No. 25-927

In The
Supreme Court of the United States

RICHARD LOWERY,

Petitioner,

v.

LILLIAN MILLS, DEAN OF THE MCCOMBS SCHOOL OF BUSINESS AT THE UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

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

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is a nonprofit public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. One of the pillars of that mission is the protection and defense of Americans' First Amendment right of speech and expression. Inherent in this First Amendment freedom is the ability to speak without facing retaliatory action by government actors meant to punish or suppress disfavored expression. To defend this principle, IJ represents clients challenging First Amendment retaliation, including successfully before this Court in *Gonzalez v. Trevino*, 602 U.S. 653 (2024).

SUMMARY OF ARGUMENT

The First Amendment's Free Speech Clause is not complicated. It forbids government actors from wielding their power against Americans to punish or suppress protected expression. Sometimes, unconstitutional censorship comes in the easy-to-identify form of ex ante prohibition—for instance, a law banning a particular viewpoint or expression on a particular topic. But sometimes, censorship is more covert and after-the-fact, where government officials wield their power to penalize speech they dislike. In both cases,

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[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amicus made a monetary contribution to its preparation or submission. Amicus timely notified the parties of its intention to file this brief as required by Rule 37.2.

the effect is the same: The government is unconstitutionally punishing expression based on its content. And both have the pernicious effect of chilling future speech.

This Court's cases have consistently recognized that *both* types of censorship are unconstitutional and support claims under Section 1983. The latter type has been characterized as retaliation claims, and the rule for them has long been straightforward: "The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (cleaned up). In other words, if a government official would not have taken some adverse action 'but for' the speaker's protected expression, that is unconstitutional. *E.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977).

This Court has rejected attempts to alter, modify, or supplement that straightforward rule. Though there are doctrines that establish parameters for what speech is constitutionally protected and for evaluating but-for causation in a couple of thorny fact patterns, this Court has never adopted any additional requirement for a First Amendment retaliation claim beyond a plaintiff showing that a government official took adverse action against her because of her protected expression.

Yet the circuit courts have uniformly added an additional requirement on their own: The retaliatory government action must reach of threshold of being adverse *enough* to support a retaliation claim. In

other words, they have effectively given government officials a free pass to intentionally wield their power to punish protected speech—just so long as they don't do it too much.

Those circuit-court rules have no grounding in this Court's precedent or in basic principles of constitutional law. And this Court has already rejected lower courts' attempts to create policy-based rules to restrict First Amendment retaliation claims. Rightly so: There is no subjective small-claims exception to the Bill of Rights or to Congress's statutory grant of federal-question and civil-rights jurisdiction to the federal courts.

Petitioner's case presents one flavor of the circuits' not-adverse-enough rules.[2] According to the Fifth Circuit, only a narrow set of formal employment actions can support a retaliation claim, and nothing else. That rule is wrong for the reasons Petitioner explains.

But more consequentially, it is wrong for the same reason that all the circuits' not-adverse-enough rules are wrong. They have no basis in the First Amendment, and they contradict this Court's consistent, simple statements of the rule against retaliation. In our view, those rules' most pernicious applications are not in the government-employment context, but when wielded to bar First Amendment claims by private citizens facing retaliation for their protected speech.

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[2] While a bit clunky, we believe that "not-adverse-enough" is a short and accurate description of what the circuit courts' rules are actually doing to limit First Amendment retaliation claims.

We write this brief to urge the Court to grant the petition and use this case as an opportunity to more broadly disavow the circuits' not-adverse-enough rules—not just in the public-employment context, but for all First Amendment retaliation claims. Part I shows that this Court has consistently applied a straightforward standard for First Amendment retaliation claims, which is at odds with the circuits' current not-adverse-enough rules. Against that backdrop, Part II shows how pervasive the circuit courts' not-adverse-enough rules have become and provides illustrative examples of how those rules have prevented justice for private Americans who speak out against the government and suffer retaliation for it.

ARGUMENT

I. The First Amendment prohibits government actors from wielding their power to retaliate against constitutionally protected speech.

This Court's retaliation cases have for decades affirmed a simple rule against First Amendment retaliation: Government officials cannot wield their power against individuals for engaging in protected speech. And, accordingly, a victim of such retaliation has a claim under 42 U.S.C. § 1983. This Court has rejected efforts by lower courts in the past to modify or supplement that simple rule, and none of its First Amendment retaliation cases have ever narrowed it.

A. This Court has consistently upheld the rule that action by the government to retaliate against protected speech is unconstitutional, without any sort of not-adverse-enough threshold.

"The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves*, 587 U.S. at 398 (cleaned up). As this Court has explained, that means that if protected speech is a "substantial" or "motivating" factor behind the government's adverse action against an individual—i.e., if protected speech is a "but-for" cause of the adverse action—that is unconstitutional. *E.g.*, *Mt. Healthy*, 429 U.S. at 285-87. That was clear no later than *Mt. Healthy*, half a century ago. Indeed, twenty years later, this Court reaffirmed that "the general rule has long been clearly established" that "the First Amendment bars retaliation for protected speech." *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998).

The Court has reiterated that same simple rule, again and again. For instance:

- "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions * * * for speaking out." *Gonzalez v. Trevino*, 602 U.S. 653, 662 (2024) (Alito, J., concurring) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

- "A government official can share her views freely and criticize particular beliefs. * * * What she cannot do, however, is use the power of the State to punish or suppress disfavored expression." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) (cleaned up).

- "[N]o one before us questions that, '[a]s a general matter,' the First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (second alteration in original) (quoting *Nieves*, 587 U.S. at 398).

- "'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves*, 587 U.S. at 398 (alteration in original) (quoting *Hartman*, 547 U.S. at 256).

- "[T]he First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech." *Lozman v. City of Riviera Beach*, 585 U.S. 87, 90 (2018).

- "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' * * * and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions * * * for speaking out." *Hartman*, 547 U.S. at 256 (alteration in original) (quoting *Crawford-El*, 523 U.S. at 588 n.10).

These all reflect the same simple rule. If an American engages in First Amendment-protected speech, and the government takes retaliatory action *because* of that speech, that violates the Constitution.

Contrary to the Fifth Circuit's decision below, this Court has never imposed an additional requirement that a plaintiff bringing such a claim must also show that the government's retaliation against her protected speech is somehow adverse *enough*.

B. This Court has rejected policy-based rules altering the standard for First Amendment retaliation claims.

The Fifth Circuit's rule allowing only certain types of retaliatory actions to count for purposes of a retaliation claim has no support in this Court's long-repeated statement of the rule against First Amendment retaliation. And this Court has already rejected efforts by the lower courts to graft on additional requirements for First Amendment retaliation claims. *See Crawford-El*, 523 U.S. at 600-01.

Crawford-El involved a prisoner who brought a First Amendment retaliation claim against a prison official, alleging the official had misdirected the prisoner's belongings during prison transfers to retaliate against the prisoner for speaking out about prison conditions and assisting other prisoners with their cases. *Id.* at 578-79. Sitting en banc, the D.C. Circuit created a special rule for civil-rights damages claims, like First Amendment retaliation claims, that involve proving the government defendant's improper motive. That court held that any plaintiff bringing such claims would be required to prove improper motive by clear and convincing evidence. *Id.* at 584-85.

This Court firmly rejected such an innovation. As it correctly identified, the D.C. Circuit's heightened standard was a policy-based rule reflecting its own views of when it would be wise to allow discovery in cases involving allegations of unconstitutional motives. *Id.* at 595. As this Court explained, adding any such rules for a Section 1983 claim is a choice for Congress—not the courts—and "for the courts of appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority." *See id.* at 593-95.

Put differently, *Crawford-El* recognized that the Constitution's straightforward rule barring retaliation against protected expression is categorical. Courts may not fashion special rules to limit constitutional claims based on that simple principle.

A similar reasoning applies here. As this Court has repeatedly explained, the First Amendment bars official retaliation against protected speech. *Supra*

Part I.A. And the lesson of *Crawford-El* is that the lower courts may not invent and impose heightened standards to make it more difficult for plaintiffs to bring certain categories of civil-rights cases in federal court. Just as *Crawford-El* held that courts cannot impose heightened pleading standards because they're skeptical of First Amendment retaliation plaintiffs, it is just as improper to impose some kind of implicit amount-in-controversy requirement to screen out cases that judges subjectively feel are not important enough.

The Constitution's prohibition against censorship has no exception for minor censorship. If a town passed a law and fined every voter who criticized the mayor $10, it would obviously be no defense to a federal suit for the defendants to say that it wasn't that big a deal. Our constitutional rights are precious, and they should not depend on judges' subjective determinations of which rights violations are or are not sufficiently important to be in their courthouses. The punishment of speech through government retaliation should be treated no differently.

And just as *Crawford-El* renounced judicially devised limitations on Section 1983 claims, that statute has no carve-outs for supposedly not-adverse-enough constitutional violations. *See* 42 U.S.C. § 1983 (providing that "[e]very person" acting under color of state law who "subject[s]" an American "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured"); *see also Uzuegbunam v. Preczewski*, 592 U.S. 279, 290 (2021) ("Every injury imports a damage, so a plaintiff who proves a legal violation can

always obtain some form of damages because he must of necessity have a means to vindicate and maintain the right." (cleaned up)). Similarly, Congress has provided no free passes for supposedly small constitutional violations in its statutes granting the federal courts jurisdiction over federal questions or civil rights. *See* 28 U.S.C. §§ 1331, 1343; *cf. Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 240 (2024) ("A court with jurisdiction has a virtually unflagging obligation to hear and resolve questions properly before it." (cleaned up)).

C. Other limitations on retaliation claims reflect that there are no additional requirements beyond showing retaliation because of protected speech.

The constitutional rule against retaliation is simple: The government may not take retaliatory action against a person because of their protected speech. But that does not mean every would-be plaintiff will satisfy the simple rule. This Court has taken many First Amendment cases over the years to define the scope of what expression it protects and, in the retaliation context specifically, how a plaintiff must prove that retaliatory animus in fact caused the government's adverse action. All these cases, though, reinforce the simple rule for retaliation claims. Even when limiting what types of speech are protected or how a plaintiff can show retaliatory causation, they have never grafted on some additional requirement.

1. This is true in public-employment cases, which were among the first types of First Amendment retaliation cases to be recognized by this Court. As

Mt. Healthy elaborated, public employees cannot be fired for speaking out as private citizens. 429 U.S. at 283-84. But that does not mean every public-employee suit will succeed. The government defendants can disprove retaliatory causation by showing that there are reasons unrelated to protected speech that are sufficient to terminate the employee. *Id.* at 287.

Public employees may also fail to establish a retaliation claim if their speech was not protected by the First Amendment in the first place. A long line of cases from this Court have parsed out when public employees are speaking as private citizens entitled to First Amendment protection from when they are acting in their professional capacities subject to supervisory discipline for their speech. *E.g.*, *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). But these rules are neither additional requirements for, nor limitations on, retaliation claims under the First Amendment. Instead, they are simply tools for evaluating whether the plaintiff was engaging in speech protected by the First Amendment at all.[3]

2. *Houston Community College* arose in the cousin context of elected officials, as opposed to public employees. Though this Court rejected the retaliation claim there, it invented no special rules. It just held that the First Amendment did not protect an elected

[3] Indeed, *Crawford-El* explained how these sorts of existing constitutional rules already filter out frivolous claims, which was yet more reason courts shouldn't be fashioning additional requirements for First Amendment retaliation claims. *See* 523 U.S. at 592-93.

official's speech against the counter-speech of his fellow elected officials.

In that case, a community college-system board member was censured by the rest of the board after he repeatedly disagreed with his fellow board members and filed various lawsuits challenging the board's actions. *Houston Cmty. Coll.*, 595 U.S. at 471. The censured board member sued, alleging the censure was unconstitutional retaliation. *Id.* at 472. Applying ordinary constitutional analysis, the Court surveyed history, tradition, and practice to determine whether the First Amendment provided any protection for a member of an elected body to speak out without facing censure from his fellow members. *See id.* at 474-77. The answer was no. *Id.* at 477. So, based on the distinctive context, no First Amendment right was violated in the first place.

The Court did observe in passing that lower courts have espoused various approaches to "distinguish material from immaterial adverse actions." *Id.* at 477. But crucially, the Court did not endorse or apply any rule akin to the Fifth Circuit's here. The Court's analysis instead turned simply on whether the board member's speech was protected from censure by the First Amendment, not a more general ruling on whether censure is adverse enough to chill speech. *Id.*

Indeed, censure may very well have the effect of chilling speech. That's certainly the intent of a censure. But the question in *Houston Community College* was *not* whether the censure was adverse enough. Rather, the question was whether history revealed that the First Amendment allowed members of a publicly

elected body to censure their fellow members. The history showed that was indeed constitutionally permissible, so there could be no retaliation claim.

3. Similar to how *Houston Community College* rejected a retaliation claim in the special arena of public-body censures of their own members, *Hartman* and *Nieves* elucidated how causation is evaluated in the exceptional contexts of retaliatory prosecutions and arrests. In *Hartman*, the Court held that a plaintiff must plead and prove a lack of probable cause to sustain a claim for a retaliatory prosecution, 547 U.S. at 265-66, and the Court extended that rule (with an exception) to retaliatory arrest claims in *Nieves*, 587 U.S. at 408.

Neither case added any additional requirements to the basic rule against First Amendment retaliation. They simply recognized that prosecutions and arrests present circumstances where it can be especially complicated to prove that retaliatory animus is, in fact, a but-for cause of the government's action when there is also probable cause that the plaintiff committed an underlying offense. *See Hartman*, 547 U.S. at 263 ("Herein lies the distinct problem of causation in cases like this one. Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise."); *Nieves*, 587 U.S. at 402 ("[I]t is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct.").

So those cases crafted rules about how the Section 1983 tort would work in these distinctive cases when it comes to proving retaliatory causation by disproving probable cause. Neither turned on an assessment that retaliatory prosecution or arrest was shielded from liability on the ground that it wasn't adverse enough. To the contrary, *Hartman* recognized that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, *including criminal prosecutions*, for speaking out." 547 U.S. at 256 (emphasis added). But it nonetheless adopted a probable-cause rule because of the special problem of proving retaliatory animus in fact caused a prosecution when there was also probable cause that would support a non-retaliatory prosecution.

In this vein, it's worth a moment on the distinction between the substantive First Amendment right prohibiting the government from retaliating against protected speech and the remedy for such retaliation under Section 1983. As Judge Oldham has explained, this Court's cases "ma[k]e clear that its probable-cause bar inheres in the *remedy* afforded by § 1983 and not in the First Amendment *right* against retaliatory arrest." *Villarreal v. City of Laredo*, 134 F.4th 273, 277 (5th Cir. 2025) (en banc) (Oldham, J., concurring). Likewise, the Solicitor General has also recognized that the probable-cause rules of *Hartman* and *Nieves* are "a requirement for a damages claim under Section 1983, not a limitation on the First Amendment itself." Br. of U.S. as Amicus Curiae at 11, *Gonzalez*, 602 U.S. 653.

But the circuit courts' not-adverse-enough rules have erroneously been based on reading a limitation

into the First Amendment itself. They aren't like *Hartman* and *Nieves*, which fashioned tort principles for proving whether there was in fact retaliation that would violate the First Amendment. They're instead the kind of independent limitations on claims to rectify well-established First Amendment violations that were rejected in *Crawford-El*.

II. The Court should take this case to bring the circuits into line with its longstanding simple rule: Plaintiffs can seek redress if the government takes official action to retaliate against protected speech.

Contrary to this Court's simple rule for First Amendment retaliation, the circuit courts have added an additional requirement by demanding that plaintiffs show the government's retaliation has reached some level that a judge considers to be adverse enough. Though the circuits vary slightly in wording, the effect on Americans exercising their First Amendment rights remains the same: If a court doesn't think the government's retaliatory action is bad enough, a plaintiff has no recourse.

A. Each circuit has developed standards requiring that government actions be adverse enough to sustain retaliation claims.

This case involves a government employee and presents a circuit split on the specific question of what types of retaliatory employment actions will support a First Amendment claim. But it illustrates a bigger problem that affects all sorts of First Amendment

retaliation claims, including those by ordinary Americans who speak out as private citizens and do *not* work for the government. While the Fifth Circuit's rule is particularly harsh, it is not unique. By our count, *all* the circuits have fashioned rules that bar retaliation claims if, in the subjective view of a judge, the government's retaliation is not adverse enough.

The Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits say some retaliation is fine so long is it wouldn't "deter a person of ordinary firmness from exercising" her First Amendment rights. *Mirabella v. Villard*, 853 F.3d 641, 649 (3d Cir. 2017); *see Cooperrider v. Woods*, 127 F.4th 1019, 1037 (6th Cir. 2025) (same); *FKFJ, Inc. v. Village of Worth*, 11 F.4th 574, 585 (7th Cir. 2021) (same); *Green v. City of St. Louis*, 52 F.4th 734, 739 (8th Cir. 2022) (same); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010); *Irizarry v. Yehia*, 38 F.4th 1282, 1288 (10th Cir. 2022) (same); *Bailey v. Wheeler*, 843 F.3d 473, 481 (11th Cir. 2016) (same); *Media Matters for Am. v. Paxton*, 138 F.4th 563, 584 (D.C. Cir. 2025) (same). The Second Circuit's test is similar, but it also requires that the person of ordinary firmness be "similarly situated" to the plaintiff. *Walker v. Senecal*, 130 F.4th 291, 298 (2d Cir. 2025).

The First Circuit uses slightly different wording with the same basic meaning. There, government defendants get a pass on retaliating against protected speech if a judge doesn't think the official's action "would deter a reasonably hardy individual" from speaking. *Barton v. Clancy*, 632 F.3d 9, 29 (1st Cir. 2011) (cleaned up).

The Fourth Circuit insists that a plaintiff must show both that the government's action "may tend to chill" protected speech and is "more than '*de minimis* inconvenience'" before it will remedy the government's retaliation. *Battacharya v. Murray*, 93 F.4th 675, 689 (4th Cir. 2024).

For its part, the Fifth Circuit follows the others for private citizens' claims, permitting retaliation until it "would chill a person of ordinary firmness" from continuing to speak. *Batyukova v. Doege*, 994 F.3d 717, 730 (5th Cir. 2021). And, as this case shows, government employers there are currently free to retaliate at will through employment actions short of "discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000).

In sum, though the circuits use slightly different (but functionally similar) formulations, they all add an additional not-adverse-enough threshold requirement to the simple rule that this Court has long followed for First Amendment retaliation claims.

B. The circuits' not-adverse-enough rules are depriving Americans of recourse for violations of their constitutional rights.

The not-adverse-enough standards the circuits have developed may make the courts' retaliation cases easier to dispose of, but that is no virtue. *See Crawford-El*, 523 U.S. at 595-97. The natural effect of these not-adverse-enough rules is that ordinary people are deprived of any recourse when government

officials retaliate against them for their constitutionally protected speech. A few examples illustrate the problem.

1. The Fifth Circuit's ruling in this case encapsulates the problem perfectly. Here, a college professor exercised his First Amendment rights to criticize his public university's policies around DEI, critical race theory, affirmative action, and academic freedom. *Lowery v. Mills*, 157 F.4th 729, 734-35 (5th Cir. 2025).

University officials then threatened the professor's salary, institutional affiliations, and research opportunities to stop him from criticizing the university. *Id.* at 743. The Fifth Circuit applied its version of a not-adverse-enough rule to hold that the university's threats—in direct retaliation for his First Amendment-protected speech—were not enough to sustain a retaliation claim. *Id.* This is even though the Court also recognized, in its standing analysis, that the university's actions were sufficiently severe to *actually* chill Professor Lowery's speech and to concretely injure him. *Id.* at 739-40. Of course they were: Just as actually firing somebody or reducing their pay to punish them for protected speech trenches on First Amendment freedoms, so too do credible threats to do those very things. The Fifth Circuit's rule leaves government officials free to silence public employees' criticisms, so long as they are clever about it.

2. Rules like the Fifth Circuit's also reach well beyond government employees to ensnare private citizens who speak out against the government. Consider a case out of the Eighth Circuit, *J.T.H. v. Mo. Dep't of Soc. Servs. Children's Div.*, 39 F.4th 489 (8th Cir.

2022), *cert. denied*, 143 S. Ct. 579 (2023). (IJ represented the plaintiffs in their petition to this Court.)

There, a sheriff's deputy in a small Missouri town sexually abused a 15-year-old boy. *Id.* at 491. The boy's parents, exercising their First Amendment rights to speech and petition, complained and threatened to sue after learning about the abuse. *Id.* As if on cue, a child-welfare investigator then showed up at the family's home to investigate child neglect. *Id.* Though the parents asked for the case to be reassigned to an official from another county who could be more neutral, the investigator refused. *Id.*

The family's life was quickly turned upside down. *See id.* The investigator told the boy's father she was coming after his law-enforcement license. *Id.* She also issued findings of neglect that would have placed the parents on a state registry of neglectful parents. *Id.* When the parents sought formal review of the findings, it was the investigator herself who reviewed and upheld her own findings. *Id.* But when the parents and the investigator appeared before the state's child-neglect board—the final stop in the review process—it determined the investigator's findings were unsubstantiated. *Id.*

Having had their lives upended by a baseless investigation because they spoke out against the police's abuse of their son, the parents brought a First Amendment retaliation claim. *Id.* The Eighth Circuit, however, acted like the Fifth Circuit below in this case by holding that only *some* kinds of adverse actions could ground a retaliation claim. And in its view, retaliatory investigations—even in direct response to

the parents' constitutionally protected speech—could not support a First Amendment claim. *Id.* at 493.

3. That is not the only time government actors have been given a pass for wielding state investigatory powers in a retaliatory fashion. In fact, the circuits' not-adverse-enough rules are particularly problematic when the government uses sensitive information acquired through its unique investigatory powers against those whose speech it wishes to punish.

Take *Mulligan v. Nichols*, 835 F.3d 983 (9th Cir. 2016), for example. Mulligan was chased and beaten by Los Angeles Police Department officers, seemingly because they confused him with a different person fitting his description. *Id.* at 986-87. After he filed an administrative claim against the city and the case began to garner significant media attention, the officers' police report was leaked to news outlets. *Id.* As media pressure on the LAPD intensified, the police union issued a press release "accusing Mulligan of being a frequent user of bath salts," synthetic stimulants that mimic the effects of amphetamines and cocaine. *Id.* at 987 & n.2. The press release also leaked a taped conversation between Mulligan and an officer from a nearby department in which he admitted to having used bath salts in the past. *Id.* at 987. The revelations and resulting media coverage caused Mulligan to lose his job. *Id.*

He filed suit against the officers and department, alleging that their campaign of leaking sensitive police information was retaliation for criticizing the officers in his petition. *Id.* The Ninth Circuit, however,

rejected the suit. In the court's view, his actions may have been constitutionally protected, and he may have suffered intentionally malicious actions in response, but the government's retaliation was still not "tangible" enough to count. *Id.* at 989.

A similar result occurred in *Mattox v. City of Forest Park*, 183 F.3d 515 (6th Cir. 1999), where the Sixth Circuit held that a firefighter had no recourse against the government's retaliation using its investigative powers. There, a city investigated a firefighter's publicly stated concerns over the fire department's operations. *Id.* at 518.

But the lengthy report didn't just investigate problems in the department. It also revealed private, personal information about the complaining firefighter, including the full transcript of her investigative interview in which she retold a traumatic incident from her childhood. *Id.* at 522-23. The report also disclosed answers to questions she was asked about her private relationships and affairs with other members of the fire department, and it reprinted entire pages of her date book in full. *Id.*

The firefighter sued, alleging that these revelations of her private, personal information were made intentionally in retaliation for her raising the initial concerns that led to the investigation. *Id.* at 518. But in the eyes of the Sixth Circuit, the government's use of its investigative power to reveal her intimate and personal information that marred her "character and reputation" and made her the object of "ridicule, contempt, shame, and disgrace" were simply not bad enough to support a claim. *Id.* at 523.

4. There are many other types of official authority governments can wield to retaliate, whose weaponization the lower courts have not found adverse enough. In one such case, an ACLU paralegal had been meeting with inmates at a county detention center to document their complaints. *ACLU of Md., Inc. v. Wicomico County*, 999 F.2d 780, 782 (4th Cir. 1993). The ACLU later relied on some of the paralegal's investigations to file suit against the detention center. *Id.*

The detention center retaliated against this exercise of the ACLU's speech and petition rights by denying the paralegal any further access to interview inmates. *Id.* The ACLU sued again, now bringing a claim for First Amendment retaliation. *Id.* at 783. The Fourth Circuit, however, rejected the suit. *Id.* at 785. Even assuming that the change in policy "*was done in response to filing of a lawsuit*," the court held it was "not sufficiently adverse to her or to the ACLU to constitute retaliation." *Id.* (emphasis added).

5. And those are just some examples. The lower courts are regularly dismissing retaliation cases based on their not-adverse-enough rules. *See, e.g.*, *Knowles v. Exeter Township*, No. 3:19-cv-2115, 2024 WL 897841 (M.D. Pa. Mar. 1, 2024) (government defendants' campaign of harassment insufficiently severe); *Johnson v. Washoe Cnty. Sch. Dist.*, No. 3:22-cv-00520, 2024 WL 196523 (D. Nev. Jan. 18, 2024) (high school volleyball coach's overt hostility towards and ostracization of a student-player in retaliation for her parents raising concerns to administrators about the coach insufficiently adverse); *Moore v. Shelby County*, No. 3:16-cv-00013, 369 F. Supp. 3d 802 (E.D. Ky. 2019) (finding that requiring the plaintiff to make

special appointments to view public records in violation of the state's open records act, destroying those records before they could be viewed, and prohibiting the plaintiff from volunteering at the county animal shelter were insufficiently adverse retaliatory acts); *Roth v. Sloan*, No. 1:08-cv-1656, 2011 WL 1627932 (N.D. Ohio Apr. 29, 2011) (finding that, in retaliation for a lawsuit filed against him, a police officer's attempts to publicly shame and disgrace the plaintiff by making him out to be a sex offender after the plaintiff had been acquitted of such conduct by a jury insufficiently adverse); *Matherne v. Larpenter*, 54 F. Supp. 2d 684 (E.D. La. 1999) (finding that a sheriff's malicious issuance of a criminal summons without probable cause and defamatory statements made to the press were insufficient to sustain a First Amendment retaliation claim).

* * *

This Court should use this case as an opportunity to reaffirm its longstanding, simple standard for First Amendment retaliation claims: Government officials may not wield their authority to retaliate against protected speech. Period. There is no sort of implicit amount-in-controversy requirement, either in the First Amendment or in Section 1983, to bar claims for retaliation that is supposedly not adverse enough. The Court should take this case and reverse in an opinion that disavows the circuits' not-adverse-enough rules—not just for public employees, but for all Americans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

March 9, 2026

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