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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Deeply Divided On The Question Presented.

Respondent does not deny that the question this case presents—whether a disciplinary conviction, supported by a constitutionally adequate quantum of evidence, precludes a retaliation claim against the charging officer—has provoked a long-standing and intractable conflict among the courts of appeals. That conflict has persisted since at least 1995, when the Fifth Circuit expressly disagreed with the Eighth on this issue; and since then has only expanded. *See Woods v. Smith*, 60 F.3d 1161, 1164 n. 13 (5th Cir. 1995), *disagreeing with Henderson v. Baird*, 29 F.3d 464 (1994). Nor can respondent deny that courts on both sides of this divide have provided thoughtful and detailed analyses of the issue. There is no thus reason to suppose—and respondent offers none—that further "percolation" among the lower courts will either resolve the conflict or further illuminate the issue.

Moreover, respondent's attempt to minimize the extent of the inter-circuit conflict cannot bear scrutiny. For example, his suggestion that this issue remains an open question in the Fifth Circuit, Br. in Opp. at 10 n. 3, is untenable in light of the language in *Woods*, *see id.*, 60 F.3d at 1164 ("favorable termination [of a prison disciplinary proceeding] is not a requisite of a retaliatory interference claim"), and of subsequent case law in the Fifth Circuit. *See, e.g., Hart v. Hairston*, 343 F.3d 762, 765 (5th Cir. 2003) (retaliation claim against charging officer survived summary judgment despite conviction in disciplinary proceeding). Similarly, in *Cain v. Lane*, 857 F.2d 1130

(7th Cir. 1988), the court remanded for consideration of a retaliation claim against a charging officer, even though the plaintiff had been convicted of the disciplinary charge and the conviction was supported by the evidence. *See id.*, at 1145 ("If the district court finds on remand that the prison administrators disciplined Cain in retaliation for his constitutionally protected speech, this would invalidate the [disciplinary] Committee's proceedings despite compliance with due process requirements"). Both of these courts would have decided this case just as the Third Circuit did.

But the Second Circuit, like the Eighth and Eleventh Circuits, would have decided it differently. At least two members of the panel that decided this case agreed that there was no dispute that respondent had in fact committed the prison violation with which he was charged. *See* Pet. App. 27a (Ambro, J., concurring) ("there is undoubtedly 'some evidence' that [respondent's] prison radio was contraband"), Pet. App. 36a (Hardiman, J., dissenting) ("[respondent's] possession of [the radio] was unquestionably a violation"). In the Second Circuit, that would have sufficed to foreclose respondent's claim. *See Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) (retaliation claim foreclosed where there is "no dispute that the plaintiff committed the most serious … of the prohibited conduct charged"). That the Second Circuit may have formulated its standard somewhat differently than the Eighth and Eleventh Circuits would not, as respondent suggests, alleviate the conflict among the circuits; rather, by introducing still another variation, it would exacerbate it.

The question presented by this case has thus been squarely considered by at least seven of the courts of appeals.[1] They are in long-standing disagreement over its proper resolution, their conflict shows no sign of abating, and nothing will be gained by further "percolation." The Court should resolve this conflict now.

II. The Question Presented Is Both Recurrent And Important.

Respondent quibbles with the statistics we offered on the prevalence of prisoner retaliation claims, but offers no support for his own contention that the issue presented by this case arises only infrequently. The discussion in the preceding section shows otherwise: this has been a recurrent issue in multiple courts of appeals for over twenty years.

More importantly, respondent takes no issue with our observation—and that of many courts—that retaliation claims like this one present a substantial risk of undermining the integrity of prison disciplinary regimes and the penologicial goals that they serve. *See* Pet. at 11. The importance of this issue to prison administration across the country amply justifies review by the Court.

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[1] Still another circuit, the Sixth, has considered this issue but its position is unclear. On one hand, it has declined to apply the Eighth Circuit's *Henderson* standard at the motion-to-dismiss stage. *See Thomas v. Eby*, 481 F.3d 434, 442 (6th Cir. 2007). But it has repeatedly followed *Henderson* at the summary judgment stage, although only in non-precedential decisions. *See, e.g., Patterson v. Godward*, 505 F. App'x 424, 425 (6th Cir. 2012); *Jackson v. Madery*, 158 F. App'x 656, 662 (6th Cir. 2005).

III. The "Vehicle" Problem Respondent Posits Underscores Why The Court Should Grant Review.

Respondent contends that this case presents a poor "vehicle" for deciding the question presented because, in his view, the district court failed to conduct an "independent analysis" of whether his radio really was "contraband as defined by prison rules and regulations." Br. in Opp. at 12. But actually, this "vehicle problem" vividly illustrates just why this case is a prime candidate for the Court's review. Respondent's contention that the courts must "independently" examine, not merely the facts underlying disciplinary decisions, but prison officials' interpretation of their own regulations, highlights the intrusive nature of claims such as his. And it highlights as well the need for the Court's intervention to prevent "second-guessing upon review" of prison disciplinary decisions, *Superintendent v. Hill*, 472 U.S. 445, 472 (1985); and to ensure that prison officials receive the "wide-ranging deference" that is their due in this area. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).[2]

[2] It is noteworthy in this respect that the Third Circuit's decision mentions deference to prison authorities only once, and only in the course of describing the holding of another case. *See* Pet. App. 15a, *citing Carter v. McGrady*, 292 F.3d 152, 158 (3d Cir. 2002).

IV. The Third Circuit's Approach Shortchanges Institutional Interests In Effective Prison Administration.

In *Hill*, the Court crafted the "some evidence" standard for resolving challenges to prison disciplinary decisions. This standard, the Court thought, struck the appropriate balance between preventing the arbitrary imposition of discipline on the one hand, and preserving prison disciplinary systems from judicial overreaching on the other. *Id.*, at 455. Claims such as respondent's—which simply re-package, under the label of retaliation, claims that would be foreclosed by *Hill*—have the same potential to impair the usefulness of prison disciplinary systems.

Courts on both sides of the issue recognize that retaliation-based challenges like respondent's undermine prison disciplinary regimes and the institutional goals of order, discipline, security and rehabilitation which those regimes are designed to further. *See O'Bryant v. Finch*, 637 F.3d 1207, 1216 (11th Cir. 2011) (such challenges can "render the prison disciplinary system impotent"); *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001) ("substantial risk of unwarranted judicial intrusion"); *Woods*, 60 F.3d at 1168 ("disrupt prison officials in the discharge of their most basic duties"), *quoting Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1995); *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990) ("allow a prisoner to openly flout prison rules after filing a grievance"). Even the concurring judge in this case bemoaned the "chaos" that would ensue if such challenges could routinely survive summary judgment. Pet. App. 29a (Ambro, J., concurring).

The rule we have suggested—that a disciplinary conviction by a neutral hearing officer, supported by "some evidence" in the record, precludes a retaliation claim against the charging officer—avoids these consequences and preserves the authority of prison administrators from excessive judicial interference in matters of institutional discipline. The Third Circuit's approach does not.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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