No. 16-1075

In The
Supreme Court of the United States

RONALD COUTTS,

Petitioner,

v.

JOSEPH WATSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the *de minimis* "some evidence" due process requirement articulated by this Court in *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445 (1985) can be appropriately applied to legally foreclose a First Amendment retaliation claim by a prisoner in the face of direct evidence that the prison discipline resulted from the prisoner seeking to exercise his First Amendment rights.

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STATEMENT OF THE CASE

This case arises from a claim that Officer Ronald Coutts retaliated against Joseph Watson, a prisoner at SCI Somerset, for his constitutionally protected request to file a grievance when an officer broke Mr. Watson's personal property – a radio. Instead of accepting responsibility for breaking the radio, prison officials took Mr. Watson's radio and later issued him a misconduct because of a small piece of tape that had been affixed to the radio more than a year earlier. The District Court granted summary judgment, finding that all of the officers, including Officer Coutts, were entitled to the "same decision" defense to Mr. Watson's retaliation claim. The Court of Appeals reversed, finding that a reasonable factfinder could conclude that the misconduct was issued in retaliation for Mr. Watson's exercise of his First Amendment rights in requesting to file a grievance against the officer he claimed broke his radio. The Court of Appeals was correct, and this Court should not review the Third Circuit's decision. Mr. Watson should receive a full and fair opportunity to prove his retaliation claim in federal district court on remand.

On the morning of December 6, 2011, during a routine search of the cell block, Mr. Watson observed Corrections Officer Kline break the top portion of the antenna of his property – a personal radio permitted under prison regulations. Pet. App. 5a. More than a year earlier, another part of the antenna had been secured to the radio with a piece of tape after it became loose during a prison transfer. Pet. App. 43a. Even

though the antenna had been taped for more than a year, apparently no prison official had raised an issue regarding the repaired state of the radio until after Corrections Officer Kline broke the radio. Pet. App. 18a. When Mr. Watson asked to fill out an incident report and requested that Corrections Officer Kline repair or replace the broken radio antenna, Officer Kline denied breaking the antenna. Pet. App. 5a-6a.

Mr. Watson then asked another corrections officer for a grievance form. The officer denied the request despite a requirement that the prison officials make grievance forms available to inmates. Pet. App. 6a. Instead, the officer directed another officer to write up a confiscation form, claiming that Mr. Watson's broken radio qualified as "contraband" under prison policy. Pet. App. 5a-6a. Other inmates with broken radio antennas were allowed to keep the radios after removal of the broken portion of the antenna. Pet. App. 18a. Notably, at the time that the confiscation form was prepared, no "misconduct" was issued to Mr. Watson for his purported possession of altered property. Pet. App. 18a.

Later that day and following a verbal altercation with several officers, Corrections Officer Coutts informed Mr. Watson that he would be issued a misconduct citation and would not get his radio back. Pet. App. 6a. Officer Coutts explained that Mr. Watson was receiving the misconduct because he had not requested the repair of the radio in a "polite way," and had given the other officers "a hard time, wanting a Grievance and an Incident Report filled out." Pet. App.

6a, 34a-35a n.2. "For that," Officer Coutts told Mr. Watson, he was "getting a Misconduct." Pet. App. 34a-35a n.2. The misconduct charged Mr. Watson with "destroying, altering, tampering with property," *i.e.*, his loose radio antenna that had been secured with a clear piece of tape. Pet. App. 44a. A hearing officer later found Mr. Watson guilty of the misconduct and confiscated the radio. Pet. App. 7a.

Mr. Watson sued Corrections Officer Coutts and seven other prison officials, alleging a number of claims under 42 U.S.C. § 1983, including a claim that Corrections Officer Coutts had violated Mr. Watson's First Amendment rights by issuing the misconduct in retaliation for his request to file a grievance. Pet. App. 7a. Corrections Officer Coutts and other defendant prison officials moved for summary judgment on the First Amendment retaliation claim. Pet. App. 7a.

The District Court adopted the Magistrate Judge's Report and Recommendation and granted the motion for summary judgment. *See* Pet. App. 38a-51a. The District Court, applying the burden shifting framework announced by the Third Circuit in *Rauser v. Horn*, 241 F.3d 330, 333-34 (3d Cir. 2001), found that summary judgment was appropriate based upon the "same decision" defense, because the officer would have issued the misconduct regardless of Mr. Watson's protected activity. Pet. App. 47a, 49a-50a. The District Court accepted without analysis the prison officers' conclusion that the radio was in fact "altered," and therefore in violation of prison rules, explaining that "Plaintiff's radio was altered from its original state because the

antenna was broken and Plaintiff attempted to fix it with tape." Pet. App. 50a. The District Court itself recognized the absurdity of disciplining Mr. Watson under these circumstances, and yet accepted the prison officers' conclusion that the misconduct was warranted, explaining, "[d]espite its somewhat nonsensical application to this situation, Plaintiff's radio clearly constituted contraband by DOC rules and regulations." Pet. App. 50a.

The Court of Appeals for the Third Circuit reversed. *See* Pet. App. 3a-19a. Finding that Mr. Watson had established a *prima facie* case of retaliation, the Court of Appeals turned to the application of the "same decision" defense. Pet. App. 14a-15a. The Court of Appeals discussed its prior decision in *Carter v. McGrady*, 292 F.3d 152 (3d Cir. 2002), in which the court had found the inmate's offenses "so clear and overt" that the disciplinary action was not retaliatory. Pet. App. 15a (citing *Carter*, 292 F.3d at 159). Under *Carter*, the court explained, "most prisoners' retaliation claims will fail if the misconduct charges are supported by the evidence," and "great deference" is due to prison administrators in the context of disciplinary decisions. Pet. App. 15a.

The court then considered several circuit Courts of Appeals' decisions analyzing the "some evidence of prisoner misconduct" doctrine that originated from this Court's decision in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445 (1985). Pet. App. 16a. Other circuits, the court observed, found that "some evidence is not an absolute bar and permit claims by

prisoners to go to trial if the prisoner can offer evidence that contradicts prison officials' explanations for their action against the inmate." Pet. App. 16a-17a. Under the Third Circuit's standard articulated in *Rauser*, for the same decision defense to apply the defendant "must establish that the same decision would have been made absent any retaliatory motive." Pet. App. 17a. While in *Carter*, the "force of the evidence that [the inmate] was guilty [of the charged misconduct]" was such that there was "no genuine issue of material fact that his misconduct citation was reasonably related to legitimate penological interests," the court noted that "Watson's situation is different." Pet. App. 17a-18a.

Mr. Watson's purportedly broken radio was not "so 'clear and overt' a violation that we can conclude that he would have been written up if he had not also given prison officials 'a hard time.' " Pet. App. 18a. The Court of Appeals specifically noted that the radio had been in the same condition for more than a year and that other inmates with radios in similar conditions did not receive misconducts or have their radios confiscated. Pet. App. 18a. Further, the officer did not charge Mr. Watson with a misconduct when the radio was initially confiscated. Pet. App. 18a. As such, a fact finder could conclude that "the misconduct was issued in retaliation for Watson's statement that he was going to file a grievance, and not in furtherance of legitimate penological goals." Pet. App. 18a.

Judge Ambro joined the majority opinion but wrote a separate concurrence to "discuss the application of the same decision defense in future lawsuits." Pet. App. 20a. Judge Hardiman wrote a separate dissenting opinion. Pet. App. 29a. He observed that the Court's opinion and concurrence shed light "on a lacuna in [the Third Circuit's] precedent on First Amendment retaliation claims in the prisoner context, namely whether and how a prisoner can overcome the 'same decision' defense when the adverse action complained of is a charge of prison misconduct and the prisoner concedes the facts giving rise to the charge." Pet. App. 29a-30a. Judge Hardiman, however, did not "see this appeal as the appropriate vehicle for answering that question." Pet. App. 30a. In his view, a prisoner cannot negate the same decision defense "merely by pointing to the existence of retaliatory motive on the part of prison officials, *i.e.*, that the prison officials acted with mixed motives." Pet. App. 31a. At most, Judge Hardiman's examination of the record revealed "that retaliation was among Coutts's motivations for issuing the misconduct." Pet. App. 33a-34a. As such, he could not agree with the majority's conclusion that Mr. Watson had introduced evidence sufficient to create a genuine dispute as to whether Mr. Watson would have received the misconduct in the absence of his protected conduct. Pet. App. 37a.

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REASONS FOR DENYING THE WRIT

Although Petitioner strains to broaden the purported conflict among the courts of appeals, the issue presented by this case is quite simple: does the *de minimis* "some evidence" standard designed to ensure that a prison disciplinary decision comports with the due process requirement articulated in *Hill*, 472 U.S. at 454-56, apply with equal force in a retaliation case implicating First Amendment rights. The Court should decline to review that question at this time because the split among the courts of appeals is neither as deep nor as wide as Petitioner suggests, federal courts are infrequently required to address this issue, and this specific case is a poor vehicle for this Court to address the split that does exist among the circuits. Further, the Court of Appeals for the Third Circuit properly found that a mere finding of "some evidence" to support the prisoner's discipline should not foreclose a retaliation claim, particularly where, as here, there is direct evidence that the inmate would not have been disciplined if he or she had not engaged in an activity protected by the First Amendment.

I. The Split Among the Circuits as to the Actual Issue in this Case is Shallow and Narrow.

Petitioner urges this Court to grant his Petition to resolve a supposed deep split among courts of appeals regarding whether an inmate's retaliation claim is foreclosed "where the retaliatory act is the issuance of the prison misconduct charge and the prisoner

actually committed the misconduct." Pet. 8. As discussed in Section III, there is a factual dispute as to whether Mr. Watson actually committed the misconduct with which he was charged. That factual dispute makes this case a particularly bad choice for this Court's review of the question presented by Petitioner. Regardless, Petitioner significantly overstates the nature and significance of the disagreement among the courts of appeals on this legal issue.

As Petitioner properly observes, Pet. 8, the Eighth and Eleventh Circuits apply the standard from *Hill*, 472 U.S. at 454-56 to preclude a retaliation claim where the prisoner's misconduct conviction is supported by "some evidence." *See Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994); *O'Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011).[1] Petitioner's placement of the Second Circuit in the same "camp" as the Eighth and Eleventh Circuits, however, goes too far. Pet. 9. In *Gayle v. Gonyea*, the court *denied* summary judgment for the prison officials even though there was plausibly some evidence of the inmate's violation. 313 F.3d 677, 684 (2d Cir. 2002). Specifically, the court held that summary judgment was not proper on

[1] The Eleventh Circuit in *O'Bryant* found that the inmate's retaliation claims failed for "*either* of two independent reasons": (1) because no retaliation claim lies "for a disciplinary charge involving a prison rule infraction when the inmate was found guilty of the actual behavior underlying the charge after being afforded adequate due process" or (2) because the inmate had not shown a causal connection between his grievances and the discipline. 637 F.3d at 1215 (emphasis added).

the inmate's retaliation claim, because the inmate disputed whether he had made the statements leading to the charge against him, even though the prison official had testified to the statements, *i.e.*, presented evidence of the inmate's guilt. *Id.* at 680-81, 684. This result appears to be directly at odds with the Eleventh Circuit's reasoning in *O'Bryant.* In *O'Bryant*, the inmate "indicated that he did not make the statements attributed to him . . . and that, in fact, the entire incident alleged in the [disciplinary report] was fabricated," yet the court found that the disciplinary panel's finding of guilt was supported by the statements of the prison officials and precluded the retaliation claim. 637 F.3d at 1211, 1215. Given the vastly different outcomes under broadly similar facts, it is far from clear that the Second Circuit's decision actually supports Petitioner's position.[2]

Petitioner also points to decisions from the Third, Fifth, Seventh and Ninth Circuits, and argues that all purportedly hold that "some evidence" of the inmate's guilt is "not dispositive but merely probative." Pet. 9. Petitioner also broadly suggests that the Sixth

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[2] In addition, the Second Circuit's articulation of the defendant's burden in a retaliation case differs significantly from that in the Eighth and Eleventh Circuits. In the Second Circuit, for the defendant to "show that the plaintiff would have received the same punishment even absent the retaliatory motivation," he must "demonstrat[e] that there is *no dispute* that the plaintiff 'committed the most serious, if not all, of the prohibited conduct charged in the misbehavior report.' " *Gayle*, 313 F.3d at 682 (quoting *Hynes v. Squillace*, 143 F.3d 653, 657 (2d Cir. 1998)) (emphasis added).

Circuit may take a similar view. Three of these circuits – the Fifth, Sixth and Seventh Circuits – have never fully considered the issue in the cases cited by Petitioner.

The Fifth Circuit in *Woods v. Smith* considered whether a retaliation claim required that "the underlying disciplinary proceedings were ultimately terminated in [the inmate's] favor" in the context of a qualified immunity inquiry. 60 F.3d 1161, 1164 (5th Cir. 1995). The Fifth Circuit analyzed and distinguished malicious prosecution cases requiring favorable termination, and explained that the retaliation inquiry looks not to the validity of the report or proceedings, but to the violation of a constitutional right. *Id.* at 1164-65. In reaching that conclusion, the panel did not consider the *Hill* "some evidence" standard, or rule whether that standard properly applied to retaliation claims.[3]

Similarly, in *Thomas v. Eby*, the Sixth Circuit did not decide the issue of whether a "proven infraction of prison rules" would satisfy the defendant's burden to prove that it would have taken the same action, because the case was presented on a motion to dismiss. 481 F.3d 434, 442 (6th Cir. 2007). Finally, in *Cain v. Lane*, the district court only addressed the inmate's due process claim, and the court of appeals remanded for consideration of the retaliation claim. 857 F.2d

[3] Although the court "decline[d] to hold as a matter of law that a legitimate prison disciplinary report is an absolute bar to a retaliation claim," the court did not squarely hold one way or another such that it can be camped on either side of the split. *Woods*, 60 F.3d at 1166.

1139, 1143 (7th Cir. 1988). As such, it can hardly be said that the Fifth, Sixth and Seventh Circuits have squarely addressed the issue presented.

In sum, the totality of the current circuit split is limited to the Third and Ninth Circuits splitting with the Eighth and Eleventh Circuits in declining to apply the *Hill* "some evidence" standard to retaliation claims. *See* Pet. App. 16a-18a; *Bruce v. Ylst*, 351 F.3d 1283 (9th Cir. 2003) ("The 'some evidence' standard applies only to due process claims attacking the result of a disciplinary board's proceeding, not the correctional officer's retaliatory accusation."). This Court has previously declined to review cases raising the question presented by Petitioner. *See O'Bryant v. Finch*, 133 S. Ct. 445 (2012) (denying certiorari); *Henderson v. Baird*, 515 U.S. 1145 (1995) (denying certiorari). This Court should similarly decline to review this case and allow the issue to percolate further among the eight federal circuits that have not yet squarely addressed this issue.

II. This Issue Does Not Recur With Sufficient Frequency to Justify Review Now.

Citing the frequency with which the Third Circuit's *Carter* decision and the Eighth Circuit's *Henderson* decision are cited, Petitioner asserts that "[r]etaliation claims have become a staple of prison litigation," and are brought "with great frequency." Pet. 10. The frequency with which other courts cite these cases offers no justification why this Court should review this particular case. Moreover, the statistics that Petitioner cites leave out key variables. For example, while

Henderson, "one of the leading decisions in the Eighth Circuit," may have been cited 400 times as Petitioner observes, *Henderson* was decided over twenty-two years ago. An average of eighteen case citations a year for a "leading" decision in an area of prison litigation does not indicate that the issue recurs with unusual frequency. Further, the number of cases citing *Henderson* says nothing about whether the case was cited for the issue presented here, as opposed to a citation for some unrelated proposition. Similarly, *Carter v. McGrady* was decided nearly fifteen years ago. An average of five or six case citations a year applying *Carter* provides no evidence that retaliation claims have become a staple of prisoner's rights litigation. The frequency figures cited by Petitioner are underwhelming and simply provide no justification for this Court's review of this specific case.

III. This Case Is Not a Good Vehicle For Reviewing the Issue.

Petitioner presents as uncontested that Mr. Watson "actually committed the misconduct" at issue. Pet. 8. That position is inaccurate. Mr. Watson has consistently maintained that the state of his radio – a loose antenna secured with a piece of tape – is not "altered" under the common meaning of the term and therefore does not constitute contraband in violation of prison policy. In fact, one of the main arguments Respondent put forward to the Court of Appeals below was that in accepting without independent analysis the prison officials' conclusion that Mr. Watson's radio was contraband as defined by prison rules and regulations, the

District Court strayed from the requirements of Federal Rule of Civil Procedure 56.

The District Court justified the application of the same decision defense by explaining that Mr. Watson's "radio was altered from its original state because the antenna was broken and Plaintiff attempted to fix it with tape." Pet. App. 50a. Yet in doing so, the District Court ignored Mr. Watson's contention that a radio with an antenna that remains intact but secured by a piece of clear tape does not meet the definition of damaged or altered to constitute a violation of prison policy. The District Court simply accepted the prison's conclusion without any analysis of whether evidence supported the imposition of the prison rule. Even if the Petitioner were correct that a prison's disciplinary decision should be upheld if "some evidence" supports the disciplinary determination, the District Court failed to inquire or establish if there was "some evidence" of Mr. Watson's violation. Instead, the District Court merely accepted as proper the prison's application of the rule to its set of facts. The failure to conduct the factual analysis required by Rule 56 makes the Court of Appeals' decision a particularly poor choice for this Court's review of the issue presented.

IV. The Third Circuit's Approach to Retaliation Claims Properly Balances the Need for Deference to Prison Decisions with the Need to Protect Inmates' First Amendment Rights.

Petitioner argues that the proper approach to retaliation claims arises from decisions in the Eighth

and Eleventh Circuits that foreclose an inmate's retaliation claim if the prisoner has been found guilty of the misconduct in a proceeding that complies with due process – *i.e.*, where "some evidence" supports the determination of guilt. Pet. 11-12. Petitioner finds support in this Court's articulation of the "some evidence" standard in analyzing whether a prison disciplinary proceeding complies with due process and in the requirement for an absence of probable cause for a retaliatory prosecution claim. Pet. 12-13. However, Petitioner's arguments ignore important differences between those claims and a claim of retaliation.

In *Hill*, this Court held that the revocation of good time credit comports with the minimum requirements of due process if the findings of the prison disciplinary board are supported by "some evidence in the record." 472 U.S. at 454. "Ascertaining whether this standard is satisfied," this Court explained, "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence." *Id.* at 455. However, the *Hill* opinion makes no mention of retaliation and there is no indication that the Court envisioned the application of the "some evidence" standard in situations beyond a due process inquiry.

Using the *Hill* "some evidence" standard to determine whether a prisoner can maintain a retaliation claim would collapse the due process and retaliation inquiries. As Judge Ambro explained in his concurrence below, "[d]ue process requires that the prisoner have a fair opportunity to show that he did not commit the misconduct. The First Amendment provides that,

even if he did commit it, he has a right to be free from enforcement that would not have occurred if he had not filed a complaint." Pet. App. 25a. The application of the same standard to both claims would provide the same answer to different questions. And "officials cannot cleanse a First Amendment violation merely by complying with the Fifth Amendment." Pet. App. 25a. In a retaliation claim, the concern is not with the validity of the discipline but the motivation behind it.

Further, often the "some evidence" supporting the prisoner's disciplinary charge will merely be the word of the officer who the inmate alleges acted in retaliation. *See, e.g.*, *O'Bryant*, 637 F.3d at 1211, 1215 (finding that the discipline complied with due process because, although the inmate claimed that the incident alleged in the disciplinary report was fabricated by prison officials, the statements of those prison officials supported the disciplinary panel's finding of guilt); *Gayle*, 313 F.3d at 684 (prison official testified as to statements that inmate disputed making). If an officer is acting with retaliatory intent, the officer could present a fabricated incident to the disciplinary board, which would suffice under the "some evidence" standard to thwart the inmate's retaliation claim, even if there were ample evidence of retaliatory motive. Simply applying the due process standard does not answer the question of whether the inmate would have been disciplined absent the invocation of his protected First Amendment rights. As Judge Ambro observed, the name "same decision" defense "belies its applicability" to a situation "where there is direct evidence that retaliation drove a charging decision." Pet. App. 28a.

Petitioner also argues that applying the "some evidence" standard to a prison retaliation claim "tracks [the rule that] the Court has adopted in the similar context of claims of retaliatory prosecutions." Pet. 13. But this Court's analysis in *Hartman v. Moore*, holding that absence of probable cause is an element of the constitutional tort of retaliatory prosecution, turned on the key distinction that the retaliating official was not the individual who could actually bring the prosecution. 547 U.S. 250, 261-63 (2006). Because prosecutors are immune from liability, the defendant in a retaliatory prosecution case will be an official "who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. Therefore, the plaintiff maintaining a retaliatory prosecution claim must not only show that the official acted in retaliation, but also that the official "induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* To "bridge the gap between the nonprosecuting government agent's [retaliatory] motive and the prosecutor's action, and to address the presumption of prosecutorial regularity," the Court required the absence of probable cause. *Id.* at 263. By contrast, in a prison retaliation case, there is no prosecutor who decides whether or not the inmate's misconduct charge will move forward before the prosecution proceeds before a tribunal. The officer accused of acting retaliatorily simply writes up the inmate for a disciplinary action, which may then be adjudicated by the prison's disciplinary panel.

The "distinctive setting" of prison disciplinary proceedings must factor into the standard that should be applied to a prisoner's retaliation claim. *See Hill*, 472 U.S. at 454. But the need for deference to prison officials to "minimize[ ] judicial interference in the internal administration of prisons," Pet. 14, must be balanced against the importance of safeguarding the First Amendment rights of the prisoners. As Judge Ambro observed in his concurrence, "[i]f officials were allowed to hunt for every minor instance of misconduct in an effort to punish inmates for their speech, the First Amendment would ring hollow inside a prison's walls." Pet. App. 27a. This Court's concern with "second-guessing" disciplinary decisions was warranted when analyzing due process, which "does not require courts to set aside decisions of prison administrators that have some basis in fact." *Hill*, 472 U.S. at 455-56. Where the concern is the motivation behind the discipline, rather than the fact of the discipline itself, a more searching inquiry must be made. Simply asking whether "some evidence" supports the discipline does not suffice; the reviewing court must ask whether "the same [disciplinary] decision would have been made *even absent* any retaliatory motive." Pet. App. 17a (emphasis added). Where a disciplinary decision is made in retaliation for the exercise of First Amendment rights, there is no furtherance of legitimate penological goals and no deference is due to prison officials.

CONCLUSION

For the reasons above, the Court should deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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