No. 24- 716

IN THE

Supreme Court of the United States

ORIGINAL

SUPREME COURT, U.S.
DEC 17 2024
OFFICE OF THE CLERK

TATE PROWS,

Petitioner,

v.

CITY OF OXFORD, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's case represents one of the most clear-cut examples of a First Amendment chill in the history of this country. Ordinance 3579 was an unlawful creation of police power, making Respondents' actions outside the sphere of legitimate legislative authority. 3579 was unconstitutionally broad, as it targeted and abridged the right of the people to peaceably assemble. *Coates v. City of Cincinnati* 402 U.S. 611 (1971).

The District Court for the Southern District of Ohio, Western Division, dismissed the Amended Complaint filed by Petitioner for lack of Article III Standing, stating that the chilling effect that Petitioner experienced was a subjective chill. The United States Court of Appeals for the Sixth Circuit affirmed dismissal of the Amended Complaint on the same grounds. Petitioner filed a petition for en banc rehearing with the Sixth Circuit which the Sixth Circuit declined to review.

The two questions presented are:

1. Are all First Amendment Chilling Effect Cases Subjective?

2. Do Political Subdivisions of States Have the Lawful Authority to Create Their Own Police Powers?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Tate Prows

Respondents and Defendants-Appellees below

- City of Oxford, Ohio, a political subdivision.
- Chief of Police John A. Jones, in his official and individual capacity.
- City Manager Doug Elliott, in his official and individual capacity.
- City Council Members Michael Smith, William Snavely, Chantel Raghu, Jason Bracken, Glenn Ellerbe, David Prytherch, Edna Southard, in their official and individual capacities.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit No. 23-3920

Tate Prows, *Appellant*, v. City of Oxford, et al., *Appellees*.

Date of Final Opinion: October 11, 2024

U.S. District Court, Southern District of Ohio, Western Division No. 1:22-cv-693

Tate Prows, Plaintiff v. City of Oxford et. al., Defendants.

Date of Final Order: November 8, 2023

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JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment on September 9, 2024. Petitioner's timely petition for en banc rehearing was denied on October 11, 2024. The jurisdiction of this Court is properly invoked pursuant to 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. X

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the states respectively, or to the people.

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.

Ohio Const. art. 18 § 3

> Subject to the requirements of Section 1 of Article V of this constitution, municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

INTRODUCTION

In August 2020, the City of Oxford, in Ohio, created a police power ordinance, Ordinance 3579, restricting assembly within people's homes. Respondents unanimously passed 3579. Respondents, during live broadcasted council meetings, issued warnings and threats to the general public that 3579 would be strictly enforced throughout the city and that it would be made a painful experience for anyone found in violation of 3579.

City police, for nearly one year, issued at least (23) citations for violations of this ordinance. Those suspected of violating 3579 had police show up to their home and issue $500.00 fines if there were more than (10) non-household members peaceably assembling in the home.

Petitioner, Tate Prows, and his family members, due to fear of having 3579 enforced upon them, decided to forgo their Holiday gatherings in 2020. Prows argued that 3579 chilled his First Amendment right to peaceably assemble with family and loved ones. Prows also alleged that 3579 violated his rights protected under the Fourteenth Amendment.

This case presents important questions of federal law which center around First Amendment rights and the Chilling Effect. This case also presents an ideal vehicle through which this Court can decide important questions which ask what the role of political subdivisions are in this country, specifically, important questions that can put an end to political subdivision overreach in the form of ultra vires police power creation.

STATEMENT OF THE CASE

This case exemplifies an all-too-common occurrence in Ohio, and across the country, political subdivisions creating their own police powers. Not only does the City of Oxford act without lawful authority, it also directly abridges one of the five protections of the First Amendment, peaceable assembly, with the passage and enforcement of this ordinance.

Ohio municipalities enjoy some of the most expansive home rule powers in the country. Article 18, Section 3 of Ohio's Constitution tells us that municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws.

The ordinance in question was not within what Ohio Courts have deemed to be powers of local self-government. Indeed, 3579 was a police power ordinance. However, there was no law passed by the Ohio Legislature from which this ordinance was adopted. 3579 was therefore an ultra vires creation of police power, making it void ab initio, along with the fact that it targeted and abridged the right to assembly. *Coates v. Cincinnati*, 402 U.S. 611 (1971).

This case represents one of the most glaring examples of the chilling effect of First Amendment rights in the history of this country. Without much, if any acknowledgment of Petitioner's foundational arguments, the Sixth Circuit ignores its own binding precedent, as well as this Court's binding precedent, in its affirmation of the District Court's dismissal. The affirmation of the

Sixth Circuit would all but eliminate First Amendment chilling effect standing.

A. The District Court Proceedings

Petitioner filed his Amended Complaint on December 27, 2022, alleging that 3579 had a chilling effect on his right to peaceably assemble with family and loved ones during the Holiday Season of 2020. The Amended Complaint also alleged violations of his Fourteenth Amendment right(s), more specifically, the Equal Protection Clause and Privileges or Immunities Clause.

Although there was clear evidence that the city both threatened to enforce and in fact did enforce 3579, two critical criteria that this Court has stated removes the subjective nature of a perceived chilling effect, the District Court still determined that Petitioner's allegations of a chill were subjective.

Relying heavily on this Court's ruling in *Laird v. Tatum* (U.S. 1972), and the Sixth Circuit's ruling in *Morrison v. Board of Education of Boyd County* (6th Cir. 2007), the District Court determined the chill to be subjective in nature, not meeting the injury requirement for Article III standing.

On August 24, 2023, the District Court ruled as follows:

> In sum, to assert Article III standing in a damages action based on alleged past chilling or a resulting past emotional injury, Prows must show that, at the very least, he suffered that

> injury from the conduct of the City or its agents in some way directed at him. He has not done so. For the above reasons, the Court dismisses Prows' Amended Complaint without prejudice for lack of standing.
>
> Petitioner filed a notice of appeal on November 13, 2023.

B. The Court of Appeals Proceedings

The Sixth Circuit Court of Appeals agreed with the District Court, affirming that the chill which Petitioner experienced was a subjective chill. Using this Court's ruling in *Laird*, the Sixth Circuit determined that allegations of a subjective chill are not adequate substitute for a claim of specific present objective harm or a threat of specific future harm.

The Circuit Court determined that Petitioner must allege more than apprehensions based on a written policy. The court stated that Petitioner did not provide evidence supporting his fear that "armed police officers would show up to his door and fine him if he gathered with his family. Evidence that officers enforced this ordinance occasionally to break up large gatherings like a college party is insufficient to show injury." *Morrison*, 521 F. 3d at 609: cf. *Berry v. Schmitt*, 688 F. 3d 290, 296 (6th Cir. 2012).

Petitioner then filed a petition for en banc rehearing on September 12, 2024. This petition was denied by the original panel after no judges requested a vote on the suggestion for en banc rehearing. This denial took place on October 11, 2024.

Petitioner, in his en banc petition, argued that the ruling against him was in direct conflict with the Sixth Circuit's recent decision in *Kareem v. Cuyahoga County Bd. of Elections*, (6th Cir. 2024). Indeed, in *Kareem*, the Sixth Circuit clearly demarcates the criteria that separates a subjective chilling effect case. Even though Petitioner's facts set were, in actuality, much more extreme than those in *Kareem*, the Sixth Circuit panel concluded that the issues raised in the petition were fully considered upon the original submission of the case, and therefore the petition was denied.

REASONS FOR GRANTING THE PETITION

Respectfully, this Court should grant certiorari to protect Article III standing under the Chilling Effect Doctrine. The Sixth Circuit's affirmation of the District Court's ruling and denial of en banc rehearing overlooks numerous examples of this Court's foundational chilling effect precedent. The Sixth Circuit goes so far as to completely ignore its own binding precedent which was recently set just months before Petitioner's case was presented to it. *Kareem v. Cuyahoga County Board of Elections* (6th Cir. 2024).

This case also represents an ideal opportunity for this Honorable Court to weigh in on an issue of paramount importance for the United States; that issue being the unlawful creation of police powers by political subdivisions. Ohio would be a perfect vehicle for this, given the clear language of Article 18 of the Ohio Constitution, and an abundance of binding precedent from the Ohio Supreme Court.

There is a very real epidemic in the United States of the tail wagging the dog. Municipalities act first, creating police power provisions that the municipalities then enforce on the people. Then, often times after much protest from the people, the State Legislature will step in to rectify the situation with some statute, code, or law. However, this is exactly opposite of how this process is supposed to work. The police power is one of the inherent attributes of state sovereignty. "Political subdivisions of States-counties, cities, or whatever-never were and never have been considered sovereign entities." *Reynolds v. Sims*, 377, U.S. 533, 575 (1964).

I. Are all First Amendment Chilling Effect cases subjective?

A. Fear-Based Standing

At first glance the answer to this question would seem to be yes, all chills are of a subjective character. Take Petitioner's case, for example, he claims that he and his family were prevented from peaceably assembling during the Holiday Season of 2020, due to fear of enforcement of 3579. Fear is, by its very nature, a subjective emotion. This would seemingly make almost every chilling effect case subjective. But this is not how this Court has crafted its chilling effect jurisprudence, and rightly so.

The Chilling Effect Doctrine truly took shape during the era of McCarthyism. During this time, many state institutions required its employees to take loyalty oaths in order to gain or retain employment. These loyalty oaths began to be challenged in the courts, with plaintiffs claiming that these oaths restricted their First

Amendment rights. This Court has noted that a denial of employment or benefits based on engaging in certain speech is to penalize them for that speech. *Speiser v. Randall* (U.S. 1958).

Fear-based standing came to this Court in *Laird. Laird* is the lead case on the chilling effect as cognizable injury-in-fact. In it, the plaintiffs, seeking declaratory and injunctive relief, challenged intelligence data gathering activity conducted and intended to be used by the United States Army in the event that local law enforcement sought its assistance in responding to civil unrest. They asserted that the Army's action violated their rights and that they suffered a chilling effect of their First Amendment rights. On review, the Court considered the question of whether Article III standing exists for a complainant who alleges that the exercise of his First Amendment rights are being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity.

In a 5-4 decision, this Court determined that the facts in *Laird* did not constitute sufficient injury to incur Article III standing, saying allegations of a subjective 'chill' are not sufficient to constitute injury in fact. Yet, it may if the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging. The Court did not preclude fear from leading to sufficient injury for standing purposes. However, fear cannot do this if it exists solely in the mind of the plaintiff.

It has been said that the chilling effect is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it. A chilling effect may not be a harm, but the reason why another harm, which is cognizable as injury, is harmful.

B. Sixth Circuit Subjective Chill

Each circuit court has a case which can be best described as its barometer for what constitutes a subjective chill. For the Sixth Circuit, that case would be *Morrison v. Board of Education of Boyd County* (6th Cir. 2007).

Timothy Morrison challenged the school's anti-harassment policy, claiming that it chilled his speech rights under the First Amendment. In a split panel decision, the Sixth Circuit determined the alleged chill to be subjective in nature, utilizing *Laird*, in its ruling. This case remains the bellwether for the Sixth Circuit and was heavily cited in Petitioner's case.

The key components of *Morrison*, that makes it a subjective chill, are that: (1) There was no enforcement of the policy, (2) There was no threat of enforcement of the policy, (3) The policy was not unlawful, and (4) The policy did not violate the speech Morrison sought to engage in. The school's policy was no different than most any school's anti-harassment or anti-bullying policy.

Morrison, like similar subjective chilling effect cases in every Circuit Court, uses a "credible threat" standard for determining whether a chilling effect of First Amendment rights has occurred. Taking heavily

from *Babbitt v. United Farm Workers Nat'l Union* (U.S. 1979), which states that, "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to undergo criminal prosecution as the sole means of seeking relief." *Id.* at 298 (quoting *Doe v. Bolton*, (U.S. 1973)). Indeed, the *Babbitt* Court referred to, if not relied on, fear: A plaintiff may show cognizable injury "when fear of prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative." *Id.* at 302.

C. Petitioner's Fears

As can be viewed through this Court's more recent decision in *Susan B. Anthony List v. Driehaus* (U.S. 2014), the criteria under *Babbitt* for cognizable injury from fear of enforcement under an allegedly unconstitutional statute is still good law.

The injury in fact component of the standing analysis is satisfied when the threat of enforcement of that law is sufficiently imminent. Sufficiently imminent is determined by reference to whether (1) the plaintiff alleges an intention to engage in a course of conduct implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is credible.

Petitioner did allege that, while 3579 was in effect, he intended to gather with his extended family, which includes more than 10 people, meeting the first requirement. Petitioner did have to censor himself to avoid violating the ordinance. Such censorship arises where the law at issue

amounts to an outright prohibition on certain types of speech in which a Plaintiff had demonstrated an intent to engage. Indeed, "The loss of First Amendment freedoms, for even a minimal period of time, unquestionably constitutes irreparable injury." *Cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, (U.S. 2020), quoting *Elrod v. Burns* (U.S. 1976).

II. Do Political Subdivisions of States Have the Lawful Authority to Create Their Own Police Powers?

The division of police power in the United States is delineated in the Tenth Amendment, which states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In the United States, the federal government does not hold a general police power but may only act where the Constitution enumerates a power. It is the states who hold the general police power. This is a central tenet to the system of federalism, which the U.S. Constitution embodies.

The police power is one the inherent attributes of sovereignty. In the United States, sovereignty resides with the people. The United States Constitution, which is a compact between the people and their federal government, includes the Tenth Amendment as a reminder that the federal government is one of limited authority and those powers that the people did not give to the federal government remain with the states and the people. There are dozens, if not hundreds of case citations, from every state, that refer to the sovereign police power of the state. Only the sovereign can create police powers. "Political

subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities." *Reynolds v. Sims*, 377 U.S. 533 (1964).

A. Police Power in Ohio

A state's regulatory power is incredibly broad and is limited predominantly by the state constitution. Article 18 of the Ohio Constitution, commonly known as the "Home-Rule Amendment," describes the authority for municipal corporations in Ohio. The focus of this Petition will be on Article 18, Section 3, *Municipal powers of local self-government.* "Subject to the requirements of Section 1 of Article V of this constitution, municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This section describes two separate and distinct powers. Those being all powers of local self-government, and what can be described as the police powers. In *Beachwood v. Board* (Ohio St. 1958), the Ohio Supreme Court ruled that all powers of local self-government solely relate to the government and administration of the internal affairs of the municipality itself. Although not an exhaustive list, the Ohio Supreme Court has determined all powers of local self-government to be the internal organization of the municipality itself, the control use and ownership of certain public property, salaries and benefits of municipal officers and employees, recall of municipal elected officials, regulation of municipal streets, procedures for the sale of municipal property, and regulation of city civil service.

3579 was an exercise of police power and not part of powers of local self-government. The City of Oxford does not have the lawful authority to create its own police powers. "Its enactment is pursuant to the sovereign police power, with which the regulations adopted by municipalities must conform, under the express and specific limitations imposed upon the power delegated . . . The claimed invalidity of the ordinance in question is based upon its conflict with the general law. It is a police regulation, such as municipalities are authorized to adopt and enforce under authority of section 3, art.18, of the Constitution of the state . . . Thus, the legislative branch of the state government enacts laws to safeguard the peace, health, morals, and safety, and to protect the property of the people of the states, and these are the general laws referred to. Municipalities may adopt and enforce regulations covering the same subject, so long and so far as the same are not in conflict with general laws." *Schneiderman v. Sesanstein*, 121 Ohio St. 80 (1929).

"The second part of the section, 'and to adopt such local police,' etc., regulations, deals with a state power and in no sense municipal power. The police power of the state, whether pertaining to the public health or the public peace, has always been recognized by all authorities as essentially state police power. It is necessarily so." *Wanamaker Dissent, State ex rel. City of Toledo v. Lynch*, 88 Ohio St. 71 (1913). This dissent later becoming law.

These examples, taken from the early years after the adoption of Article 18, are foundational jurisprudence of municipal powers, carefully crafted by the Ohio Supreme Court. Municipalities across Ohio are flagrantly ignoring this and are creating their own separate and distinct police

power provisions. Petitioner believes this is happening all across the United States. Although some states have stronger home rule powers, like Ohio, and other states are strictly under Dillon Rule, no state political subdivision has the lawful authority to create its own police power provisions.

B. Why Petitioner's Case Presents an Ideal Vehicle for Resolving this National Conflict.

Ohio is a state that has some of the strongest home rule provisions in the United States. This is because its Constitution gives municipalities all powers of local self-government. This does not mean that political subdivisions in Ohio have the lawful authority to create their own police powers, as those powers of local self-government are local in scope and apply to the inner workings of the municipality itself. Therefore, if it cannot be done in Ohio, then it most certainly cannot be done in other states that have much more limited home rule, or perhaps Dillon Rule.

Political subdivisions across the country are actively engaged in these behaviors. It is an impossibility of law for the created to usurp the creator, but this is precisely what is happening.

There cannot be equal protection under the law if every political subdivision in each state is making its own police power provisions. This is exactly why Article 18 Section 3 of Ohio's Constitution states that the police power provisions are to be *adopted* from and not in conflict with the general laws. A citizen would never know what the law was if the hundreds and thousands of political subdivisions across Ohio and the United States all had their own police

power provisions. This creates uncertainty of the law and also breeds far more instances of constitutional rights violations as the political subdivisions grow ever bolder.

Political subdivision overreach is happening on a nationwide scale and an answer to this ever-growing legal question is needed, now.

III. The Sixth Circuit Decision is Wrong and Conflicts with This Court's Decisions.

The criteria for a subjective chill has been put forth by this Court's decision in *Laird.* Every Circuit Court has adopted these principles and each of them has its own case that exemplifies these criteria for a subjective chill. The Sixth Circuit is well aware of these criteria. Just a few months prior to Petitioner's Appeal, the Sixth Circuit properly reversed a District Court's dismissal which improperly labeled a First Amendment chilling effect case as subjective. This case being *Kareem v. Cuyahoga County* (6th Cir. 2024). Petitioner is only left to wonder why his case was ruled on so differently.

The subjective chill criteria, explained by this Court in *Laird,* essentially says that (1) there was no enforcement of the challenged statute, (2) there was no threat of enforcement of the challenged statute, (3) the challenged statute was not unlawful, and (4) there was only an ancillary, if any, effect on First Amendment rights.

Petitioner's case had the exact opposite of these criteria, as (1) there was enforcement of 3579, (2) there was threat of further enforcement of 3579, (3) 3579 was an unlawful creation of police power and far outside the

legitimate legislative sphere of Respondents, and (4) 3579 directly targeted the First Amendment right of peaceable assembly. The facts in Petitioner's case are far removed from the facts in *Laird*, or any other subjective chilling effect case, for that matter.

If Petitioner does not have Article III standing under the chilling effect then it is difficult to envision a scenario in which anyone would.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted, and the decision of the U.S. Sixth Circuit Court of Appeals be summarily reversed.

Respectfully submitted,

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December 17, 2024