No. 21-1532

In The
Supreme Court of the United States

BRIAN C. DAVISON,

Petitioner,

V.

DEBORAH ROSE, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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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 in necessary per *Madsen v. Women's Health Ctr.* 512 U.S. 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 Constitiutional 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?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Deborah Rose ("Rose"), Tracy Stephens ("Stevens"), Eric Hornberger ("Hornberger"), Jill Turgeon ("Turgeon"), Brenda Sheridan ("Sheridan"), Jeffery Morse ("Morse"), William Fox ("Fox"), Kevin Kuesters ("Kuesters"), Joy Maloney ("Maloney"), Suzanne Devlin ("Devlin"), and the Loudoun County School Board ("LCSB") respectfully oppose the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The published opinion, dated December 3, 2021, is reproduced in the appendix to the petition ("Pet. App.") at pages 1a-36a, and reported in 19 F.4th 626 (4th Cir. 2021). The district court opinion is reproduced in the appendix to the petition at pages 37a-97a, with the district court's opinion of May 1, 2020, unreported but available at 2017 U.S. Dist. LEXIS 120176.

I. COUNTER STATEMENT OF THE CASE

Brian C. Davison ("Davison") sued the School Board, School Board members, two former School Board members, and two School Board employees, alleging violations of his First and Fourteenth Amendment rights related to alleged denial of free speech on Facebook and at School Board meetings, banning him from his children's elementary school and interference with his children's education. He also sued two School Board members and two School Board employees alleging defamation and violation of state law.

Davison was a regular speaker at LCSB meetings during the public comments portion; he regularly blogs about complaints, criticism, and conflicts he has with individuals in the community, including School Board members and personnel; and he created Facebook and Twitter accounts for the purpose of posting hundreds of articles and comments in addition to posting thousands of comments on various other on-line forums including newspapers. He frequently speaks on topics related to student performance, "lack of transparency and local government," alleged undisclosed conflicts of interest, school budgets and violations of federal privacy laws, in addition to calling for resignation of LCSB officials on a regular basis and alleging violations of the Virginia Freedom of Information Act ("VFOIA"). Davison has disagreed with other commentators or ridiculed the Respondents and other LCSB employees for "their refusal to discuss issues or efforts to suppress information." Davison stated that he would take his "disagreements to

court or suggested that he would post the disagreement in a publicly viewable on-line forum."

Davison alleged that he was "banned" from individual School Board members' Facebook pages, including one member's Facebook page before the member was elected to the School Board. He publicized these "bannings" and continued to re-post and post negative comments on Loudoun County Public Schools ("LCPS") Facebook page, after which he claims LCPS "stopped accepting new comments on its Facebook page for the duration of the 2015 election cycle rather than restore Davison's critical comments." After a recent election, Davison alleges LCPS restored the ability for all to comment on Facebook and on September 10, 2015, LCPS posted "terms and conditions" on its Facebook page "claiming the page represented neither a public, limited public or even designated forum," and that "any citizen who violated" the conditions more than three times would be permanently banned.

Throughout 2015, LCSB members voiced personal safety concerns about Davison as a result of threatening behaviors, which led to a law enforcement officer being present at all meetings after January 10, 2015. Davison complained about the presence of deputy sheriffs at School Board meetings, alleging "conspiracy" to "surveil" him.

Davison alleged that, at "various public hearings," Respondents Hornberger and Rose have interrupted his comments "to such an extent that the interruptions consumed large portions of Davison's allotted speaking time and materially limited Davison's participation in the public forum." Davison was permitted to keep speaking at every meeting except one, where he was asked to yield the podium

because he began discussing individual board members off topic at a meeting designated to the discussion of elementary zoning policy.

Davison further complained about individual School Board members contacting his employer, his parents, and/or a family member, and the Sheriff's Office, and filing a "criminal complaint" and "harassment complaints" against him with the Loudoun County Sheriff's Office alleging that he made threatening comments against Respondent Rose and her children.

At a September 22, 2015, PTA meeting, Davison aggressively accused Respondent Stephens of violating the law and students' privacy. Davison told her, "Try me. Try me. You'll end up in Federal Court." This aggression at a school meeting, compounded by Davison's history of threats against the LCSB members, prompted Davison's ban from the school grounds.

On September 30, 2015, Davison was served with a no-trespass letter stating that he was "barred from entry" onto the Seldens Landing property for the remainder of the school year 2015-2016. Revised letters were issued in October 2015. The latest revised letter stated that the physical ban was a result of Davison's statements that he was a Navy veteran and allusions to the American Sniper, using the terms "shotgun" and "hand grenade" in reference to public meetings, referring to the school as a "target rich environment", making references to the LCSB members' children, and referencing public officials meeting their creator.

Later in October of 2015, Respondent Stephens made a referral to Child Protective Services (CPS) regarding Davison after receiving multiple reports

from teachers and community members about the well-being of Davison's children. These reports included Davison requiring his son to pass out flyers in school that advanced Davison's complaints, Davison's daughter crying and being visibly upset on several occasions, and Davison's aggressive behavior towards his children's teachers. Stephens was a mandatory reporter to CPS under Virginia law and made the referral after consultation with her supervisors and counsel.

Davison was notified of the process to follow for review of the ban. Davison was given written notice of LCSB's Policy §2-20 for appeals of administrative decisions and he appealed. Davison had multiple communications with LCSB personnel and School Board members requesting recission of the ban. Following completion of the administrative level reviews of his appeal from the October no trespass letter, which included review of Davison's submissions outlining why he objected to the ban, an appointed School Board committee held a hearing on November 23, 2015, for which Davison was provided advance notice on November 18, 2015, and which he attended. The committee received and reviewed the record submitted in support of principal Stephens' no trespass letter, including Davison's numerous submissions, and voted to uphold the no trespass letter/ban due Davison's erratic actions at the hearing, which confirmed that his risk of disruption was not abated.

Davison appealed to the Circuit Court by filing a Petition for Review on December 22, 2015. The Petition for Review included claims filed pursuant to Virginia Code § 22.1-87 and claims alleging violation of his First and Fourteenth Amendment rights. In

accordance with § 22.1-87, LCSB filed the administrative record with the Circuit Court. At no time following the December filing of his Petition for Review did Davison request a hearing. On August 5, 2016, the case was dismissed with prejudice on Davison's motion and with his agreement by Order of the Circuit Court which Davison signed, "SEEN AND Agreed." Davison admitted that no "justiciable controversy" remained for the court to decide; that he had "no reason to believe LCSB will issue another ban in bad faith;" and that he "didn't want to waste the time of the Court, of the school board, or anybody else to be here . . . ." At no time did he request severance of his other claims, including constitutional claims, or separate nonsuit of those claims.

On May 13, 2016, Davison filed the underlying federal action for injunctive relief and monetary damages. The federal action was stayed pending resolution of the ongoing state court petition for review, which was dismissed on August 5, 2016. After lifting its stay on September 9, 2016, the district court granted Defendants' Motion to Dismiss on grounds of res judicata and qualified immunity as to all claims except the claim for injunctive relief against Defendant Morse to allow Davison to access her social media pages.

Davison appealed the district court's decision to the Fourth Circuit, which remanded the case for resolution of the outstanding claim for injunctive relief. On April 19, 2019, the district court granted Defendants' renewed motions to dismiss. On April 30, 2019, Davison filed a Motion for Reconsideration of the district court's orders, which was granted on July 31, 2019. This reinstated Davison's claims for

injunctive relief under Counts 1-7, and his claims for monetary relief under Counts 4, 5, 7, and 8.

The district court proceeded to reaffirm dismissal of all claims against LCSB and the individual Defendants in their official capacities. On December 19, 2019, the parties entered a joint stipulation of voluntary dismissal of all claims against Defendant DeKenipp and Counts 1, 3, 4, 5, 6, and 7 against Defendants Maloney, Turgeon, Keusters, and Fox.

This matter reached a final decision in district court on May 1, 2020 after the district court denied Davison's Motion for Partial Summary Judgment and granted Defendants' Motion for Summary Judgment on all claims except a claim for injunctive relief regarding Davison's access to Defendant Morse's social media pages. The parties voluntarily dismissed that outstanding claim after Defendant Morse unblocked Davison on social media.

Davison appealed the district court's orders to the Fourth Circuit, which affirmed the district court on all counts. Davison now seeks a Writ of Certiorari despite the Fourth Circuit's direct and proper handling of each of his claims.

II. REASONS FOR DENYING THE PETITION

A. SUMMARY OF THE ARGUMENT

The petitioner, Davison, has presented no "compelling reason" for the petition to be granted. *See* Sup. Ct. R. 10.

Separate from the individual questions presented, the petitioner withholds facts critical to this litigation and misrepresents the issues before the courts below.

The first two questions presented address the same issue, which is the Fourth Circuit's analysis of the no-trespass ban. The no-trespass ban was constitutionally applied because Davison presented an ongoing threat of disruption on school property on grounds entirely separate from his speech.

The county policy against personal attacks at school board meetings does not constitute viewpoint discrimination because the language of the policy limits discussion at school board meetings to matters related to public schools, which does not include personal attacks against identifiable individuals. Davison's viewpoint was not discriminated against because in each instance, where he was merely just interrupted but allowed to continue speaking, he ignored the subject of the meeting to discuss his personal opinions about individual board members and their children. None of Davison's opinions were barred from disclosure, and Davison had ample alternative channels of communication at all times. The same applies to petitioner's questioning of the LCSB social media policy.

Post-deprivation remedy satisfies due process in this case because Davison presented an ongoing

threat of disruption and hostility, which endangered the purposes of the school meetings. The nature of his threats, the availability of post-deprivation remedies, and the limited nature of his ban keeps the Respondents' actions comfortably within Constitutional limits.

Davison is not entitled to invoke an *England* reservation because the district court did not raise a *Pullman* abstention, which is required for *England* to apply. The right to reserve claims does not apply where the federal court does not abstain from a decision.

The issue of Stephens' referral of Davison to CPS was addressed by the Fourth Circuit and properly dismissed because Stephens was a mandatory reporter under Virginia law and no evidence was presented to show that she acted in bad faith. The Supremacy Clause is not relevant because the referral was made after concern for Davison's children was voiced by multiple outside parties for reasons entirely separate from Davison's speech at school board meetings. Additionally, the Fourth Circuit determined that no valid retaliation claim existed.

The final question presented is invalid because it is not a question in need of an answer. A plaintiff can overcome government denial in a retaliation claim after providing extensive evidence. However, all lower courts and state courts have determined that such evidence is not present in this case. Davison's retaliation claim failed because there are ample facts in the record to prove that LCSB's actions in preventing Davison's access to school grounds was constitutional, and Davison did not

provide any evidence to overcome those determinations.

B. The Fourth Circuit properly acknowledged all parties' agreement that the school board meetings were limited public fora and explained that petitioner failed to show that the no-trespass ban was causally related to his protected speech.

In support of Davison's first question for this Court, he claims that the Fourth Circuit did not conduct forum and scrutiny analysis in reviewing the Respondents' ban against him. In support of his second question, he claims that the no-trespass ban was not narrowly tailored. However, the Fourth Circuit addressed the no-trespass ban comprehensively and properly determined that the ban was constitutional.

It was determined, in accordance with party agreement, that the no-trespass ban applied to limited public fora. *See Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377 (4th Cir. 2008). The Fourth Circuit continued by affirming the district court's determination that Davison did not present evidence sufficient to show that the no-trespass ban was causally related to his protected speech. Therefore, Davison's disgruntlement with the lack of scrutiny analysis and narrow tailoring misrepresents the issue before this Court. It is true that forum and scrutiny analysis must be conducted in the course of claims involving the limitation of speech, and the petitioner cites abundant case law related to the curtailing of speech. However, the Fourth Circuit properly agreed with the district

court that this case does not involve the curtailing of speech. This case involves the prohibition of an individual from school grounds on the basis of aggressive and threatening behavior.

> While criticisms of staff are surely protected speech, Davison omits the other stated reasons in the no-trespass bans. In particular, Stephens wrote in the last no-trespass letter that Davison had 'made allusions to American Sniper,' said 'SHOTGUN' and 'BE PREPARED' in reference to public meetings, called a public school a 'target rich environment,' and 'made a reference to public officials meeting their creator,' among other concerning statements. (Pet. App. 21a)

It is plain that the Respondents' decision to prohibit Davison from the school premises was a safety precaution to quell unease amongst staff and community members incited by Davison's behavior. The no-trespass letters were only in effect for a period of approximately eight months, Davison was still permitted to attend LCSB meetings, and Davison was entitled to appeal the decision to multiple entities. Therefore, there was no unconstitutional curtailing of Davison's speech because he presented no evidence in the course of the litigation to show that the no-trespass letters were issued on the basis of his speech.

Davison's Petition must be denied in part because the first two questions presented misrepresent the legal issues as decided below, as it

was conclusively determined that the no-trespass bans were not related to the petitioner's speech.

C. The Fourth Circuit properly held that the LCSB policy against personal attacks was viewpoint neutral because petitioner was allowed to continue speaking in the relevant meetings and the policy was reasonably necessary to advance the purposes of the forum.

In support of the third question presented, the petitioner argues that a policy prohibiting personal attacks creates viewpoint discrimination. However, his framing of the issue over-generalizes relevant rules and fails to rebut the Fourth Circuit's reasoning in allowing the policy.

The petitioner cites to the concurrence opinion in *Matal v. Tam* for the proposition that the essence of viewpoint discrimination is allowing positive or benign marks but not derogatory ones. However, the fact pattern of *Matal* is highly distinguishable from this case. *Matal* involved a disparagement clause implemented by the Patent and Trademark Office ("PTO") to reject an application for federal registration of a band name. *Matal v. Tam*, 137 S. Ct. 1744, 1754 (2017). In *Matal*, this Court held that the policy of the PTO constituted viewpoint discrimination because it prohibited all speech in the PTO context that others may have found offensive. *Id.* at 1763.

"The State may be justified in reserving its forum for certain groups or for the discussion of certain topics." *Good News Club*, 533 U.S. at 106 (cleaned up) (quoting *Rosenberger v. Rector &*

Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). In a limited public forum, the government "'must not discriminate against speech on the basis of viewpoint,' and any restriction 'must be reasonable in light of the purpose served by the forum'". *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067-68 (4th Cir. 2006) (quoting *Good News Club*, 533 U.S. at 106-07).

In a limited public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

"A content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum and order. Such a policy is deemed content-neutral when it 'serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 387 (2008) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The Fourth Circuit determined that LCSB was fully justified in limiting its forum to the discussion of specific agenda items and imposing reasonable restrictions to conduct good business and advance

education. The LCSB policy, like the policy in *Steinburg*, is content-neutral because it serves the legitimate public interest in decorum and order in school meetings, and the policy does not serve purposes related to the content of expression. The policy prohibits personal attacks that stray from the designated topics of each meeting for the purposes of advancing efficient, effective, and orderly public business. The record in the lower courts established that other citizens who employed personal attacks were not interrupted because their comments were on-topic with the matters of each meeting. Davison was, and continues to be, permitted to share his opinions of the LCSB members in ample alternative channels of communication, and crucially, he was not prevented from sharing those opinions at LCSB meetings. Unlike the policy in *Matal*, which prohibited derogatory remarks in all forms, the LSCB policy only warns against off-topic personal attacks in limited forums, which still allows the speaker to voice opinions in alternate channels while preserving the legitimate purpose of the forum. There is no contradiction between the Fourth Circuit's rule and the rules of this Court and other circuits because Davison's personal attacks were not barred by the policy. The policy only applied to his comments which were off-topic from the designated meetings, as even benign off-topic statements would be. Davison was only ever asked to yield the floor once, which was because he began discussing the individual LCSB members during a public hearing about the elementary zoning process without ever addressing the topic of the meeting.

The Fourth Circuit clearly explained that Davison introduced evidence of five videos showing

instances where he was allegedly discriminated against based on his viewpoint. In each of the videos, Davison was interrupted at school board meetings and warned for discussing individual board members, their children, or matters that were off topic from the purposes of each meeting. Further, the Fourth Circuit determined that in videos presented by Davison to show that other citizens were not interrupted despite aggressive language, that each of those instances involved directly on-topic statements. Davison was never prohibited from voicing his opinions because they were derogatory, he was merely interrupted and warned when his comments exceeded the constitutionally established limits on the forums' purposes. Dispositively, and per the LCSB policy, Davison was merely warned that his comments were out of line and was allowed to continue speaking. At all times, Davison had alternative means of communication to express his ideas about the LCSB members.

D. The Fourth Circuit properly affirmed the lower court's decision that the petitioner's claim related to the LCSB social media pages was barred by principles of res judicata.

The petitioner's fourth question presented is not subject to appellate review because Davison's claim for injunctive relief regarding the Respondents' social media pages was dismissed with prejudice under the principles of res judicata.

To the extent that he attempts to argue that the LCSB policy prohibiting discrimination on its social media pages constitutes viewpoint discrimination,

such an argument is invalid because the stated purpose of the social media policy is to present matters of public interest to Loudoun County. Incorporating the argument in the above section, the LCSB social media policy is not viewpoint discriminatory because its restrictions against discrimination reasonably advances its stated purpose and still allows ample alternative channels for communication.

E. The Fourth Circuit properly determined that the facts of this case made the grant of post-deprivation review constitutional.

The petitioner's sixth question presented must be denied because the facts of this case are such that Davison's threats and behavior allowed for post-deprivation remedies to satisfy due process.

"Due process, as this Court often has said, is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). A factor test is used to determine which procedural protections are required, including: the private interest that will be affected by the official action; the risk of an erroneous deprivation, and the probable value of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In some cases, the availability of a post-deprivation hearing satisfies due process. *Zinerman*, 494 U.S. at 128; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("'The necessity of quick action by the State or the impracticality of providing any predeprivation process'" may mean

that a postdeprivation remedy is constitutionally adequate, quoting *Parratt v. Taylor*, 451 U.S., at 539); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) ("Where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required). Those whose presence pose a continuing danger to persons or property, or are an ongoing threat of academic disruption, may be immediately removed from the school without a pre-deprivation hearing. *Goss v. Lopez*, 419 U.S. 565, 582 (1975).

In this case, Davison attended many school board meetings and public comment periods where he behaved erratically, aggressively, and employed threats and warnings. The individuals concerned by Davison's behavior were not limited to the Respondents, but included community members, teachers, and school staff. As a result of Davison's allusions to the American Sniper, discussion of guns and hand grenades at public meetings, referring to an elementary school as a "target rich environment" and warning LCSB members to "be prepared," action was taken to prevent his access to school grounds. The no-trespass letters still permitted Davison access to discuss the ban with Respondent Stephens, allowed him to appeal the ban to an administrative board, and allowed state review pursuant to Va. Code § 22.1-87.

The law is clear that post-deprivation review satisfies due process requirements where pre-deprivation process is impractical, the procedures are sufficiently reliable to prevent erroneous

deprivation, or there was an ongoing threat of disruption. All three such circumstances are present in this case. Pre-deprivation process was impractical and the ban process was sufficiently reliable to prevent erroneous deprivation because Davison actively attended meetings where he exhibited concerning and threatening behavior. Each attempt to convince Davison that his behavior violated LCSB policy only perpetuated and intensified his aggression towards the board members. Pre-deprivation process was impractical because Davison at no point showed any interest in compliant behavior.

Further, Davison was provided multiple avenues of short and long term remedy. Davison was authorized to meet with Stephens to discuss lifting the ban, which led to a meeting where his aggressive demeanor prevented her from granting his request. Davison then appealed to the administrative review board, which also denied his appeal because his aggressive demeanor and language was such that the review board concluded that he remained an ongoing threat of disruption.

The events which led to this action involve Davison choosing to behave in an aggressive, threatening manner towards the LCSB members, teachers, and school staff. The district court and the Fourth Circuit agreed that Davison clearly presented an ongoing threat of disrupting the educational process. Therefore, the access to multiple layers of administrative and state review, as well as a direct line of communication to Respondent Stephens, satisfies the procedural due process requirements of the Constitution.

F. The Fourth Circuit properly held that an *England* reservation was not available to the petitioner because the Eastern District did not raise a *Pullman* abstention.

Davison first filed his claims in state court seeking the review of LCSB's no-trespass ban. He then filed the underlying federal action in the district court. The district court stayed the issue pending the decision of the state court. Davison proceeded to move for a nonsuit in state court, which was denied because Davison's only options were to withdraw his appeal or to dismiss the matter. Davison chose voluntarily to dismiss the case with prejudice. The district court then was required to dismiss the majority of his federal claims because he brought the same claims against the same parties, which is prohibited by the doctrine of res judicata.

The *England* reservation applies to reserve a litigant's rights in federal court after the federal court abstains from hearing the issue and sends the litigant to state court for the resolution of antecedent state issues. *England v. La. State Bd. Of Med. Exam'rs*, 375 U.S. 411 (1964); *see also Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 67 (1st Cir. 2008). A *Pullman* abstention is therefore required by the federal court before a litigant is granted the right to reserve. *San Remo Hotel, L.P. v. City & Cnty. Of San Francisco*, 545 U.S. 323, 339 (2005). "Our holding in England does not support petitioners' attempt to re-litigate issues resolved by [state] courts." *Id.* at 340.

The law is clear that a litigant is not automatically entitled to complete reservation of claims on the sole basis that he also filed in federal court. Davison suggests that a *Pullman* abstention

was necessarily invoked by the district court's stay on the matter, but he fails to address the procedures required for an *England* reservation. The district court did not abstain from hearing the matter and it did not send Davison to state court. Davison initiated his claims in state court, and dismissed them with prejudice in state court.

Whether Davison invoked the *England* reservation in his denied state nonsuit motion is irrelevant to the analysis. The case law does not allow the litigant to invoke the reservation of his own rights, the federal court must abstain under *Pullman* for rights to be reserved. Otherwise, every litigant would be permitted to dodge the doctrine of res judicata by filing an identical action in state and federal court. Davison never mentioned his pending federal action to the state court in oral hearings and never informed the state court that he was dismissing his action to pursue federal claims. Unlike in *San Remo Hotel*, where the federal court invoked a *Pullman* abstention while the state court claims were handled, the federal court in this case merely stayed their decision without abstaining under *Pullman*. Therefore, the Fourth Circuit properly held that Davison was not entitled to raise an *England* reservation in federal court after already agreeing to dismiss his state action with prejudice.

G. The Fourth Circuit properly affirmed the district court decision that Davison could not meet the elements of a First Amendment Retaliation claim.

In October of 2015, Respondent Stephens made a referral to CPS regarding Davison after receiving multiple reports from teachers and community

members about the well-being of Davison's children. These reports included Davison requiring his son to pass out flyers in school that advanced Davison's complaints, Davison's daughter crying and being visibly upset on several occasions, and Davison's aggressive behavior towards his children's teachers. Stephens was a mandatory reporter to CPS under Virginia law and made the referral after consultation with her supervisors and counsel. In support of his seventh question presented, the petitioner incorrectly suggests that the Fourth Circuit's acknowledgment of Stephens' status as a mandatory reporter stands for a holding that the Supremacy Clause has been violated. However, the Fourth Circuit addressed Davison's retaliation claim directly and found that the causation element was not met.

The final question presented is invalid because it is not a question in need of an answer. A plaintiff can overcome government denial in a retaliation claim after providing extensive evidence. However, all lower courts and state courts have determined that such evidence is not present in this case. Davison's retaliation claim failed because there are ample facts in the record to prove that LCSB's actions in preventing Davison access to school grounds was due to his behavior and threats, and Davison did not provide any evidence to show that the ban was related to his opinions of the LCSB members.

Civil liability for a First Amendment retaliation claim only exists if the alleged constitutional violation was the but-for cause of the action against the plaintiff. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1952 (2018); *see also*

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996). This is true even if retaliation may have been a substantial motive. *Id.*

In this case, there was ample evidence presented below showing that Davison exhibited months-long behavior that included personal threats against the LCSB members, alluding to the American Sniper, referring to the school as a "target rich environment," and warning the Respondents to "be prepared." Because of Davison's threatening behavior, which created severe unease amongst school staff and community members, he was prohibited from entering school premises for the remainder of the school year with the opportunity to appeal. The Eastern District of Virginia and the Fourth Circuit could find no evidence supporting a causal relationship between Davison's ban and his protected speech because Davison was not banned because of his opinions about the LCSB members. Further, the petitioner's claims against the individual defendants were properly dismissed on qualified immunity and res judicata grounds.

The petitioner's suggestion that the Supremacy Clause was violated by the Fourth Circuit's acknowledgement of Stephens' status as a mandatory reporter to CPS misstates the opinion because it was plainly determined that Davison failed to show the necessary elements of a retaliation claim. It cannot be validly claimed by the petitioner that the Virginia statutory structure superseded his retaliation claim when the Fourth Circuit dismissed his retaliation claim in the section immediately preceding its discussion of the CPS issue. Stephens reported Davison to CPS because of numerous recommendations from concerned parties including

the teachers of Davison's children, other teachers at the school, and Stephens' supervisors and counsel. There is no evidence in the record to show that the referral was done in retaliation. The lack of a valid retaliation claim led the Fourth Circuit to discuss the Virginia statutory structure, where there was a further lack of evidence of any violation by Stephens because Davison could not present any evidence that Stephens acted in bad faith.

III. CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

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