No. 21-1532

IN THE

Supreme Court of the United States

BRIAN C. DAVISON,

Petitioner,

v.

DEBORAH ROSE, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a forum and scrutiny analysis are required when considering First Amendment infringement claims involving the government barring citizen speech on publicly owned property?

2. Whether blanket prohibitions on future speech by speakers within the internal class for limited or designated public forums must be narrowly tailored to restrain no more speech than is necessary per *Madsen vs. Women's Health Ctr.*, 512 US 753 (1994)?

3. Whether the government's prohibition of "personal attacks" while allowing personal compliments within a limited public forum is viewpoint neutral?

4. Whether government's prohibition of "discriminatory" speech against groups on its social media pages, when used as limited public forums, is viewpoint neutral?

5. Whether pre-deprivation due process is required for First Amendment speech infringements in limited public forums when a speaker presents no immediate risk of disruption under *Zinermon v Burch*, 494 U.S. 113 (1990)?

6. Whether a plaintiff has the right of return to litigate Constitutional claims in federal court, via an *England* reservation, under a stay pending the conclusion of state litigation filed before the initiation of the federal lawsuit?

7. Does the Supremacy Clause allow state law, involving reports to child protective services in the present litigation, to modify the standard for First Amendment Retaliation claims under 42 U.S.C. § 1983?

8. Whether a plaintiff in a First Amendment Retaliation claim can overcome government officials' denial by providing extensive direct and circumstantial evidence of retaliation that must be considered by a court when dismissing claims on summary judgment?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Brian Davison, an individual. Petitioner was the plaintiff and appellant below.

The Respondents are Deborah Rose, Tracy Stephens, Eric Hornberger, Jill Turgeon, Brenda Sheridan, Jeffrey Morse, William Fox, Kevin Kuesters, Joy Maloney, Suzanne Devlin, and the Loudoun County School Board, which were defendants and appellees below.

On petitioner's motion, the district court dismissed Defendant Eric DeKenipp, who is not a party to the Court of Appeals and therefore not a respondent here.

CORPORATE DISCLOSURE

No corporations are a party to this case.

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INTRODUCTION

Brian Davison became a critic of the Loudoun County School Board (LCSB) years before Loudoun gained the national spotlight for its controversial policies and treatment of parents. Beginning in 2015, Davison embarked on a months-long campaign criticizing LCSB and officials at his children's school on matters of public concern including poor overall academic, violations of federal educational and privacy laws, violations of state conflict of interest and transparency laws, and even perjury during Freedom of Information Act (FOIA) lawsuits. Defendants responded by blocking Davison from their official LCPS social media accounts, censoring his public comments during school board meetings, deleting his critical comments from the official LCPS social media pages, and even filing frivolous criminal harassment complaints for Davison's public criticism of school board members' official actions.

When Defendants' actions failed to silence Davison's criticism, Defendants retaliated in the fall of 2015 by referring Davison to child protective services (CPS) and issuing a no-trespass ban barring him from his children's school at all times, even when the public was invited for student events or during after school, evening, and weekend hours when the public was allowed to use the school's playgrounds,

track and ball fields. Prior to the ban, Davison had never been informed he caused any disruption nor ever asked to leave any LCPS grounds. Davison sued for monetary damages and injunctive relief under 42 U.S.C. § 1983. His relevant claims on appeal include First Amendment infringement and retaliation claims as well as procedural Due Process claims.

The Fourth Circuit concluded (i) LCSB could prohibit "personal attacks" from parents during public comment periods of school board meetings without running afoul of viewpoint neutrality requirements, App. 17a-18a (ii) Davison's ban from his children's school for the duration of the year, even when operating as a limited public forum, was constitutional without conducting any forum or scrutiny analysis, *Id.* 32a-33a (iii) that school districts need not provide any tailoring of a no-trespass ban nor any pre-deprivation due process when the parents presented no immediate threat of disruption and the bans were crafted over a week's time, *Id.* 34a-35a (iv) state laws conferring immunity on public officials reporting parents to CPS can be applied in constitutional claims, *Id.* 23a-35a (v) plaintiffs have no right to return to federal court for constitutional claims under an *England* reservation when courts issue stays to allow previously filed state lawsuits to conclude, *Id.* 15a and (vi) as a matter of law, Defendants could not have retaliated against Davison in the no-trespass ban and CPS referral. *Id.* 21a-28a.

This case presents questions of extreme importance involving parental First Amendment rights within limited public forums. The circuit courts are split on many of these questions involving fundamental liberty interests. Can public officials prohibit "personal attacks" in limited public forums while allowing personal compliments on the same germane topic at public meetings? Can public bodies prohibit "discriminatory" speech against groups on social media that constitute a limited public forum? Are forum and scrutiny analyses required for First Amendment speech and assembly claims? Must blanket prohibitions on future speech by targeted individuals within limited public forums be narrowly tailored? Are parents entitled to pre-deprivation due process for infringements of future speech in a limited public forum, an irreparable injury against a liberty interest, when the parent presents no threat of disruption? Can state statutes provide immunity to public officials on First Amendment Retaliation claims? Must courts address evidence in favor of a nonmoving party when considering First Amendment Retaliation claims? Do plaintiffs have a right to return to federal court to litigate federal claims?

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Davison respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS IN THIS CASE

The Fourth Circuit's denial for rehearing en banc is currently unreported and is reproduced at page 100a of the appendix to this petition ("App."). (Davison v. Rose; 20-1683; Jan. 3, 2022) The District Court of the Eastern District of Virginia's initial stay of the litigation, issued on July 8, 2016, is unreported and reproduced at App. 98a. (Davison v. Rose; 1:16-cv-540) The dismissal of all claims by the District Court pursuant to Respondent's Motion to Dismiss the Amended Complaint is unreported but available at 2017 U.S. Dist. LEXIS 120176. (Davison v. Rose; 1:16-cv-540; July 28, 2017) The Fourth Circuit's remand of the case to the District Court pursuant to Davison's appeal of the motion to dismiss is unreported. (Davison v. Rose; 17-1988; Mar 19, 2018) Upon remand and in consideration of the ruling in *Davison v Randall*, 912 F.3d 666 (4th Cir. 2019), the District Court issued a revised dismissal order that was unreported. (Davison v. Rose, 1-16-cv-540; Apr 19, 2019) Upon Davison's Motion for Reconsideration, the District Court vacated its prior dismissal order and granted Petitioner's Motion to Dismiss in part. (Davison v. Rose; 1:16-cv-540; Jul 31, 2019) The District Court issued a summary judgment order on May 1, 2020, reproduced at App. 37a. (Davison v. Rose; 1:16-cv-540) The District Court issued its final order concluding all remaining claims on May 21, 2020. (Davison v. Rose; 1:16-cv-540) The Fourth

Circuit's published affirmance, reproduced at App. 1a, is available at 19 F. 4th 626 (4th Cir. 2021). (Davison v. Rose; 20-1683; Dec 3, 2021)

JURISDICTION

The judgment of the Fourth Circuit denying Davison's petition for rehearing was entered on January 3, 2022. App. 100a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibitin 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 redress of grievances."

42 U.S.C. § 1983 provides in pertinent part:

"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..."

STATEMENT OF THE CASE

Factual Background: This case arises from disputes over school district policy between petitioner and the LCSB that resulted in Davison's referral to CPS and being banned from his children's school for nearly an entire school year. Davison, an MIT graduate and former United States Naval nuclear submarine officer who a maintained top secret Department of Defense security clearance as a contractor, became an educational activist and critic after he initiated a FOIA lawsuit in 2014 for student growth percentiles (SGPs) and learned that (i) the Loudoun County Public Schools (LCPS) violated the federal No Child Left Behind (NCLB) law regarding the use of growth scores and (ii) both his children's elementary school and LCPS overall lagged significantly behind similar school districts in student growth.

Beginning in 2015, Davison raised several matters of public concern via national blogs, local newspaper discussions and social media involving Defendant LCSB and its individual board members including violations of federal educational law, violations of state transparency and conflict of interest law, and financial mismanagement. Nearly every LCPS board member would block Davison from commenting on their official social media page during 2015 as a result of his criticism.

Following Davison's criticism of LCSB policy at school board meetings, Davison and Defendants publicly disputed whether restrictions on "personal attacks" in limited public forums were constitutional. Defendants Rose and Hornberger censored Davison at numerous LCSB meetings for speech critical of individual board members including comments noting Rose had made frivolous criminal complaints against Davison for past comments at school board meetings. Defendant Fox acknowledged in January 2015 that Davison had been "censored, stonewalled" by LCSB.

Davison would also raise specific criticisms of his children's elementary school (SLES), including violations of federal educational privacy laws and substandard academic achievement, in public forums and at parent-teacher association (PTA) meetings throughout 2015. Defendant Stephens, principal of SLES, suppressed Davison from discussing unflattering student growth SGP scores at PTA meetings or on its website since they "may reflect poorly on LCPS and SLES". However, none of Davison's critiques were personal matters involving his children.

Two weeks prior to Davison being banned from his children's school, Davison publicly alleged that multiple high-ranking LCPS officials had committed or suborned perjury during the summer of 2015 in another FOIA case involving LCSB. The Virginia

state police concluded it was a "legitimate complaint" with "extensive, detailed records and transcripts that support his claim".

Despite never asking Davison to leave school grounds, Defendants prepared and issued a no-trespass ban against Davison, equivalent to an individual injunction, over seven days following his criticism at the September 22, 2015, PTA meeting. Defendants only cited Davison's comments at SLES school meetings which constituted limited public forums in the initial no-trespass letter. Following Davison's appeal of the no-trespass ban, Defendants added numerous other justifications in a revised no-trespass ban including Davison's innocuous speech from months earlier at other schools and Davison's criticism in national blogs and social media. After Davison handed out flyers critical of Defendant Stephens, additional justifications were added to the third version of the no-trespass ban issued on October 14, 2015, and Davison was referred to CPS by Stephens and high-ranking LCPS officials Davison had accused of suborning perjury.

Davison attempted to have the ban lifted both by raising appeals to LCPS administrators and seeking judicial review in state court. Defendant Fox, a member of the committee which heard Davison's appeal to the LCSB, acknowledged not reading the two-hundred-page administrative record just before

voting to sustain the ban a few minutes later. A newly elected school board member in December 2015 noted Davison's request to attend his daughter's choir recital on school grounds was clearly reasonable, yet Defendants denied all of Davison's requests throughout the school year to attend student events on SLES grounds to which the public were invited, either during or after school hours.

During a spring 2016 meeting that Davison recorded, Stephens acknowledged Davison (i) had never been considered a physical threat, (ii) never disrupted student instruction, and (iii) could have the no-trespass ban lifted if he agreed to not criticize school officials to parents on school grounds. After Stephens was replaced as principal of SLES in July 2016, her replacement invited Davison to tutor students weekly, unmonitored, in the hallways of SLES for the entire school year. Stephens was demoted from the 800-student SLES to a much smaller 100-student elementary school.

Procedural Background: In May 2016, Davison filed this case in the United Stated District Court for the Eastern District of Virginia. App. 47a That court had federal question jurisdiction under 28 U.S.C. § 1331. In July 2016, the District Court denied Defendants' motion under FRCP 12(b)(1) and stayed the case until Davison's Petition for Judicial Review in state court case was concluded. *Id.* 98a. Davison

agreed to dismiss the state judicial review as moot while raising an *England* reservation in his nonsuit motion to litigate his federal claims in District Court. The case returned to the District Court which dismissed all claims in a July 2017 opinion primarily based on sovereign immunity grounds, raised *sua sponte* by the District Court. 2017 U.S. Dist. LEXIS 120176 at 24-26.

Davison appealed to the the Fourth Circuit which remanded the case to the District Court to consider Davison's claims for injunctive relief. In the interim period, Davison won a Fourth Circuit ruling in another case against the Loudoun County Board of Supervisors Chair for similar unconstitutional, viewpoint-based banning of citizens on official social media. *Davison vs. Randall*, 912 F.3d 666 (4th Cir. 2019). The District Court requested briefings from the parties in response to the *Randall* opinion. Davison also moved for reconsideration of the prior dismissal on sovereign immunity and other grounds. The District Court issued an opinion in July 2019, vacating the prior order on Defendants' motion to dismiss and reinstating most of Davison's claims.

In May 2020, the District Court dismissed all of Davison's claims except for injunctive relief against Defendant Morse pertaining to his blocking of Davison on social media. When Morse agreed to unblock Davison, the parties dismissed that final

claim and Davison raised this appeal.

The Fourth Circuit issued a published opinion in December 2021 holding (i) Defendants' ban against Davison without any tailoring was constitutional without conducting any forum or scrutiny analysis, (ii) post-deprivation procedural due process was appropriate for Davison's no-trespass ban by citing Goss vs Lopez, (iii) public bodies may constitutionally prohibit "personal attacks" in limited public forums as a "content-based" restriction, and (iv) Davison's First Amendment Retaliation claim failed both on the evidence as a matter of law and upon immunity conferred by Virginia's mandatory CPS reporting statute. The opinion did not address at length Davison's facial claim of viewpoint discrimination involving LCPS' social media policy. Davison's petition for an en banc rehearing was denied on January 3, 2022.

REASONS FOR GRANTING THE WRIT

I. The First Amendment questions presented are of exceptional importance for public debate in modern life and courts are divided on these questions.

Just as Fane Lozman suffered the retaliatory efforts by the City of Riviera Beach to "intimidate" him into ending his public activism and political speech critical of the government, Davison encountered an escalating series of retaliation by

Defendants including a no-trespass ban from his children's school and referral to child protective services. *Lozman v City of Riviera Beach*, 138 S. Ct. 1945 (2018) The Department of Justice and National School Superintendent Association has categorized parental activists as "domestic terrorists" and advocated harsher treatment at public meetings where parents criticize the school boards. Absent protection of First Amendment rights in such cases, including the right to engage in political speech without fear of government retaliation, parental activism is at risk of being significantly chilled.

Political speech, including Davison's comments on Defendants' social media pages and at school board meetings, is entitled to the "highest level of protection" *Bland v Roberts*, 730 F.3d 368, 387 (4th Cir. 2013) citing *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988); *Borough of Durvea v Guarnieri*, 564 U.S. 379 (2011). The greatest deference is given to "speech on matters of public concern". *Dun & Bradstreet v Greenmoss Builders*, 472 U.S. 749, 758-59 (1985) citing *NAACP v. Claiborne*, 458 U.S. 886, 913 (1982) and *Carey v. Brown*, 447 U.S. 455, 467 (1980). The "public's interest in receiving informed opinion" is curtailed when public officials censor community activists from discussing policy and critiquing officials' actions on social media. *San Diego v. Roe*, 543 U.S. 77, 82 (2004)

In addition to physically addressing government officials and fellow citizens during public school board meetings, modern social media websites have likewise become the modern-day public square. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have been difficulty identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular.") The ability of a community to remain informed about the policies and effectiveness of its government is dependent on a broad array of activists speaking out on matters of public concern, especially in smaller communities where the press is limited.

The circuit courts are split on whether "personal attacks", speech critical of an individual government official even when addressing their policy positions or official conduct, can be constitutionally prohibited in limited public forums. In multiple circuits, prohibitions suppressing speech critical of an individual public official, a "personal attack", is unconstitutional. See *Ison v Madison Loc. Sch. Bd.*, 3 F.4th 887, 893-95 (6th Cir. 2021) (prohibiting "personally directed [antagonistic]" remarks constitutes "impermissible viewpoint discrimination because ... [it] prohibits speech purely because it disparages or offends."); *Lowery v Jefferson County Bd. Of Educ.*, 586 F.3d 427, 435 (6th Cir. 2009) ("board may not exclude speech merely because it criticizes

school officials"); and *Heaney v Roberts*, 846 F.3d 795, 802 (5th Cir. 2017) ("Heaney was speaking on an approved topic and within his allotted time... not silenced for violating a reasonable restriction."). The Fourth Circuit's ruling here has entrenched its conflicting position from *Steinburg* that personal attacks, citizen speech critical of specific government officials, in a public meeting can be constitutionally curtailed.

II. The Fourth Circuit's ruling contravenes Supreme Court precedent requiring forum and scrutiny analysis when considering First Amendment infringements on public property

Courts must first determine the nature of the forum when ruling on plaintiffs First Amendment infringement claims on government property. *Frisby v Schultz*, 487 US 474, 479 (1988) ("standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue'" citing *Perry v Perry*, 460 US 37, 44 (1983)) Further, it is settled that schools after instructional hours are limited public forums. *Good News Club v Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Goulart v Meadows*, 345 F.3d 239, 250 (4th Cir. 2003).

Despite (i) Davison stressing throughout this litigation that public forum analysis was a prerequisite for consideration of whether critical parents could be banned from school property and (ii)

Defendants failing to ever proffer any arguments involving the nature of Seldens Landing Elementary School during non-school hours as a forum, the Fourth Circuit inexplicably failed to even conduct a forum analysis when ruling on the constitutionality of Defendants no-trespass against Davison. The no-trespass ban was in effect at all times, even during events during school hours to which the public was broadly invited, during after school hours, and during evenings and weekends when Defendants had acknowledged LCSB policy allowing the public to use exterior grounds such as ball fields and the track for general use. The Fourth Circuit failed to address its own earlier opinion, *Cole v. Buchanon*, in which it acknowledged a forum analysis would be required if the plaintiff had raised claims involving being banned from the outside track. 328 Fed. Appx. 204, 209 n7 (4th Cir. 2009)

The Fourth Circuit ruling heavily relies on its earlier published opinion in *Lovern vs. Edwards*. 190 F.3d 648 (4th Cir. 1999). In *Lovern*, issued prior to the Court's *Good News Club* precedent that schools after hours were limited public forums, the Fourth Circuit deemed the plaintiff's claim wholly frivolous and failed to conduct any forum analysis . Here, the Fourth Circuit simply states that the no-trespass ban "was constitutional" without any forum analysis or further discussion. App. 31a-33a. Davison is aware of no case law from any other circuit in which First

Amendment infringement claims on government property were evaluated without first conducting a public forum analysis and determining the appropriate scrutiny.

III. Blanket prohibitions of future speech by speakers within the internal class of limited or designated public forums are the equivalent of injunctions and must be narrowly tailored to restrain no more speech than is necessary per *Madsen*.

When a court determines that government property constitutes limited or designated public forums, the class of speakers to which the forum is generally open must first be determined before determining the requisite level of scrutiny that must be applied to speech infringements. Restrictions on speech for members of the internal class must pass strict scrutiny. *Arkansas Educ. Television Comm'n v Forbes*, 523 US 666, 677 (1998) ("if the government excludes a speaker ... within the class to which a [limited] public forum is made generally available ... subject to strict scrutiny"). For members of that internal class, future restrictions against individuals based on specific time, place, or manner (TPM) violations, the equivalent of injunctions, must be most narrowly tailored and involve significant public interests. *Madsen v Women's Health Ctr.*, 512 US 753, 763 n2 (1994) ("for a content-neutral injunction, we think that our standard time, place, and manner

analysis is not sufficiently rigorous ... whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest").

The Fourth Circuit's ruling failed to address this issue by simply declaring "no trespass bans [from school grounds] are constitutional". App. 33a. While the District Court's unreported opinion did analyze this internal speaker class issue, the Fourth Circuit's *de novo*, published opinion did not incorporate or even reference any of the District Court's analysis. The District Court had concluded that any parent *merely accused* of causing a disruption as a result of speech on school grounds can no longer be part of the internal class of speakers to which the limited public forum is made available. The District Court then sidestepped the *Madsen* jurisprudence, regarding heightened scrutiny for restrictions resulting from TPM violations, by concluding such blanket no-trespass bans need only be reasonable.

Despite the Fourth Circuit failing to address the nature of the forum or the scrutiny that must be applied in any way, other Courts have concluded that blanket injunctions on future speech are effectively injunctions and unconstitutional. *Huminski*, 396 F.3d at 90-93; *Cyr v ARSU*, 955 F. Supp. 2d 290, 293 (D. VT 2013) (create a "First Amendment-Free Zone"); *Cyr v ARSU*, 60 F. Supp. 3d 536, 548 (D.Vt. 2014) (a

categorical ban against an individual is "not narrowly tailored in any way" and is unreasonable even for nonpublic forums) Courts considering similar no-trespass bans have concluded they are unreasonable when applied to student events where the public is generally invited. *Johnson v. Perry*, 859 F. 3d 156, 175 (2nd Cir. 2017).; *Chiu v Plano Indep. Sch. Dist.*, 339 F.3d 273 (5th Cir. 2003); See also *Zeyen v Pocatello/Chubbuck Sch. Dist. #25*, 2018 U.S. Dist. LEXIS 82589 at 23; *Frierson v Troy City Sch. Dist. Bd. Of Educ.*, 2018 U.S. Dist. LEXIS 42537 at 10. In *Barna v Bd. Of Sch. Dirs. Of Panther Valley Sch. Dist.*, the official capacity claim asserting an unconstitutional no-trespass ban within a limited public forum continued unabated. 877 F.3d 136, 141 (3rd Cir. 2017) Absent a determination of a true threat, Davison is not aware of any court that sanctioned a blanket no-trespass ban on future speech against parents on school grounds when operating as limited or designated public forums.

The requirements of *Madsen*, requiring most narrow tailoring for no-trespass bans against targeted individuals within limited public forums, do not pose an impediment to the protection of students, staff, parents or the public. Here, Defendants need only have considered what tailoring is appropriate against a citizen critic who had always obeyed all orders from LCPS officials and had ***never even been asked to leave*** any district forum. It is undisputed that Defendants

failed to consider any tailoring in Davison's no-trespass ban and that current LCPS Policy 6310 automatically bars any recipient of a no-trespass ban from being present at any limited or designated public forum of LCPS.

Davison also argued that Policy 6310, which gives the arbitrator unfettered discretion for issuing no-trespass bans, is unconstitutional on its own. *Lakewood v Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988); *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) ("[B]ecause the potential for the exercise of such power exists, we hold that this discretionary power is inconsistent with the First Amendment."); *Summum v Callaghan*, 130 F.3d 906, 920 (10th Cir. 1997) ("ensure that the County's justifications are not simply "post hoc rationalizations" or a pretext for viewpoint discrimination"); *Thomas v Bd. Of Educ.*, 607 F.2d 1043, 1057 (2nd Cir. 1979) ("Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar.")

Blanket no-trespass bans which do not provide any tailoring against members of the internal class of limited public forums should always be unconstitutional.

IV. The Fourth Circuit's ruling sanctioned unconstitutional viewpoint discrimination by upholding Defendants' policy against personal attacks

in a limited public forum.

In *Matal vs. Tam*, the Court held the "essence of viewpoint discrimination" is allowing "positive or benign mark[s] but not a derogatory one". 137 S. Ct. 1744, 1766 (2017). Yet, the Fourth Circuit's ruling concluded that Defendants' prohibition against "personal attacks" during citizen comments at school board meetings were constitutional. App. 18a.

The Fourth Circuit first addressed personal attacks in *Steinburg v Chesterfield County Planning Comm'n.* 527 F.3d 377, 384-385 (4th Cir. 2008) In differentiating between comments that attacked an official personally without pertaining to any relevant topic before the public body and comments that criticized the official's "qualifications ... or his conduct", the Fourth Circuit in *Steinburg* upheld a government ban on "personal attacks" by implicitly concluding only off-topic attacks against public officials could be considered "personal attacks". *Id.* at 387.

Here, the Fourth Circuit dropped any requirement that comments critical of an individual public official must be off topic by declaring policies banning "personal attacks" are constitutional. The ruling reasoned that prohibiting "personal attacks" is not a viewpoint-based restriction but an allowable content-based restriction within a public forum. Yet, any "viewpoint neutral" policies prohibiting personal

"attacks" are oxymorons since Merriam-Webster defines attack as "to use harsh words against" or "to criticize harshly". Davison does not dispute that public bodies can restrict various topics within limited public forums, but critical comments against officials may only be restricted by barring certain topics, not by their nature as an "attack".

Davison's comments were not proscribed content since (i) LCSB meeting policy allowed public comments concerning any educational topic, not merely meeting agenda items as in *Steinburg,* (ii) the LCSB discussed its public comment policy at numerous board meetings during which Davison's comments were censored, and (iii) Defendants never censored Davison when he praised school officials by name but only when he addressed school board Defendant Rose's actions in reporting Davison to the law enforcement for his protected speech at board meetings and on social media.

The Sixth Circuit has held that rules "against 'attacks on people or institutions' during the public comment portion of a city council meeting" could be construed as viewpoint discrimination and prohibiting "personally directed [antagonistic]" remarks constitutes "impermissible viewpoint discrimination because ... [it] prohibits speech purely because it disparages or offends." *Ison*, 3 F.4th at 894 citing *Matal.* Such a clear break among circuits

warrants consideration by the Court.

V. The Fourth Circuit's ruling failed to apply *Matal* to the Defendant's social media policy prohibiting "discriminatory" comments in a limited public forum.

In his appeal, Davison raised a facial claim against Defendant LCSB's social media policy prohibiting "discriminatory" comments. In its policy, LCSB allows positive comments against identifiable groups, including groups based on national origin or gender orientation or religious affiliation, but prohibits any "discriminatory" comments. Such a policy is clearly unconstitutional under *Matal vs. Tam.*

The Fourth Circuit ruling failed to address the claim on appeal despite Davison clearly laying out his argument in briefings. App. 36a. Contrary to its assertion, Davison's claim against LCPS for a viewpoint-based social medial policy had not been barred by the District Court on res judicata grounds. The District Court's July 31, 2019, opinion on Davison's reconsideration motion noted that any events occurring after December 22, 2015, would not be barred. Thus, Davison's facial claim against LCPS for its social media policy "discriminatory" comments was proper.

VI. The Fourth Circuit's ruling failed to apply *Zinermon* or *Parratt* when considering the pre-

deprivation due process required for infringement of Liberty interests.

The Court has declared that any infringement of speech rights for any length of time constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the Court has further ruled that infringements of liberty interests in which monetary damages cannot provide adequate relief require pre-deprivation due process unless notice and a hearing are not feasible. *Zinermon v Burch,* 494 U.S. 113, 127 (1990); *Parratt; v Taylor*, 451 U.S. 527, 538 (1985).

The Fourth Circuit cited *Goss vs Lopez*, a case in which two students were actively protesting during school hours in the middle of the auditorium and resisted police who attempted to intervene, in concluding that Defendants could not feasibly provide Davison with pre-deprivation notice or hearings. 419 U.S. 565, 582 (1975). The facts belie the Fourth Circuit's conclusion and set a dangerous precedent that no pre-deprivation is ***ever*** required for infringement on parents' speech rights in limited public forums as the District Court concluded. App. 62a. In fact, the Fourth Circuit's published ruling did not distinguish due process requirements for bans against parents from limited public forums on school grounds versus those on district property. Thus, this ruling effectively eliminates any pre-deprivation due process requirement for school boards in the Fourth

Circuit who bar parents from any public meeting.

Here, Defendants issued a no-trespass ban to Davison over seven days after the last alleged disruption at a SLES PTA meeting on September 22, 2015. During those seven days, Defendants crafted the ban and provided advanced warning to school board members who were previously concerned that such a ban was unconstitutional in the spring of 2015. Yet, despite having never asked Davison to leave school grounds or even informing Davison that he had disrupted any event, Defendants did not provide Davison notice of the impending ban or provide a hearing for Davison to rebut the allegations during those seven days. During the entire period of the no-trespass ban, Davison coached elementary soccer players on other LCPS fields. Davison also attended numerous Vertans Day events, even being invited on stage to participate as a veteran in some elementary school ceremonies. The Defendants claims that Davison should be banned, much less than due process couldn't have been afforded in advance, is a ruse. The indisputable facts clearly refute the Fourth Circuit's conclusion that pre-deprivation process was not possible.

A Second Circuit court has similarly concluded that pre-deprivation due process is required for such no-trespass bans when the recipient does not constitute an immediate threat of disruption.

Johnson v Perry, 2015 U.S. Dist. LEXIS 142885 at 11-12. Absent a reversal of this published ruling, open season on banning parents from everything from PTA meetings to school board meetings will commence in the Fourth Circuit.

VII. The Fourth Circuit's ruling erroneously concluded as a matter of law that plaintiffs must file first in federal court to raise England reservations preserving their right to litigate constitutional claims in federal courts.

Federal courts can (i) dismiss certain cases/controversies that should properly be resolved in state courts under *Younger* abstentions or (ii) stay cases until state courts interpret state laws under the *Pullman* abstentions. *Juidice v Vail*, 430 U.S. 327, 348 (1977) ("Under *Pullman* abstention, the federal court may retain jurisdiction pending state-court interpretation ... under Younger it may not."); *Nivens v Gilchrist*, 444 F.3d 237, 245-46 (4th Cir 2006) (Whereas *England* reservations are proper where jurisdiction is retained via stays, *Younger* "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts".) In contrast with *Younger* dismissals, plaintiffs may invoke *England* reservations following *Pullman* stays to preserve their

right to return to federal court for federal claims.[1]

The Fourth Circuit concluded in its ruling, *sua sponte* without briefings on the issue, Davison could not raise *England* reservations because he filed first in state court and therefore *Pullman* could not be invoked. Opinion, p11. This conclusion errs in fact, errs in law, and creates significant risk to proliferate erroneous future rulings. The District Court's July 8, 2016, order specifically "stayed" all claims in the federal litigation pending the outcome of Davison's state law Petition for Judicial Review, in Loudoun Circuit Court. App. 100a. Defendants requested Davison be forced into state court by dismissing Davison's claims outright, but the District Court ruling expressly denied Defendants' request.[2] Based on these unambiguous rulings, *Pullman* was necessarily invoked.

In state court, Davison properly invoked an

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[1] *Colorado River* and *Burford* abstentions may also be invoked by federal courts. However, a Colorado River abstention is inapposite in this case and no cases exist where Courts of Appeals "denied ... right to return to federal court where federal claims remained after a Burford abstention" *Front Royal & Warren County Indus. Park Corp v Town of Front Royal*, 135 F.3d 275, 284 (4th Cir 1998)

[2] Davison raised Supreme Court jurisprudence that jurisdictional dismissals under abstention doctrine are not warranted simply because cases involve state interests. *Sprint Comms, Inc v Jacobs*, 134 S. Ct. 584 (2013).

England reservation in written pleadings advising the court of his intent to proceed in federal court. The Court has stated reservations can be implicitly raised. *England*, 375 U.S. at 421 ("an explicit reservation is not indispensable") Plaintiffs implicitly reserve *England* by simply notifying state courts of the claims' nature and not voluntarily litigating beyond state law claims. *Ivy Club v Edwards*, 943 F.2d 270, 287-88 (3rd Cir. 1991). The Third Circuit noted *Ivy* explicitly reserved its claims orally and "in brief[s]" to the Superior and Supreme court of New Jersey. *Id.* At 275. Given the majority of Davison's Loudoun court nonsuit motion highlighted plans to litigate all federal claims in federal court, any claims that Davison did not inform the state court of his intentions to "pursue federal action" are clearly erroneous. Op at 11-12. Davison's Petition for Judicial Review, raised under jurisdiction of state statute 22.1-87, did not include any federal law counts. Were federal law counts included, such counts would be nonsuited under Virginia law without any preclusive effect. *Ford Motor Co. V Jones*, 266 Va. 404, 407 (2003).

Second, the Fourth Circuit's ruling errs in law. Under the facts in *San Remo Hotel v City & Cnty. Of San Francisco*, the case cited by the Fourth Circuit to create new doctrine, plaintiffs commenced legal action in state court ***before*** commencing their federal case. 545 U.S. 323 (2005) The Court noted that plaintiffs could have preserved some federal claims under an *England* reservation when the federal court invoked

Pullman to send the litigants back to the "long dormant" state court case filed by plaintiffs. Thus, the Fourth Circuit's published ruling erroneously limits rights of plaintiffs to litigate constitutional claims in federal courts.

VIII. The Fourth Circuit's ruling erroneously elevates state law involving government reporting to child protective services above the elements of a First Amendment Retaliation claim in violation of the Supremacy Clause.

Public officials are liable for retaliation under the mixed-motive, but-for standard described in *Mt. Healthy City School District Board of Educ.*. 429 U.S. 274, 283-84 (1977); See *Lozman v City of Riviera Beach*, 138 S. Ct. 1945, 1952 (2018). Thus, retaliation for protected speech is unlawful even when actions – Defendants' no-trespass ban and referral to child protective services - may have been proper absent the retaliatory motive. *Trulock v Freeh*, 275 F.3d 391, 405-406 (4th Cir. 2001); *Suarez v McGraw*, 202 F.3d 676, 686 (4th Cir. 2000)

The Fourth Circuit ruled that the state of Virginia could enact statutes and regulations, such as the requirement for school officials to report certain actions to child protective services, which would limit First Amendment Retaliation claim liability. The Fourth Circuit stated that if Defendants had a reasonable basis to refer Davison to CPS, even if done

for retaliatory purposes, Defendants must prevail on a retaliation claim involving the CPS referral. This contradicts the Court's jurisprudence that municipal officials cannot be immunized against constitutional claims by sovereign immunity or state law. *Pennhurst State Sch. Hosp. v Halderman*, 465 U.S. 89, 123 n34 (1984) citing *Mt. Healthy City Bd. Of Ed. v Doyle*, 429 U.S. 274, 280 (1977) and *Lincoln County v Luning*, 133 U.S. 529, 530 (1890). It also contravenes the Supremacy Clause of the Constitution that dictates all federal law takes precedence over conflicting state laws.

The Fourth Circuit raised the CPS retaliation defense *sua sponte*. Similarly, the District Court *sua sponte* raised a sovereign immunity defense in its initial July 2017 opinion dismissing all claims in July 2017. Defendants have never raised either defense throughout the long history of this litigation. When the District Court issued its ruling in July 2019 in response to Davison's motion for reconsideration, it implicitly acknowledged it erred in citing sovereign immunity as its primary basis for dismissal, but failed to cite sovereign immunity throughout the reconsideration opinion or explicitly reverse its prior erroneous analysis. Absent a reversal of the Fourth Circuit's published opinion, its *sua sponte* basis for elevating state law defenses over First Amendment claim standards will be the law of the Fourth Circuit.

IX. The Fourth Circuit's ruling failed to consider any of the voluminous direct and circumstantial evidence supporting plaintiff's First Amendment Retaliation claim when issuing judgment in favor of Defendants on summary judgment.

A state actor is liable for retaliation when (1) undertaking an action with the intent to prevent the exercise of a constitutionally protected activity and (2) such action would deter a person of ordinary firmness from engaging in the constitutionally protected activity. *Mt. Healthy City School District Board of Educ. V. Doyle*, 429 U.S. 274,283-84 (1977).

In an appeal of a First Amendment claim, appellate courts are directed to independently review the record to "assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *NY Times, Co. v Sullivan*, 376 U.S. 254, 285 (1964) citing *Pennekamp v Florida*, 328 U.S. 331, 335 (1946) and *Edwards v South Carolina*, 372 U.S. 229, 235 (1963)

On summary judgment, courts must view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. The question a "judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The Fourth Circuit's *de novo* opinion granting summary judgment dismissal to Defendants on Davison's First Amendment Retaliation claim concluded as a matter of law Defendants did not retaliate against Davison in issuing a no-trespass ban despite extensive direct and circumstantial evidence of retaliatory intent provided by Davison. To adhere to the summary judgment standard, the Fourth Circuit would have had to consider the following crucial evidence Davison proffered of retaliatory intent and either conclude the evidence (i) was not credible or (ii) could not persuade a jury to find retaliation. In addition to the months-long pattern of escalating attempts to censor Davison's public criticism of LCPS and while representing just a small portion of the evidence Davison presented to the District Court on summary judgment and on appeal to the Fourth Circuit, any of the following four would, or certainly could, lead a jury to rule Defendants retaliated against Davison.

First, in the actual no-trespass letter, LCPS officials cited Davison's criticism of them and PTA officials on national, regional, and local blogs and social media as well as via emails as a basis for the ban. ("emailed a number of public officials accusing LCPS of a FERPA violation"; "indicating that our District leaders are among the most hated according to a blog that you referenced"; "threatening teachers with posting their images on yet another flyer if they

violate your perceived free speech rights") In its legal briefings to the District Court, LCPS noted "critical emails, often including threatened litigation or public vilification against teachers (including his own children's teachers), support the school ban". This is direct evidence that Davison was banned as a result of exercising his protected speech rights outside school grounds.

Second, the initial no-trespass ban, issued seven days after Davison criticized Defendants for violating FERPA at a PTA meeting, required Davison to obtain Defendant Stephens permission to come onto school grounds but categorically barred Davison from attending any parent event for the duration of the year. Davison submitted a sworn statement for summary judgment detailing Defendant Stephens' admission during a spring 2016 meeting that Davison (i) had never been considered a physical threat, (ii) never disrupted student instruction, and (iii) could have the no-trespass ban lifted if he agreed to not criticize school officials to parents on school grounds. Any jury would reasonably infer Davison presented no threat of disturbance to the school, but rather a political threat to Defendants in criticizing them to other parents. Admitting that Davison could return to school grounds on the condition he not criticize LCPS to other parents, clearly indicating Davison posed no threat of disruption whatsoever, is a blatant admission of viewpoint discrimination and retaliatory

intent. Davison's attorney noted during the summary judgment hearing that Davison possessed an audio recording of the meeting in which Stephens made this admission. (Summary judgment hearing, February 21, 2020; pp63-64: "We have Ms. Stephens again on that .... recording stating that ...[Davison was] never a threat. [Stephens] just don't want you talking ... we'll let you back into school if you promise that you will not talk about these things, and when Davison refused, she sustained the ban, and he could ... not attend his childs' events.")

Third, LCPS officials first considered banning Davison in the spring of 2015 after months of Davison publicly criticizing LCPS policies, officials and allies on the SLES PTA. School board Defendant Fox, trained as a lawyer who consulted on U.S.C. § 1983 actions, believed the no-trespass letter was unconstitutional and prevented its issuance in April 2015. Fox also acknowledged that LCPS officials had "censored, stonewalled" Davison in a January 2015 email. Fox would acknowledge during depositions that he never considered a threat yet voted to uphold the ban anyway. Davison also proffered evidence that Defendant school board members harbored retaliatory intent and sent text messages stating Davison was "LCPS Enemy #1".

Fourth, shortly after the first version of the no-trespass ban was issued on September 30, 2015,

Davison handed out flyers critical of LCPS and Stephens on a public sidewalk near SLES. In response, Defendant Stephens called the sheriff's office and exclaimed "I WANT HIM ARRESTED" for distribution of what she described as "defamatory" flyers. Her behavior and demands were documented in a Loudoun County Sheriff's Office (LCSO) incident report. An email from a SLES staff member described their exasperation at calling 911 about Davison exercising his First Amendment rights on public sidewalk, but the LCSO noting Davison's leafletting was a protected activity and refusing to even send a deputy in response. The revised versions of the no-trespass ban, issued in early October 2015, referenced Davison handing out allegedly "defamatory" flyers as a basis for the ban. Defendant Devlin, the LCPS security supervisor responsible for crafting and issuing the no-trespass letter, implicitly admitted the ban was retaliation when she described Davison's handing out flyers on public sidewalks as "flaunt[ing]" his authority over and personally "insulting" Stephens.

Fifth, the no-trespass ban and CPS referral were approved at the highest levels of LCPS immediately after Davison's public allegations of perjury at a school board meeting just two weeks before the no-trespass ban was issued. Davison accused LCPS spokesperson Wayde Byard of committing perjury as well as attorneys DeVita and Judkins of suborning

perjury during a FOIA lawsuit between Davison and LCPS that summer. Davison presented evidence to and was interviewed under oath by Virginia State Police officers who concluded Davison's claims were ""legitimate" and included "extensive, detailed records and transcripts that support his claim". One of the accused, LCPS attorney Stephen DeVita, would shepherd the no-trespass ban from its inception in March 2015 through its eventual school board approval and issuance in September 2015. DeVita, along with the LCPS Chief of Staff, was also intricately involved in Davison's referral to CPS just a couple weeks later for simply involving his children in advocacy critical of LCPS.

These facts clearly would persuade an independent jury that Davison was subjected to retaliation. In fact, Luke Rosiak, a national investigative journalist, recently reached just such a conclusion in his NY Post article[3] and published book. The Fourth Circuit's failure to ***even acknowledge Davison raised any of these facts in its ruling***, much less explain why they were either not credible or couldn't lead to a conclusion of retaliation, demonstrates a failure to adhere to the summary judgment standard on Davison's First Amendment Retaliation claim. Courts must not rule based on how they interpret the

[3] Article comprised of excerpts from "Race to the Botoom". https://nypost.com/2022/03/06/how-a-dad-became-teachers-enemy-1-to-teachers-in-loudoun-county/

evidence but ***how a jury could*** interpret the evidence. The District Court similarly failed to address any of this evidence in its summary judgment ruling in May 2020 despite acknowledging Davison's allegations of perjury against high-ranking LCPS officials involved in reporting him to CPS in its initial opinion dismissing all claims in July 2017. Both rulings read more like a pleading from the Defendants than a reasoned analysis of why Davison's extensive evidence, including successful referrals of LCSB members for criminal investigation for conflict-of-interest violations, could not possibly lead to a jury finding in Davison's favor.

It should be noted that the Fourth Circuit ruling recognizes Defendants potentially retaliated against Davison in referring him to CPS, else there is no need to consider state law immunity in dismissing that portion of the retaliation claim. However, the ruling did not conduct the same analysis with respect to Davison's no-trespass ban from SLES. The only basis for such an inconsistency is that the Fourth Circuit either (i) believes school districts have a statutory property right to ban parents from limited public forums irrespective of First Amendment Retaliation rights or (ii) a parental ban from his children's school for the duration of the year is not sufficient to be considered an adverse action. Either basis constitutes legal error for a First Amendment Retaliation claim.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully Submitted,

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APPENDICES