Case No. 22-5903

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDALL McELHANEY,

Plaintiff-Appellant,

vs.

DUSTIN WILLIAMS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Tennessee, Northeastern Division
No. 2:21-CV-00019

BRIEF AMICUS CURIAE OF THE GOLDWATER INSTITUTE SUPPORTING PLAINTIFF-APPELLEE AND REVERSAL

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Table of Contents

Table of Authorities

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The interest of amicus curiae is set forth in the accompanying Motion for Leave to File.

SUMMARY OF ARGUMENT

While this case may seem mundane at first, it involves constitutional issues of great significance. In suspending the father from attending his daughter's games for a week, the defendants violated the First Amendment by retaliating against him for protected speech and intruded on the right of a parent to direct and manage the care, custody, control, and education, of his child—all rights the Supreme Court has called fundamental. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

The court below ruled against the father by granting the defendants qualified immunity. It held that the defendants did not violate his clearly established rights—without identifying the exact nature of that right—when they suspended him because of his two messages to the coach. That decision, however, failed to properly characterize the right at issue, because it skipped step one of the qualified immunity analysis and went directly to determining whether the right at issue was clearly established at the time of the incident. But it is far from plain that the right was not clearly established, and it *is* obvious that a constitutional right is at issue here. This case then is the reverse of the situation that would warrant a court skipping step one of the qualified immunity analysis.

[1] The Goldwater Institute's counsel authored this brief in its entirety. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no other person—other than the amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Had the district court started with step one, it would have recognized that the defendants violated the father's First Amendment rights by engaging in unlawful retaliation. In this circuit, to prove a First Amendment retaliation claim, the father need only show that "he engaged in constitutionally protected speech," that "adverse action was taken … that would deter" an ordinary person from engaging in that constitutionally protected speech, and that "the adverse action was motivated at least in part by his protected conduct." *Wenk v. O'Reilly*, 783 F.3d 585, 593 (6th Cir. 2015). A parent certainly has the right to speak with a public-school employee who has consistent interactions with his child about his child.

Courts have long recognized the fundamental right of parents to oversee the care, custody, control, and education of their children, and although schools stand *in loco parentis* while entrusted with children's custody, that authority is subordinate to the rights of parents. As the Third Circuit has observed, "Public schools must not forget that '*in loco parentis*' does not mean 'displace parents.' … It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000). Thus, a parent speaking with a public-school employee about his child is exercising protected speech. The one-week suspension is an adverse action that would likely deter reasonable people—especially those who have bought season tickets—from engaging in protected speech. Finally, not only was the suspension (the adverse action) motivated in part by the protected conduct (the text messages), but there is no evidence to suggest that there *is any reason besides* the text messages for the suspension.

Moving to step two of the qualified immunity analysis, it is critical that the right at issue here is kept in mind. It is not, as the district court put it, the "unfettered right to attend games after … criticiz[ing] the coach and his opinions on how to run the softball team." *McElhaney v. Williams*, No. 2:21-cv-00019, 2022 WL

4103849, at *6 (M.D. Tenn. Sept. 8, 2022). Rather, it is the right of a parent to speak with a public-school employee about his child with whom the school employee has consistent interactions. The Supreme Court has warned about the danger of "misapprehend[ing] the claim[s] of liberty" at issue in constitutional cases, *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), which happens when a court focuses too particularly or pragmatically on the activity in question rather than on the realm of freedom or the abstract principle at stake. Focusing on cases involving sports, as the district court did, simply misses the point.

Finally, this case demonstrates the "oddity" of the qualified immunity doctrine. *See Hoggard v, Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement respecting denial of cert.). Qualified immunity is frequently applied as the "one-size-fits-all doctrine" that holds state actors "who have time to make calculated choices about enacting or enforcing unconstitutional policies" to the same standards "as a police officer who makes a split-second decision to use force in a dangerous setting." *Id*. at 2421–22. Both can receive the same level of protection from suit. This is worrisome, as officers who make the split-second decision to use force in dangerous situations have much less time to consider the constitutionality of the decisions they take than do, say, school sports coaches making and enforcing general policies. Here, defendants had ample time to come to a reasoned and constitutional decision. But they did not. They should not receive the same protection as cops on the beat.

ARGUMENT

I. Defendants violated father's constitutional rights by retaliating against him for his protected speech.

The district court, relying on *Pearson v. Callahan*, 555 U.S. 223 (2009), skipped the first step of the qualified immunity analysis and found the second ("clearly established") prong dispositive. While this is permitted, skipping the first

step led the court to misconceive the right *actually* at issue, which is the freedom of speech in the context of a parent's fundamental right to oversee the care and custody of his child.

Plaintiff alleges that defendants retaliated against him, in violation of his First Amendment rights, by suspending him from attending softball games due solely to the fact that he spoke to his daughter's softball coach about her playing time. This Circuit uses a three-step test to assess a prima facie First Amendment retaliation claim. The plaintiff must show: "(1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct." *Wenk,* 783 F.3d at 593.

Because the district court skipped step one of the qualified immunity analysis, it did not determine whether Plaintiff made a prima facie showing under this test. He has.

First, he engaged in protected speech. He spoke with a public-school employee who has consistent interactions with his daughter, and he spoke to her about her care and education. Holding this to be anything other than protected speech would contradict a century of Supreme Court precedent protecting the fundamental rights of parents.

Parents have a fundamental liberty interest in making decisions concerning "the care, custody, and control of their children." *Troxel*, 530 U.S. at 65 (2000) (plurality).[2] This right is one of the oldest such rights recognized by the Supreme

[2] Although *Troxel* produced no majority opinion, the majority of justices did agree that this is a fundamental constitutional right. *See id.* at 80 (Thomas, J., concurring); *id.* at 86-87 (Stevens, J., dissenting).

Court. A century ago, at the dawn of the theory of "fundamental" rights, it used the word "fundamental" to characterize a parent's right "to control the education of their [children]." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). It reaffirmed that right two years later, holding that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534–35 (1925). And in 1944, it reiterated that "the custody, care and nature of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Time and again, the Court has upheld parental rights over states' attempts to interfere with their choices. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"). As the Third Circuit admonished in *Gruenke*, "[i]t is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." 225 F.3d at 307.

As a parent has the right to control and oversee the education and upbringing of his child, he naturally must have the right to communicate with those who oversee his child in public schools. Logically, if parents have no constitutional right to communicate with those who are temporarily trusted with *in loco parentis* supervision of their children, then parents will be incapable of exercising their underlying fundamental right to oversee the care, custody, and control of their children. The proposition that parents have this fundamental right depends on the principle that children are not "mere creature[s] of the state," and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. It follows that parents *must* be free to communicate with public employees who have consistent

interactions with their children. Otherwise, their fundamental parental rights would be rendered meaningless as soon as a parent entrusts a child's care to public school employees. If students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," neither do their parents. *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969).

Indeed, because responsibilities and rights are inextricable,[3] a parent could be said to have a *duty* to communicate with those who are educating and exercising *in loco parentis* authority over their children, including their coaches, who, after all, impart values above and beyond athletics. That is not to say that this right is unlimited or that a parent can communicate at all times and in all ways with public school employees. Obviously "[l]imitations on speech that would be unconstitutional outside the schoolhouse are not necessarily unconstitutional within it." *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir.1989). But the manner of communication is not what is at issue here; in this case the communication *itself* is what the defendants took issue with.

Defendants have decided to forbid such communication for no reason other than to avoid interactions they consider tedious.[4] But the desire to avoid interactions with parents—even the proverbial "sports parent"—is not a sufficiently

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[3] *See, e.g.,* Henry B. Veach, *Human Rights: Fact or Fancy?* 164–65 (1985) ("suppose it is assumed that a given individual is under an obligation to perform a certain action. … Would it not follow that the person … could properly claim that he had a right not to be interfered with or to be forcibly prevented or deliberately deprived of the necessary means of [discharging it]?").

[4] Obviously schools have the legitimate authority to maintain order and tranquility on school property, and may lawfully limit a parent's access to facilities and personnel where the parent's actions have been abusive or disruptive. *See, e.g., Cunningham v. Lenape Reg'l High Dist. Bd. of Educ.*, 492 F. Supp.2d 439, 448–49 (D.N.J. 2007). But there is no reason to believe the father's actions were disruptive

weighty state interest to justify a blanket policy that removes certain topics from the realm of possible conversations between parents and school employees. This is especially true given that the school's policy is to already limit parent interaction with coaches by banning parents from attending *any* practices.

Further, even outside the parent-child relationship, plaintiff's communication would be protected speech. This Court has explained that "[s]peech is generally protected by the First Amendment, with restrictions on only limited types of speech, such as obscenity, defamation, and fighting words." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 588 (6th Cir. 2008). There is *no evidence* that the plaintiff's speech rose to the level of obscenity, defamation, fighting words, or any other unprotected category. This Court has also already rejected any attempt to graft a "public concern" requirement onto speech from parents to or about school officials. *Id*. ("Defendants' contention is that parental speech about school officials is not constitutionally protected if the speech is not about matters of public concern. Such a contention is clearly wrong.") So, while schools can constitutionally restrict the *manner* of parental communications, what they cannot do is restrict communication wholesale. But that is exactly what the school did here.

The second and third steps of the inquiry are even easier. The suspension from attending games would dissuade a reasonable person from speaking to the coach about their daughter's playing time. Any parent invested enough to contact a coach out of concern that a child is not playing enough is also likely to avoid such conduct if the consequences include being barred from watching his child play in the future.

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here; rather, the school simply imposes a blanket ban on communications and punished the father for violating that blanket ban with *no argument* that the way in which he did communicate was disruptive.

As for the third step, in this circuit a plaintiff need only prove that the protected speech was at least part of the motivation for the adverse action—here the suspension plainly was the consequence of the father's speech. There is no indication that there was any other reason for the suspension.

Thus, Plaintiff has met the burden and has established a prima facie case that the school violated his constitutional right to speak to his daughter's teacher.

II. The right of a parent to speak to a school employee that has interactions with their child, about their child, is clearly established.

The lower court characterized the right at issue as whether "Plaintiff had an unfettered right to attend games after he criticized the coach and his opinions on how to run the softball team." *McElhaney*, 2022 WL 4103849, at *6. But this formulation misses the crucial relevant context by focusing too narrowly on particulars rather than on the underlying principle. Because constitutional rights exist at the level of principle, too tight a focus can easily mislead a court. *See, e.g., Lawrence*, 539 U.S. at 567. One would not say, for example, that *Texas v. Johnson*, 491 U.S. 397 (1989), was concerned only with the question of burning a U.S. flag at a Republican Party convention, and that it therefore leaves unresolved whether there is a constitutional right to burn a state flag, or to burn a flag at a Democratic Party convention. Likewise, the broader context should be kept in mind: when the parent-child relationship is added to the freedom of speech, it becomes clear that the school's blanket policy violates the father's clearly established rights.

First, there is extensive and well-known Supreme Court precedent upholding parental rights to manage and oversee the education of their children. In *Meyer*, the Supreme Court held unconstitutional a law prohibiting the teaching of modern languages other than English, as violating a parent's fundamental rights. 262 U.S. at 399–403. In *Pierce*, it held unconstitutional an Oregon ban on private schools. 268 U.S. at 534–35. In *Prince*, it held that parental rights could not trump child labor

laws, but in doing so, reaffirmed the fundamental importance of parental rights. 321 U.S. at 166. And in *Troxel*, it held unconstitutional a Washington law which granted grandparents visitation rights over parental objections on the grounds that it violated parents' fundamental rights. 530 U.S. at 75.

True, none of these cases explicitly hold that a parent has the right to speak to a softball coach—but both the Supreme Court and this circuit have held that a case directly on point is not necessary to prove a right is clear established. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *Sutton v. Metro. Gov't of Nashville & Davidson Cnty.*, 700 F.3d 865, 876 (6th Cir. 2012). All that is needed is for the precedent to make it such that the constitution question is "'beyond debate.'" *Guertin v. Michigan*, 912 F.3d 907, 932 (6th Cir. 2019) (citation omitted). In this way, officials can still be held liable for wrongful conduct even "'in novel factual circumstances.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (citation omitted). And obvious violations of the Constitution are actionable even absent precedent that would otherwise settle the issue. *See Tyson v. Sabine Cnty.*, 42 F.4th 508, 520 (5th Cir. 2022) (qualified immunity "does not immunize those officials who commit novel, but patently obvious, violations of the Constitution." (citation & internal marks omitted)); *Wade v. Daniels*, 36 F.4th 1318, 1323 (11th Cir. 2022) (a right is "clearly established" when "the conduct so obviously violates the constitution that prior case law is unnecessary.").

The suspension based solely on the father exercising his right to speak about his daughter to a public school official who has consistent interactions with her is an obvious violation of the Constitution. The Supreme Court has held time and time again that the state cannot interfere with the parent-child relationship absent a sufficient interest, such as maintaining good discipline and order on school property. The interest here is a desire to avoid awkward and tiresome conversations with parents with *no evidence or assertion* that such conversations will affect good

discipline on school property and certainly no evidence that *this* communication had any negative results on discipline or order. That simply is not enough under the Supreme Court's precedent.

Additionally, this Circuit's own precedent makes the right in question clearly established. In *Wenk*, this Court approved a First Amendment retaliation claim brought by parents against school officials who had reported the father for suspected abused of his special-needs daughter. 783 F.3d at 587. The father was a fierce advocate for changes to his intellectually disabled daughter's educational plan, and this bothered the Director of Pupil Services, who had frequent interactions with the father. *Id*. The Director reported the father to Franklin County Children Services (FCCS) for suspected child abuse, based on allegations that others in the school had told her, even though the others largely denied telling the Director any such thing. *Id*. at 591–92. After FCCS found the allegations unsubstantiated, and all criminal investigations into the father were dropped, the parents sued the Director. *Id*. at 592.

The Director raised qualified immunity, arguing that as a "mandatory reporter," she was legally obligated to report suspected child abuse; this, she claimed, negated the retaliation aspect. *Id*. at 594–600. This Court nevertheless held that the report to child services *was* an adverse action, and was motivated at least in part by the parents' advocacy for their daughter. The Court reasoned that the report only came after the parents went over the Director's head, and that the addition of fabricated allegations was sufficient to show that the action was motived *in part* by animus towards the parents' protected conduct. *Id*. at 596. This Court then held that based on previous decisions, the "right to be free from retaliation [including by filing a child abuse report] for exercising their First Amendment Rights was clearly established." *Id.* at 600.

Additionally, in *Kesterson v. Kent State Univ.*, this Court allowed a First Amendment retaliation claim to proceed where a student alleged that her softball coach retaliated against her for telling the coach that the coach's son raped her. 967 F.3d 519, 523–24 (6th Cir. 2020). This Court held that it was "beyond debate that a coach at a state university cannot retaliate against a student-athlete for speaking out by subjecting her to harassment and humiliation," *id*. at 525, and explained that decades of precedent established that "[s]tudents may exercise their First Amendment rights unless doing so would 'materially and substantially disrupt' school operation." *Id*. (citation omitted). Thus, this Court denied the coach qualified immunity.

If a school employee—including a softball coach—cannot retaliate against a student for protected speech, it should be clear that the same official may not retaliate against a parent for protected speech. And if harassment and humiliation are adverse actions against the student, then being suspended from attending one's child's softball games is also an adverse action. While, again, a school may certainly bar any person from school grounds for engaging in violence, threats, disruption, etc., it may not impose a blanket prohibition on speech—or punishment for speech—in the absence of any such disturbances.

III. This case calls for the Court to address the first step of the qualified immunity analysis.

This case is a perfect example of the oddities in the "one-size-fits-all doctrine" of qualified immunity. *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., statement respecting the denial of cert.). The same legal analysis that governs a case involving a police officer who makes a split-second decision in the face of violence has been applied here to defendants who formulated a policy and had plenty of time to decide what actions to take when someone violated that policy. But that does not have to be the case.

This Court has warned against a "formalist approach" to qualified immunity, *Daily Services, LLC v. Valentino*, 756 F.3d 893, 900 (6th Cir. 2014), and urged lower courts to focus "on the function it serves" rather than granting immunity based "on formalistic labels." *Shoultes v. Laidlaw*, 886 F.2d 114, 118 (6th Cir. 1989). This case is a perfect example of why.

In *Pearson*, the Supreme Court dispensed with the requirement that a court first determine whether defendant violated a constitutional right before determining whether the right was clearly established. 555 U.S. at 236. Requiring the first step, it said, "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case," because sometimes "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id*. at 236–37.

But the Supreme Court cautioned that it is still sometimes necessary to address the first step. "[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be," it said. *Id*. at 236 (*quoting Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)). In other words, in some cases courts will find it difficult to determine whether a defendant violated a clearly established right without first going through the exercise of determining whether the defendant violated a constitutional right at all.

The case here presents a situation that calls for addressing that first step. The purpose of allowing lower courts to skip part of the qualified immunity inquiry was to free courts from having to address the issue when the case presented an allegation that "is so factbound that the decision provides little guidance for future cases." *Id.* at 237 (citation omitted). But this is not a situation where the right is so fact-dependent that there is a judicial economy benefit to skipping it. *Pearson* also

explained that a court could skip the first step when there is a pending case involving the exact same right before a court of higher review, when the right depends on the interpretation of a state statute, or "[w]hen qualified immunity is asserted at the pleading stage, [so] the precise factual basis for the plaintiff's claim or claims may be hard to identify." *Id.* at 238–39. None of these circumstances are present here. On the contrary, the main issues the Court warned of has occurred: skipping the first step has led to an inaccurate determination of the constitutional right at issue.

But more than that, this case gives this Circuit the chance to address one of the major oddities of the current qualified immunity doctrine in a way that does not run afoul of precedent. This Circuit can, and should, make clear that skipping the first step of the qualified immunity is generally inappropriate in situations not involving fact-specific law enforcement situations. This is especially advisable given the recent acknowledgement that qualified immunity has no basis in the text of Section 1983 or the common law. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of cert.) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Ramirez v. Guadarrama*, 2 F.4th 506, 524 (5th Cir. 2021) (Willett, J., dissenting) ("the atextual, judge-created doctrine of qualified immunity shields lawbreaking officials from accountability, even for patently unconstitutional abuses, thus largely nullifying § 1983."); *Horvath v. City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring) ("Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement." (citation omitted)); *Sampson v. Cnty. of L.A.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring) (labeling qualified immunity as a "judge-made doctrine"). *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 88 (2018) (arguing that qualified immunity "lacks legal justification, and the Court's justifications are unpersuasive."); Joanna C. Schwartz, *The Case Against Qualified*

Immunity, 93 Notre Dame L. Rev. 1797, 1836 (2018) (explaining that the "[q]ualified immunity doctrine is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law.")

Even if qualified immunity s appropriate for law enforcement officers acting in dangerous situations, where split-second decisions might mean the difference between life and death,[5] the calculus should be entirely different when the case involves a teacher or administrator implementing policies at school. Given that "the function it serves," *Shoultes*, 886 F.2d at 118, is to prevent "overdeterrence" of important government activities and to prevent the infliction of retroactive liability on public officials, *see* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 Yale L.J. 259, 265, 265, 271 (2000), there is sense in applying the same doctrine identically in both situations. As judges across the country have recognized, *see Hoggard*, 141 S. Ct. at 2421 (Thomas, J., statement respecting the denial of cert.); *Horvath*, 946 F.3d at 800 (Ho, J, concurring); *Sampson*, 974 F. 3d at 1025 (Hurwitz, J., concurring), the risks of overdeterrence and retroactivity are entirely different when applied to an officer in a gunfight and a public school official implementing a formalized, blanket policy over the course of months or years. This case offers the Court the opportunity not only to acknowledge this "oddity" but to do something about it without running afoul of precedent.

Engaging in the qualified immunity analysis is required by precedent. But it is clear that there is no textual or common law basis for the current application of qualified immunity. Recognizing the challenges of this situation, this Court should hold that in cases where there is not one of the specific situations expressed in

[5] Though there is a strong argument that qualified immunity should not apply even in those instances from a textualist and originalist viewpoint.

Pearson to justify skipping the first step of the qualified immunity analysis, courts should address both.

CONCLUSION

This Court should reverse the decision below and hold that parents have a clearly established constitutional right to speak to public school employees about their own children.

Respectfully submitted this 21st day of December 2022 by:

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CERTIFICATE OF COMPLIANCE

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/s/ *Timothy Sandefur*
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Dated: December 21, 2022

CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 21st day of December 2022 on all counsel of record.

/s/ *Kris Schlott*
Kris Schlott, Paralegal