No. 25-712

IN THE

Supreme Court of the United States

SANDRA HERNDEN,

Petitioner,

v.

CHIPPEWA VALLEY SCHOOL DISTRICT, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION(S) PRESENTED

Was the court of appeals correct in holding that Petitioner did not experience a First Amendment adverse action that would chill a person of ordinary firmness and—at the very least—the Respondent was entitled to qualified immunity?

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INTRODUCTION

Petitioner asks this Court to determine whether a school board president who used the public online threat reporting website established by the Department of Justice in response to threats against schools during the COVID-19 pandemic engaged in First Amendment retaliation. Pet. App. 4.

The court of appeals, consistent with the other circuits, recognized Petitioner was required to allege adverse action that would deter a person of ordinary firmness from continuing to engage in the constitutionally protected conduct. *Paige v. Conyer*, 614 F.3d 273, 277 (6th Cir. 2010). In applying the rule to Petitioner, the court concluded Respondent's alleged action would not—and did not—deter a person of ordinary firmness from continuing to exercise their First Amendment rights. This application of the law is also consistent with the approach used by other circuits. It is evident that Petitioner's quarrel is not with this well-settled rule of law articulated by the Sixth Circuit, but in how the court of appeals applied that rule to the particular facts of this case.

The constitutional claim Petitioner seeks to raise before this Court does not merit plenary review. The Sixth Circuit's ruling is consistent with this Court's prior holdings and with the other Circuits that have addressed the issues. Moreover, Petitioner's claim is a poor vehicle for review by this Court as Respondent is entitled to qualified immunity regardless of Petitioner's ability to prove an actionable adverse action. For these reasons, certiorari should be denied.

STATEMENT OF THE CASE

School boards are locally elected groups of citizens charged with crafting policy and approving budgets for districts of widely varying sizes and contexts. Most challenges that boards face are nonpartisan in nature: they relate to issues of policymaking, budgeting matters, the supervision of the district superintendent, and improving student achievement and well-being. Being a member of a board is a part-time position with few emoluments of office.

Respondent Frank Bednard ("Bednard") formerly served as a Chippewa Valley Schools (the "District") Board of Education (the "Board") Member. Bednard, a retired law enforcement officer, served on the Board for 22 years. (R. 25-4, PageID # 389). Bednard served on the Board during the COVID pandemic—a period of time when the public was quite critical of public servants, especially school board members. The Board had to make difficult decisions, adhere to mandates from state and federal powers that it was legally obligated to follow, and withstand public scrutiny. Indeed, during the COVID pandemic, "[l]ocal school officials across the United States [we]re being inundated with threats of violence and other hostile messages from anonymous harassers nationwide, fueled by anger over culture-war issues. Reuters found 220 examples of such intimidation in a sampling of districts."[1]

Petitioner, Sandra Hernden, was a police officer at Harper Woods Police Department, and she had children in attendance at the District through school of choice. (R. 25-

1. https://www.reuters.com/investigates/special-report/usa-education-threats/

2, PageID # 325). Since this lawsuit, Petitioner accepted a new job working at the Warren Police Department, where she has a higher salary and works with her husband. (*Id.* at PageID # 327). Petitioner no longer has children attending the District, nor does she live within the District's boundary. (*Id.* at PageID # 242-43).

Against this backdrop, Petitioner admittedly had "heated" interactions with the Board regarding masking and its efforts to keep students safe. (R. 1, PageID # 4). Bednard testified that, at a Board meeting on September 13, 2021, Petitioner participated in public comment. (R. 25-4, PageID # 389). He immediately observed that Petitioner's demeanor was much more serious than when normally addressing the Board. (*Id.*). She seemed "very angry and very agitated." (*Id.*). Petitioner's public comment to the Board began with a history of the publication of Adolf Hitler's *Mein Kampf* and a description of how Nazi Germany labeled Jewish individuals with "yellow badges." (*Id.*). As these comments went on for some time and appeared to be irrelevant to District matters, Bednard attempted to direct Petitioner to explain how this commentary related to the District. (*Id.*). Petitioner continued, telling a story about a family member. (*Id.*). When Bednard again attempted to direct Petitioner to address District matters, she yelled several times that she was getting to her point. (*Id.* at PageID # 390). Petitioner proceeded to tell the Board that, by having students wear masks, the Board was just like the Nazi's identifying Jewish individuals with yellow badges.[2]

2. Plaintiff also admitted to accusing the District of engaging in "Gestapo tactics" and turning the Board into a "dictatorship." (R. 25-2, PageID # 354).

(*Id.*). As of September 13, 2021, the District did not have a mask mandate in place. (*Id.*). As a retired Macomb Sheriff Command Officer, Bednard testified that he has more than 30 years of experience and training in reading an individual's behavior. (*Id.*). During this public comment period, the **"[Petitioner's] aggressive behavior shocked and scared [him]."** (*Id.*) (emphasis added).

On October 4, 2021, the then United States Attorney General issued a memorandum encouraging school boards to report behavior that could constitute harassment or threats. (R. 1-4, PageID # 28). That night, Bednard viewed an ABC News report on the memorandum which reported that *anyone* could refer abusive, intimidating, or threatening behaviors at Board meetings to the Department of Justice ("DOJ"). (R. 25-4, PageID # 390; R. 25-2, PageID # 361). That same day, Petitioner sent an email to the District with the subject line, "Special attention to Frank [Bednard]" with a link to a Sixth Circuit decision "concerning public commentary at school board meetings." (R. 1-3, PageID # 24). Petitioner's email read:

> Once again, law on parents side. Maybe a lil more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me.
>
> 1st 2 were free…

(*Id.*). The above email to Bednard indicates Petitioner warned him to exercise "due care and caution" and then threatened that the "1st 2 [interruptions?] were free. . . ." (*Id.*). Petitioner confirmed this was a threat that she would pursue legal action. (R. 25-2, PageID # 368).

In light of Petitioner's "escalating aggressive behavior at Board meetings," Bednard found this email threatening and transmitted a copy of it to the DOJ on October 5, 2021, with a message describing Petitioner's conduct and threatening behavior. (R. 1-3, PageID # 26). Petitioner did not suffer any monetary or emotional damage because of this email. (R. 25-2, PageID # 363, 365). Petitioner was not even aware that Bednard sent a communication to the DOJ until a friend informed her; her friend discovered this through an independent FOIA request. (*Id.* at PageID # 349). Petitioner admitted that the DOJ has not taken any action or contacted her in any manner. (*Id.* at PageID # 350). Petitioner admitted "[s] he had no way to know whether this prospective criminal investigation could, or even would, become actualized into a current investigation." (R. 16, 25).

Petitioner continued to appear at District Board Meetings and address the Board in an acerbic and uncivil manner. For example, she attended Board Meetings in October 2021 and April 2022, where she spoke during public comment. (R. 25-2, PageID # 347; R. 25-5, PageID # 394). Plaintiff has not alleged, and there are no facts to suggest, that her speech was actually chilled as a result of the above email. She continued to appear at Board meetings and continued to send emails to Board Members.

After Petitioner's constant and aggressive conduct towards the District Board and its individual members, she filed suit against Bednard alleging engaged in First Amendment retaliation.[3] (R. 1, PageID # 9). The District

3. Petitioner's other claims were dismissed by the district court and court of appeals and are not at issues here. Pet. App. 6 ("no claim against Pyden is made in this Petition").

filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(c) arguing that Petitioner had not alleged that the District itself did anything. (R. 17, PageID # 121). The Court granted this Motion in part and denied it in part. Pet. App. 41a-59a. Petitioner and Bednard filed opposing Motions for Summary Judgment. (R. 24, PageID # 220; R. 25, PageID # 279). In lieu of oral argument, the Court decided the motions on the parties' briefing. Pet. App. 27a-40a. The Court granted Respondent's Motion in full and denied Petitioner's Motion in full, finding that, as a matter of law, Petitioner did not suffer an adverse action that would deter a person of ordinary firmness from engaging in protected speech. (*Id.*). Petitioner appealed the decision to the Sixth Circuit Court of Appeals. On appeal, all three judges on the panel held that Respondent was entitled to qualified immunity, and the majority went further, holding that Petitioner's First Amendment Rights were not violated where her speech as not actually chilled and she only alleged a speculative fear of investigation that never occurred. Pet. App. 19a.

REASONS FOR DENYING THE PETITION

I. Petitioner Overstates the Degree, and Practical Significance, of Any Difference Among the Circuits' Approaches.

Petitioner contends this issue is ripe for review by this Court due to a Circuit split and division amongst the lower courts. However, Petitioner's argument lacks merit as there is no Circuit split nor division amongst the lower courts with regard to application of the standard for a First Amendment retaliation claim. In fact, every Circuit has adopted the "ordinary firmness" test and utilize the same factors when analyzing a First Amendment

retaliation claim. As detailed more fully below, the Petition should be denied.

a. There is no circuit split regarding the 'person of ordinary firmness' test.

The Sixth Circuit, and "every other Circuit has adopted the 'ordinary firmness' test" for First Amendment retaliation claims alleged by private citizens. *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005) (collecting cases across the Circuits and observing that "every other Circuit has adopted" the standard), abrogated in part on other grounds by *Pearson v. Callahan*, 555 U.S. 223 (2009); *see e.g. Thaddeus-X v. Blatter*, 175 F.3d 378, 394, 398 (6th Cir. 1999) (en banc) ("The benefits of such a standard are that it is an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening the most trivial of actions from constitutional cognizance"); *Mendocino Env't Ctr. v. Mendocino Cnty*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003) ("The ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment"); *Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006). This presents an objective question. *Bennett*, 423 F.3d at 1251.

This consensus standard requires a "fact intensive inquiry" that focuses on factors such as "the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." *Suarez Corp. Indus. v. McGraw*,

202 F.3d 676, 686 (4th Cir. 2000); *see also Thaddeus-X*, 175 F.3d at 398 (application of standard "is not static across contexts"). Given the fact intensive nature of this standard, a look into the plaintiff's response to the alleged retaliation is relevant to determining whether there was an objectively adverse action taken. *See Balt. Sun. v. Erlich*, 437 F.3d 410, 419 (4th Cir. 2006) (while courts "must measure the adverse impact against an objectively reasonable plaintiff[,] . . . 'the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity'"); *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 479 (2022) (plaintiffs "behavior and concessions seem telling"). When the alleged retaliatory act is a government communication, the inquiry "must [also] account for" the fact that the challenged act "is itself a form of speech." *Houston*, 595 U.S. at 478.

Building off this universal standard, a number of courts of appeals have developed case law to identify specific adverse actions that can be regarded as adverse as a matter of law or can be regarded as so *de minimis* that they do not meet the threshold on their face. *See Thaddeus-X*, 175 F.3d at 397 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)); *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 584 (6th Cir. 2012) (*de minimis* or inconsequential actions are "properly dismissed as a matter of law"); *Bennett*, 423 F.3d at 1253 ("for private citizen plaintiffs, the objective test allows for a 'weeding out' function when the injuries complained of are trivial or amount to no more than *de minimis* inconvenience in the exercise of First Amendment rights"); *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006) (finding no deprivation of First Amendment rights where

university professor was denied "emeritus" status because the "benefits of such status . . . carry little or no value and their deprivation therefore may be classified as *de minimis*"); *Mezibov v. Allen*, 411 F.3d 712, 721-23 (6th Cir. 2005) (finding no First Amendment deprivation where allegedly defamatory statements by prosecutor would not deter a "defense attorney of ordinary firmness" from continuing to defend his client). The process is a familiar one in which the law starts with a general standard, and then gradually crystalizes more particular rules that fulfill the same purpose as the standard, but with a greater degree of certainty.

The court below correctly applied this standard despite Petitioner's position. Contrary to Petitioner's contention, the decision below did not convert the objective "person of ordinary firmness" standard to a subjective one. Rather, it simply applied the standard in a way that meaningfully distinguishes between claims that would trivialize the First Amendment and claims involving adverse action of Constitutional dimensions. Petitioner also contends the court of appeals departed from the objective test by considering how the plaintiff actually reacted and apparently "require[d] some sort of compensatory or economic harm" which would directly conflict this Court's holding in *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021). Pet. App. 21. First, the Sixth Circuit did not depart from the standard as it is widely accepted that our circuit courts should consider factors such as the plaintiff's status when making an adverse action determination. See *Thaddeus-X*, 175 F.3d at 398 (application of standard "is not static across contexts"). Second, the court never held—or even inferred—that some type of nominal damages were required. Finally, *Uzuegbunam* addressed

nominal damages allowing standing for redressability on a claim of a *completed* violation of legal right—not what constitutes an adverse action for the purposes of the First Amendment.

b. The cases cited by the petition do not involve any meaningful division of lower court or this Court's authority.

Contrary to Petitioner's argument, the cases relied upon do not support her assertion that there is division amongst the Circuits or that this Court's authority is not followed. First, this Court has recognized the lower courts' objective ordinary firmness test when analyzing First Amendment retaliation cases. *See Houston*, 595 U.S. at 477; *Nieves v. Bartlett*, 587 U.S. 391, 397 (2019).[4] Like the lower courts, this Court has applied this objective test to the specific facts before it and considered how certain factors—i.e. if the petitioner is a government employee, if there is a claim of retaliatory prosecution, etc.—may affect the application of the test. *See Nieves*, 587 U.S. at 397; *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283–284 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms"). Indeed, this Court has long recognized factors that can determine whether or not a private citizen's First Amendment rights have been chilled. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (collecting cases where this Court

4. Confusingly, Petitioner asserts retaliation claims related to prosecutions and arrests have special rules that do not relate to this matter. Pet. App. 16. At no point has any party in this matter claimed Petitioner's retaliation claim is subject to the test outlined by this Court in *Nieves*.

has found "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights").[5]

In none of the cases decided by this Court did the chilling effect arise "merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Id.* at 11. Rather, "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." *Id.*

Thus, the lower court's determination that Petitioner experienced no harm, no real fear, or any chilling of her speech in response to Bednard's message and, thus, no First Amendment retaliation is consistent with this Court's precedent and application of the standard. Rather than attempt to point out a true split in the circuits, Petitioner argues ***this Court*** has admitted that there is

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5. Petitioner takes issue with the lower court's analysis of the adverse action alleged because the majority opinion did not cite "decisions from this Court or other circuits." Pet. App. 19. First, it has no bearing on the reviewability of this matter that the Sixth Circuit did not cite precedent directly from this Court. Second, the lower court cited *Laird* in its opinion when analyzing the chill of Petitioner's speech and recognizing allegations of a speculative or subjective harm do not establish a First Amendment retaliation claim. *Id.* at 16a.

no settled test on adverse actions in the First Amendment retaliation context citing to *Houston*. Pet. App. 15 (citing 595 U.S. at 477). But *Houston* indeed recognizes the variety of factors this Court considers when a plaintiff alleges a chilling effect on their First Amendment rights. *See Houston*, 595 U.S. at 477 (the adverse action analysis is not static and considers different factors to determine if a plaintiff has met their burden). In *Houston*, those factors included an individual's status as a government official ("we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes") and whether the adverse action at issue is itself a form of speech. *Id.* at 478.

Second, Petitioner relies on cases addressing facial challenges and standing rather than as applied and retaliation First Amendment challenges. Pet. App. 22-27. *Bantam Books* concerned a state commission tasked with "investigat[ing] and recommend[ing] the prosecution" of publishers whose materials it deemed objectionable. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59-60 (1963). The commission sent threatening notices to distributors of these publications citing the commission's authority, explicitly warning that the "Chiefs of Police have been given the names" of the publications, and declaring that compliance would "eliminate the necessity of our recommending prosecution to the Attorney General's department." *Id.* at 62-63, n. 5. The notices were "invariably followed up by police visitations." *Id.* at 68. This Court held that the commission's tactics constituted "a scheme of state censorship effectuated by extralegal sanctions." *Id.* at 72.

Petitioner's alleged retaliatory action by Bednard did not involve anything remotely like the explicit threats of criminal prosecution in *Bantam Books*. Moreover, *Bantam Books* did not even involve a retaliation claim or examine the actions of an outside state actor who reported an author of a publication to the commission. *Bantam Books* would be a more appropriate comparator if Petitioner was challenging the actions of the Attorney General in 2021 or the task force assigned to investigate threatening claims made against Boards of Education. But that is undisputedly not the case here. Pet. App. 22, n. 15 ("[Petitioner] is not challenging the policy in general or the fear that such a reporting program might one day apply to her").

Petitioner's reliance on *Speech First, Inc. v. Schlissel* is also unavailing. 939 F.3d 756 (6th Cir. 2019). *Schlissel* dealt only with the question of whether a plaintiff has suffered a sufficient injury to have standing to make a facial challenge to a policy, which again, Petitioner is not challenging; it contains no holding at all about—and does not even purport to address—what constitutes an adverse action that could violate the First Amendment on the merits, and it specifically disclaimed applicability to as-applied claims. *See id.* at 766; *cf. Morrison v. Bd. of Educ. of Boyd City*, 521 F.3d 602, 608 (6th Cir. 2008). Still, the Sixth Circuit was clear in *Schlissel* that the mere allegation of a subjective 'chill' or speculative fear is not "an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Schlissel*, 939 F.3d at 764.

Regardless, as pointed out by the Sixth Circuit in its opinion, *Schlissel* still requires a specific objective harm

to show an adverse action, not just a threat of harm. *Id.*; Pet. App. 16a. This means "something more than 'the individual's knowledge that a governmental agency was engaged in certain activities or . . . the individual's concomitant fear that . . . the agency might in the future take some other and additional action detrimental to that individual.'" *Schlissel*, 939 F.3d at 764 (quoting *Laird*, 408 U.S. at 11). It is insufficient to allege "the mere existence, *without more*, of a governmental investigative and data-gathering activity." *Id.* (quoting *Morrison*, 521 F.3d at 608). As such, Petitioner has failed to establish an issue requiring this Court's review thereby warranting denial of her Petition.

II. This Case Is a Poor Vehicle for Review.

Aside from failing to establish that the issue presented warrants review by this Court since there is no division amongst the Circuits, she also fails to present a case where review of the issue would impact the outcome. As detailed more fully below, the facts of this case do not warrant review and therefore, the Petition should be denied.

a. This case is a poor vehicle for the issue presented because the case was properly dismissed for independent reasons.

Addressing the First Amendment issue will not affect the outcome of this case because Bednard is still entitled to qualified immunity even if his conduct did violate the First Amendment.

As demonstrated by the instant petition, there is no case law holding that a public school official violates the

First Amendment by simply reporting to law enforcement that particular speech and behavior appears threatening. This is unsurprising because the public policy is to not discourage reporting of concerns out of fear of being sued. *See*, *e.g.*, Mich. Compl. Laws §§ 722.623 and .633 (requiring school officials to make reports or face criminal liability). This is exactly what the Attorney General in 2021 encouraged in his October 4, 2021, memorandum encouraging school boards to report behavior that could constitute harassment or threats. (R. 1-4, PageID # 28).[6] In fact, even Petitioner, who is a law enforcement officer, admitted that people should report to the police if they believe a crime may have occurred. (R. 25-2, PageID # 361-63).[7]

Qualified immunity is an absolute defense to § 1983 claims. *Binay v. Bettendorf*, 601 F.3d 640, 647 (6th Cir. 2010). The doctrine is designed to protect "all but the plainly incompetent who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Once a qualified immunity defense is raised, "the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Binay*, 601 F.3d at 647. To overcome a qualified-immunity defense, plaintiffs must show: (1) that government officials violated a constitutional right

6. *Available at* https://www.justice.gov/archives/opa/pr/justice-department-addresses-violent-threats-against-school-officials-and-teachers.

7. This is an area where hindsight is exceedingly unkind. For example, undersigned represented Oxford Community Schools in multiple lawsuits arising from the mass shooting at Oxford High School. In those cases, the plaintiffs' theories were that school officials should be liable for failing to report what they believed was a threat to school safety.

and (2) that the unconstitutionality of their conduct was clearly established when they acted. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018).

Even if a question could be raised as to whether Bednard's actions violated Petitioner's constitutional rights, that is not enough to impose liability. School Board Members are entitled to qualified immunity if their conduct does not violate a "clearly established" constitutional right. *Pearson v. Callahan*, 555 U.S. at 231. A "clearly established" right is one that is "sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2011).

The "clearly established" analysis starts with examining existing precedent from the United States Supreme Court and Sixth Circuit for guiding authority on similar issues. *Stewart v. City of Euclid, Ohio*, 970 F.3d 667, 674-75 (6th Cir. 2020). The facts of the prior cases must be sufficiently similar to clearly establish the law.

This Court has "repeatedly told courts" "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). For example, "the right to due process of law is quite clearly established by the Due Process Clause," but that does not mean that "any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *see Reichle*, 566 U.S. at 665 ("the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by

probable cause"). This Court's cases therefore "establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. Anything less "would destroy the balance that [the Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Id.* at 639 (quotation marks and citation omitted).

Our circuits routinely grant qualified immunity in First Amendment cases on the ground that "First Amendment law is particularly context-driven." *MacIntosh v. Clous*, 69 F.4th 309, 321 (6th Cir. 2023) (quotation marks and citation omitted); *see Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017) ("It is particularly difficult to overcome the qualified immunity defense in the First Amendment context"). The Sixth Circuit in *Stockdale v. Helper*, for example, examined a public official's letter calling for the dismissal of two police officers; the letter was the "sole reason" the officers were ultimately fired. 979 F.3d 498, 501-502 (6th Cir. 2020). The officers sued, alleging that the letter constituted unconstitutional retaliation for their prior lawsuit, but the Sixth Circuit dismissed on qualified-immunity grounds. *Id.* at 506. The court acknowledged that "a public official violates the First Amendment by retaliating against an individual for exercising free speech rights," but found that this general legal rule did not put the specific factual issue "beyond debate." *Id.* at 506-507 (quotation marks and citations omitted). The court granted qualified immunity because no precedent found retaliation in a relevantly similar situation: where the defendant merely sets a "decision in motion" but does not herself "take the adverse action." *Id.* at 507; *see also Davidian*

v. O'Mara, 210 F.3d 371, at *4 (6th Cir. 2000) (Table) (qualified immunity warranted where precedent did not give notice that defendants' conduct was "severe enough to chill a person of ordinary firmness from continuing to publish unfavorable articles").

Petitioner offers that if her Petition is granted, she would argue qualified immunity would not apply pursuant to *Bantam Books* and *Schlissel*—but as previously discussed, neither of these cases clearly establish that Respondent is not entitled to qualified immunity. Pet. App. 25, n. 16. Neither of these cases are remotely comparable. *See supra* Section Ib. Petitioner still does not point to any law that would have provided Bednard with "fair warning" that his email to the DOJ would be unconstitutional. *Clous*, 69 F.4th at 319 (citation modified). "[E]specially in light of the Attorney General's recent memorandum **urging** school board members, such as Bednard, to report instances of harassment." Pet. App. 19a (emphasis added).

In the present matter, the district court judge did not even find it necessary to address qualified immunity because Petitioner's constitutional rights were not violated. Pet. App. 27a-40a. On appeal, all three judges on the panel held that Respondent was entitled to qualified immunity, and the majority went further holding that Petitioner's First Amendment Rights were not violated. Pet. App. 1a-23a.

b. This case is a poor vehicle because petitioner presents a purely academic issue.

In the Sixth Circuit, Petitioner did not even raise the issue of qualified immunity. In fact, the word "immunity"

does not even appear in Petitioner's Brief. Failure to raise and properly present an issue amounts to a waiver. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones"); *see also Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537, 545 (6th Cir. 2020); *Maloney v. Comm'r of Soc. Sec.*, 480 F. App'x 804, 810 (6th Cir. 2012) ("It is axiomatic that 'a court should not consider an argument that has not been raised in the [lower tribunal]'") (citation omitted); *Fetting v. Kijakazi*, 62 F.4th 332, 338 (7th Cir. 2023).

Here, as Plaintiff did not even raise the issue of qualified immunity in the Sixth Circuit, that issue has been abandoned, which means that the relief sought could not change the outcome of the case. Stated differently, Petitioner is asking for an advisory opinion.[8]

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8. The "case or controversy" requirement prohibits all advisory opinions, not just some advisory opinions and not just advisory opinions that hold little interest to the parties or the public. If advisory opinions "are ghosts that slay," Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1007 (1924), it is hard to grasp why the risks associated with them would be ameliorated, as opposed to accentuated, when the public has a keen interest in the resolution of the issue. Matters of great public interest are precisely the kinds of issues that demand the federal courts to be most vigilant in this area—vigilant that the powers they exercise are powers the Constitution gives them and vigilant that they exercise those powers in disputes with the "clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

c. Few courts have addressed analogous facts, which belies the suggestion that this court should utilize its limited resources to resolve an issue that is uncommon and unlikely to be repeated.

There is scant case law presenting facts that are analogous in any meaningful manner, i.e.—(1) a community member presenting at a school district in a threatening manner, (2) that the perceived threatening behavior was reported to the DOJ for investigation *at the DOJ's request*, and (3) that the community member was admittedly unaware of the report, was not actually investigated, and admitted that it did not chill her speech whatsoever.

Petitioner seemingly acknowledges that this fact pattern is not something that has been frequently litigated. In an attempt to overcome that problem, Petitioner suggests that—"[i]n light of our current toxic and vindictive politics"—that this issue will become pervasive. History has not borne that out. Even a casual observer of American politics and society would acknowledge that national politics have been highly polarized and toxic for more than a decade. Still, case law with similar facts is non-existent.

This begets the conclusion that the situation at issue in this case is unlikely to be repeated and does not warrant review. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the

parties") (citation modified). It is clear that this is a case where Petitioner takes issue with how the standard applies to the facts of her case, not with the standard itself nor how it will be applied in future cases. Surely there is no dispute that this task force created in 2021, in response to masking debates during the COVID pandemic, under an entirely different administration and Attorney General who is no longer in office, is not pursuing these reports to the DOJ. Indeed, this task force appears to have been disbanded long ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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