No. 25-143

In The
SUPREME COURT OF THE UNITED STATES

REBECCA HARTZELL,
Petitioner,

v.

MARANA UNIFIED SCHOOL DISTRICT; ANDREA DIVIJAK; AND JOSEPH DIVIJAK,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This action stems from a short, though emotionally charged, altercation between Petitioner Rebecca Hartzell ("Petitioner") and Respondent Andrea Divijak ("Divijak") on February 7, 2020. Divijak is the principal at the school where five of Petitioner's children were enrolled. Following the altercation, Petitioner was removed from campus and local police issued a "no-trespass" order. Petitioner's ban from campus was later upheld by the Marana Unified School District (the "District") Superintendent. In relevant part, Petitioner brought claims for i) alleged violations of her procedural due process rights against the District and ii) First Amendment retaliation against the District and Divijak. Both courts below concluded that Petitioner's due process claim failed because she did not have a protected liberty interest in entering school property. Properly framed, the first question presented is:

1. Whether the Fourteenth Amendment includes a parental right to access school property as a protected liberty interest, triggering procedural due process protections regardless of the reason for denying such access.

The second question presented is:

2. Whether this Court should abandon its long-standing and entrenched qualified immunity precedents by which all state and local government officials are treated similarly, regardless of their job duties or the nature of the alleged unconstitutional act.

TABLE OF CONTENTS

TABLE OF SUPPLEMENTAL APPENDICES

TABLE OF CITED AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

RULES

INTRODUCTION

Petitioner requests certiorari on two distinct questions. First, she asks this Court to constitutionalize a parental right to enter school campuses by over-reading the Ninth Circuit's decision below and framing that decision as evidence of an entrenched circuit split. But no such split exists. Second, Petitioner asks the Court to eliminate qualified immunity for non-law enforcement government officials or, in the alternative, to create a different qualified immunity standard for non-law enforcement government officials despite, among other shortcomings, there being no evidence in the record that her desired standard would have led to a different result in this case.

On the first question, the Ninth Circuit correctly held that parents do not have a liberty interest in physically accessing school property under the Fourteenth Amendment. No other circuit court has reached a contrary conclusion. In fact, it does not appear that any other circuit court has answered that question at all. The bulk of cases addressing the scope of a parent's right to direct the care and upbringing of their children in the school context involve First Amendment claims related to curriculum issues, student and family behavioral surveys, or other pedagogical matters. As a result, the Ninth Circuit appears to be the first circuit court to have squarely addressed the issue of whether the Fourteenth Amendment itself, not in combination with any other constitutional right, guarantees a parental right to physically access school property.

On the second question, Petitioner asks the Court to create a new qualified immunity standard for school principals based on the argument that principals "have plenty of time to reflect on the constitutionality of their actions" as opposed to law enforcement officers making split-second life or death decisions. Petition, p. i. But, even if the Court were inclined to create a new standard, this is not the appropriate case to do so. Nothing in the record suggests that Divijak had "plenty of time to reflect on the constitutionality" of her actions. Law enforcement arrived on the scene, questioned all parties, and informed Petitioner that she was "trespassed" from campus all within a short period of time. To be sure, other school district officials later had time to reflect on the legality of their options. But those officials are not and have never been defendants in this case. And no finder of fact has yet determined that Petitioner's constitutional rights were even violated.

In any event, adopting Petitioner's proposed standard would eviscerate the long-standing authority of school principals to regulate the school environment for the protection of their students. The fear of personal liability would hamper the ability of school administration to make the snap decisions sometimes necessary to protect the well-being of the school community. Finally, this is an uncommon case in that the grant of qualified immunity did not eliminate Petitioner's ability to recover for alleged constitutional harms. Petitioner's First Amendment retaliation claim against the District survives and is currently set for trial in late October. In short, this is

not a case where granting a state actor immunity effectively precludes recovery for an aggrieved plaintiff.

This Court should deny the petition.

STATEMENT

In the 2019-20 school year, Petitioner had five children enrolled at Dove Mountain C-Stem K-8, a K-8 school within the Marana Unified School District. Pet. App. 3a-4a. It is undisputed that Petitioner made complaints about school operations as described in the petition. Pet. App. 5a-6a. In fact, even before her children were enrolled in this school (though still within the District), Petitioner had advocated for her children and other students within the District. Pet. App. 4a-5a. While District and other school officials did not always agree with Petitioner's complaints and, admittedly, some subordinate employees spoke unfavorably of Petitioner, it was not until February 7, 2020, when Petitioner physically grabbed Divijak, the school principal, that Petitioner was removed from campus.[1] Pet. App. 7a.

[1] Petitioner maintains to this day that any contact was incidental. At minimum, it was not until the events of February 7, 2020, when she made some sort of physical contact with Divijak that she was removed from campus. But the motivations for the removal remain a live question to be resolved by a jury. It is worth noting, however, that a jury returned a defense verdict on a defamation claim against Divijak in which Petitioner alleged that Divijak said that Petitioner "grabbed her" and that this statement constituted defamation. Pet. App. 15a.

On that day, Petitioner approached Divijak to complain about the scheduling of her children's presentations. Pet. App. 6a. Because she was overseeing a school-wide event, Divijak did not want to engage in that conversation at that time. Pet. App. 6a. To leave the classroom she was in, she had to walk by Petitioner. Pet. App. 6a. As Divijak did so, Petitioner grabbed Divijak's wrist and told Divijak to not walk away from her. Pet. App. 50a. Divijak instructed Petitioner to not touch her. Pet. App. 50a. After she broke free from Petitioner's grip, she was visibly emotional and one of her staff called the police to report that the school's principal had just been grabbed by a parent. Pet. App. 50a. Divijak's secretary made this report to law enforcement.

Shortly thereafter, police responded to the scene and began conducting interviews. Pet. App. 7a-8a. Marana Police Officer Jerry Ysaguirre interviewed Petitioner in the parking lot of the school. Pet. App. 7a. During that interview, Petitioner admitted that she intended to reach her hand out and touch Divijak to stop her from walking away. Pet. App. 7a. She denied grabbing Divijak. Pet. App. 7a. Officer Ysaguirre then interviewed Divijak and other school staff before watching security camera footage of the incident. Pet. App. 8a. In his interview with Petitioner, Officer Ysaguirre informed her that she was being "trespassed" from the campus. Pet. App. 51a.

After interviewing Petitioner, Divijak, other school employees, and Paul Gute (a school parent), and reviewing the security camera footage, Officer

Ysaguirre referred Petitioner for prosecution under a specific Arizona statute related to assault of school employees. Pet. App. 52a. Several months later, the town prosecutor dismissed those charges. Pet. App. 52a.

Following the incident, Petitioner requested a meeting with District officials, including the superintendent, Dr. Doug Wilson. Pet. App. 51a. That meeting occurred on February 24, 2020. Pet. App. 9a. Prior to the meeting, however, Petitioner sent a letter to Dr. Wilson, through her attorney, in which she stated that the letter would be the only statement she would make regarding the February 7, 2020, incident. Supp. App. 2a.[2]

Following the meeting, Petitioner sent an email to Dr. Wilson and his staff confirming her "understanding of the conditions moving forward." Supp. App. 2a. In it, she acknowledged that she could enter the school to pick up her preschooler. Supp. App. 3a. She also confirmed she could pick up her other children from school as needed. Supp. App. 3a. She also confirmed that she understood that she would check back in on April 1, 2020, regarding her "ability to attend end of year performances (barring no incidences have occurred)." Supp. App. 4a. Finally, she requested clarification regarding her ability to communicate with her children's teachers. Supp. App. 4a.

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[2] To more fully lay out all relevant facts, Respondents have included a Supplemental Appendix [Supp. App.] with limited additional relevant portions of the record.

From that meeting forward, Petitioner was allowed to pick up and drop off her preschooler. Supp. App. 2a. She was also allowed to, and did, communicate with her children's teachers. Supp. App. 3a-4a. Petitioner detailed the terms discussed in the February 24, 2020, meeting and abided by every other term therein. Yet, Petitioner continues to characterize the ban as "indefinite" despite herself confirming it would end April 1, 2020. Petitioner knew from the date of that meeting that she would be allowed back on campus beginning on April 1, 2020. Unfortunately, the COVID-19 pandemic resulted in the closure of all public schools in Arizona, beginning in March 2020 and lasting for the remainder of the school year. Petitioner then withdrew her children from the District for the 2020-21 school year. Pet. App. 52a.

REASONS FOR DENYING THE PETITION

Neither question presented by the petition warrants this Court's review. There is not, in fact, a circuit split on the scope of a parent's right to direct the care and upbringing of their children requiring this Court's intervention. In reality, the Ninth Circuit was the first circuit court to decide whether parents have a protected liberty interest in accessing school property. Nor is this case an appropriate vehicle for the Court to alter its long-standing qualified immunity precedents. These reasons are addressed in turn below.

I. The First Question Presented Does Not Warrant Review.

Properly framed, the first question presented—whether the right to access school property is a liberty interest protected by the Fourteenth Amendment—does not warrant review. The Ninth Circuit is the first circuit court to have squarely addressed this question and, as a result, no circuit split exists, and this Court's intervention would be premature.

A. Petitioner's Fourteenth Amendment claim was expressly premised on a "liberty interest" to access school property, which the Ninth Circuit properly found did not exist.

Petitioner's Due Process claim was far more narrow than described in the petition. She alleged that her substantive due process right to direct the care and upbringing of her children by being present on their school campus was violated without sufficient procedural due process. Pet. App. 66a-67a. Thus, Petitioner's procedural due process claim was based entirely on a claimed liberty interest in physically accessing her children's school. Pet. App. 66a-67a.

The only question presented to and resolved by the Ninth Circuit, therefore, was whether the parental liberty interest pronounced in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925)[3] extends so far as to

[3] This liberty interest in directing the care and upbringing of

encompass a parental right to physically enter school property. Because the District Court and Ninth Circuit answered that question in the negative, Petitioner's procedural due process claim failed.[4] And Petitioner has identified no other case law—of this Court, a circuit court, or any other court—holding to the contrary.

B. No circuit split exists regarding the scope of the alleged *Meyer-Pierce* right at issue in this case: physical access to schools.

Petitioner frames the decision below as demonstrating a deep and ongoing circuit split over the scope of a parent's right to direct the care and upbringing of their children. But a proper framing of the issue, *see supra* Section I.A, reveals the novelty of this issue. This is not a case involving the scope of parental rights to participate in or influence the content of their child's education. Petitioner made no such claims.[5] Instead, Petitioner sought (and seeks)

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one's children is commonly referred to as the *Meyer-Pierce* right.

[4] The District Court and Ninth Circuit determined that Petitioner did not have a protected liberty interest in accessing school property. As a result, the question of what procedural process was due to and received by Petitioner was not addressed by either court below.

[5] Petitioner belatedly attempted to inject First Amendment issues into her procedural due process claim to avoid summary judgment. Pet. App. 39a-40a. The District Court properly rejected those attempts, and the Ninth Circuit affirmed the District Court's ruling that Petitioner had not adequately asserted that theory of liability in her Complaint pursuant to

to constitutionalize a parental right to access school grounds. The Ninth Circuit cleanly framed the issue: "Hartzell was banned from accessing school property. This does not implicate Hartzell's right to direct her children's education." Pet. App. 39a.

In its decision below, the Ninth Circuit decided only that the *Meyer-Pierce* right, on its own, does not include a liberty interest in accessing school grounds triggering procedural due process protections. Pet. App. 38a-39a. Because the right to access school property is not encompassed within the *Meyer-Pierce* right, Petitioner's procedural due process claim failed.

No other circuit appears to have squarely addressed this question, let alone come to a contrary conclusion. The two Third Circuit cases cited by Petitioner do not demonstrate a circuit split. In *C.N. v. Ridgewood Board of Education*, 430 F.3d 159 (3d Cir. 2005), after affirming that the *Meyer-Pierce* right "is neither absolute nor unqualified," the Third Circuit held that a middle and high school student behavioral survey did not unconstitutionally interfere "with parental decision-making authority," even under what Petitioner refers to as the "parent-primacy" model. *Id.* at 182, 185.

Petitioner's second case fares no better. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), the Third Circuit held it was a violation of a family's substantive due process rights for a student's swim coach to, among other acts, require the student to

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Rule 16, Fed. R. Civ. P. Pet. App. 40a-41a.

submit to a pregnancy test and engage in gossip surrounding the student's possible pregnancy. *Id.* at 305-07. Neither *C.N.* nor *Gruenke* addressed a parental right to physically access school property. As a result, there is no circuit split on this issue.

There is ample case law from this Court and varying circuits defining the contours of the *Meyer-Pierce* right, including many discussed in the petition. But critically, these decisions often involve school curriculum, pedagogical, or instructional matters or privacy rights and the interplay between the *Meyer-Pierce* and those other constitutional (often First Amendment) rights. See, e.g., *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (finding violation of right to direct religious upbringing of children); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005) (holding no "fundamental right to exempt [a] child from the school dress code"); *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (finding 50-hour community service graduation requirement did not infringe on *Meyer-Pierce* right). Each court that has addressed whether, and to what extent, the *Meyer-Pierce* right extends past the schoolhouse door was presented with questions related to classroom or school operational matters; not whether parents could physically enter campus. To the extent a circuit split exists regarding the scope of the *Meyer-Pierce* right, it is on these instructional and, often, First Amendment, topics. But this case does not present any such question, and no split exists regarding the question at issue here: whether the Fourteenth Amendment, on its own, includes a parental right to

access school property as a protected liberty interest, triggering procedural due process protections.

C. Granting the Petition and finding in Petitioner's favor would require this Court to articulate, as a matter of first impression, a new balancing test between the *Meyer-Pierce* right and the ability of school officials to secure their campuses.

Even if the right to access school grounds emanates from the penumbras of the *Meyer-Pierce* right, illuminating the shadows of that right at this stage would require the Court to adopt a test in the first instance to balance the right with multiple long-recognized state interests without the benefit of lower court percolation.

In myriad contexts, decisions resolving constitutional claims against school districts affirm the ability of school officials to "maintain order on school premises and secure a safe environment in which learning can flourish." *Wofford v. Evans*, 390 F.3d 318, 321, 323 (4th Cir. 2004). In these cases, courts are required to balance that ability with the constitutional right at issue. The applicable test varies depending on the constitutional right at issue. For example, in the free speech context, courts are tasked with determining whether a student's speech "materially disrupt[ed] classwork or involve[ed] substantial disorder or invasion of the rights of others." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

Similarly, in cases involving student drug testing policies, courts are required to weigh the privacy interests of students against a school's responsibility "for maintaining discipline, health, and safety" of the student body by considering "the nature of the privacy interest allegedly compromised," the "character of the intrusion," and "the nature and immediacy of the [school's] concerns and the efficacy of the Policy in meeting them." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830, 832, 834 (2002).

In the case of access to school property, it is clear that school officials have an important interest in protecting the safety of campus. If a parent on campus is cursing, fighting with a sports official, assaulting an administrator, interfering with a teacher's ability to teach, or engaging in other clearly disruptive conduct on campus, local school officials need to be able to keep children safe and learning by promptly removing that parent from campus without providing some sort of pre-deprivation due process. Of course, if the removal is for an illegal reason, then the parent has other avenues to challenge the removal. A fundamental right to be on campus is not necessary to protect parents' rights.

A finding in Petitioner's favor would require this Court to not only decide that the *Meyer-Pierce* right includes a right to access school property but also to create a new test instructing lower courts how to balance that right with the interest of school officials in maintaining an orderly school

environment. Granting the petition at this time would rob the Court of the benefits of percolation below. See, e.g., *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*,587 U.S. 490, 496 (2019) (Thomas, J., concurring); *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J. concurring in part and concurring in the judgment); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

Finally, as described in Section I.A, *supra*, the Ninth Circuit appears to be the first and only circuit court to have addressed the issue of a parental right to access campus, full stop. It may be the case that no such split ever develops. It may also be that this case presents a unique scenario involving an independent *Meyer-Pierce* claim unlikely to recur. Even the cases cited by Petitioner, *see* Petition, p. 19, support a conclusion that these issues are more appropriately resolved via a First Amendment retaliation claim (which, for Petitioner, is proceeding to trial in the District Court). *See McElhaney v. Williams*, 81 F.4th 550 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 696 (2024) (remanding case to the District Court to determine retaliatory intent in banning parent from sporting events following text message criticizing coaches but affirming dismissal of federal due process claim based on parent's property-interest in season tickets); *see also Fellers v. Kelley,* No. 24-cv-311-SM-AJ, 2025 WL 1098271 (D.N.H. Apr. 14, 2025) (denying preliminary injunctive relief after finding plaintiffs failed to demonstrate a likelihood of success on merits of First Amendment claim). The Court should not jump into the fray prematurely before it is clear that a similar situation has occurred or will occur again.

D. Petitioner asks this Court to intervene in anticipation of how lower courts will apply this Court's recent precedents in other unrelated cases.

Petitioner also asks this Court to intervene because she predicts lower courts will "characterize [*Mahmoud v. Taylor*] as limited to situations involving religious values—with the result of further limiting the scope of parental rights far more narrowly than *Meyer*, *Pierce*, and *Troxel* actually warrant." Petition, p. 18. According to Petitioner, the Court should grant the petition because it "presents a straightforward question of parental rights unaffected by more complicated questions of religious free exercise." *Id.* Thus, Petitioner asks this Court to preemptively intervene because she anticipates the Ninth Circuit will narrowly apply the Court's holding in *Mahmoud* in future cases. Notably, Petitioner does not argue that *Mahmoud* bears on the question presented or mandates a different outcome for her procedural due process claim. Nor could she, as *Mahmoud* had nothing to do with parents' rights to enter the classroom, and the narrow issue presented in the petition has nothing to do with Petitioner's First Amendment retaliation claim.

Petitioner seeks this Court's intervention, then, based entirely on speculative fears about future misapplication of this Court's precedents by lower courts in other cases. Such fears do not warrant this Court's intervention in this case.

II. The Facts Of This Case Do Not Justify Any Changes To This Court's Qualified Immunity Precedents.

By her second question presented, Petitioner asks this Court to grant review to "clarify" its qualified immunity precedents and adopt two limitations to the doctrine. The first would eliminate the so-called one-size-fits-all rule by which the same qualified immunity standard applies to all public officials, non-law enforcement officials included. The second would alter the "clearly established" analysis depending on whether the alleged unconstitutional act at issue was a "split-second" decision, creating a factual quagmire into which lower courts will be asked to wade on a routine basis. While Petitioner's proposals should be rejected on the merits, this case is also an inappropriate vehicle to adopt Petitioner's proposals. As a result, the Court should deny certiorari on the second question presented.

A. This case is an inappropriate vehicle to adopt Petitioner's proposed "clarifications" to this Court's qualified immunity precedents.

First, Petitioner asks the Court to adopt a "sliding scale" test by which lower courts will be required to determine how "obvious" the right at issue is before analyzing whether relevant case law clearly establishes the right. Petition, p. 25. Under Petitioner's proposal, the more "obvious" a constitutional right, the less on-point a case may be to

satisfy the clearly established prong of the qualified immunity analysis.

But Petitioner failed to raise any sort of "obviousness" argument in the District Court and Ninth Circuit even though the Ninth Circuit regularly finds constitutional rights to have been clearly established based on their obvious nature. For example, in *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022), the Ninth Circuit denied qualified immunity to a law enforcement officer because it was obvious that "a decision to shoot" a suspect was "objectively unreasonable" where the suspect "posed no immediate threat to [the officer] or others at the time of his death." *Id*. at 629.[6]

In another case, the Ninth Circuit affirmed the denial of qualified immunity to an officer who "[shot] a civilian with the subjective purpose to harm unrelated to a legitimate [law enforcement] objective" because "no reasonable officer could fairly have believed" such an act was constitutional. *A.D. v. California Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013). The officer in that case attempted to distinguish two relevant cases to argue that it was not clearly established that his acts were unconstitutional, but the Ninth Circuit plainly held

[6] *Estate of Aguirre* involved an appeal from summary judgment and, as a result, the Ninth Circuit did not conclude that the suspect actually posed no threat. Rather, construing the facts in the plaintiff's favor, the Ninth Circuit assumed the suspect posed no threat and held that, if true, the conduct was of an obviously unconstitutional nature.

that "the constitutional rule [those cases] established 'appl[ies] with obvious clarity'" to the conduct at issue. *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Petitioner did not argue that the alleged constitutional violation in her case was "obvious" until her reply brief on appeal. Pet. App. 37a-38a. The Ninth Circuit, therefore, found that she had waived her argument on this point.[7] This Court is "a court of review, not of first view." *Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). As a result, the Court should "decline to entertain" Petitioner's argument on this point. *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 173 (2016).

Nor is this case an appropriate vehicle to abandon the so-called "one-size-fits-all" rule. Petitioner asks the Court to limit qualified immunity only to law enforcement officials making split-second decisions. But Petitioner's argument ignores that other government actors, school officials included, are often also required to make split-second decisions. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 580 (1975) (recognizing that at schools "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action"). And Petitioner

[7] While this Court does allow parties to raise issues that may have been futile to raise below, *see MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007), Petitioner's obviousness argument would not have been futile, and she did not raise any variation of that argument below. Petitioner has therefore waived her obviousness argument on review.

offers no principled reasons why the constitutional rights of plaintiffs who die at the hands of an officer making a split-second decision (especially if a court later determines the force used was excessive but finds that minor factual distinctions preclude a "clearly established" finding) should be treated less favorably than a parent who was removed from school property for laying a hand on a school official. A more appropriate case to consider the elimination of qualified immunity for classes of officials with time to deliberate on decisions would actually involve a situation in which the state actor had time to engage in such deliberations.

Petitioner's argument also overlooks that, even by Petitioner's own telling, the only alleged act of Divijak was to request law enforcement assistance. Divijak herself did not have the luxury of consulting with counsel or contemplating the state of the law in the Ninth Circuit or elsewhere. She told staff members she had been grabbed by a parent in the midst of a heated discussion, and a staff member called the police to report a possible assault. The only other act Divijak took that day was to talk with police minutes later. She was not present at the February 24, 2020, meeting with Petitioner, was not responsible for continuing Petitioner's ban from campus, and had no authority to impose or lift a ban on Petitioner.

Petitioner's request for the categorical elimination of qualified immunity for school officials ignores cases where a principal follows school district policy in performing a task. If that policy is later

found to be unconstitutional (as Petitioner asserts in her remaining retaliation claim against the District), the principal would unfairly be held personally liable even if the unconstitutionality of the policy at issue is a question of first impression and the principal had no role in the policy's creation.

In those cases where lower-level school officials are simply enforcing policy adopted by school boards or decisions handed down by superintendents, plaintiffs remain able to bring claims against the municipality and those policy-making officials. *See, e.g.*, *Barone v. City of Springfield*, 902 F.3d 1091, 1107 (9th Cir. 2018) (citing *Lytle v. Carl*, 382 F.3d 978, 981 (9th Cir. 2004)) (discussing the final policymaker theory of liability under 42 U.S.C. § 1983). Nothing is gained by holding school officials personal responsible in such a case, where the school official is not on notice that their act is unconstitutional.

Finally, this is not a case in which a plaintiff has conclusively suffered an egregious constitutional abuse and had all avenues of recovery foreclosed. Petitioner has a First Amendment retaliation claim pending against the District. Contrary to Petitioner's assertion that all relevant facts "have already been determined at trial" in this matter, Petition, p. 25, not a single fact relevant to Petitioner's First Amendment claim has been determined. The only claim sent to the jury in this matter was a portion of Petitioner's state-law defamation claim. Pet. App. 3a. It may be determined, on remand, that no First Amendment violation occurred at all. No finder of fact has yet determined that Petitioner's First Amendment rights

were actually violated. Certainly, to the extent the Court is inclined to limit qualified immunity for non-law enforcement officials generally or school officials specifically, a better case to address those issues would involve a plaintiff who has indisputably suffered a constitutional harm but has been denied relief solely due to the application of qualified immunity. In that case, the only obstacle between the plaintiff and constitutional vindication would be this Court issuing a pure pronouncement of law. This is not that case. For the foregoing reasons, this case is a poor vehicle to address the second question presented.

B. Merely having time to reflect and consider options should not preclude immunity, especially for government officials who often act in unsettled areas of law like school principals.

Petitioner argues that because a school principal "has time to evaluate the situation, review the applicable procedures and law, and even consult legal counsel before acting," qualified immunity should never inure to the benefit of school principals.[8] Petition, p. 23. But, as evidenced by decades of litigation involving the scope of constitutional rights in schools, there is not a clear-cut constitutional

[8] Petitioner's proposal is not limited to cases involving alleged violations of a parent's constitutional rights. It would categorically eliminate immunity for school officials for all alleged constitutional violations, including in fact-intensive student disciplinary matters.

answer in every situation and a clearly established standard should still serve to immunize school officials who must act in uncharted constitutional territory, even with the benefit of legal advice.

Even in situations where a school official has time to consult with counsel, they may receive advice that a constitutional issue is not settled and that one or more proposed courses of action appear to be lawful. Taking action to "maintain[] security and order," *New Jersey v. T.L.O.,* 469 U.S. 325, 340 (1985), in those situations should not subject school officials to personal liability just because they were required to act in an unsettled area of law before a relevant Court has settled the question.

For example, prior to 2021, outside of the Third Circuit, principals around the nation, though guided by legal counsel, had no clear guidance regarding when, if at all, they could discipline students for speech that occurred over social media platforms off campus and/or over the weekend. Some principals had to analyze the "nexus" of the speech to the school's "pedagogical interest" to determine whether they could discipline a student for off-campus online speech. *See Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011). Others had to apply the traditional substantial disruption test pronounced in *Tinker*. *See D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011); *see also Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007). For a short period of time in the Third Circuit, *Tinker* did not apply at all to off-campus speech. *See B.L. by & through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d

170, 189 (3d Cir. 2020), *aff'd but criticized*, 594 U.S. 180 (2021).

It was not until this Court reviewed the Third Circuit's *Mahanoy* decision that principals around the country had further guidance confirming that their ability to punish students for off-campus online speech, though limited compared to their ability to regulate speech at school, continued to exist. *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 189 (2021). Even there, this Court left "for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference" in determining whether a school can punish a student for their speech. *Id.* at 190. It would be unjust to impose personal liability on principals who exercise good faith judgment in attempting to maintain order at their schools, especially if exercised in consultation with legal counsel, if they happen to put a toe over a line which has not yet been drawn by courts.

Acting contrary to clearly established law should still, of course, subject officials to liability. Eliminating qualified immunity for school officials writ large would paralyze those officials and prevent action to maintain order in schools in all but the most clear-cut situations. This would not only eliminate immunity for school principals acting contrary to clearly established law, but it would also flip the current scheme on its head: school officials could afford to act in only those situations where it was clearly established that their action was *lawful*. Far from giving school officials "breathing room to make

reasonable but mistaken judgments about open legal questions," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), it would suffocate those officials' ability to act.

C. In addition to being inapplicable because Petitioner did not raise an "obviousness" argument below, Petitioner's sliding scale test would not apply to her own case and would only confuse the state of the law.

As discussed in Section II.A, *supra*, Petitioner waived any argument related to the obviousness of the alleged constitutional violation. As a result, this was not a case wherein the Ninth Circuit determined the constitutional violation was not "obvious enough" which would have, apparently, triggered Petitioner's second proposed limitation.

Even had Petitioner raised the issue below, and even if this Court were to adopt the proposed standard, this is not a case where a minor factual distinction from other cases led the courts below to grant Divijak qualified immunity. For support, Petitioner is forced to misrepresent the facts of *Baxter v. Bracey*, 751 Fed. Appx. 869, 872 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020). In Petitioner's telling, the Sixth Circuit granted law enforcement officers qualified immunity merely because the plaintiff was sitting, rather than lying, on the ground when attacked by a police dog during an arrest. Petition, p. 27. In reality, the Sixth Circuit compared two prior cases involving canine seizures, one finding the seizure to have been unconstitutional, *Campbell*

v. City of Springboro, 700 F.3d 779 (6th Cir. 2013), and the other upholding the seizure as constitutional, *Robinette v. Barnes*, 854 F.2d 909, 913-14 (6th Cir. 1988). *Baxter,* 751 Fed. Appx. at 872. In *Campbell*, police "used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing." 700 F. 3d at 789. In *Robinette*, police used a "well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location." *Baxter*, 751 Fed. Appx. at 872 (citing *Robinette*, 854 F.2d at 913-14). The Sixth Circuit concluded that *Baxter* was closer to the situation described in *Robinette* than to *Campbell*: the plaintiff had fled from police, hid in an unfamiliar location, ignored warnings that a canine would be released, and chose to remain in hiding. *Id*. The Sixth Circuit concluded that the mere fact that he was sitting with his hands raised when the canine was released was not "on its own, [] enough to put [the officer] on notice that a canine apprehension was unlawful in" the circumstances because, even with the suspect's hands raised, the officer "faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk." *Id*. Contrary to Petitioner's recitation, the Sixth Circuit carefully applied the fact pattern of two relevant cases to resolve the qualified immunity issue. But at no point below did Petitioner cite even a single case that was remotely factually similar to her case. It was not as though the Ninth Circuit affirmed Divijak's immunity after Petitioner identified a case involving a high school, rather than elementary, principal, or of a parent grabbing a principal at a sporting event instead of near a classroom.

Petitioner offered no case that was similar to the facts at issue here. Instead, Petitioner relied almost entirely on a completely distinct case involving a college student who made no physical contact with a school official, for the general proposition that the right to be free from retaliation based on one's speech is a clearly established right. Pet. App. 36a. *See O'Brien v. Welty*, 818 F.3d 920 (9th Cir. 2016). But colleges and primary schools are distinct environments in the First Amendment context. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4, (2000) (Souter, J., concurring) (noting that this Court's "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education" (internal citations omitted)); *see also Oyama v. Univ. of Hawaii*, 813 F.3d 850, 863 (9th Cir. 2015) (declining to generally "extend [the] student speech doctrine to the university setting"). Because this Court has repeatedly instructed the Ninth Circuit to reject general formulations of a constitutional right in determining whether a right was clearly established, the Ninth Circuit did so here. *See Ashcroft*, 563 U.S. at 742 (citing *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam)); *see also Evans v. Skolnik*, 997 F.3d 1060, 1067 (9th Cir. 2021).

In addition, were it adopted, Petitioner's proposed standard would serve only to introduce confusion into this area of law. This standard would convert the clearly established analysis from a single

question of "is there a factually similar case putting government officials on notice that engaging in the alleged behavior would violate a constitutional right,"[9] into a complex analysis of how much time the government official had to deliberate on the act and the extent to which a case must involve comparable facts, given the deliberation time available. Because a crucial part of the analysis would be how much time an official had to deliberate, ancillary questions would necessarily arise, further complicating the analysis and expanding litigation in this area. Namely, courts would inevitably be asked to resolve thorny factual disputes as to how much time the official actually had to deliberate before a decision was required and whether the government official took enough time to deliberate. And as discussed in Section II.B, *supra,* this test would act to defeat immunity for school officials who sought legal guidance in an unsettled area of law but who, ultimately, reached the wrong conclusion as later determined by a reviewing court.

In any event, Petitioner does not assert that this standard would have resulted in a different outcome in her case. She does not assert that Divijak had any substantial time to deliberate or consult with legal counsel.[10] Nor could she. The police were called

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[9] Petitioner acknowledges that an obviousness standard exists that obviates a plaintiff's need to identify an on-point and controlling case yet asks the Court to recognize "that *obvious* violations of the Constitution don't need specific on-point precedent." Petition, p. 27. This is already the law.

[10] Again, Petitioner did not assert a claim against the District's Superintendent. The Superintendent met with Petitioner, her counsel, and the District's counsel and ultimately made the

by Divijak's staff and within minutes they responded and began interviewing witnesses. And even if, contrary to the facts, Divijak did have time to deliberate and consult with the District's counsel, Petitioner did not identify a remotely similar case. The closest she came was a case in which college administrators *may have* violated the First Amendment rights of a student who expressed conservative political views, criticized university officials, and attempted to videotape conversations with those officials. Pet. App. 36a. *See O'Brien*, 818 F.3d at 925-26, 936 (concluding that student's complaint contained sufficient allegations which, if proven, would support a First Amendment retaliation claim against individual defendants). But, as discussed above, college campuses are distinct from elementary and high schools. *See Southworth*, 529 U.S. at 238 n.4. Parental speech is different than student speech. Political speech is different than making physical contact and demanding that someone not walk away. Under her own sliding-scale analysis, Petitioner would, at minimum, need to identify a case involving banning a parent from a K-12 school campus, regardless of any other factual similarities. Petitioner did not do so. As a result, even if Petitioner were allowed to demonstrate the law was "clearly established" at "a lower level of stringency," Divijak would still be entitled to immunity.

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decision to maintain Petitioner's ban from campus.

CONCLUSION

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

Respectfully Submitted,

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TABLE OF APPENDICES

SUPPLEMENTAL APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS JURY TRIAL DAY TWO, NOVEMBER 15, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
4:21-CV-00062-SHR

NOVEMBER 15, 2023
9:43 a.m.

Rebecca Hartzell, Plaintiff

Vs.

Marana Unified School District, et al., Defendants

BEFORE THE HONORABLE SCOTT H. RASH
UNITED STATES DISTRICT JUDGE
TUCSON, AZ

Anni Bryan, RDR, CRR
Official Court Reporter
(520) 205-4268

*****

Ms. Lisa Ann Trudinger-Smith (Defendants' counsel) Q: Exhibit D is already in evidence. This is the letter that you just mentioned, right, the letter from your attorney?

Dr. Rebecca Hartzell (Plaintiff) A: Correct.

Q. And your attorney said, "The following paragraph will be the only statement made about the particular incident," right?
A. Correct.

Q. Basically, we're not talking about what happened at this meeting, right?
A. Because it's outlined here, yes.

*****

Q. Let's go back to Exhibit J, the email we were just talking about, which is the chain of emails. And after the meeting -- as you've said before, you're a documenter -- you sent an email that same day, right?
A. Right.

Q. And you said, "This is my understanding of the conditions moving forward." That's what your email says, correct?
A. Yes.

Q. "I'm allowed to drop my kids off. My son will walk my preschooler into preschool."
A. Yes. I was instructed not to get out of the car, but yes.

Q: I'm just asking what this says, not about other things that were said, I'm just asking about your email.
A: Okay.

Q. "I'm allowed to enter the school to pick up my preschooler." That's what your email says, right?
A. Pick her up, yes.

Q. That was your understanding of the conditions after the meeting. And you said, "I am allowed to pick up my children if for some reason they need to be picked up early from school, i.e., illness, doctor's appointment," correct?
A. Yes. But then I didn't know the process of signing in or out, so that's probably where I got confused.

Q. But you knew that this was something you had discussed because you documented it as your understanding based on the meeting you'd had, right?
A. Yes. I see that now.

Q. And then you said, "I will check back in with Dr. Wilson on April 1 regarding my ability to attend end of the year performances (barring no incidences have occurred)," correct?
A. That's correct.

Q. And then you said, "What I want to clarify is if I am able to communicate with my children's teachers regarding their academic and/or emotional needs."
A. Correct.

*****

Q. But you did e-mail with your children's teachers between the date of this e-mail and the end of the school year, right?
A. Yes.