No. 18-761

In the Supreme Court of the United States

DENNIS DAHNE,

Petitioner,

v.

THOMAS RICHEY,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with the Petition Clause of the First Amendment, a prison may refuse to process an inmate's properly-filed administrative grievance solely on grounds that it contains language that the prison deems "unnecessary" or "inappropriate."

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STATEMENT OF THE CASE

A. Washington State's "Offender Grievance Program" Invites Inmates to File Grievances on a Broad Range of Topics.

The Washington State Department of Corrections ("WSDOC") has established an "Offender Grievance Program" through which inmates may submit formal complaints about the conduct of prison staff. WSDOC describes the program in an official WSDOC policy and in a separate Offender Grievance Program

Manual (the "OGPM"). ER[1] 115-65. In the words of the OGPM, the program permits "administrative review and resolution" of inmate complaints and provides "a way for every offender to have his/her grievance heard and dealt with in a formal manner." ER 128.

The grievance process begins when an inmate files a written "offender complaint." ER 168-69. WSDOC permits inmates to file such complaints on a broad range of topics, including the "[a]pplication of [WSDOC] policies" and the "[a]ctions of employees . . . over whom the facility or supervising office has jurisdiction." ER 117. The OGPM advises inmates that their grievances must "[i]dentify how the issue or incident [being grieved] affects [them] personally." ER 138. It also tells inmates that they "are responsible to provide in [their] written complaint[s] all information relating to the issue being grieved." ER 138.

An inmate's initial written grievance may be returned for a rewrite if, in WSDOC's view, an inmate has used "profane" language or failed to write a "simple, straight-forward statement of concern." ER 141. Nowhere, however, do the WSDOC policies and procedures applicable to the grievance program indicate that grievances containing "disrespectful," "unnecessary," or "inappropriate" language will be returned without processing.

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[1] "ER" refers to the Ninth Circuit's excerpts of record, which are available at Docket Entry #6.

After a grievance is filed and accepted, the WSDOC grievance coordinator or an "assigned investigator" investigates the matter. ER 143. Among other things, he or she "will . . . review inventories, daily logs, medical records, etc., as necessary," "interview resource staff (doctors, supervisors, chaplain, etc.) for additional perspective, as necessary," and "interview [the] grievant and/or witnesses as appropriate." ER 143.

Following the investigation, the investigator prepares a report, which includes, among other things, a "[s]uggested response" to the inmate's complaint. ER 144. WSDOC requires that "[s]taff conduct grievance investigation reports" state "what corrective action has been/will be taken to resolve the issue and provide a completion date for that action, when known." ER 144.

B. Dahne Refused to Process Richey's Grievance Solely Because Richey's Language Was, in Dahne's View, "Un-Necessary and Inappropriate."

Respondent Thomas W.S. Richey ("Richey"), an inmate in Washington State, filed a prison grievance in which he alleged that a guard unfairly deprived him of his right to use the prison yard, to shower, and to obtain clean clothes. ER 168. Because he did not know the guard's name, Richey identified her in the grievance as the "extremely obese Hispanic female guard." ER 168. Citing the recent murder of another corrections officer, Richey's grievance suggested that the guard's misconduct posed a broader safety risk. ER 168. His language made perfectly clear that he did not intend his comment to be a threat: the guard's

misconduct, he wrote, "can make prisoners less civilized than myself to resort to [*sic*] violent behavior in retaliation. She is a danger to the orderliness and security of the prison." ER 168.

On November 15, 2011, a prison staff member returned Richey's grievance without processing it. ER 168. The staff member indicated that "rewriting is needed" and that Richey needed to submit a revised grievance within five days. ER 168. The staff member instructed Richey to "[r]ewrite—appropriately. Just stick to the issue of what happened, when, [and] who was involved." ER 168.

Richey "believe[d] [that his] grievance had done just that." SER[2] 4. Nevertheless, on November 17, 2011, Richey rewrote the grievance to emphasize "what happened," "when," and "who" was involved. ER 169. As in his initial grievance, he alleged that the guard "denied [him] yard, [his] right to a shower, and a shower roll without due process nor proper reason or justification." ER 169. And, again, he suggested that the guard's misconduct posed a danger to all in the prison, in that it needlessly risked provoking violent behavior among other inmates. ER 169.

Several days later, Petitioner Dennis Dahne ("Dahne"), the prison's grievance coordinator, again returned Richey's rewritten grievance without processing it. ER 169. He demanded that Richey "[r]ewrite as directed. Hispanic female is adiquit.

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[2] "SER" refers to the Ninth Circuit's supplemental excerpts of record, which are available at Docket Entry #13.

[*sic*] Extremely obese is un-necessary and inappropriate." ER 169. Nowhere on the form or in any of his other correspondence with Richey did Dahne indicate that he had refused to process Richey's grievance because he found it "threatening," "abusive," or unacceptable for any other reason. ER 168, 169.

Richey responded by writing a "kite" in which he expressed his belief that the phrase "extremely obese" adequately described the prison guard at issue, and was "necessary and appropriate in helping [Dahne] identify her." SER 5. Richey asked Dahne "not to punish [him] by rejecting [his] grievance because [Dahne] disagreed with [his] choice of language." SER 5. Dahne did not respond. SER 5. So, on December 7, 2011, Richey sent another kite asking, "Are you going to process my properly submitted grievance or what? I'm not rewriting it so do your job and process it." ER 170. On December 8, Dahne wrote, "No, due to your decision not to rewrite as requested your grievance has been administratively withdrawn." ER 170.

C. The District Court and the Court of Appeals Each Disregarded Dahne's Contention That He Refused to Process Richey's Grievance Because He Construed It as a Threat, and Determined Instead That Richey Had Demonstrated a Violation of the First Amendment's Petition Clause.

Following Dahne's refusal to process his grievance, Richey initiated this lawsuit. In his complaint, he alleged that Dahne's conduct violated both the Petition and Speech Clauses of the First

Amendment. SER 5. Only Richey's Petition Clause claim is at issue in this appeal.

Eventually, the parties filed cross-motions for summary judgment. Richey contended that the undisputed material facts entitle him to judgment as a matter of law on both of his claims; Dahne contended that no constitutional violation occurred and that, in any event, he is entitled to qualified immunity. App. 15a-22a.

When it ruled on the parties' cross-motions, the district court appeared to resolve a factual dispute concerning Dahne's precise reasons for refusing to process Richey's grievance.[3] ER 9-10; App. 15a-16a. In support of his motion, Dahne contended that he directed Richey to rewrite his grievance "because [it] contained . . . irrelevant, inappropriate, *and borderline threatening* extra language." ER 4; App. 9a (emphasis added). Richey, however, contended that Dahne rejected the grievance solely for the reasons he indicated in his handwritten note—*i.e.*, Richey's language was, in Dahne's view, "un-necessary and inappropriate"—and not because Richey's language amounted to a threat. ER 169. On that point, the district court agreed with Richey: it held that "Dahne took the adverse action of ordering Richey to rewrite his grievance *because of inappropriate language* in the grievance." ER 9; App.

[3] In its order, the district court wrote that it "agrees with Dahne that the material facts are undisputed and the matter turns on questions of law." ER 8. As explained further below, however, its apparent rejection of Dahne's contention that Richey's language amounted to threat may be material for purposes of summary judgment.

15a-16a (emphasis added); *see also* ER 13; App. 19a. Nowhere did its opinion discuss, much less adopt, Dahne's contention that Richey's language amounted to a threat. For those reasons, the district court granted summary judgment to Richey on his Petition Clause claim.[4] ER 16; App. 22a-23a. The court's order only concerned Dahne's liability on the Petition Clause claim; it contemplated a trial where, presumably, a jury would determine Richey's damages. ER 16; App. 22a-23a.

Dahne filed an interlocutory appeal, challenging the district court's refusal to grant him qualified immunity. ER 1-2. Like the district court, the court of appeals did not analyze Richey's Petition Clause claim as one involving a threat; it characterized Richey's language as merely "rude" and "offensive." App. 3a. On that basis, the court of appeals held that "the [Petition Clause] violation here occurred when Dahne refused to allow the grievance to proceed . . . after Richey did not rewrite it in a way that satisfied Dahne's sense of propriety." App. 6a. "That," it concluded, "is the sort of content-based discrimination that runs contrary to First Amendment protections." App. 6a. Its opinion did not discuss whether or to what extent the First Amendment entitles an inmate to use "threatening" language in a grievance.

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[4] The district court's opinion is inconsistent in the way it describes Richey's Petition Clause claim. Initially, the opinion describes the Petition Clause claim as one based on the "constitutional right of access to the courts." ER 9. Shortly thereafter, it describes the same claim as one grounded in "freedom of speech." ER 10.

Nonetheless, Dahne interprets the court of appeals' opinion as announcing a "clearly established constitutional right to include abusive, threatening language in prison grievances." Pet. for Cert. at 1. Richey does not contend, and never has contended, that the Petition Clause entitles him to include threats in a grievance. Regardless, Dahne now asks this Court to use this case to consider whether the First Amendment confers a right "to include threatening, abusive, and irrelevant language in grievances." Pet. for Cert. at i.

ARGUMENT

A. This Case's Interlocutory Posture Would Make It a Poor Vehicle in Which to Consider Whether an Inmate Has a First Amendment Right to Use "Threatening" or "Abusive" Language in a Grievance.

In order to reach the question of whether the Petition Clause protects "threatening" or "abusive" language in prison grievances, this Court would first need to revisit a fact-related dispute concerning the pretrial record. Given this case's interlocutory posture, the Court should decline to do so.

The Court has held time and again that it may not decide cases concerning "hypothetical" factual disputes. *See*, *e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not . . . give opinion[s] advising what the law would be upon a hypothetical state of facts." (internal quotation marks and citation omitted)). Here, as an evidentiary matter, the district court clearly stated its view of the facts: it determined that Dahne "order[ed] Richey to

rewrite his grievance *because of inappropriate language* in the grievance." ER 9; App. 15a-16a (emphasis added). Its opinion did not mention Dahne's contention that he found Richey's language "threatening" and "abusive," and identified no other reason for Dahne's decision.

This Court should not presume that those omissions were immaterial, or that the district court intended to use "inappropriate" as a synonym for "threatening" or "abusive." For example, in the related context of free speech,[5] "threatening" or "abusive" language is sometimes entitled to materially less protection than language that, in the government's view, is merely "inappropriate" or "unnecessary." On one hand, it is well established that the First Amendment's protections do not apply to threats of violence. *See*, *e.g.*, *R. A. V. v. St. Paul*, 505 U.S. 377, 388, (1992). Likewise, in certain other circumstances, language that is arguably "abusive" is not protected by the Speech Clause. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("[W]e have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood . . . if the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)); *id.* at 56 (applying the same rule in the context of a claim for intentional infliction of emotional distress); *see also Snyder v. Phelps*, 562

[5] The Speech and Petition Clauses offer similar protections, although, as this Court has recognized, those protections are not identical. *See* n.9, *infra*.

U.S. 443, 465 (2011) (Alito, J., dissenting) (noting that "[i]t is well established that a claim for the intentional infliction of emotional distress can be satisfied by speech").

On the other hand, however, this Court has emphatically disapproved of restrictions on speech that is (as Dahne put it) merely "unnecessary." For example, in *United States v. Stevens*, 559 U.S. 460, 470 (2010), the government argued that "[w]hether a given category of speech enjoys First Amendment protection [should] depend[] upon a categorical balancing of the value of the speech against its societal costs." In the Court's view, "that sentence [was] startling and dangerous." *Id.* The Court reaffirmed that the First Amendment "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefit" and rejected the notion that the government may "imprison any speaker so long as his speech is deemed valueless or unnecessary." *Id.* at 470-71. The Court has disapproved of restrictions on "offensive" speech in equally stark terms. *See*, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Thus, if this Court were to accept Dahne's invitation to decide whether "threatening" or "abusive" speech in a grievance is protected by the Petition Clause, it likely would need to decide (contrary to the district court's determination) that Dahne actually rejected Richey's grievance on those

grounds, or at least that a jury could reasonably conclude as much at trial. Put differently, in the absence of an evidentiary determination that Dahne rejected the grievance because he found it "threatening" or "abusive," an opinion by this Court on those issues would amount to a decision concerning a hypothetical set of facts. *See Chafin*, 568 U.S. at 172.

In this case's interlocutory posture, the Court should decline to engage in that sort of evidence-weighing. The Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995), illustrates why. *Johnson* held that a court of appeals lacks jurisdiction to consider an interlocutory appeal of a district court's refusal to grant qualified immunity where the appeal raises "only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id*. at 313.

Several aspects of *Johnson*'s decision apply with equal force here. First, *Johnson* distinguished between the core functions of trial and appellate courts:

> "[T]he issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters. And, to that extent, interlocutory appeals are less likely to bring important error-correcting benefits here than where purely legal matters are at issue . . . ."

Id. at 316 (citing *Pierce v. Underwood*, 487 U.S. 552, 560-561, 584 (1988), and *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 434 (1985)) (internal citations omitted). Those institutional distinctions are as applicable to this Court as they are to the courts of appeals. At minimum, the Court should wait until after trial to assess the sufficiency of each party's evidence. The time to do so is not in the context of this interlocutory appeal.

Second, *Johnson* suggested several practical concerns regarding interlocutory appeals challenging the sufficiency of a party's evidence:

> "[Q]uestions about whether or not a record demonstrates a 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases . . . involve factual controversies about, for example, intent—controversies that, before trial, may seem nebulous."

Id. Again, that concern is as applicable to this Court as it is to the courts of appeals. The district court's opinion did not discuss its apparent rejection of Dahne's claim that the grievance was "threatening" and "abusive," nor, for that matter, has any party given live testimony on that or any other topic. For those reasons, this Court's evaluation of the evidence concerning Dahne's intent would be, as *Johnson* warned, a "nebulous" exercise. *Id.*

Finally, *Johnson* warned that an appellate court's interlocutory review of the sufficiency of a party's

evidence will often lead to repeated appeals on the same subject:

> "[T]he close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by the trial testimony) to require it, once again, to canvass the record. That is to say, an interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision."

Id. at 316-17. Once again, that concern is as applicable to this Court it is to the courts of appeals. The best time at which to weigh the parties' evidence concerning Dahne's reasons for refusing to process Richey's grievance is after trial, not in an interlocutory appeal in which the record is less than fully developed. The Court should deny the petition for those reasons.

B. This Case's Underdeveloped Record Would Make It a Poor Vehicle in Which to Assess the Constitutionality of Restrictions on "Threatening, Abusive, and Irrelevant" Language in Prison Grievances.

The Court often "finds it premature to resolve . . . constitutional question[s] on [a] less than fully developed record." *Youngberg v. Romeo*, 457 U.S. 307, 329 (1982) (Blackmun, J., concurring); *see also Hidalgo v. Arizona*, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., respecting denial of certiorari) (noting that the parties "may have the opportunity to fully develop a record," and that "this petition will be better suited for certiorari with such a record"). This is one such case.

Richey agrees with Dahne that *Turner v. Safley*, 482 U.S. 78 (1987), provides the framework with which the Court evaluates a First Amendment challenge to a prison regulation. Under *Turner*, "[f]irst and foremost, there must be a valid, rational connection between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (quoting *Turner*, 482 U.S. at 89) (internal quotation marks omitted). "If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor." *Id*. at 229-30 (quoting *Turner*, 482 U.S. at 89-90). Under *Turner*, the Court has repeatedly cautioned that the government faces a steep climb when it attempts to regulate inmates' speech on the basis of its content. *See id*. at 230 ("[T]he *Turner* test, by its terms, simply

does not accommodate valuations of content."); *Turner*, 482 U.S. at 90 ("We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." (citing *Bell v. Wolfish*, 441 U.S. 520, 551 (1979); *Pell v. Procunier*, 417 U.S. 817, 828 (1974)).

In addition, "courts should consider three other factors," each of which requires a detailed factual showing by a prison. *Shaw*, 532 U.S. at 230. Courts consider "the existence of 'alternative means of exercising the right' available to inmates; 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;' and 'the absence of ready alternatives' available to the prison for achieving the governmental objectives." *Id.* (quoting *Turner*, 482 U.S. at 90).

In his proposed question, Dahne has asked the Court to approve of a restriction on "threatening, abusive, and irrelevant" language in prison grievances—a quintessential form of content discrimination. And, in this posture, the evidence based on which the Court would need to do so consists primarily of three written declarations: one from Richey, one from Dahne, and another from a different member of the prison staff. ER 102-177.

If the Court is inclined at some point to review a content-based restriction on inmates' ability to file grievances, it should decline to do so based on such scant evidence. The two declarations other than Richey's devote just a few paragraphs to describing why, in the prison's view, Dahne's refusal to process

Richey's grievance served an important governmental interest. *See* ER 103-113. They do so in largely conclusory terms. For example, Dale Caldwell, WSDOC's Grievance Program Manager (who, apparently, had no personal involvement in the underlying dispute), suggested baldly that, if prisons "were to blindly allow offenders to use abusive and derogatory language . . . it would lead to mistrust and resentment, detract from true communication, undermine the safety of the prison system in Washington State, and eventually destroy the credibility of the Grievance Program in Washington State." ER 108. However, the record contains no evidence whatsoever concerning how Richey's grievance *actually* affected Dahne, other prison staff, or broader prison operations. Nowhere, for example, does Dahne's declaration describe how Richey's specific grievance supposedly hindered him in performing his job duties. *See* ER 110-13. Nor does the record contain any testimony from the first staff member to review Richey's grievance or the prison guard whose conduct he challenged, who, as far as the record reveals, may not have reviewed the grievance at all. Presumably, if "threatening, abusive, and irrelevant" language posed a serious enough threat to prison operations to justify content-based restrictions, such evidence would exist.[6]

[6] *Amici*'s concerns are equally devoid of support in the record. In particular, there is no evidence whatsoever that Richey's grievance posed any meaningful risk of creating a hostile work environment, or that it otherwise might expose the prison to litigation by any of its staff members.

At any rate, those assertions are ripe for development at trial. In particular, the claim that a few bad words in an inmate's grievance would "undermine the safety of the prison system" and "eventually destroy the credibility of the Grievance Program" strains credulity, especially in light of the fact that the grievance program apparently has remained alive and well in the years since the court of appeals announced the rule that Dahne challenges here; Dahne admits that a majority of the more than 20,000 grievances that WSDOC processes each year are resolved informally. ER 105. Similarly, Caldwell asserted in his declaration that grievances "affect[] the staff member responding to the grievance, as well as the staff member being described, because the latter will see the grievance as part of the investigation into staff conduct . . . ." ER 107. In light of Dahne's own evidence, that statement deserves skepticism: the OPGM says only that "[s]taff members grieved for alleged misconduct or retaliation *may* read the initial grievance during the interview with the assigned investigator," and offers no practical reason why staff members *must* read such grievances in every case. ER 136 (emphasis added).

If the Court is inclined to consider Dahne's proposed question, it should do so based on a record that answers those and other important factual questions, which the current record leaves unresolved. The petition should be denied on that independent basis.

C. The Court of Appeals' Decision Is Neither Contrary to This Court's Precedent Nor an Outlier Among the Circuits.

Dahne characterizes the court of appeals' opinion below as a jurisprudential outlier that is unique among the circuits and contrary to this Court's precedent. Neither is true.

First, the court of appeals' decision is consistent with the distinction drawn by this Court between restrictions on "outgoing" correspondence to "noninmate[s]" and "incoming" correspondence to inmates. *See Thornburgh v. Abbott*, 490 U.S. 401, 408, 411-13, n.10 (1989). "Incoming" messages pose unique risks because they are directed at and will be read by inmates. *See id*. at 412 ("Once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct."). Thus, *Thornburgh* held that, as to those sorts of communications, prison officials should "be given broad discretion to prevent such disorder." *Id*. at 413.

"Outgoing" messages, however, raise no such concern. *Thornburgh* acknowledged that "outgoing correspondence that magnifies grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison." *Id*. at 411-12 (citing *Procunier v. Martinez*, 416 U.S. 396, 416 (1974)) (emphasis in original). Though it disapproved of *Martinez*'s analytical approach, *Thornburgh* left in place its central holding, which invalidated, on First Amendment grounds, a prison regulation that prohibited "statements that 'magnify grievances' or

'unduly complain'" in "outgoing letters." *Martinez*, 416 U.S. at 415-16; *see also Thornburgh*, 490 U.S. at 411 ("[A] careful reading of *Martinez* suggests that our rejection of the regulation at issue resulted not from a least restrictive means requirement, but from our recognition that the regulated activity centrally at issue in that case—outgoing personal correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security."). *Thornburgh* also noted that "*Martinez* has been characterized in subsequent decisions of this Court as a case concerning 'written communication by inmates' to *noninmate* recipients." *Thornburgh*, 490 U.S. at 412, n.10 (citing *Pell*, 417 U.S. at 826, and *Houchins v. KQED, Inc.*, 438 U.S. 1, 12, 31 (1978)) (emphasis added).

Inmate grievances are akin to "outgoing" correspondence because they are directed to "noninmates," *i.e.*, to prison staff. *See id.* In *Thornburgh's* language, nothing an inmate writes in a grievance is "targeted to a general audience," nor, "[o]nce in the prison," could statements in a written grievance "reasonably . . . be expected to circulate among prisoners. . . ."[7] *Id.* at 412. The court of appeals' decision is thus consistent with the approach of *Thornburgh* and *Martinez*.

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[7] As the court of appeals noted, if an inmate attempts to distribute a copy of an inappropriate written grievance to fellow prisoners, a prison can punish him for that separate offense. App. 6a. However, the record is devoid of any suggestion that Richey did or attempted to do so.

Second, if there exists a circuit split at all, it is not as pronounced as Dahne claims.[8] Several of the cases on which Dahne relies did not involve Petition Clause claims at all. *Hadden v. Howard*, 713 F.2d 1003 (3d Cir. 1983), for example, was a Fourteenth Amendment due process case. There, an inmate alleged that a prison deprived him of a liberty interest when it punished him for a "maliciously untrue" statement in a grievance. *See id*. at 1006-08. The inmate did not allege, and the Third Circuit did not consider, whether a violation of the inmate's right to petition had occurred. Similarly, *Hale v. Scott*, 371 F.3d 917, 918 (7th Cir. 2004), concerned an inmate's free speech challenge based on a "libelous" statement in a grievance.[9] Unlike Richey, the inmate in *Hale* did not allege a right to petition claim and did not assert an injury based on the prison's failure to

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[8] The various unpublished decisions that Dahne cites are not precedent and are thus insufficient to demonstrate a circuit split. *See*, *e.g.*, *Reyes Mata v. Lynch*, 135 S. Ct. 2150, 2155 n.3 (2015) ("[W]e are not certain what the Fifth Circuit . . . thinks about [a] question . . . [because it] has stated [its] position in only a single sentence in a single unpublished opinion, which (according to the Circuit) has no precedential force.")

[9] As this Court has recognized, "[c]ourts should not presume there is always an essential equivalence in the [Speech and Petition] Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). There is "extensive common ground in the definition and delineation of these rights," but "[t]here may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation." *Id*. at 389.

process the grievance; in fact, the Seventh Circuit's opinion suggested that the prison had done so. *See id.* at 918 (noting that "the prison investigated the [inappropriate statement in the grievance] and found it to be baseless").

Ustrak v. Fairman, 781 F.2d 573 (7th Cir. 1986), likewise indicated that the inmate's First Amendment claim was grounded in the First Amendment's Speech Clause, not the Petition Clause. *See id.* at 580 (referencing "free speech"). The same was true in *Smith v. Mosley*, 532 F.3d 1270 (11th Cir. 2008). *See id.* at 1277 (noting that the court's decision "depends on whether [the applicable prison rules] amounted to valid limitations on the exercise of speech").

Other of Dahne's cases turned on facts that are materially different from those in this case. In *Smith v. Campbell*, 250 F.3d 1032, 1035 (6th Cir. 2001), an inmate who worked as a "legal advisor" to fellow prisoners "threatened" a staff member during an in-person witness interview on behalf of another inmate. As a result of the threat, the inmate lost his position as a legal advisor, following which he filed several grievances. *Id.* The Sixth Circuit rejected the inmate's First Amendment claim not because of the content of any written grievance, but rather "because of his aggressive attitudes in the discharge of his job duties and his attempts to intimidate staff members." *Id.* at 1037.

Similarly, *Watkins v. Kasper*, 599 F.3d 791, 797-798 (7th Cir. 2010), held that an inmate's "oral complaint[s]" lost First Amendment protection because the inmate raised one of them "public[ly]" and

voiced another in a "confrontational, disorderly manner." In both cases, the court noted that the inmate could instead have raised his concerns in a written grievance. *Id.* at 797 ("Instead of openly criticizing Kasper's directives during a meeting with other law clerks, Watkins could have taken the less disruptive approach of filing a written complaint."); *id.* at 798 ("Watkins did not confine himself to a formal, written grievance or a courteous, oral conversation with Kasper about the placement of his legal materials. Instead, he confronted Kasper face-to-face in the library, presumably within earshot of other prisoners . . . ."); *see also Lockett v. Suardini*, 526 F.3d 866, 869 (6th Cir. 2008) (an inmate who called a hearing officer a "foul and corrupted bitch" during an in-person hearing could be disciplined). Here, the panel's decision itself acknowledged that prison administrators may punish offenses like the one in *Watkins*. App. 6a.

In *Cowans v. Warren*, 150 F.3d 910, 911 (8th Cir. 1998), the Eighth Circuit did not meaningfully analyze the application of the Petition Clause to an inmate's disrespectful language in a grievance. Rather, it affirmed the district court's decision to grant qualified immunity on an inmate's right to petition claim only "[t]o the extent [the claim was] alleged" and without meaningful discussion. *Id.* Given the vagueness of that holding, the state of the Eighth Circuit's law on this subject is uncertain given another case decided shortly before *Cowans*. *See Loggins v. Delo*, 999 F.2d 364, 365, 365-67 (8th Cir. 1993) (holding "as a matter of law . . . [that] the language in [an inmate's similar] letter to his brother did not implicate security concerns," despite the

letter's characterization of the prison mail censor as "a beetled eye'd bit—" who "enjoys reading people's mail").

Finally, none of the state court cases on which Dahne relies are "decision[s] by a state court of last resort." Sup. Ct. R. 10(a). For that reason, those cases are insufficient to demonstrate a split of authority warranting this Court's review. *Cf. Davis v. Jacobs*, 454 U.S. 911, 914 n.4 (1981) (noting that the Court may deny a petition because the opinion below "may not be the judgment of a State court of last resort" (quoting *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-918 (1950) (Frankfurter, J.)) (internal quotation marks omitted)).

To the extent there exists a split of authority regarding Dahne's proposed question, that split has not developed to the point of warranting review by this Court. The petition should be denied on that separate basis.

D. The Court of Appeals' Decision Regarding Qualified Immunity Does Not Warrant This Court's Review.

The Court should decline to review the court of appeals' decision regarding qualified immunity for at least two reasons.

First, Dahne's formulation of the question presented asks the Court to review only the substantive First Amendment issue underlying the parties' dispute. It does not clearly ask the Court to consider whether the court of appeals correctly applied the doctrine of qualified immunity. Sup. Ct.

R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *see also Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 588 n.8 (1999) (declining to consider an issue because the "issue is not within the question presented"). The issue of qualified immunity turns on a materially different set of considerations and thus is not "fairly included" within the merits question. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (noting that "a district-court order denying qualified immunity . . . is conceptually distinct from the merits of the plaintiff's claim" (internal quotation marks and citation omitted)).

Second, Dahne's argument regarding qualified immunity amounts to a contention that the court of appeals merely "misappli[ed] . . . a properly stated rule of law." Sup. Ct. R. 10. Even if true, that argument does not warrant this Court's review. And, at any rate, the court of appeals appropriately considered and rejected Dahne's argument regarding whether the right at issue was clearly established. The applicable precedent, it noted, was *Brodheim v. Cry*, 584 F.3d 1262, 1269, 1271 (9th Cir. 2009), which held starkly that "[i]t is well-established that . . . prisoners have a First Amendment right to file prison grievances" and that "disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment." Based on that holding, the court of appeals concluded that clearly established law prohibited Dahne from refusing to process Richey's grievance because its language did not "satisf[y] Dahne's sense of propriety." App. 5a-6a.

That conclusion correctly applied the doctrine of qualified immunity. In particular, Dahne cites no case holding that a court of appeals' decision cannot *itself* clearly establish a particular rule of law within that circuit. In fact, several other circuits follow the Ninth Circuit's approach, in that they look to their own cases in determining which rules of law are clearly established. *See Burgess v. Fischer*, 735 F.3d 462, 473 (6th Cir. 2013) (noting that a particular right "was not clearly established until our decision in *Aldini v. Johnson*, 609 F.3d 858 (6th Cir. 2010)")); *Lankford v. City of Hobart*, 27 F.3d 477, 480 (10th Cir. 1994) ("[W]ith this court's opinion in *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989), it became clearly established that sexual harassment can constitute a violation of equal protection and give rise to an action under 42 U.S.C. § 1983.").

E. *Amici*'s Additional Concerns Do Not Warrant This Court's Review.

Amici's contention that this Court should intervene simply because Richey's claim seems to them "insubstantial" or "trivial" is meritless. That argument fundamentally misinterprets Richey's claim. Richey did not initiate this lawsuit on grounds that the guard's denial of his right to use the prison yard, to shower, and to obtain clean clothes *itself* amounted to a constitutional violation. Rather, the injury that Richey alleged, which the court of appeals correctly recognized, was the denial of an opportunity to seek redress (through the prison's grievance program) for those indignities. To Richey, the guard's decision to punish him unfairly was far from a "trivial" matter, but even if it were, the Petition

Clause still would not permit Dahne to refuse to process the grievance merely because the issue it raised was, in his view, unimportant. *See Stevens*, 559 U.S. at 470-71.

Nor is this case an appropriate vehicle in which to address *amici*'s arguments regarding the exhaustion requirements of the Prison Litigation Reform Act. Dahne withdrew his argument that Richey had failed to exhaust his administrative remedies at the district court level and has not re-raised it since then. App. 74a. That issue is not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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