NO. 23-_____

In the Supreme Court of the United States

DUSTIN WILLIAMS, ET AL.,

Petitioners,

v.

RANDALL MCELHANEY,

Respondent.

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

The decision below reflects a well-defined "split of authority," joining the Second Circuit in *Frierson v. Reinisch*, 806 Fed.Appx. 54 (2020), as split from the Third, *Blasi v. Pen Argyl Area School District*, 512 Fed. Appx. 173 (2013); and Eighth, *Wildman v. Marshalltown School District*, 249 F.3d 768 (2001). This circuit split bars school employees from enforcing reasonable rules of participation in extracurricular athletics, to promote lessons of sportsmanship. Contrary to the Third and Eighth Circuits, the Sixth and Second hold enforcement as content-based retaliation violating the First Amendment.

The court below also significantly departed from settled precedent concerning the "clearly established" prong of qualified immunity, articulating a new test, phrased for the first time in any Circuit as "low level of generality," 81 F.4th at 554, which is incompatible with the requirement that the "violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). Applying its new test, the court ignored similar cases involving extracurricular activities, instead conflating this case with highly general cases in the general academic setting.

The Question Presented is:

Where a parent who has voluntarily agreed to be bound by team rules for their minor to play in an extracurricular academic setting including rules that a parent will not discuss playing time or position assignment, was it clearly established that a school employee violates the parent's First Amendment rights by suspending the parent from attending games for one week for violation of those team rules, such that the right may be defined at a "low level of generality"

rather than particularized authority placing the matter beyond debate.

PARTIES TO THE PROCEEDINGS

Petitioners and Defendants-Appellees below

- Dustin Williams, Head Coach,
  Upperman High School Softball team.
- William Stepp, Principal,
  Upperman High School, Baxter, Tennessee.
- Nathan Brown, Athletic Director,
  Upperman High School.
- Timothy Martin, Deputy Director of Schools,
  Putnam County Board of Education.
- John Pettit, School Resource Officer and
  Deputy Sheriff, Putnam County Sheriff's
  Department.

The district court dismissed the "Putnam County School System."

Respondent and Plaintiff-Appellant below

- Randall McElhaney,
  Plaintiff in the underlying § 1983 case.

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 22-5903
Randall McElhaney, *Plaintiff-Appellant,* v.
Dustin Williams; William Stepp; Nathan Brown; Timothy Martin; John Pettit; Putnam County, Tennessee School System, *Defendants-Appellees.*

Opinion: August 25, 2023

United States District Court, Middle District of Tennessee, Northeastern Division

No. 2:21-cv-00019

Randall McElhaney, *Plaintiff,* v.
Dustin Williams; William Stepp; Nathan Brown; Timothy Martin; John Pettit; and
Putnam County School System, *Defendants.*

Judgment: September 8, 2022

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dustin Williams; Nathan Brown; Billy Stepp; Tim Martin; and John Pettit; respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *McElhaney v. Dustin Williams, William Stepp, Nathan Brown, Timothy Martin, John Pettit, Putnam County, Tennessee School System*, 81 F.4th 550 (6th Cir. 2023). It is reproduced in Appendix at App.1a-16a. The opinion of the District Court is unreported at 627 F.Supp.3d 911 and reproduced in the Appendix at App.19a.

JURISDICTION

On August 25, 2023, the Sixth Circuit entered judgment. (App.17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent, Randall McElhaney, seeks damages for an alleged violation of his First Amendment rights pursuant to 42 U.S.C. § 1983:

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a case of first impression for this Court, which is also the subject of a well-developed circuit split involving the Sixth and Second Circuits on one hand, and the Third and Eighth Circuits on the other, involving the permissibility of team rules created by a high school coach, that prohibit a parent (as opposed to the student-athlete) from directly addressing the coach (as opposed to some other school administrator), concerning internal discretionary coaching decisions regarding playing time and playing position for a varsity athlete in an extracurricular sport—even when the parent agrees to the team rules. Based on the reasoning of the Sixth Circuit, high school athletic coaches cannot limit the parent's ability to interfere with their internal coaching decisions regarding playing time or playing position even when the parents agree to abide by team rules to that effect.

In addition, the Sixth Circuit, in a reported case, has created an entirely new test of "low level of generality," that has not been adopted by any Circuit, which significantly dilutes (to the point of incompatibility) this Court's consistent requirement that "violative nature of particular conduct is clearly established" in the qualified immunity context. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). The result of the Sixth Circuit's new test is that the individual defendants were deprived of qualified immunity despite no case in the Sixth Circuit

or in any jurisdiction relevant to these individuals, holding that the defendants' conduct would violate the constitutional rights of a parent; indeed there is a clear circuit split where the Third Circuit and Eighth Circuit affirmatively would find the conduct constitutional.

In essence, the Sixth Circuit decision prohibits high school athletic coaches from establishing team rules to maintain order, enforce team rules, and maintain coaching authority over the quintessential operation of a sports team by constitutionalizing interference by parents in the core functioning of a sports team—their child's playing position and playing time in extracurricular athletic events—even where the parents are permitted to criticize the coach and players otherwise (to administrators or others, just not the coach).

The decision also constitutionalizes the inability of parents to agree to team rules that establish reasonable time, place, and manner restrictions on parental criticism of core sports team functions, in a way necessary to manage an effective and efficient control of the team in the voluntary extracurricular athletic program.

This decision has far-reaching public policy implications that cries for review by this Court. If left unreviewed, the Sixth Circuit's decision will have a chilling effect on individuals—many of whom are parent-volunteers—willing to coach extracurricular team sports when they face hostile criticism for their internal discretionary coaching decisions regarding who to choose for an extracurricular team, when to play members of the team, and what position to play members of the team.

1. Speech Giving Rise to This Case

There are no material issues of fact in dispute.

Respondent's daughter, L.M., was a junior at Upperman High School in Baxter, Tennessee. Upperman High School has a varsity girls' softball team governed by the TSSAA that is a voluntary extra-curricular athletic activity that competes with other high schools in the Middle Tennessee area. (*See* Decl. Stepp, DE 39-5, Page ID#293-299 and Parent-Player information form, DE 39-1, Page ID# 234-235.)

Prior to the season in question, a player-parent-coaches' meeting was held, at which time the parents and players were given team rules to follow with respect to their participation in this voluntary extra-curricular athletic activity. In part, the rules provided as follows:

> Playing time is non-negotiable for coaches to talk directly with parents about.
>
> * * *
>
> Parents need to be supportive of the program on the field and off the field. In the stands and at home. We understand every parent wants what is best for their child. Please remember this program wants what is best for this team and we have to strive for that. We need parents to be supportive of other players, other players on the team, and the program. By doing this the season will be a much more pleasant and enjoyable, result being the kids will gel more like a team instead of individuals, and parents will gel as well. Guarantee your child sees and feels negativity and it will affect how they perform

> on and off the field. Practices are closed on the field or in the gym. No Parents or legal guardians are allowed to attend practice. No parents are to interact with their child during the games . . . this means no parents in the dugout during the games and no parent coming to the dugout coaching or giving instructions. Again let's be positive and cheer the girls on the field.

(Parent-Player information form, DE 39-1, Page ID# 234-235)

Randall McElhaney [hereafter McElhaney] attended the meeting and agreed to these team rules. (Depo. of R. McElhaney, DE 39-3, Page ID#255-258.)

Randall McElhaney's charges are made in the context of an athletic program in which his daughter's participation, and by extension his own, was voluntary.

On April 15, 2021, the Plaintiff became upset when his daughter was relieved as the pitcher for the Upperman High School softball team during a particular game, and not transferred to play second base. She was allowed to remain in the game as a "designated player" (for those more familiar with baseball, the equivalent of a designated hitter). (*See* Decl. of Williams DE 39-6, Page ID#300-302; and text messages, DE 39-2, Page ID#236-248.)

This precipitated a series of text messages with the coach that were highly critical of the coach. This series of text messages—excerpts from the text messages from the Plaintiff to Head Softball Coach Dustin Williams contain the following language:

Plaintiff's, Randall McElhaney, text message to Head Coach Dustin Williams on April 15, 2021

> "L[1]" came home and said she talked to you. You need to look at the books and find out which kid has made the least amount of errors on the team. I can tell you "L" is with 0. You benched "L" out of 2nd base after I rebutted what Mike told you that "L" under hand that ball to "A" at 1st in the Soddy Daisy Tournament and I said "L" had to throw it fast like that to get the girl out because if she wouldn't have the girl would have been safe. "C" has made two errors already at 2nd base and you had to get onto her during the Dekalb County game and she does not cover bases at all. She has no idea what she is doing. She got played over every one of her middle school years at 2nd. So you are benching an upper classman to put her there. That is not understandable at all. Your other 2 pitchers don't leave the field at all. I didn't understand when you took "L" out of the pitching circle why she didn't just trade places with "A" at 2nd the other night in Livingston. No matter who makes errors in the outfield you just leave them in there. They take bad angles and they don't catch the ball or they just run up and let it fall in front of them when they can make a play. "L" has one of the biggest if not the biggest hearts on the team. Always wanting

[1] "L" is "L.M.", the plaintiff's daughter. Other student teammates are included by initials, but their names are in the actual texts, which were redacted for filing in accordance with Fed. R. Civ. P. 5.2.

to please. Kid has been playing through pain and won't say a word for fear of being punished. We picked up on it and took her for her procedure yesterday and had I not refused to let her come tom practice for fear of her trying to physically practice, she would have been there. Kids got heart and wants to be on the field and yet every year shes the kid that is taken out to give someone an opportunity. Shes had least errors and least PA at bat because shes the one that's been taken out to give others opportunities there too. If she has same stats as others shes on track to be hitting .500. I feel "L" waited her turn for 2nd. "S" wanted there for college so "L" had to sit then. Now here we go again. "L" nor I want her pitching every game. That's unrealistic and not needed, but she also doesn't want nor deserve to bat only. Kids got a darn good glove. When her confidence is built, shes even better. Right now, her confidence is killed because shes been benched. Im not the coach but promise I don't sugar coat for my kid or any other and Jacquie don't sugar coat stats at all for any kid.

"L" is right here and said she doesn't disagree with any of what was just said. I told her this is what she should have said to you in the teachers lounge when she talked to you today.

Head Coach Dustin Williams' text message response to Randall McElhaney on 4-15-21.

> I am sorry you feel this way, and sorry that you don't understand that we are only trying to do what we feel like is best for our team currently. I don't feel like running down other players is the best way to approach the situation nor do I feel like questioning our programs structural integrity is beneficial for anyone involved. We enjoy having "L" on our team and appreciate her heart . . . she is a great kid and a joy to be around, but I am under no circumstances going to continue to justify our reasons for what we do inside of our program or what we feel like is best for us. It seems from the comments I have heard that have came from you outside the park that you are extremely displeased with how we are running the program and have an exponential amount of opinions on how we should be running it . . . crazy we have to have that conversation at 6-0 in the district but everyone is entitled to their own opinion. It seems we have reached the boiling point and you have a couple of options . . . 1.) go talk to my administration about how you feel 2.) walk away from the program or 3.) allow us to continue working daily to do what we feel like is best for our program and support us instead of running us down. I will not have this conversation again and feel completely disrespected in how this is being handled.

Plaintiff's, Randall McElhaney, reply to Head Coach Dustin Williams's response on 4-22-21.

If you feel so disrespected, I would love for you to tell me how this would this situation should be handled any differently than discussing it with you instead of running to someone else. I would just like to know why my kid seems to be the only one getting taken advantage of over and over. You know me I don't sugar coat anything and don't expect you to. My arguments are backed up by stats. I know you have Carrie keeping the books but we also keep stats on gamechanger that keeps up with team starts for you to be able to see anytime you want. In travel ball my wife keeps such accurate stats she has been asked by other teams to keep their team stats also when our travel team isn't playing. She is so accurate it isn't funny. I have only been to watch "L" in a few games this year with me being with "A". Just because someone hasn't "cost you a game at 2nd base" doesn't mean that "L" shouldn't be on the field. I want this team to be so successful it kills me and to know this team hasn't been to state yet kills me so bad. The year that "S. D.'s" team were all Seniors should have been in Murfreesboro hands down. I have coached several teams in my past so its not like I don't' know what I'm talking about. I told "L" to come and talk to you yesterday or today but she doesn't say anything close to what was said above because she really likes you and we do to and frankly she doesn't want to maybe make you mad or

say anything to get on your bad side. In a nutshell "L" has had to wait her time and I would rather her say everything she wants to discuss with you. My family likes you an awful lot Dustin that's the reason I always talk to you and it goes no further. I am not trying to run down any kid. "L" said you said in your meeting that the other child isn't as good as "L" is. With that being said that makes it even more frustrating for "L" and our family. It's not the other child's fault at all "L" has been on high level teams and when she went to Alabama Camp Coach Murphy told "L" that she was one of the best girls that he saw playing 2nd base. YOU ARE THE COACH HANDS DOWN. I WANT TO SEE THIS TEAM SUCCEED (AS MUCH AS ANYBODY). When "L" started pitching at Livingston she was hurting but she didn't want you to know. That's why she hasn't been as good as she should be this year. I will never go to administration over a coach unless they physically harm my kid. I don't believe in that. If I ever feel I need for my kid or kids to step away from a team I will pull them. Then we will have a decision to either not and play at all or have them transfer and play for someone else. My kids are no where near allstars and I don't treat them that way at all. I would like her for her to remain with the team but would also like to see her be able to contribute as well.

I figured we would keep game changer stats and we can even put you on as administrator

> so you can see every bit of stats that you need to. You can see in plays of district games where batters have a tendency to hit to and what batters are more successful against us and it will help us later on down the road.
>
> Gamechanger keeps every stat you can think of. I don't want to run any kid down. That is not my intention. I heard your podcast with Rusty. In a nutshell maybe I shouldn't have said anything to you and maybe just let my kid to learn to talk with you and address all of her concerns.

(Text messages, DE 39-2, Page ID# 236-248.)

Given his inability to resolve the situation with his first response, Head Softball Coach Dustin Williams did not further confront the Plaintiff, but instead sent these emails to Upperman Athletic Director Nathan Brown and Upperman High School Principal William Stepp. Principal Stepp had known the Plaintiff through past incidents. He scheduled a meeting with the Plaintiff, and after a discussion regarding what had occurred, William Stepp, the Principal of Upperman High School, decided that there should be "some space" between the Plaintiff and the Softball Coach and indicated that the Plaintiff should not attend the softball games for a week. The Plaintiff responded that he had to see his other child play athletics and could only attend one game that week "anyway". (*See* Decl. Stepp, DE 39-5, Page ID#293-299.)

Enraged by this decision, the Plaintiff called Deputy Director of Schools Timothy Martin at the Putnam County Board of Education Central Office; appealed this decision; and specifically asked that the decision

of the Principal be overruled. Deputy Director of Schools Martin called the Principal; discussed the matter with him; and called the Plaintiff back and affirmed the decision. (*See* Dep. of R. McElhaney, DE 39-3, Page ID#269.)

The Plaintiff then demanded a meeting with the Director of Schools, Corby King. The Plaintiff met with Director King on April 27, 2021, and the decision was not overruled. (*See* Decl. of Director of Schools King, DE 39-4, Page ID#281-292.)

In the meantime, on April 20, 2021, in defiance of the instructions of the Principal of Upperman High School, the Plaintiff slipped in the varsity girls softball game through a broken back gate and sat in the bleachers. It was reported to Principal William Stepp that the Plaintiff was present in violation of his instructions. Principal Stepp went to the softball field; sat on the bleachers; and whispered to the Plaintiff that he was not supposed to be there and asked him to leave. The Plaintiff then followed Mr. Stepp from the field and through the gate at which time the Plaintiff began cursing and yelling in earshot of other students and spectators. (*See* Decl. Stepp, DE 39-5, Page ID#293-299.) School Resource Officer, Deputy Sheriff John Pettit was present. The Plaintiff protested to SRO Pettit that the Principal did not have the authority to require him to leave the school premises. SRO Pettit advised him that the Principal was in control of the Upperman High School campus and that he would have to leave if the Principal instructed him to do so. Officer Pettit did not arrest the Plaintiff, nor did he touch the Plaintiff. He was merely present. (*See* Depo. of R. McElhaney, DE 39-3, Page ID# 272-274.)

The Plaintiff then left; got in his vehicle; and came back by Principal Stepp and Officer Pettit and apologized for losing his temper. (*See* Decl. Stepp, DE 39-5, Page ID#293-299.) Randall McElhaney agreed to the team rules that did not preclude or prohibit criticism of coaches (or even other team members) but regulated the time, place, and manner in which the criticisms could be expressed in a way necessary to manage an effective and efficient softball program.

This lawsuit was instituted 17 days later.

2. District Court Proceedings

The United States District Court for the Middle District of Tennessee exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331, and analyzed this case under the doctrine of qualified immunity. The Court determined that there was no Sixth Circuit Court of Appeals case directly on point, but found that cases from the Sixth Circuit tangentially supported the Defendants in this case and that the decision by the Third Circuit Court of Appeals in *Blasi v. Pen Argyl Area School District*, 512 Fed. Appx. 173 (3rd Cir. 2013) supported its decision. The Court held that this Third Circuit case on point would "have more purchase" in the Sixth Circuit Court of Appeals, and granted the Defendants qualified immunity because the right was not clearly established.

McElhaney appealed the District Court's grant of qualified immunity.

3. Decision of the Sixth Circuit

The Sixth Circuit reversed, finding that the Constitutional right was established at a "low level of

generality" in regard to the general standard educational setting but did not consider the extracurricular setting and did not identify any authority that the "violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). Rather, the Sixth Circuit adopted a new test, and conflated this with the traditional academic setting—which is markedly different than the voluntary—for both parents and student—extracurricular athletic setting.

The Sixth Circuit remanded the case to determine whether or not the suspension of Randall McElhaney was in retaliation for exercising his First Amendment rights that the Sixth Circuit held were established at a "low level of generality" and denied qualified immunity to all of the individual defendants without regard to the specific contours of their personal involvement.

REASONS FOR GRANTING THE PETITION

I. THERE IS A WELL-DEFINED SPLIT IN THE CIRCUIT COURTS OF APPEAL. THE SIXTH CIRCUIT'S CONCLUSION THAT A PARENT HAS A FIRST AMENDMENT RIGHT TO CHALLENGE A COACH ON HIS CHILD'S PLAYING TIME—EVEN THOUGH THAT WAS AGAINST TEAM RULES TO WHICH HE AGREED—IS INCONSISTENT WITH HOLDINGS FROM THE THIRD CIRCUIT AND EIGHTH CIRCUIT.

A writ of certiorari is warranted because the Sixth Circuit decision joins a well-defined split among the circuits that have considered the underlying constitutional question of whether a high school varsity

athletic coach may implement team rules that restrict a parent's ability to criticize his internal coaching decisions regarding playing time and playing position in an extracurricular sport. The Sixth Circuit's decision directly conflicts with the decision of the Third Circuit Court of Appeals in *Blasi v. Pen Argyl Area School District*, 512 Fed. Appx. 173 (3rd Cir. 2013), which permitted the high school coach to validly make such restrictions. Directly contrary to the Sixth Circuit opinion, the Third Circuit in *Blasi* held:

> The first and second counts of the complaint set forth plaintiff's charges that the School District violated his constitutional right to free speech both by sanctioning him for the e-mails criticizing his sons' coaches and team mates and by enacting a subsequent amendment of its Guidelines expressly extending the prohibition against degrading, ridiculing or berating coaches and players to the use of electronic media (internet/e-mail etc.). We find no merit in his claims.
>
> School officials have comprehensive authority, consistent with fundamental constitutional safeguards, to maintain an environment suitable for academic and extra-curricular learning by all students. *See Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). There is no constitutionally protected right to play sports. *See Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 344 n. 2 (3d Cir. 2004).
>
> The narrower goals of an athletic team differ from those of academic pursuits and are not

always consistent with the freewheeling exchange of views that might be appropriate in a classroom debate. *See, e.g.*, *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). School officials have a legitimate interest in affording student athletes "an educational environment conducive to learning team unity and sportsmanship and free from disruptions that could hurt or stray the cohesiveness of the team." *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001).

In order to achieve an effective and efficient athletic program for the students who wish to play, school officials may properly condition participation with a greater limitation of constitutional rights, including the right to free speech, than might otherwise be permissible. *See Tennessee Secondary School Athletic Association v. Brentwood Academy*, 551 U.S. 291, 127 S.Ct. 2489, 168 L.Ed.2d 166 (2007) (restriction on speech in recruiting athletes); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (voluntary participants in school athletics have reason to expect intrusions upon normal rights and privileges).

In this instance, plaintiff's charges are made in the context of an athletic program in which his sons' participation, and by extension his own, is voluntary. Plaintiff was aware of and agreed to the standards required of students, and their parents, in order to participate in the School District's basketball program, including restrictions on the manner and tone

> of speech used with respect to coaches and other players. Although he makes an unsupported argument of non-applicability, the plaintiff acknowledges in his complaint that such restrictions were "drafted as a reasonable time, place, and manner regulation of speech. [Emphasis added.]

Blasi at 175-176.

The Sixth Circuit opinion is also in conflict with *Wildman v. Marshalltown School District*, the Eighth Circuit Court of Appeals, 249 F.3d 768 (8th Cir. 2001) where the coach required a player to write an apology to her teammates before allowing her to return to the team. Respectfully, it also contradicts *Lowery v. Everard*, 497 F.3d 584 (6th Cir. 2007) where students were dismissed from a football team where they circulated a petition that they "hated" the football coach.

The well-defined split among the circuits is also reflected by *Frierson v. Reinisch*, 806 Fed.Appx. 54 (2nd Cir. 2020), a case which denied qualified immunity in a case involving a parent who criticized a coach in meetings with students and parents. This Second Circuit case is also contrary to the Third Circuit and the Eighth Circuit, as the district court below recognized. 627 F.Supp.3d at 918. ("Even if unpublished authority counted, *Frierson* could hardly be considered to have placed the issue beyond debate when an equally, non-controlling unpublished Third Circuit case reached the opposite conclusion on facts much more analogous to those presented here."). As the district court recognized, but the Sixth Circuit ignored, this thus reflects a well-defined circuit split.

Finally, this case has significant public policy implications because it constitutionalizes a violation of reasonable team rules that limit time, place and manner interference with discretionary internal coaching decisions concerning the playing time of a player or the playing position of a player in a voluntary extracurricular athletic activity. The coach must be able to freely decide who to play and what position; when to substitute; and similar decisions to maintain effective control of the team being coached.

The Sixth Circuit's denial of qualified immunity contradicts the Third Court of Appeals that has considered the identical First Amendment issue, as well as the similar Eighth Circuit case, and thus together with the Second Circuit creates a well-defined split among the circuits on the ability to limit a parent's criticism of coaching decisions, even when the parent agrees to abide by such team rules when their child is on a varsity athletic team in extra-curricular activities.

II. THE SIXTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S QUALIFIED IMMUNITY PRECEDENT AND ADOPTS A NEW STANDARD INCOMPATIBLE WITH THIS COURT'S PRECEDENT.

In addition to creating a split in the circuits, the Sixth Circuit decision is contrary to this Court's precedent in the qualified immunity analysis requiring a high "degree of specificity," *Mullenix v. Luna*, 136 S.Ct. 305, 309, (2015) (*per curiam*), rather than what the Sixth Circuit defined for the very first time as a "low level of generality." This test (the phrasing of which has apparently never before been used in the Sixth Circuit or any Circuit) is not consistent with this

Court's requirement that the law must be "particularized to the facts of the case." *See White v. Pauley*, *supra*. Indeed, the district court below affirmatively recognized that the only authority were two competing unreported cases from the Third Circuit and the Second Circuit, and that there was no particularized caselaw placing the matter beyond debate or the individual defendants on notice.

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). "If a constitutional right would have been violated under the plaintiff's version of the facts, 'the next, sequential step is to ask whether the right was clearly established.'" *Saucier*, 533 Y.S. at 201. However, after *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) the Court need not decide the constitutional question but may analyze the case to determine if the law was "clearly established". Stated another way, "the salient question" is whether the state of the law at the time of this incident gave a defendant "fair and clear warning" that the conduct with respect to the plaintiff was unconstitutional. *See White v. Pauly*, 137 S.Ct. 548 (2017)

> Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640, 107

> S.Ct. 3034, 97 L.Ed.2d 523 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Id., at 639, 107 S.Ct. 3034.

White at 252.

And *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018):

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *al-Kidd*, *supra*, at 741-742, 131 S.Ct. 2074 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *See Reichle*, 566 U.S., at 666, 132 S.Ct. 2088. Otherwise, the rule is not one that "every reasonable official" would know. *Id.*, at 664, 132 S.Ct. 2088 (internal quotation marks omitted).
>
> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours

> must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 577 U.S. ___, ___, 136 S.Ct. 305, 309, 193 L.Ed.2d 255 (2015) (*per curiam*)

Wesby at 589-590. *See also Kisela v. Hughs*, 138 S.Ct. 1148 (2018); and *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074 (2011).

Under this threshold inquiry, the Sixth Circuit's decision conflicts with this Court's clearly established precedent that requires courts to judge a governmental employee's restriction on speech without any specific guidance by way of a decision from this Court, from the Sixth Court of Appeals, or from the perspective of a reasonable public official on the scene.

The Third Circuit has held that a high school coach may develop team rules that limit a parent's ability to criticize the coaching decisions with respect to playing time or playing position. This Sixth Circuit case below is contrary to the decision of the Third Circuit.

The speech in question in this case occurred in the context of an extracurricular varsity high school softball program. It is well-established that students do not have a general constitutional right to participate in extracurricular athletics. *See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763 (6th Cir. 1999), *rev'd on other grounds*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001); *Alerding v. Ohio High School Athletic Ass'n.*, 779 F.2d 315 (6th

Cir. 1985); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004); *Niles v. University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983). Schools are free to impose restrictions on students in these extracurricular activities, as well as parents—that would not be permissible in an academic school setting. The Third Circuit in *Blasi* affirms this. A student's participation in extracurricular activities, and by extension the parent's, is voluntary.

The Sixth Circuit's decision is contrary to this Court's precedent in its qualified immunity analysis because there is no case from this Court, from the Sixth Circuit Court of Appeals, the District Courts in Tennessee, or the Tennessee Supreme Court that declares a rule such as this unconstitutional or improper. There is no precedent that would have put school personnel on notice that this rule violated the parent's Constitutional rights as required by all cases from this Court since even before *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074 (2011), where this Court held:

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood what he is doing violates that right.

Al-Kidd at 2083. [Emphasis added.]

This doctrine has been followed consistently by this Court with respect to the issue of qualified immunity. *See White v. Pauly*, 137 S.Ct. 548 (2017); *District of Columbia v. Wesby*, 138 S.Ct. 577 (2017); and *Kisela v. Hughes*, 138 S.Ct. 1148 (2018).

In *White v. Pauly*, 137 S.Ct. 548 (2017) this Court held:

> While this Court's case law "do[es] not require a case directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*, at ___, 136 S.Ct., at 308. In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law." *Ibid.*

White at 551.

These High School coaches, athletic directors and principals are not plainly incompetent, nor knowingly violating the law. There was no precedent that clearly established that their actions violated Randall McElhaney's constitutional rights and the Sixth Circuit analysis at a "low level of generality," was contrary to what this Court has required in the qualified immunity analysis.

The Sixth Circuit also made no attempt to examine the actions of each individual, but denied qualified immunity to all of them, without identifying "clearly established" precedent relative to any of their individual conduct.

The Sixth Circuit also erroneously conflated this with the traditional academic setting—which is markedly different than the voluntary—for both parents and student—extracurricular athletic setting—which had never been done in the Sixth Circuit or this Court—and had only been analyzed in *Blasi*, *supra*. Accordingly, respectfully, the Sixth Circuit did not analyze this case in the "specific" analysis required.

The only case that met the "particularized" standard directly was *Blasi* from the Third Circuit. Cases from the Sixth Circuit "leaned" in the direction of *Blasi*, but the Sixth Circuit did not follow them. *See Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). *Heike v. Guevara*, 519 Fed. Appx. 911 (6th Cir. 2013), *Stokey v. North Canton School District*, 2018 WL 2234953 (N.D. Ohio 2018).

CONCLUSION

Particularly given the significance of the case for the high school coaching community and educational community—above and beyond simply the interests of the parties to this lawsuit—the Court should grant *certiorari* review and cure the well-defined split of authority between the Sixth and Second Circuits on one hand and the Third and Eighth Circuits on the other. The orderly administration of justice and the gravity of the implications of the decision throughout the secondary athletic administration, demands no less than the Court's attention.

The Court should also use the opportunity to quash the improvident recharacterization by the Sixth Circuit of the test for "clearly established" law in the context of qualified immunity, a test the Sixth Circuit apparently intends to broadly apply given the designation of the case below to be reported for publication.

For the foregoing reasons, Petitioners respectfully request that the decision of the Sixth Circuit denying qualified immunity and creating a split of authority

among the circuits be summarily reversed, or alternatively, that a writ of certiorari be granted.

Respectfully submitted,

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