No. _____

In the Supreme Court of the United States

CHUCK ZAMIARA, CURTIS CHAFFEE, AND SHARON WELLS, PETITIONERS

v.

KEVIN KING

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a low-level prison employee may be personally liable under § 1983 for First Amendment retaliation claims based on an adverse action that the employee neither took nor sought to have taken against the prisoner.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Michael Singleton and Mary Berghuis were parties in the district court and in the court of appeals. The petitioners are Sharon Wells, Curtis Chaffee, and Chuck Zamiara, employees of a Michigan correctional facility. The respondent is Kevin King, an inmate.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–55a, is reported at 680 F.3d 686. The order denying the petition for rehearing en banc, App. 108a, is unreported. The opinion of the United States District Court for the Western District of Michigan, App. 56a–76a, is unreported, but available at 2009 WL 3424221.

JURISDICTION

The district court had jurisdiction over respondent's claims under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court of appeals filed its opinion on May 22, 2012, App. 1a, and on August 16, 2012, it denied petitioner's timely filed petition for rehearing en banc, App. 108a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

Respondent Kevin King, a Michigan prisoner, sued five prison employees for First Amendment retaliation, seeking to hold them personally liable for the decision to move King to a higher level of security. While King's claims against two of the employees were properly dismissed, his claims against the other three were allowed to proceed. But none of the three remaining employees King sued were responsible for the decision to increase his security level. One requested that King be moved to another unit within the prison at the same security level, another processed that request, and the third followed a supervisor's decision to increase the security level because of King's history of instigating prisoner disruptions. The Sixth Circuit, in a divided opinion, nonetheless held the three prison employees individually liable under § 1983. After overturning the district judge's factual findings that the three had no retaliatory intent, the Sixth Circuit concluded that even though the defendants lacked authority to take the allegedly retaliatory act, they were the proximate cause of that act. But as the Second Circuit recognized in the same context, intent is not even an issue when a defendant lacks authority to take the adverse action.

The question presented is whether a § 1983 claim for First Amendment retaliation can proceed against an individual who is not the person deciding to take the retaliatory act and who neither took nor intended to have that act taken against the prisoner. The Sixth Circuit said yes, creating a conflict with the Second Circuit and the District Court for the Southern District of Georgia. The Sixth Circuit's decision also ignores the principles this Court explained in a related context in *Staub* v. *Proctor Hospital*, 131 S. Ct. 1186 (2011)—that

even employees who act with discriminatory animus cannot be held liable for acts they commit if those acts are not adverse actions. And the decision conflicts with the principle that an intervening decision-maker can break the causal chain by providing an independent reason for taking action. See *Hartman* v. *Moore*, 547 U.S. 250 (2006).

Not only does the Sixth Circuit's ruling create a circuit split that only this Court can resolve, it will inspire a wave of prisoner suits against low-level prison employees. The petition for certiorari should be granted, and the decision of the Sixth Circuit reversed.

STATEMENT OF THE CASE

This is a § 1983 action brought by Kevin King, a prisoner in the Michigan Department of Corrections serving a life sentence for first-degree murder. App. 56a–57a. King asserts that three Corrections employees retaliated against him for exercising his First Amendment rights by transferring him from Level II to Level III security. App. 63a. Specifically, he asserts that the employees retaliated against him for his participation in a class action (*Cain*) against the Department of Corrections and for assisting other prisoners with their grievances. App. 65a.

A. Wells requests a transfer for King

The chain of events underlying King's claim begins with his allegations against Sharon Wells. Wells was a resident unit manager at the Brooks Correctional Facility, a Level II facility, who supervised 242 prisoners. App. 58a, 68a. On April 20, 2000, Wells

wrote a memo to Deputy Warden Shirlee Harry requesting that King be transferred to another unit within Brooks. App. 59a–60a, 68a, 8a. Wells's request was for only a transfer, not for an increase in security level, *id.*, which is significant because the Sixth Circuit held in an earlier ruling (not challenged here) that transferring a prisoner to another facility is not a cognizable adverse action. App. 101a–02a (*King I*).

Wells's memo explained that King was a security risk. He was "becoming increasingly more powerful in the eyes of the prisoners" in the unit where he resided. App. 60a. Wells recounted that King had made statements about his ability to influence other prisoners—including that "these guys in the unit will do what ever I ask" and that "[i]f I wanted to cause a disturbance I could anytime"—and that other prisoners often went to King for help filing grievances. *Id.* She concluded her memo by stating that "it should be considered a security risk to the unit officers when prisoner King's authority over other prisoners is higher [than] the officers working in the unit." *Id.* The district court found Wells "to be a very credible witness," found that "there is no evidence that her assessment [that Wells was a security risk] was based on his protected activities," and found that she did not have a retaliatory motive. *Id.*

Based on the memo, Deputy Warden Shirlee Harry requested that King be transferred to another Level II facility. App. 61a, 8a. King did not sue Harry; to the contrary, he affirmatively testified that he did not believe she had a retaliatory motive. App. 52a.

B. Chaffee processes the transfer request

Curtis Chaffee, the transfer coordinator at Brooks, processed Harry's transfer request and prepared a Security Classification Screen Review for King. App. 61a. Consistent with the transfer request, Chaffee indicated that King was "manageable in Level II/Remain Level II." App. 61a. Chaffee also sent an email to the Correctional Facility Administration Central Office, explaining that "[t]he reason for [the] request is that [King] has been at [Brooks] for 6 months [and] during this time, he has developed a cadre of followers over whom he has substantial influence." *Id*. Chaffee, relaying Harry's reasons, stated that "[i]t seems that [King] can instigate them to create problems (grievances, complaints to Warden's Forum, etc.)" and that "Deputy Harry has asked for a 'break' from prisoner King and would accept him back after a period of time." *Id*. 61a, 68a. The district court found that Chaffee "did not know King" and "had no knowledge of King's involvement in the *Cain* litigation." App. 68a.

C. Zamiara evaluates the transfer request

Chaffee's email request went to Chuck Zamiara, a classification specialist in the Central Office. App. 61a–62a. Zamiara, who processed 30 to 50 transfer requests daily, took into account both the transfer request from the personnel at Brooks and also the fact that King's name was on a transfer hold list. App. 62a. The transfer hold list exists to help the Department of Corrections, which houses roughly 50,000 prisoners, monitor prisoners who present a risk of violence or escape, or who are perceived to cause problems in prisons. *Id*. Because King was on the hold list (as a

result of concerns he had been involved in an escape attempt), Zamiara discussed with Nick Ludwick, the Classification Director, the transfer request and whether Zamiara's security level should be increased. App. 63a. It was Ludwick, not Zamiara, who had the decision-making authority to increase a prisoner's security level by transferring him to a Level III facility, and who ultimately approved King's security increase. App. 71a. King did not sue Ludwick.

After Ludwick approved the increase in King's security level, Zamiara responded to Chaffee that King would be transferred to Chippewa Correctional Facility "as a level III" because "prisoner is perceived as a disruptive prisoner who is manipulating others to create unrest" at Brooks. App. 72a, 63a. The district court found that Zamiara, who was located in Detroit, "did not know that King was on Warden's Forum" and that he "had no interest in King's involvement in the *Cain* litigation." App. 70a.

D. Chaffee updates the paperwork

After King's transfer occurred, a discrepancy existed between the security screen Chaffee had prepared (which listed King as "manageable at Level II/Remain at Level II) and the ultimate transfer order (which said he needed to be transferred to Level III because he "manipulates other prisoners"). App. 63a. At the warden's direction, Chaffee prepared a new screen to reflect the reason for the security level increase. App. 63a–64a. Although Chaffee backdated the security screen when he updated it, the district court found that the backdating was not intended to be deceptive or to cover up any decision, but was done

because the new screen replaced the prior one after Ludwick's decision to increase King's security level. App. 69a; see also App. 37a–38a.

E. The district court rules for defendants

Before trial, the district court determined that King had satisfied the first two elements of his retaliation claim—that he had engaged in protected conduct, and that increasing his security level was an adverse action. App. 65a, 15a. With these issues decided, the district court held a two-day bench trial to resolve the single remaining issue—whether the adverse action of raising King's security level was motivated at least in part by his protected conduct.

After the two-day trial, and after observing that "[t]he credibility of all parties and witnesses is critical to the determination of the Defendants' subjective motivations," App. 65a–66a, the district court held that "the preponderance of the evidence does not support a retaliatory motive on the part of these Defendants." App. 75a. The court specifically found that "King's reclassification and transfer to a higher security level prison were not motivated by King's protected conduct." *Id*. The court also concluded that Wells (the resident unit manager who recommended King's transfer) had no involvement in the decision to raise King's security level, App. 68a; Chaffee (the transfer coordinator) did not have authority on transfers and merely implemented the orders from Central Office, App. 68a; and Zamiara based his recommendation to increase King's security level on King's pattern of attempting to control other prisoners, just as King had done at a prior prison, App. 71a. Accordingly, the

district court issued a judgment that the defendants had not retaliated against King in violation of the First Amendment.

F. The Sixth Circuit reverses

The Sixth Circuit reversed in a divided opinion. The court of appeals majority criticized the district court for holding that Wells and Chaffee "could not be held liable for retaliation because they were not 'involved' in the decision to increase King's security level." App. 17a–18a. In the majority's view, "[t]he district court's use of the word 'involved' . . . erroneously focused solely on who made the ultimate decision to increase King's security, not whether any of the defendant's action were the proximate cause of the increase in security." App. 18a. The majority further explained that "a person who sets in motion an adverse action can be liable for retaliation for the reasonably foreseeable consequences of his actions." *Id*. As to Zamiara, the majority similarly reasoned that Zamiara "*participat[ed]* in the increase even if he denied being the *decision maker*." App. 45a. As with Wells and Chaffee, the court of appeals concluded that "Zamiara's acts were a proximate cause of the increase in King's security level, even if [Classification Director] Ludwick had to approve it." App. 45a. And the majority also held that the district court clearly erred in its factual findings that none of the defendants acted from a retaliatory motive. App. 32a, 38a, 47a.

Judge Beckwith, a senior district judge sitting by designation, concurred in part and dissented in part. App. 50a. The dissent observed that Wells only requested a transfer, not an increase in security, and it

was not reasonably foreseeable that an increase in security would result from her memo seeking only a transfer. App. 51a–52a. Judge Beckwith also highlighted "crucial evidence the majority fails to mention"—"that King testified that *he does not believe that [Deputy Warden] Harry retaliated against him*." App. 52a. Harry's untainted request for a transfer, coupled with a lack of evidence that either Chaffee or Zamiara knew or should have known that the reasons provided for the transfers were false or given for retaliatory reasons, meant that the actions taken by Chaffee and Zamiara could not have been retaliatory. App. 53a–55a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's ruling that non-decision-makers can be personally liable for retaliation creates a circuit split.

A prisoner asserting a First Amendment retaliation claim must establish not only that he was engaged in protected conduct and that an adverse action followed, but also that there was a causal link between the protected conduct and the adverse action—"that protected speech was a 'motivating factor'" causing the adverse action. *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998); see also *Thaddeus-X* v. *Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

The Second Circuit has concluded that the causal link is missing as to a defendant when that defendant was not the person deciding to impose the adverse action. In *Deters* v. *Lafuente*, two police officers who had been arrested for injuring a suspect sued the City

of Poughkeepsie for false arrest and other claims. 368 F.3d 185, 186 (2d Cir. 2004). A few days after they brought their lawsuit, they were informed that the city was bringing disciplinary charges against them. The officers later brought a § 1983 action asserting that the mayor and the police chief retaliated by allowing the disciplinary charges against them to continue without a justifiable basis.

The Second Circuit accepted as true for purposes of the appeal "that [the mayor] and [the police chief] maintained plaintiffs' disciplinary proceedings when they knew the charges were baseless." 368 F.3d at 187. Despite this fact, the Second Circuit held that the mayor and the police chief were entitled to qualified immunity because they were not the decision-makers with respect to continuing the disciplinary proceedings: "the only person empowered under the City Charter to prosecute or dismiss the disciplinary charges against the plaintiffs was the City Administrator." *Id.* at 187. While the mayor could make recommendations about disciplinary proceedings, the Second Circuit reasoned that it could not "see how [the mayor] and [the police chief], without any authority to stop the proceedings, violated plaintiffs' constitutional rights by not dismissing" the charges. *Id.* at 189. Retaliatory intent, the Second Circuit explained, "is not an issue where, as here, defendants had no authority to act." *Id.*

Had King's situation occurred in the Second Circuit, his retaliation claim would have been dismissed because none of the defendants were decision-makers on the adverse action. Wells, Chaffee, and Zamiara each lacked the authority to increase King's security level; given that they lacked the

authority to take the adverse action King complains of, they would not have been held liable in the Second Circuit.

King's retaliation claim also would have failed in the Southern District of Georgia. In *Goins* v. *Weilenman*, a prisoner sued several prison employees (including a psychologist and a counselor) under § 1983, for a retaliatory transfer. 2009 WL 2224637, *1 (S.D. Ga. July 24, 2009). The district court observed that "even though [defendants] recommended the transfer, they were not the ultimate decision-makers responsible for it." *Id*. Citing Sixth Circuit precedents pre-dating *King*, the district court stated that "[w]here the defendant is not the decision-maker, there is no causal connection between the filing of grievances and the subsequent transfer." *Id*. at *4 (also citing *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999), as applying similar reasoning to a Title VII claim). Cf. *Fleishmann* v. *Cont'l Cas. Co.*, --- F.3d ---, 2012 WL 4944321 (7th Cir. 2012) (rejecting an age-discrimination claim against an individual who was not the decision-maker: "[E]ven if Johnson's comment indicates she harbors age-related animus, she did not decide to fire Fleishman; Izzo did. And a nondecisionmaker's animus is not evidence that the employer's actions were on account of the plaintiff's age.").

II. The ruling also conflicts with the principles this Court applied in *Staub* v. *Proctor Hospital* and in *Hartman* v. *Moore*.

The Sixth Circuit's approach of holding non-decision-makers individually liable also cannot be

reconciled with a recent employment-discrimination decision of this Court or with this Court's guidance on intervening causes in § 1983 retaliation claims.

In *Staub* v. *Proctor Hospital*, a hospital employee contended that he was fired because two of his supervisors were hostile to his military obligations. 131 S. Ct. 1186, 1189 (2011). The causation test for discrimination under the relevant statute (the Uniformed Services Employment and Reemployment Rights Act) was, just as here, "that discrimination be 'a motivating factor' in the adverse action." *Id.* at 1192 (emphasis omitted). Because of the procedural posture of the case, the Court accepted as true the employee's allegations, including that the supervisors made false reports of misconduct against him. Compare App. 24a n.11.

Nonetheless, this Court explained that the supervisors could not be held individually liable, even for making a false report, because they were not the decision-makers in firing the employee: "while [the supervisors] acted with discriminatory animus, the act they committed—the mere making of reports—was not" an adverse action under the Act. *Id.* at 1191. It was another individual—the vice president of human resources—who decided to fire him. *Id.* at 1189.

The Court also refused to impose liability based on the theory, accepted here by the Sixth Circuit, that it was enough that the supervisors' action could foreseeably cause the adverse action: "If the dismissal was not the object of [the supervisors'] reports, it may have been their result, *or even their foreseeable consequence*, but that is not enough to render [the

supervisors] responsible." *Id*. at 1191 (emphasis added).

While the *Staub* opinion then turned to the more difficult question of whether the hospital itself could be liable for the combined actions of its various agents, the present case focuses solely on individual liability and therefore should have been decided consistent with the Court's analysis concluding that the supervisors could not be held individually liable.

The Sixth Circuit's analysis is also out of step with this Court's reasoning concerning § 1983 retaliation claims in other contexts. In *Hartman* v. *Moore*, a case about retaliatory prosecution, this Court addressed the causation problem that arises from connecting "the retaliatory animus of one person and the action of another." 547 U.S. 250, 262 (2006). Noting "the distinct problem of causation" that arises when animus is separated from the decision-maker, the Court explained that "[e]vidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor"—i.e., the decision-maker regarding a prosecution—"who would not have pressed charges otherwise." *Id*. Indeed, this Court characterized the prosecutor's independent decision as an intervening cause: "the intervening decision of the third-party prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2095 (2012) (discussing *Hartman*, 547 U.S. at 261–63).

These same principles demonstrate a lack of causation here. King affirmatively conceded that Deputy Warden Harry had no retaliatory animus, App. 52a, which means that Harry's recommendation broke

the causal chain between the defendants' purported animus and the decision to increase King's security level. Put simply, not only did Harry's non-retaliatory request make Wells's request irrelevant, Harry's request was the reason Chaffee and Zamiara relied and acted on when processing the request. Harry's non-retaliatory request shows that Chaffee and Zamiara would have increased King's security level regardless, i.e., even if they had no animus. *Hartman*, 547 U.S. at 260 ("upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of" (citing *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U.S. 274, 287 (1977))); *id.* ("It may be dishonorable to act with an unconstitutional motive and perhaps in some instance be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway.").

The Sixth Circuit majority did advance a legitimate concern that an officer could insulate herself from liability by "setting in motion a punitive act ultimately executed by someone else." App. 19a. But this concern is easily alleviated by adopting a "cat's paw" theory. See *Staub*, 131 S. Ct. 1190 n.1 (explaining Aesop's fable about the cat's paw). Under a cat's paw theory, when complaining that a decision-maker acted based on a non-decision-maker's discriminatory intent, the plaintiff must show that the non-decision-maker performed an act motivated by a discriminatory animus that was *intended* by the non-decision-maker to cause an adverse action. *Id.* at 1194. Here, Wells sought only to have King transferred within the same prison, which was not an adverse action. App. 8a, 23a,

68a. Chaffee similarly only relayed Harry's request for a transfer (which was undisputedly not retaliatory), and then implemented the classification director's decision to increase King's security level. And Zamiara similarly acted in response to Harry's non-retaliatory request. Because there is no evidence that Wells, Chaffee, or Zamiara attempted to influence the classification director's decision to increase the security level, none of them used the classification director as a tool to retaliate.

III. Allowing liability against non-decision-makers will bring cascades of new prisoner litigation.

If the Sixth Circuit's decision is allowed to stand, low-level prison employees in the circuit (and those confronting copycat litigation in other circuits) face the risk of new lawsuits attempting to hold them individually liable for decisions they did not make or even intend to occur. A number of recent cases in the Sixth Circuit would have come out differently had the panel majority's liability theory been the law and highlight the recurring nature of this issue. E.g., *Williams* v. *Wallis*, 2011 WL 1099970, at *2 (W.D. Mich. Mar. 22, 2011) ("a defendant cannot be held liable on a First Amendment retaliation claim where the defendant was not involved in the decision resulting in the adverse action and lacked the authority take the retaliatory action"); *Fritz* v. *Charter Twp. of Comstock*, 2012 WL 499540, at *8 (6th Cir. Feb. 15, 2012) (no "causal connection between Plaintiff's protected speech and the adverse action" since defendants lacked authority); *Poppy* v. *City of Willoughby Hills*, 96 F. App'x 292, 294–95 (6th Cir.

2004) (defendant not liable if not the "decisionmaker"); *Cohen* v. *Smith*, 58 F. App'x 139, 144 (6th Cir. 2003) ("defendants were merely messengers, and their complete lack of authority to take the adverse action of which [plaintiff] complains suggests that [plaintiff] is, metaphorically, barking up the wrong tree in suing them"); *Baar* v. *Jefferson County Bd. of Educ.*, 686 F. Supp. 2d 699, 713 (W.D. Ky. 2010) (defendants did not have any authority to take the adverse action); *Solomon* v. *Lafler*, 2009 WL 2591378, at *7 (E.D. Mich. Aug. 24, 2009) ("[B]ecause the defendants themselves did not have the authority to convict [plaintiff] of this charge, under *Shehee* they cannot be liable for trying to frame him on it."); *Pratt* v. *City of Lexington*, *Tenn.*, 2008 WL 4206329, at *5 (W.D. Tenn. Sept. 9, 2008) (defendant had no decisionmaking authority with regard to the transfer, which would negate an essential element of plaintiffs' claim); *Berryman* v. *Sampson*, 2011 WL 6450775, at *6 (E.D. Mich. Sept. 8, 2011) ("these [defendants] did not have the ability to [retaliate]").

As these cases illustrate, before the Sixth Circuit's ruling below, district courts regularly dismissed claims against non-decision-makers, just as this Court did in *Staub*. But now in the Sixth Circuit, even low-level prison employees who lack the authority (or even the intent) to take the alleged retaliatory act could be liable. This risk of individual liability means that prison employees will have to think twice about taking even actions that are not adverse, because a court might think even non-adverse actions (like Wells's transfer recommendation) could foreseeably lead to an adverse action. That outcome is not consistent with the

principles for individual liability applied in *Staub* and in *Hartman* and recognized by other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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