NO. 23-572

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 20, 2023 *Counsel for Respondent*

COUNTERSTATEMENT OF QUESTION PRESENTED

Does a parent have a clearly established right to criticize the ways in which public school employees treat the parent's child at school, such that school officials are on notice that retaliation against the parent violates the parent's First Amendment rights?

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STATEMENT OF THE CASE

This matter arises from a lawsuit brought under 42 U.S.C. § 1983 by Randall McElhaney, a parent of a student athlete, against employees of a public high school in Tennessee, a school resource officer, and the Putnam County School System in Tennessee, on claims of retaliation against Mr. McElhaney's exercise of his right to free speech. School officials retaliated against Mr. McElhaney based on the content of his speech to and about a school official, even though such speech is protected by the First Amendment.

I. The Parent's (Mr. McElhaney) Protected Speech and the Retaliation Against Him.

Mr. McElhaney's daughter L.M. was, at the time of the events giving rise to this matter, a member of the Upperman High School softball team in Baxter, Tennessee. Doc. 45-12, Page ID # 433.[1] Plaintiff is an ardent supporter of his daughter and her team and holds season's tickets for her softball games. Doc. 45-7, Page ID # 407. L.M. normally played the positions of pitcher and second base, but on or about April 2, 2021, Dustin Williams, the softball coach, replaced L.M. with a lesser performing player at second base. Doc. 45-10, Page ID # 411. This continued for several games. *Id.* Mr. McElhaney contacted Coach Williams via private text message to find out why L.M. was not allowed to play second base and why she was singled out to give less experienced players opportunities to

[1] "Doc." Refers to docket entries in the district court.

play during important games. Doc. 45-10, Page ID # 411-412.

Coach Williams felt "completely disrespected" by Mr. McElhaney and objected to the fact that L.M. saw the text messages, and so he forwarded the private messages to Upperman High School Principal William Stepp and Athletic Director Nathan Brown. Doc. 45-11, Page ID ## 422, 444; Pet.App.6a. Principal Stepp found the text messages "inappropriate" and responded by barring Mr. McElhaney from attending L.M.'s softball games for a week. Pet.App.6a; Doc. 45-13, Page ID ## 438, 441-442. Principal Stepp and Athletic Director Brown later met with Mr. McElhaney to address the text messages, which resulted in Mr. Brown's refusal to "overrule" Principal Stepp's decision. Pet.App.6a. Doc. 45-4, Page ID # 389-390.

Nevertheless, Mr. McElhaney attended L.M.'s softball game on April 20, 2021, to support his daughter. He sat in his reserved seat and did not cause any disruption. Pet.App.7a. During the third inning of the game, Principal Stepp became aware of Mr. McElhaney's presence and asked him to leave the stands. The two men went toward the gate where they were joined by John Pettit, a School Resource Officer and Deputy Pettit employed by the Putnam County Sheriff's Department. Doc. 45-2, Page ID # 359. Although Deputy Pettit did not observe Mr. McElhaney violating any law or being disorderly, the deputy told him that he had to leave if Principal Stepp wanted him to and that if he did not comply, he was trespassing. Doc. 45-2, Page ID # 361. Not wanting to risk arrest, Mr. McElhaney left.

Following the April 20, 2021 game, Timothy Martin, the Putnam County Deputy Director of Schools and

Corby King, Superintendent of Schools for Putnam County, each spoke with Mr. McElhaney separately and rubber-stamped Principal Stepp's ban of Mr. McElhaney. Doc.45-1, Page ID # 351; Doc. 45-3, Page ID ## 379-382, 373-376.

II. Proceedings in the District Court

On May 7, 2021, Mr. McElhaney filed suit in the U.S. District Court for the Middle District of Tennessee, Northeastern Division. He brought a civil rights action under 42 U.S.C. § 1983 against defendants Dustin Williams, William Stepp, Nathan Brown, Timothy Martin, and John Pettit, asserting that his communications with Coach Williams constituted protected speech under the First Amendment and that the defendants had impermissibly retaliated against him for exercising those speech rights.

All defendants moved for summary judgment, asserting qualified immunity. In reaching its decision, the district court relied on case that governs student speech in school—most notably *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007)—and it erroneously applied that law to the speech of an adult, Mr. McElhaney.[2] By doing so, the court determined that Mr. McElhaney

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[2] In *Lowery*, the Sixth Circuit relied on *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) for the proposition that "school officials may regulate speech that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." *Lowery*, 497 F.3d at 588. The court concluded that because, "[i]t was reasonable for [school officials] to forecast that [the student athlete's speech] petition would undermine [the coach's] authority and sow disunity on the football team[,] . . . there was no constitutional violation" in dismissing the student from the team. *Id.* at 600-01. *Lowery*, by its own terms, applied specifically to student speech.

was not exercising a clearly established right. Therefore, in its Memorandum Opinion of September 8, 2022, the district court held that the defendants were entitled to qualified immunity and dismissed the case. Pet. App.20a.

Plaintiff timely appealed.

III. Appeal to the Sixth Circuit Court of Appeals

On appeal, the Sixth Circuit reversed the grant of summary judgment and held that "any reasonable officer would have understood that McElhaney's speech was protected." Pet.App.10a.

The Sixth Circuit noted that "[f]or the most part, defendants' understanding of the First Amendment rests on student-speaker precedents," Pet.App.11a, but that such case law "does not guide our consideration of parental speech about educational institutions," Pet.App.12a. Accordingly, the Circuit Court rejected district court's application of *Lowery* to this matter.

The Sixth Circuit explained that permissible viewpoint-based prohibitions on speech are limited to only a few categories, specifically fraud, obscenity, incitement, and criminal speech, Pet.App.11a (citing *United States v. Alvarez*, 567 U.S. 709, 717, 720 (2012)), and that if the speech does not fall into one of those categories, "schools cannot regulate the content of parents' speech about their child to a school employee who interacts with the child." Pet.App.11a. (citing *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 588 (6th Cir. 2008); *Wenk v. O'Reilly*, 783 F.3d 590, 599 (6th Cir. 2015)).

The Sixth Circuit remanded the matter to the district court to determine "whether defendants had a

retaliatory motive when they suspended McElhaney—which, if so, would be at odds with the First Amendment." Pet.App.14a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT WITH OTHER CASES THAT WARRANTS REVIEW BY THIS COURT.

Though Petitioners allege two circuit splits, neither withstands scrutiny.

A. There Is No Split With the Third Circuit.

Petitioners assert that there is a split between the Sixth Circuit opinion and the Third Circuit case of *Blasi v. Pen Argyl Area School District*, 512 F.App'x 173 (3d Cir. 2013). However, *Blasi* is unpublished, and the facts and holding of that case defeat that assertion.

The Third Circuit determined that the 2013 *Blasi* case should have no precedential value. 512 F.App'x at 174. It is not binding authority in any circuit, neither the Third Circuit nor any other federal court of appeals has cited the opinion with approval in the ten years since it was filed. Thus, any "split" is illusory.

Furthermore, the facts and holding of *Blasi* differ in significant ways from those of this case.[3] In *Blasi*,

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[3] The facts set forth in the *Blasi* opinion are rather scant. The Third Circuit seemed to recognize this, stating: "We write principally for the parties, who are familiar with the factual context and legal history of this case. Therefore, we have set forth only those facts necessary to our analysis." *Id.* at 175.

the father of two public school basketball players complained to coaches about "their coaching methods, the behavior of his sons' team mates [*sic*] toward them, and alleged favoritism" toward other players. *Id.* In *Blasi,* the parent sent "scathing and threatening emails in which [he] berate[d] and harass[ed] . . . coaches and ma[d]e degrading and deplorable comments about 7th and 8th grade players" about students. *Id.* The school principal sanctioned the father for violating the Parent/Spectator Guidelines by barring him from the next home game. *Id.* The father brought an action pursuant to § 1983 in the U.S. District Court for the Eastern District of Pennsylvania, and the district court granted the school district's motion to dismiss. *Id.* (Emphasis added).

On appeal, the Third Circuit held that the school could sanction the father because the guidelines provided a "reasonable time, place, and manner regulation of speech," as the father himself conceded. *Blasi*, 512 F.App'x at 175; *see, generally*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The court noted: "The Guidelines do not preclude or prohibit criticism of coaches (or even other team members) but regulate the time, place, and manner in which such concerns are expressed in a way necessary to manage an effective and efficient basketball program." *Id.*

The facts of *Blasi* are notably different from those of this case. Although the contents of the father's emails are not included in the Third Circuit's opinion, the emails were "threatening." Mr. McElhaney never threatened anyone in any manner. He most decidedly annoyed Coach Williams and others, but he is not alleged to have threatened anyone. Although the Third Circuit did not resolve the issue on this basis, it

well could have, as "the First Amendment would not protect the parent's speech because 'true threats' are not protected speech." Pet.App.13a (citing *Virginia v. Black*, 538 U.S. 343, 351 (2003)). Nonetheless, the legal principal that holds up *Blasi* is the school's ability to impose viewpoint neutral, place, and manner restrictions on speech. *Blasi*, 512 F. App'x at 175. In *Blasi,* the rules did not preclude criticism of the coaches; however, in this case, school officials are trying to enforce just such a limitation. Petitioners retaliated against Mr. McElhaney for the content of his speech, *i.e.* for failing to "be positive," and not due to failure to abide by a time, place, and manner restriction. *See* Pet.App.20a-21a.[4] Moreover, the court in *Blasi* conducted no qualified immunity analysis. It made no specific determination of whether the parent was exercising a clearly established right.

Therefore, there is no true split of authority between the Sixth and Third Circuits because (1) *Blasi* and this case are decided based on different legal principles; (2) because *Blasi* has no precedential value; (3) and *Blasi* has not been relied upon as precedent in the ten years since the decision was filed.

B. There Is No Split With the Eighth Circuit.

There is no split between the Sixth Circuit and the Eighth Circuit's *Wildman v. Marshalltown School*

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[4] As the Sixth Circuit observed in the case below, the "Parent-player Information" sheet also contained time, manner, and place restrictions "including a ban on interactions between parents and players during games (a time restriction) and a prohibition on parents attending practice (a place restriction)." Pet.App.14a. However, Mr. McElhaney was never alleged to have violated those restrictions.

District, 249 F.3d 768 (8th Cir. 2001), because in *Wildman* the issue was school regulation of student speech, an entirely different issue than the one presented in this case.

In *Wildman*, a high school basketball player wrote a letter to her teammates due to her frustration at not being promoted to the varsity team. 249 F.3d at 769. In the letter, the student called for her team to "do something about this" and to "give [the coach] back some of the bullshit that he ha[d] given" the team. *Id*. Upon learning of the letter, the coaches gave the student an ultimatum: apologize to her classmates within twenty-four hours or she would not be allowed to return to the team. *Id.* The student refused to apologize and was barred from playing basketball for the rest of the season and from the post-season awards banquet. *Id.* The student brought suit in the United States District Court for the Southern District of Iowa against the school principal, school athletic director, varsity girls' basketball coach, and the school district, alleging that they violated her rights under the Free Speech Clause of the First Amendment. The district court, dismissed the case on the defendants' motion for summary judgment, "holding that Wildman's letter materially interfered or substantially disrupted a school activity." *Id.* at 771.

On review, the Eighth Circuit, applying *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) and its progeny, held that the student's insubordinate speech which toward her coaches and her suggestion that the team unite in defiance of the coach was not protected speech. *Wildman*, 240 F.3d at 772. The actions of the school officials in this situation reflected its authority to teach their students "civility

and sensitivity in the expression of opinions." *Id.* at 771 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Poling v. Murphy*, 872 F.2d 757, 758 (6th Cir. 1989)).

The factual difference between these cases is clear. Unlike in *Wildman*, Mr. McElhaney was not a student subject to the school's discipline. His communication with Coach Williams was between two adults, specifically between a citizen and a public official. Mr. McElhaney's speech was aimed at a single audience: Coach Williams. It was not distributed to others in an attempt to cause team members to defy the coach in any way.

The differing facts raised a completely different legal issue than the one implicated in the present case. In *Wildman,* the issue was the regulation of student speech in a public-school setting. The specifical question before the Eighth Circuit was whether a school could discipline a student for her speech when that speech was insubordinate to her coaches and disruptive to the team's operation. In contrast, the question before the Sixth Circuit was whether school officials could discipline an adult for his speech to and about school officials.

Clearly, the legal standard applicable issues involving the speech rights of students in public schools is different from First Amendment standards outside of that context. It is well-settled that the speech rights of students in a public school setting are not coextensive with the rights of adults. *Bethel*, 478 U.S. at 682; *Morse v. Frederick*, 551 U.S. 393, 396-397 (2007). "A consistent theme running throughout *Tinker* and its progeny is that the First Amendment rights of students are more limited than those of adults." *Lowery*,

497 F.3d at 600. Indeed, school officials, generally, may enforce rules of conduct against students even though the same conduct "would be perfectly permissible if undertaken by an adult." *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (considering schools' regulatory authority over students in the Fourth Amendment context) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

Furthermore, just as in *Blasi*, the Eighth Circuit in *Wildman* did not conduct any analysis under the law of qualified immunity. Specifically, there is no analysis of whether the student was exercising a clearly established right. It is incongruous for Petitioners to assert that the Sixth Circuit did not properly apply the "clearly established" prong of the qualified immunity analysis and then try to convince this Court that there is a split with the Eighth Circuit in a case that did not encompass that analysis at all.

In short, due to the completely different factual and legal issues at play in these cases, there is no circuit split between the Sixth and Eighth Circuits.

II. THE SIXTH CIRCUIT'S OPINION IS IN ACCORD WITH THIS COURT'S QUALIFIED IMMUNITY AND FIRST AMENDMENT PRECEDENTS.

A. The Sixth Circuit Has Not Created a "New Standard" for Qualified Immunity.

Petitioners erroneously argue that the Sixth Circuit adopted a new standard for determining whether a right is clearly established. That is not so. Petitioners have zeroed in on a single phrase ("low level of generality") used but twice in the Sixth

Circuit's opinion, and they ignore the court's actual analysis.

> The Sixth Circuit correctly noted that
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> > clearly established law "should not be defined at a high level of generality." *White v. Pauly*, 580 U.S. 73, 79, 137 S.Ct. 548, 196 L. Ed. 2d 463 (2017) (quotation marks omitted). What does that mean in effect? On the one hand, we do not require an earlier decision that is "directly on point." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S.Ct. 305, 193 L. Ed. 2d 255 (2015). But on the other, "existing precedent" must place the contours of the right "beyond debate." *Id.*

Pet. App. 9a. (Emphasis added.) Because Mr. McElhaney alleges that Petitioners retaliated against him for exercising a protected right, the inquire is "whether any reasonable official would have understood that McElhaney's speech was protected," Pet. App. 9a (citing *Crawford-El v. Britton*, 533 U.S. 574, 593 (1998)), because qualified immunity does not protect an official "if the right retaliated against was clearly established," *id.* (quoting *Bloch v Ribar*, 156 F.3d 673, 682 (6th Cir. 1998)).

This Court has explained that "what 'clearly established' means in [a given] context depends largely upon the level of generality at which the relevant 'legal rule' is to be established." (Quotation marks omitted.) *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (citing *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)). According, the Sixth Circuit stated and applied the "clearly established" test, as it has been enunciated multiple times by this Court: "[W]e have repeatedly

told courts . . . not to define clearly established law a high level of generality." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); *e.g. White*, 580 U.S. at 79; *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The Sixth Circuit in the case below held that Mr. McElhaney's right to criticize how school employees treats his child was clearly established. Pet.App.15a ("In that situation, it is clearly established at a low level of generality that a school official may not retaliate against the parent for the content of his speech.") The words "low level of generality" do nothing to limit "clearly established"; rather it is an acknowledgement that the right has not been defined at a "high level of generality," as this Court has repeatedly instructed.

B. The Sixth Circuit's Opinion Aligns with This Court's Qualified Immunity Precedents.

The Sixth Circuit below set out and applied the following standard:

> Qualified immunity shields officials from trial "unless their actions violate clearly established rights." *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 608 (6th Cir. 2015) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).
>
> [. . .]
>
> [C]learly established law "should not be defined at a high level of generality." *White v. Pauly*, 580 U.S. 73, 79 (2017) (quotation marks omitted). What does that mean in effect? On the one hand, we do not require an earlier decision that is "directly on point."

> *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). But on the other, "existing precedent" must place the contours of the right "beyond debate." *Id.* The constitutional right at issue here is the right not to be subjected to retaliation for engaging in First Amendment activity. In this appeal, the parties have focused their disagreement on the protected nature of McElhaney's speech, so we turn to that question now.

Pet.App.9a.

Petitioner's implied argument is that the facts of the present case must be virtually indistinguishable from a precedential case in order for a right to be "clearly established." That position is in conflict with this Court's precedents.

The Court has clearly stated that "officials can be on notice that their conduct violates established law even in novel factual situations." *Hope v. Pelzer*, 536 U.S. 730, 731 (2002) It is not required that "the very action in question has previously been held unlawful," *Anderson*, 483 U.S. at 640, nor even that previous cases be "fundamentally similar," *Hope*, 536 U.S. at 731. Indeed, there is a "danger . . . [in] a rigid, overreliance on factual similarity." *Id.* at 742. What *is* required is that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.) A "contour" is "the general form or structure of something." *Baynes v. Cleland*, 799 F.3d 600, 616 n.5 (6th Cir. 2015).

The contours of the right has been established, both in this Court's First Amendment jurisprudence

(see *infra*) and in precedential cases dealing with the question of a parent's rights to criticize school officials. The defendants in this matter were put on notice that a parent has a right to criticize school officials, by *Jenkins v. Rock Hill Local School District* and *Wenk v. O'Reilly*. In *Jenkins*, the court held that parents have a constitutionally protected right to criticize school officials, just as any citizen has the right to criticize public officials. 513 F.3d 580.[5] In *Wenk*, parents of an intellectually-disabled teenager brought suit against a school employee, alleging that she filed a child abuse report against the student's father in retaliation for the parents' advocacy to change their daughter's educational plan. 783 F.3d at 587. The court held that parents' "right to be free from retaliation for exercising their First Amendment rights was clearly established at the time of this case," and therefore a school official who retaliated against them was not entitled to qualified immunity. *Id.* at 600.

C. The Sixth Circuit's Opinion Aligns with This Court's First Amendment Jurisprudence.

In determining whether the right in question was clearly established, the Sixth Circuit turned to the "bedrock principle" that underlies the First Amendment's promise of free speech, *i.e.*, that "states cannot prohibit speech merely because it offends the

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[5] The specific question before the Court in *Jenkins* was whether parents' speech about public school officials was constitutionally protected when it was not about a matter of public concern; this Court held that the "public concern" test that applied in cases regarding governmental employee speech was not applicable to parent speech about school officials. 513 F.3d. at 587.

sensibilities of others." Pet.Att.10a (quoting *Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 734 (6th Cir. 2020); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). Indeed, the court noted that other than a few areas, almost all speech is protected from governmental interference, "[e]specially so, it bears adding, when government censorship is based on the views expressed within the speech." Pet.App.10a, (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993)). The court observed:

> [T]here are a handful of categories of speech for which content-based prohibitions may be permissible. But it is a short and somewhat notorious list. It includes "speech expressed as part of a crime, obscene expression, incitement, and fraud." *Novak* [*v. City of Parma*], 932 F.3d [421] at 427 [(6th Cir. 2019)] (citing *United States v. Alvarez*, 567 U.S. 709, 717, 720 (2012)). Unless the nature of their speech falls within one of those "historic and traditional" categories, *Alvarez*, 567 U.S. at 717, schools cannot regulate the content of parents' speech about their child to a school employee who interacts with the child. *See Jenkins*, 513 F.3d at 588; *Wenk*, 783 F.3d at 599.

Pet.App.10a-11a. "But retaliating against speech on the basis of its content, as alleged here, drifts into foul territory." Pet.App.14a.

This analysis by Sixth Circuit is firmly grounded in this Court's First Amendment opinions. It is well established that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 582 U.S. 218, 234 (2017) (quoting *Lamb's*

Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993)) (quotation marks omitted). Indeed, "viewpoint discrimination is an 'egregious form of content discrimination' and is 'presumptively unconstitutional.' *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019).

In sum, the Sixth Circuit's analysis relied upon, and is in accord with, this Court's precedents with respect to both qualified immunity and First Amendment speech protections. As such, certiorari is not warranted or appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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