to grow unbridled and acts as a steel barrier protecting virtually every public official sued in their individual capacity. This modern immunity shield stands in stark contrast to the very purpose for which Congress enacted Section 1983 and the appropriate application of common law principles. This *de jure* immunity shield that protects individual officials further extends to the official's employer by creating a *de facto* shield for government employers. That is because quite often the public employee fails to "establish" a constitutional tort violation because of an inability to scale the current qualified immunity mountaintop. Consequently, a court never reaches the merits of a public employee's municipal liability claim because the official is cloaked with qualified immunity.

This creates perverse incentives for example by incentivizing government employers to develop policies that place sole authority upon official employees on

important discretionary matters such as disciplining and terminating public employees because the official is insulated with qualified immunity. This leads to less oversight by the government employer which of course leads to a likely increase in constitutional deprivations of public employees when there are no further due process protections required by state law. An official's qualified immunity defense impacts every Section 1983 lawsuit, and that issue was decided below with the lower courts applying the Court's current qualified immunity analysis and according qualified immunity to the official sued individually.

This case involves a Section 1983 lawsuit for monetary damages by an at-will public employee against the district school director and board of education for First Amendment retaliation. The lower courts both agreed that petitioner engaged in protected speech under the First Amendment by making two social media posts criticizing certain school district policies. However, the courts determined that two of three successive disciplinary measures imposed upon the petitioner shortly after he engaged in protected speech ((1) guidance letter in personnel file and (2) suspension pending independent attorney investigation), were not adverse actions sufficient to chill a person of ordinary firmness from engaging in further protected speech.

The third disciplinary measure eventually imposed upon petitioner was termination from employment. While the courts below held termination an adverse action sufficient to chill a person of ordinary firmness from further protected speech, they ruled that petitioner failed to establish causation as a result of the termination, although petitioner provided evidentiary support

that the disciplinary measures were pretextual in retaliation for his protected speech. Consequently, the lower courts held that petitioner failed to establish an underlying constitutional violation by the director of schools shielded from suit by qualified immunity, and thus petitioner's municipal claim against the board also failed.

The Court should grant review to reconsider its qualified immunity jurisprudence and conclude that its current framework does not accord with traditional immunity doctrine at common law in 1871. Moreover, the Court should grant review on an issue of first impression and conclude that placing a guidance letter in a public employee's personnel file, the first disciplinary measure imposed upon petitioner, would chill further protected speech. The Court should then vacate the lower court judgments and remand to the district court for petitioner's case to proceed to trial.

A. Legal background

1. The Reconstruction Congress first enacted Section 1983 as part of the 1871 Ku Klux Klan Act, a suite of "Enforcement Acts" designed to help combat lawlessness and civil rights violations in the southern states. William Baude, *Is Qualified Immunity Unlawful*?, 106 CAL. L. REV., pg. 45, 49 (2018). As the Court has recognized, neither the original text enacted in 1871 nor the current version of Section 1983 mentions the word "immunity." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Nor is there any reference in either version of the statute that accords immunity entitlement to a governmental official as an affirmative defense to Section 1983 lawsuits. Baude, *supra* at pg. 50.

Although this Court has acknowledged that official immunity is not expressly stated in the text of Section 1983, it took the leap into its current qualified immunity doctrine nearly a century after Section 1983 was first enacted with its decision in *Pierson v. Ray*, 386 U.S. 547 (1967). The *Pierson* Court held that Section 1983 should be read against the backdrop of common law defenses when government officials are sued, and therefore "good faith" was an available defense accorded a defendant public official. *Id* at 556-557; Baude, *supra* at pg. 53. The *Pierson* decision laid the foundation and "pioneered the key intellectual move" forward to the Court's current qualified immunity framework. Baude, *id* at pg. 52.

2. Less than a decade later, the Court quickly expanded *Pierson's* "good faith" defense to broadly cover executive official action. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) ("[S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.")

3. The march forward to qualified immunity soldiered on, and the Court set forth the standard of "objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Harlow*, the Court altered the standard of qualified immunity adopted in prior Section 1983 cases. *Harlow* expressly shielded government officials performing discretionary functions from "liability for civil damages insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which

a reasonable person would have known." *Id.* The Court reasoned that this wholly objective standard would "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.*

4. The Court has further recognized and acknowledged that its decision in *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law" *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), which was reinforced by the Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Mitchell* held that *Harlow* established an "immunity from suit rather than a mere defense to liability," which, like an absolute immunity, "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (emphasis supplied). Thus, the Court held in *Mitchell* that the denial of qualified immunity should be immediately appealable by a governmental official. *Id.* at 530.

5. This "immunity from suit" standard stated in *Mitchell* was clarified and further expanded with an emphasis on making an early assessment and determination in the litigation stage because qualified immunity shields an officer from standing trial and from facing the burdens associated with litigation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

6. Although the Court's qualified immunity doctrine has evolved from the time Congress enacted Section 1983, the Court has remained steadfast that "[o]ur immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in "freewheeling policy choice[s]." *Wyatt v.*

Cole, 504 U.S. 158, 170 (1992) (Kennedy, J. concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

B. Factual Background and Proceedings below

1. Petitioner became the head football coach at a public high school in January of 2017. As a former NFL football player, the school district welcomed him with an usual display of public support. Upon petitioner's hiring as coach, this public support included the school district prominently erecting a billboard in the county with petitioner's photograph in his NFL uniform (App.63a). From January of 2017 through April of 2017 after petitioner's initial hiring, the district school director and athletic director also regularly posted on their social media accounts photographs of petitioner interacting with students within the district. (App.64a-67a).

2. In August of 2017 near the beginning of petitioner's first season as coach, the athletic director advised petitioner that funds were missing from the school's football financial account that petitioner and the team helped raise in a fundraiser that was to benefit the school's football program. (R.41-1 Page ID #1190).

3. Petitioner was very upset that funds were missing because he and his team had worked so hard raising money for the football program. Petitioner had also contributed his own money in an effort to help the school with its football program. (R.41-1 Page ID #1190).

4. Around the time of the missing football program funds, the district school director invited petitioner to have lunch with her at a local country club on or

around September 5, 2017. The district school director advised petitioner that there were two female members on the board that did not like her and wanted her to be fired as the director of schools. The district school director asked petitioner to help her to have these female members removed from the board. (R.41-1 Page ID #1192).

5. Petitioner did not agree to assist the district school director in removing these board members and lost trust in the director as a result of her request. (R.41-1 Page ID #1192).

6. Petitioner later learned that a few months prior to this luncheon in May of 2017, the two female board members had given the director poor evaluations in the director's first performance evaluation. (R.41-1 Page ID ##1192-1193)

7. A few days after his luncheon with the director, petitioner visited an elementary school within the school district. He was shocked at the poor condition of the school, particularly the open-floor architectural design concept of the classrooms that were devoid of permanent walls. In petitioner's opinion, this created a poor learning environment for the students. At the elementary school, petitioner was given permission to take photographs of the classrooms and his visit with the students. (R.41-1 Page ID #1194).

8. After leaving the elementary school from his visit, petitioner posted on his Facebook page on September 22, 2017, that there were problems within the school district and described the poor school conditions. (App.86a-89a).

9. The director of schools, principal of the elementary school petitioner visited, petitioner's high school principal, and official elementary school page all posted photographs on the same day on September 22, 2017, on their various social media accounts containing photographs of students within the school district. (App.68a-85a)

10. That day on September 22, 2017 after making his first Facebook post, the district director and school principal engaged in a text communication exchange with petitioner acknowledging they knew petitioner was trying "to help" but he did not know all of the "facts." (App.40a-42a).

11. Two days later on September 24, 2017, petitioner posted his second Facebook post about how he thought the district's policy of allowing prisoners to work on campus during school hours was not a good idea. (App.90a-92a).

12. Immediately after this second Facebook post on September 24, 2017, the director of schools initiated a text message exchange with petitioner and admonished him from posting before "knowing all the facts." (App.43a). The same day, the director of schools and school principal called petitioner on the telephone and told him they "could make it where [petitioner] would never coach football again anywhere." The county mayor also engaged in a text exchange with petitioner. (App.44a-46a).

13. Eleven days later on October 5, 2017, the school principal issued a guidance letter to petitioner to be placed permanently in his personnel file. (App.47a-51a).

14. Four days after that on October 9, 2017, the school principal issued a suspension letter to petitioner and notified him of an independent attorney investigation. Petitioner's last game as coach was on October 6, 2017, the day after the guidance letter was placed in his personnel file. (R.41-1 Page ID #1200).

15. In November of 2017, petitioner gave his story to the attorney investigator in an interview and denied all of the allegations against him which was memorialized in a transcript. (R.41-1 Page ID ##1297-1440).

16. Petitioner filed his First Amendment retaliation lawsuit in January of 2018. There was no discovery in accordance with the pending dispositive motions and qualified immunity's strictures on exposing officials to the rigors of litigation. (R.39 Page ID #1158).

17. Petitioner's counsel later in a separate Tennessee open records lawsuit seeking documents into the independent attorney's investigation of petitioner, discovered the attorney was engaged and retained to represent the district school director and the board on October 9, 2017, regarding allegations of the petitioner outlined in the guidance letter.[1] (App.54a-56a).

18. On February 9, 2018, the attorney issued his investigative report recommending termination of the petitioner. (App.7a-8a).

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[1] The case was captioned *M. E. Buck Dougherty III v. Washington County Board of Education*, Case No. 37519, Washington County, Tennessee Circuit Court. Additional documents involving the investigation of petitioner were discovered during this open records lawsuit that are not part of the record on appeal.

19. On March 15, 2018, the district school director terminated petitioner from his employment as coach. (App.8a).

20. Under board policy 5.2031, an at-will employee serves at the will of the district school director, and the director has sole authority and discretion to direct and control the at-will employee. This also includes the director's sole authority to terminate at-will employees. This policy developed by the board giving the district school director autonomous power and control over the petitioner, is derived from Tenn. Code Ann. §49-2-301(b)(1)(FF), which provides that a local board of education shall develop a policy for dismissing at-will employees. (App.52a-53a).

21. In May of 2018 after petitioner's termination, the Tennessee Comptroller of the Treasury issued an investigative report to the district school director and board, with copies to the Governor, State Attorney General, local District Attorney General, and certain state legislators, with findings of the football fundraiser cash shortage petitioner had initially complained about and various deficiencies within the school's baseball concession operations. (App.57a).

22. A few days after the Comptroller's investigative report was issued, the district school director resigned from her position as director of schools for the county school system. (R.41-1 Page ID #1201)

23. The Sixth Circuit affirmed summary judgment on qualified immunity grounds for the district school director and affirmed the board's motion to dismiss on petitioner's *Monell* claim.

24. After his suspension and termination, petitioner applied for the open head football coaching position at his high school alma mater where he was a successful student-athlete. Although petitioner had previously served as an assistant coach at his alma mater, he did not receive any response from the school regarding his application for head football coach. (R.41-1 Page ID #1201).

REASONS FOR GRANTING THE PETITION

Members of the Court have recently expressed the need to reconsider its qualified immunity jurisprudence in order to further align with immunity principles at common law in 1871. The Court continues to maintain that the common law in 1871 should always be read as the backdrop to the express text of Section 1983, in accordance with the Court's *Pierson* decision in 1967. Given the Court's express desire to reconsider its qualified immunity doctrine and the importance and frequency of Section 1983 lawsuits and the qualified immunity defense, review is warranted.

First Amendment free speech is one of the most important rights citizens maintain under the Constitution. The issue of whether placing a guidance letter in a public employee's personnel file would chill protected speech under the ordinary firmness test is an issue of first impression that the Court has not previously addressed. Given the high priority of First Amendment issues, this issue is of such national importance that review on its own is warranted.

I. THE COURT SHOULD RECONSIDER ITS QUALIFIED IMMUNITY JURISPRUDENCE TO ACCORD WITH THE COMMON LAW IN 1871.

As Justice Thomas recently observed in providing a history of the Court's qualified immunity jurisprudence and its continued drift from the moorings of common law principles in 1871, "[u]ntil we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment).

In making the sober determination as to whether to reconsider its prior jurisprudence and body of law, the Court has traditionally held when a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," these factors weigh in favor of reconsideration. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) (quoting *Payne v. Tennessee,* 501 U.S. 808, 829-830 (1991)); *see also Crawford v. Washington,* 541 U.S. 36, 60, (2004).

A. Current Immunity Doctrine Is Incompatible with the Traditional Allocation of Burdens.

1. Since the Court first laid the foundation that qualified immunity is an affirmative defense in *Gomez v. Toledo*, 446 U.S. 635 (1980), it is imperative that the Court further scrutinize the inherent elements that comprise the various categories of available defenses. There are three primary categories of defenses in

federal civil proceedings: (1) Rule 12 (b) defenses; (2) affirmative defenses; and (3) negative defenses. Hon. Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 Fed. Courts. L. Rev. 153, 158 (2013)

A negative defense is an attack on the plaintiff's prima facie case. The burden of proof remains on the plaintiff to establish the elements of his case. St. Eve and Zuckerman, *id.* at 160.

Unlike a negative defense, an affirmative defense does not attack plaintiff's prima facie case in chief but rather seeks to avoid liability with new allegations outside of plaintiff's case that negate liability from suit. An affirmative defense operates much like a claim for relief and the defendant bears the burden of proving an affirmative defense when asserted. The modern concept of the affirmative defense is derived from the common law plea of confession and avoidance. St. Eve and Zuckerman, *id.* at 161.

2. *Gomez* addressed and focused on the burden at the pleading stage where a defendant is required to plead qualified immunity as an affirmative defense. However, in an obscure one sentence comment by then Associate Justice William Rehnquist prior to his ascension as Chief Justice, he joined the Court's *Gomez* opinion, "reading it as he does to leave open the issue of the burden of persuasion, as opposed to the burden of pleading," *Gomez*, 446 U.S. at 642.

Although *Gomez* addressed the burden of pleading, the Court's subsequent immunity jurisprudence has branded qualified immunity as an affirmative defense, although it does not contain the common law elements inherent in affirmative defenses regarding the burden of persuasion. It operates nothing like the common

law plea of confession and avoidance from which we derive the modern-day affirmative defense. Current qualified immunity, although labeled an affirmative defense, does not allocate the burden of persuasion on the defendant official as affirmative defenses traditionally require. In other words, qualified immunity is an affirmative defense in name only.

The current misallocation of burdens in analyzing qualified immunity is the precise reason the Court should reconsider its immunity jurisprudence to properly realign the burden on the defendant official when immunity is raised as an affirmative defense. *Gomez* left open the burden of persuasion issue as applied to qualified immunity. The mechanics of a plaintiff's Section 1983 case in chief combined with a defendant official's immunity defense as currently practiced, are not in accordance with the historical burden allocation of the common law. Accordingly, the Court's *Gomez* decision regarding the burden of persuasion was left open. However, as currently applied, it is incompatible with the common law burden allocation traditionally placed upon a defendant when asserting an affirmative defense.

B. Immunity Entitlement Historically Was Limited to Select Officials Based Upon the Specific Function Performed.

1. As Justice Thomas noted in his concurring opinion in *Ziglar v. Abbasi*, [i]nstead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under [Section] 1983, [the Court] instead grant[s] immunity to any officer whose conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known. *Ziglar*, 137 S.Ct. at 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (internal quotations and citations omitted). Justice Thomas further added that immunity is applied across the board without further analysis into "the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated." *Ziglar*, 137 S.Ct. at 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (internal citations omitted).

2. In reconsidering its qualified immunity jurisprudence in order to assess the burden allocation on the defendant official, the Court should further undertake to restore the burden on the defendant official to demonstrate the official claiming immunity enjoyed such entitlement at common law in 1871 in an analogous circumstance. Which would include the defendant official proving the specific function performed in an analogous circumstance at common law. *See Ziglar*, 137 S.Ct. at 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (internal quotations and citations omitted).

C. This Is a Suitable Vehicle to Reconsider Qualified Immunity.

The Court has an opportunity to reconsider its qualified immunity jurisprudence to properly align with the common law in 1871. In so doing, it would be keeping within the Court's tradition of looking to the common law in 1871 when analyzing Section 1983 lawsuits and qualified immunity defenses. This is precisely the analysis the Court first conducted in

Pierson when setting the foundation for its current qualified immunity jurisprudence.

II. A GUIDANCE LETTER IN PERSONNEL FILE CHILLS FURTHER PROTECTED SPEECH.

On an issue of first impression, the Court has never addressed whether placing a guidance letter in a public employee's personnel file is sufficient to chill further protected speech.

A. The Ordinary-Firmness Test.

1. The Eighth Circuit has noted that the ordinary-firmness test is well established in case law, and is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment. *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003). The ordinary-firmness test is an "objective one, not subjective." *Garcia*, 348 F.3d at 729.

2. The Sixth Circuit has also adopted the ordinary-firmness test under a First Amendment retaliation claim. The Sixth Circuit adopted this standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). An adverse action is one that would "deter a person of ordinary firmness from the exercise of the right at stake." *Thaddeus-X v. Blatter*, 175 F.3d 378, 393 (6th Cir. 1999) (*en banc*)).

3. As Judge Posner indicated, "'since there is no justification for harassing people for exercising their constitutional rights [the effect on freedom of speech] need not be great in order to be actionable.'" *Id.* at 397 (quoting *Bart*, 677 F.2d at 625). The plaintiff "need not show he was actually deterred from exercising his right

to free speech." *Ctr. for Bio–Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007). "[A] credible threat to the nature and existence of one's ongoing employment is of a similar character to the other recognized forms of adverse action—termination, refusal to hire, etc." *Fritz v. Charter Twp.*, 592 F.3d 718, 724, 728 (6th Cir. 2010). "A chilling effect sufficient under this prong is not born of *de minimis* threats or inconsequential actions, but neither does the requisite showing permit solely egregious retaliatory acts to proceed past summary judgment." *Ctr. for Bio-Ethical Reform*, 477 F.3d at 822. In the First Amendment context, the 6th Circuit has held "any action that would deter a person of ordinary firmness from exercising protected conduct will [constitute a sufficient adverse action], which may include harassment or publicizing facts damaging to a person's reputation." *Fritz v. Charter Twp.*, 592 F.3d at 724.

Here, the Sixth Circuit applied *Thaddeus-X* and held that placing the guidance letter in petitioner's personnel file would not create a chilling effect upon petitioner's further protected speech. (App.11a)

B. This Is an Issue of First Impression.

As indicated herein, the Court has never addressed this specific issue. Because the ordinary-firmness test is an objective test, applying it in this context of placing a guidance letter in a public employee's personnel file, provides the Court with an attractive vehicle to further develop its First Amendment retaliation body of law in the important area of analyzing public employees' constitutional rights under the First Amendment.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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NOVEMBER 25, 2019

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[2] Application pending admission to U.S. Supreme Court Bar.