No. A-24-____

In the Supreme Court of the United States

THOMAS OSTLY,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
CHESA BOUDIN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is a notable conflict among the courts of appeals regarding the burden-shifting framework applicable to First Amendment retaliation claims against employees who exercises their First Amendment Rights to comment on matters of public interest. 42 U.S.C. 1983 (First Amendment – Free Speech). This Court developed a 5-part test for claims of first amendment retaliation in its seminal decision *Pickering v. Bd. of Educ.* (1968) 391 U.S. 563, 568. Since *Pickering*, some circuits apply a "but for" causation standard, requiring the plaintiff to demonstrate that the adverse action would not have occurred but for the protected conduct. Other circuits employ a "motivating factor" standard, where the plaintiff must show that the protected conduct was a motivating factor in the adverse action, even if other factors also contributed.

Given this Court's recent *Murray v. UBS Securities, LLC* (2024) 601 U.S. 23 decision applying Title VII's burden-shifting analysis to Sarbanes-Oxley Whistleblower retaliation claims and incorporating a "contributing factor" standard even less stringent than the "motivating factor" standard, this Court should provide clarity as to the appropriate standard for first amendment retaliation claim since the applicable standard determines the burden shifting analysis on a motion for summary judgment, directly affecting the survivability of Civil Rights cases of significant public import, such as District Attorney Ostly's claims of retaliation for whistleblowing on the Public Defender's

policy and practice of failing to communicate settlement offers to their clients and filing false bar complaints against District Attorneys who refused to accept their plea offers and took cases to trial.

Question:

Should courts analyzing a defendant employer's motion for summary judgment of plaintiff employee's first amendment retaliation claim pursuant to 42 USC 1983 apply the "but for," "motivating factor," or "contributing factor" causation standard to determine plaintiff's burden of proof in establishing a *prima facie* case and whether the plaintiff must prove pretext to survive summary judgment?

PARTIES TO THE PROCEEDING

Petitioner Thomas Ostly was the appellant below.

Respondents City and County of San Francisco ("CCSF") and its Offices of the District Attorney ("ODA") and Public Defender ("OPD") were the appellees below.

STATEMENT OF RELATED PROCEEDINGS

- *Thomas Ostly v. City and County of San Francisco and Chesa Boudin,* No.: 3:21-cv-08955-EMC, United States District Court for the Northern District of San Francisco
- *Thomas Ostly v. City and County of San Francisco and Chesa Boudin,* No. 23-16000, Ninth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas Ostly, (hereinafter "Ostly") a former Assistant District Attorney in San Francisco, respectfully petitions for a writ of certiorari, claiming his whistleblowing on unethical conduct by San Francisco Public Defenders was protected speech under the First Amendment and was a matter of widespread public concern.

OPINIONS BELOW

The District Court's decision and order granting Defendants'-Appellee's Motion for Summary Judgment is reproduced in the Appendix.

The United States Court of Appeals for the Ninth Circuit's opinion and judgment affirming the District Court's decision and order granting motion for summary judgment is reproduced in the Appendix.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on August 28, 2024.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. § 1983, prohibits government employers from retaliating against an employee who exercises his First Amendment Rights to comment on matters of public interest. 42 U.S.C. 1983 (First Amendment – Free Speech).

INTRODUCTION

There is a notable conflict among the courts of appeals regarding the burden-shifting framework applicable to First Amendment retaliation claims. Some circuits apply a "but for" causation standard, requiring the plaintiff to demonstrate that the adverse action would not have occurred but for the protected conduct. Other circuits employ a "motivating factor" standard, where the plaintiff must show that the protected conduct was a motivating factor in the adverse action, even if other factors also contributed.

The divergence in causation standards directly affects the plaintiff's burden of proof in establishing a prima facie case. Under the "but for" standard, the plaintiff bears a heavier burden, needing to prove that the adverse action would not have occurred absent the protected conduct. Conversely, the "motivating factor" standard allows the plaintiff to succeed by showing that the protected conduct was one of several factors influencing the decision.

The standard of evidence required in these cases can vary. Generally, the preponderance of the evidence standard applies, requiring the plaintiff to demonstrate that it is more likely than not that the protected conduct was a factor in the adverse action. However, in certain contexts, a clear and convincing evidence standard may be applied, necessitating a higher degree of proof.

In the context of a motion for summary judgment, the burden of production and persuasion can shift between the parties. The plaintiff must initially establish a prima facie case, after which the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse action. If the defendant meets this burden, the plaintiff must then demonstrate that the proffered reason is pretextual. The standard of causation—whether "but for" or "motivating factor"—influences whether the plaintiff must prove pretext to survive summary judgment.

The public policy underlying 42 USC 1983 First Amendment retaliation claims is to protect individuals from government actions that infringe upon their constitutional rights, which is a fundamental aspect of democratic governance. Title VII claims, on the other hand, focus on preventing discrimination in the workplace. While both are important, the protection of constitutional rights is arguably more critical to maintaining the public's trust in government institutions.

The McDonnell Douglas framework under Title VII is generally considered more favorable to plaintiffs, as it allows them to establish a prima facie case with a lower threshold and shifts the burden to the employer to provide a legitimate reason for the adverse action. This framework may be easier for plaintiff employees to navigate compared to the more stringent "but for" causation standard in some First Amendment retaliation claims.

Given the importance of protecting constitutional rights, it is recommended that the Supreme Court adopt a standard closer to the Title VII McDonnell Douglas framework rather than the Pickering standard. This would provide a clearer, more consistent standard that offers greater protection to the public at large, ensuring that individuals can exercise their First Amendment rights without fear of retaliation.

STATEMENT OF THE CASE

As a criminal prosecutor in San Francisco, Ostly reported unethical behavior by Deputy Public Defenders who (1) failed to convey plea deals to clients and (2) retaliated against him with unfounded State Bar complaints and public allegations of misconduct not related to litigation.

Ostly was a volunteer City employee in the SFDA from April 2013 to January 2014, when the City hired him full time as an Assistant District Attorney.

During Ostly's employment, the City and County of San Francisco employed approximately 50 attorneys, public defenders and prosecutors, assigned to manage general felonies at the Hall of Justice. Their respective case assignments were scheduled to overlap as much as possible for calendaring purposes. However, common interruptions (e.g. for trial, vacation, reassignment, etc.) meant that all of the few dozen lawyers employed by the City to oversee criminal cases regularly interacted. As a result, the City's Hall of Justice resembled something more akin to a small-town courtroom where all the lawyers knew one another and where news of cases and the performance of the lawyers assigned to those cases spread quickly. (Declaration of Thomas Ostly ("Ostly Decl. ¶ 3.) During his employment Ostly witnessed a pattern of San Francisco Public Defender's not communicating settlement offers to defendants who

might accept them over the public defender's objection.

In 2017 Ostly reported City employees Matt Sotorosen and Sangita Singha for failing to communicate settlement offers to a criminal defendant. After that defendant terminated the services of the public defender his private counsel called Ostly to testify on behalf of the criminal defendant at ant ineffective assistance of counsel hearing.

After overwhelming evidence was presented that the City employees had in fact committed misconduct and violated the defendant's civil rights by not communicating settlement offers, the felony case was dismissed in the interest of justice. (Ostly Decl. ¶ 15.)

Ostly additional instances of similar misconduct by public defenders that evidenced the problem was not isolated and was systemic. As a result, former elected public defender Jeff Adachi was interviewed about the alleged misconduct that occurred in two cases Ostly was prosecuting.

The article regarding the alleged civil rights violations of defendants was not published until shortly after Jeff Adachi's death on March 7, 2019. Ostly immediately notified his supervisors, in writing, that he expected retaliation by public defender's for speaking with the reporter regarding the systemic

misconduct and also testifying on behalf of one defendant whose rights were violated by the public defender's previously assigned to the defendant's case.

Immediately after the article regarding misconduct was published, public defenders began making coordinated and unsubstantiated accusations of misconduct against Ostly. The allegations were made out of court to private counsel, other prosecutors, and court staff when Ostly was not present.

Ostly began a trial shortly after the published allegations regarding the systemic civil right violations of defendants. The public defender assigned made multiple allegations of prosecutorial misconduct but in and out of court including that the criminal case would be dismissed and result in the CA State Bar disciplining Ostly. As required by the SFDA's protocol, Ostly reported the false allegations of misconduct to the SFDA Trial Integrity Unit, who responded the public defender was "completely without ethics." (Ostly Decl. ¶ 23, Exhibit 11).

In May of 2019, Ostly was informed by multiple San Francisco City employees that emails had been sent by the public defender's office to the felony attorney team asking public defenders to complain about Ostly. Ostly was warned by multiple City employees he was being targeted. Chesa Boudin, the public defender turned elected District Attorney was a recipient of the e-mails disparaging Ostly and soliciting complaints about him.

Ostly retained private counsel who sent a notice to preserve all communications regarding Ostly to the SF Public Defender management. This notice included Chesa Boudin since he was a public defender at the time.

Ostly's private counsel also pursued the e-mails Ostly was warned about through the Freedom of Information Act. The SF Public Defender repeatedly denied their existence, but they were eventually produced during the discovery phase of the District Court action. (Ostly Decl., ¶ 24, Exhibit 12).

In June 2019 the SF Public Defender's Office filed a bar complaint against Ostly for conduct that was alleged to have occurred in April 2019. Ostly predicted the bar complaint would be filed in writing to his supervisors a month before that in March 2019.

The SF Public Defender then filed motions to recuse Ostly from his criminal cases claiming he would not be able to prosecute effectively because he would take the filing of the bar complaint personally and retaliate against public defender clients he was prosecuting. The motion was repeatedly denied, and the bar complaint was attached as an exhibit.

After the bar complaint was made public in Ostly's cases, he received a call from a reporter from the SF Examiner regarding the allegations of prosecutorial misconduct and criminal activity by the SF Public Defender's Office. As with the filing of the bar complaint, Ostly had predicted the SF Public Defender would send the bar complaint to the press to retaliate against Ostly and chill all prosecutors from

reporting public defender misconduct. Ostly immediately responded to the reporter with everything public from his case files, including his e-mails and other correspondence showing the complaint was wholly without merit. As a result, the bar complaint was not reported in the SF Examiner.

After the bar complaint and out of court allegations being made against Ostly persisted for weeks, SFDA Chief of the Criminal Division Marshall Khine acknowledged the accusations made against Ostly were meritless and expressed outrage at the public defender conduct. (Ostly Decl. ¶ 29, Exhibit 15).

Ostly's direct SFDA supervisors advised him to limit all future communications with the public defenders in writing and to document the ongoing false accusations. (Ostly Decl., ¶ 28.)

The retaliation against Ostly continued throughout 2019 and culminated in his firing 48 hours after Boudin was sworn in as the elected District Attorney.

After Ostly was fired by Boudin, the public defender began coordinated interviews with the press expressing concern for the press that was favorable to Ostly and wanting to justify Boudin's decision to terminate him. This included public defenders and Boudin prosecutors claiming on their work social media accounts that Ostly was fired for prosecutorial misconduct and that he was a "pig" and "cockroach." Ostly Decl Paragraph.

In 2022 Boudin was removed from office as after an unprecedented successful recall. Shortly after he

was removed from office the SFDA documented the rampant misconduct in the Independent Investigations Bureau committed by some of the same public defenders Ostly had identified years earlier. The e-mail summary of misconduct committed during the Boudin administration is attached.

REASONS FOR GRANTING THE PETITION

A. A Conflict Among Courts of Appeals on The Burden Shifting Analysis For First Amendment Retaliation Claims Merits This Court's Review

There is a conflict among different courts of appeals regarding the burden-shifting analysis on First Amendment retaliation claims.

The Supreme Court in *Hartman v. Moore* established that for a First Amendment retaliation claim, the plaintiff must show that the retaliatory motive was a "but-for cause" of the adverse action (*Hartman v. Moore*, 547 U.S. 250 (2006)). This principle was reiterated in *Nieves v. Bartlett*, where the Court held that to prevail on a First Amendment retaliation claim, the plaintiff must demonstrate that the adverse action would not have been taken absent the retaliatory motive (*Nieves v. Bartlett*, 587 U.S. 391 (2019)).

However, the Ninth Circuit in *Garcetti v. Ceballos* applied the *Pickering* test, which balances the interests of the employee in commenting upon matters of public concern and the interest of the state as an

employer in promoting the efficiency of the public services it performs through its employees (*Garcetti v. Ceballos*, 547 U.S. 410 (2006)). This approach differs from the "but-for" causation standard and introduces a balancing test that considers the context of the speech and the employer's interest.

Additionally, in *Hartman v. Moore*, the D.C. Circuit applied a burden-shifting framework where once the plaintiff shows that protected conduct was a motivating factor, the burden shifts to the defendant to show that the action would have been taken regardless of the protected conduct (*Hartman v. Moore*, 547 U.S. 250 (2006)).

The Supreme Court in *Lozman v. Riviera Beach* also applied the Mt. Healthy test, which requires the plaintiff to show that retaliation was a substantial or motivating factor behind the adverse action, and the defendant can prevail only by showing that the action would have been taken regardless of the retaliatory motive (*Lozman v. Riviera Beach*, 585 U.S. 87 (2018)).

These differing approaches indicate a lack of uniformity among the courts of appeals regarding the appropriate burden-shifting analysis for First Amendment employee retaliation claims involving public employees.

B. Impact on Plaintiff's Burden to Prove *Prima Facie* Case of Retaliation—"But For," "Motivating Factor," or "Contributing Factor"

In First Amendment retaliation claims, the plaintiff must establish a prima facie case by demonstrating a causal connection between the government defendant's retaliatory animus and the plaintiff's subsequent injury (*Nieves v. Bartlett*, 587 U.S. 391 (2019)). Specifically, the plaintiff must show that the adverse action would not have been taken absent the retaliatory motive, which is known as "but-for" causation (*Nieves v. Bartlett*, 587 U.S. 391 (2019)), (*National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024)).

The "but-for" causation standard requires the plaintiff to prove that the adverse action would not have occurred in the absence of the retaliatory motive (*Nieves v. Bartlett*, 587 U.S. 391 (2019)). This is a stricter standard compared to the "motivating factor" or "contributing factor" standard, which only requires the plaintiff to show that the protected activity was one of the factors that motivated the adverse action, even if other factors also played a role (*University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013)).

In the context of a motion for summary judgment, the plaintiff must provide sufficient evidence to create a genuine issue of material fact regarding the causal connection between the protected activity and the adverse action. If the plaintiff can show that the

protected activity was a "motivating factor," the burden shifts to the defendant to demonstrate that the same decision would have been made even in the absence of the protected conduct (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). However, under the "but-for" causation standard, the plaintiff must show that the adverse action would not have been taken but for the retaliatory motive, which is a higher burden of proof (*Nieves v. Bartlett*, 587 U.S. 391 (2019)).

The "but-for" causation standard is generally required for First Amendment retaliation claims, meaning the plaintiff must prove that the adverse action would not have occurred without the retaliatory motive (*Nieves v. Bartlett*, 587 U.S. 391 (2019)). This standard is more stringent than the "motivating factor" or "contributing factor" standard, which only requires showing that the protected activity was one of the factors that influenced the adverse action (*University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013)).

There is a conflict among different courts of appeals regarding the burden-shifting analysis. Some courts apply the "but-for" causation standard, requiring the plaintiff to prove that the retaliatory motive was the decisive factor in the adverse action (*Nieves v. Bartlett*, 587 U.S. 391 (2019)). Other courts use a less stringent standard, requiring the plaintiff to show that the protected activity was a contributing factor, and then shifting the burden to the defendant to prove that the same action would have been taken regardless of the

protected activity (*Murray v. UBS Securities*, LLC, 601 U.S. 23 (2024))

C. Effect on Burden of Production and Persuasion and Employee's Obligation to Prove Pretext on Summary Judgment

In the context of a motion for summary judgment, the burden of production and persuasion can shift between the parties. The plaintiff must initially establish a *prima facie* case, after which the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse action. If the defendant meets this burden, the plaintiff must then demonstrate that the proffered reason is pretextual. The standard of causation—whether "but for," "motivating factor," or "Contributing Factor"—influences whether the plaintiff must prove pretext to survive summary judgment.

D. The District Court Erred by Granting Summary Judgment

The District Court's decision focused primarily on the first two *Pickering* factors—whether Ostly's speech concerned matters of public concern in his capacity as a private citizen, respectively—and reasoned generally his statements to the press and his complaints to his supervisors were not protected speech because they were job-related in his capacity as a public employee and concerned personal issues rather than matters of public concern. "Because Plaintiffs speech and petitions were not protected, the Court's inquiry ends here. Plaintiff made no protected

speech against which Defendants could have unlawfully retaliated." However, even if any of Plaintiff's speech or petitions were protected, Plaintiff has produced no evidence beyond the most conclusory and tenuous allegations that Defendant Boudin knew about any of his allegedly protected speech, let alone retaliated against it." (ER-18, 13-17) In so doing, the Court ignored its obligation on summary judgment to draw all reasonable inferences in favor of Ostly's evidence.

Conversely, the Court rejected Ostly's temporal proximity argument, drawing all inferences in Boudin's favor by accepting the truth of Boudin's self-serving declaration he had no knowledge of Ostly's complaints and that he had several legitimate reasons to terminate Ostly's employment based on complaints from the public and his coworkers without any corroborating evidence, despite conflicting and contrary testimony he terminated Ostly's employment along with other ADAs as part of a general turnover in staff following his appointment and prerogative to appoint his own staff, and despite only being in the position for two days, making his own declaration testimony additional circumstantial evidence in Ostly's favor.

Lastly, the Court completely ignored Ostly's Cat's paw theory of retaliation which can impute liability to Boudin and the City based on any actions he took at the prompting or recommendation of another party who had retaliatory motives against Ostly, which included all of his colleagues and the entire PDO with

whom he worked immediately before taking office as the new DA and for whom there was actual evidence of motive to retaliate so that it would unreasonable not to infer his PDO colleagues has any influence on his decision to terminate Ostly. On the contrary, the only "coworker complaints" to which Boudin could have been referring as a reason to terminate Ostly's employment would have been those of Public Defender coworkers since he had only been in office two days before terminating Ostly and could have developed coworker relationships with DAs much less interviewed them for any performance evaluation of Ostly to justify his termination of employment.

The Ninth Circuit majority opinion skipped the first two elements of the *Pickering* test and simply adopted the lower Court's *dicta*-like analysis of the temporal proximity argument, incorporating same flawed standard of review and completely ignoring the Cat's paw theory of imputing the PDO's retaliatory motives to Boudin.

Boudin cited several reasons unrelated to Plaintiff's allegedly protected speech for Boudin's decision to release Plaintiff, including courtroom interactions with Plaintiff and complaints received about Plaintiff from third parties. These are questions of fact which Ostly refuted in his declaration opposing summary judgment.

As the dissenting opinion notes:

The majority rejects Mr. Ostly's First Amendment retaliation claims solely because, in its view, he offered "no credible evidence" that his speech was "a substantial or motivating factor" for his termination. Barone v. City of Springfield, 902 F.3d 1091, 1098 (9th Cir. 2018). "As with proof of motive in other contexts, this element of a First Amendment retaliation suit may be met with either direct or circumstantial evidence and involves questions of fact that normally should be left 1 Case: 23-16000, 08/28/2024, ID: 12904380, DktEntry: 41-1, Page 7 of 8 Case 3:21-cv-08955-EMC Document 63 Filed 08/28/24 Page 7 of 8 for trial." Ulrich v. City & Cnty. of San Francisco, 308 F.3d 968, 979 (9th Cir. 2002) (citation omitted); see Eng v. Cooley, 552 F.3d 1062, 1071 (9th Cir. 2009) ("This third step is purely a question of fact."). Because Mr. Ostly presented sufficient circumstantial evidence that Mr. Boudin fired him because of his past campaigns against Mr. Boudin's former colleagues in the Public Defender's Office, the question of motive/causation should have been left to the jury—not decided by the district court, or this panel of judges."

CONCLUSION

The resolution of these issues is critical in determining the outcome of First Amendment retaliation claims. The Supreme Court's intervention is necessary to harmonize the conflicting standards and provide clarity on the applicable burdens of proof and standards of evidence.

Respectfully submitted,

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