No. 25-143

IN THE

Supreme Court of the United States

REBECCA HARTZELL,

Petitioner,

v.

MARANA UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner Rebecca Hartzell is a mother and special needs advocate. She also serves as a director of the master's program in applied behavioral analysis at the University of Arizona. She is highly qualified to offer advice to educators, and she did so with respect to the teachers at her own children's school, Dove-Mountain K-8. Unfortunately, that was a source of tension for school administrators—so, after an incident in which Hartzell accidentally touched Respondent Divijak's arm as she was exiting a classroom, Respondent Divijak and the school banned her from school grounds and forbade her from talking to her children's teachers. The Ninth Circuit held that a reasonable jury could conclude that Petitioner was banned based solely on her exercise of her freedom of speech. App. 22a-23a.

This ban violated Hartzell's constitutional rights in two ways: First, it violated the Fourteenth Amendment's requirement of procedural due process. By banning her from school grounds and from in-person contact with teachers, Respondents effectively deprived Hartzell of the right to control and direct the education of her children—by substantially hindering her ability to exercise that right—and did so without any notice or opportunity to be heard. Second, the principal, acting in her individual capacity, violated Petitioner's First Amendment rights by retaliating against her because of her protected speech.

Yet the Ninth Circuit ruled that Hartzell has no due process rights here, on the theory that her right to control and direct her children's education ends at the schoolhouse gate. App.39a. And it granted Respondent Divijak

qualified immunity on Petitioner's First Amendment retaliation claim. App.64a.

Both questions are real, consequential, and unresolved issues for this Court to answer—questions that are of increasing importance in the lower courts today. Contrary to the Respondents' protestations, those lower courts are divided—with one side (including the Ninth Circuit) clinging to a rule that this Court seriously undermined in *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2350 (2025).[1]

Respondents try to massage away that circuit split by narrowly defining the issue to simply whether a parent has a liberty interest in physically accessing school grounds—but that commits the fallacy of construing the right at issue narrowly in order to engineer the answer. *Cf. Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (noting that "misapprehend[ing] the claim of liberty" in a case can mislead a court). The question is not whether a parent has a constitutional right to enter school grounds, but whether the government can impose burdens on the parent's right to raise a child so as to render that right ineffectual—here, banning the parent from school grounds or speaking to teachers. By saying that parental rights essentially stop once the parent chooses to send the child to a public school, the Ninth Circuit answered that question in the affirmative.

As for qualified immunity, Respondents argue that it's just unfair to hold government officials like Principal

1. This Court should consider granting, vacating, and remanding for reconsideration in light of *Mahmoud*. The decision below was rendered before *Mahmoud* was announced, and the petition filed after.

Divijak responsible for constitutional violations that might not have been "clear" at the time of the government official's actions. But that argument ignores three crucial points.

First, qualified immunity lacks any textual foundation in 42 U.S.C. § 1983. Second, situations involving school administrators differ in constitutionally relevant ways: particularly, officials such as Respondent Divijak generally have plenty of time to think about what they do before doing it, and even to seek legal advice. That has led several Justices to urge this Court to revisit qualified immunity in such circumstances. *See Ziglar v. Abbasi*, 582 U.S. 120, 156-60 (2017) (Thomas, J., concurring); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting); *Wyatt v. Cole*, 504 U.S. 158, 169-75 (1992) (Kennedy, J., concurring); *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J. respecting denial of certiorari). Third, it is more unfair to bar recovery for innocent parties whose rights have been violated by a government official. As this Court has recognized, "it is the public at large which enjoys the benefits of the government's activities," so "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights … have been violated." *Owen v. City of Independence*, 445 U.S. 622, 655 (1980).

Finally, as a practical matter, government officials are virtually always indemnified for any damages resulting from constitutional wrongs. *See, e.g.,* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 Geo. L.J. 305, 330 (2020) ("officers virtually never

contribute to settlements and judgments entered against them."). And whenever they are not indemnified, that is a conscious decision of the government entities to not indemnify their employees.

ARGUMENT

I. There is a clear, unresolved, and deepening circuit split.

The circuits are currently divided over whether the Constitution's protection for the parental right to direct and control the education and upbringing of a child (the *Meyer-Pierce* right) extends beyond a parent choosing between a public and a private school. Petition 14-17. The First, Second, Fifth, Sixth, Ninth, and Tenth Circuits have, to varying degrees, held that a parent's right substantially diminishes once the parent chooses between a public or a private school.[2] The Third has rejected this view.[3]

Respondents seek to obscure this split by "reframing" the first question presented, and thereby narrowing the right at issue. That is loading the dice, however. The point

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2. *See Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005); *Fields v. Palmdale School Dist.*, 427 F.3d 1197 (9th Cir. 2005); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694 (10th Cir. 1998).

3. *See, e.g., C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 934 (3d Cir. 2011).

is that dispositive Ninth Circuit precedent holds that the *Meier-Pierce* right effectively ends at the schoolyard gate which is why the court said no due process was necessary. App.66a-67a. That is the issue over which the circuits disagree—and that's the issue that was undermined by *Mahmoud,* 145 S. Ct. at 2350.

Respondents try to reframe the first question presented as: "whether the right to access school property is a liberty interest protected by the Fourteenth Amendment." Br. in. Opp'n ("BIO") at 7. But that's not the question the Ninth Circuit actually addressed. It said that being banned from school property "does not implicate" the *Meyer-Pierce* right because "'what *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive.'" App. 39a (citation omitted). But "[b]ecause Hartzell does not allege that her ability to send her children to the school of her choice was restricted, the *Meyer-Pierce* right does not apply." *Id.*

In other words, the real question is whether the Constitution's protection for a parent's right to control and direct the education and upbringing of her child extends beyond the single decision of choosing a public or private option for her child's education. If it doesn't, it naturally follows that it doesn't protect Hartzell here. But if the right includes more than that—if, as this Court said in *Mahmoud*, "the right of parents 'to direct the religious upbringing of their' children would be an empty promise if it did not follow those children into the public school classroom," 145 S. Ct. at 2351—then the state cannot burden a parent's right to raise her children by literally barring her at the schoolhouse gate.

The Ninth Circuit, has consistently answered this question in the negative. In *Fields*, it held that "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." 427 F.3d at 1206; App. 39a. According to this view, "what *Meyer–Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself"—and that's basically all. 427 F.3d at 1207. The court below understood this. App. 39a. That's why it concluded that "[b]ecause Hartzell does not allege that her ability to send her children to the school of her choice was restricted, the *Meyer-Pierce* right does not apply." *Id.*

The question here is therefore not as narrow as the Respondents' rephrasing suggests. This case turns on whether a parent's right to control and direct the education of their children goes beyond choosing between a public or a private school. That was the starting, and ending, point for the Ninth Circuit's analysis. The court below, contrary to Respondents' assertions, simply concluded that banning Petitioner from school property "does not implicate Hartzell's right to direct her children's education" because she had chosen to send her children to public school—so her rights had already been exhausted. *Id.*

The Third Circuit would have addressed the issue differently. It says that the question of parental rights "var[ies] depending on the significance of the subject at issue," and so that if a school district's "actions 'strike at the heart of parental decision-making,'" a violation can exist, *even if* the parent has decided to send a child to a public school. *Blue Mountain Sch. Dist.*, 650 F.3d at 934 (quoting *C.N.*, 430 F.3d at 184).

Thus, a circuit split exists over whether the Constitution's protection for a parent's right to educate her child includes more than simply choosing between a public and private school. Respondents do not contest that a split exists over this issue. That was the issue on which the judgment below turned—and it is one on which the Ninth Circuit is simply wrong. This Court should grant certiorari.

II. Individual citizens should not bear the burden of government agents violating the constitution except in rare circumstances.

This Court's qualified immunity jurisprudence has been the subject of frequent questioning and debate. Justices on this Court have raised questions about the legal foundations of the Court's qualified immunity doctrines. *See, e.g.*, *Ziglar,* 582 U.S. at 157-60 (Thomas, J., concurring) (explaining that this Court's qualified immunity jurisprudence amounts to free-wheeling policy choice and the balancing of the vindication of constitutional rights and the necessity of ensuring the effectiveness of government officials performing their duties which "[t]he Constitution assigns … to Congress).

With particular relevance to this case, Justice Thomas and judges on lower courts have called for consideration of whether existing qualified immunity jurisprudence makes sense with respect to non-law enforcement officers who have plenty of time to think through their decisions, and even to seek legal advice. *See Hoggard*, 141 S. Ct. 2421 (Thomas, J., respecting denial of cert.); *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Cir. Judge Ho,

concurring in denial of rehearing). Scholars have also argued that qualified immunity is unlawful and that the legal justifications proffered for qualified immunity are unavailing. *See*, *e.g.*, Tyler R. Smotherman, *For Police, Not Professors: Why University Officials Should Be Denied Qualified Immunity for First Amendment Violations (and Why Police Officers and the Fourth Amendment Are Different*), 71 Drake L. Rev. 137 (2024); Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 Cardozo Pub. L. Pol'y & Ethics J. 515 (2010); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 88 (2018).

This petition presents the Court with a perfect opportunity to address the question. Here, a school principal was granted qualified immunity for a situation that required no split-second decision making. There was no threat to the school community. There was no need for hasty action. There was no reason the Respondents could not consult legal counsel to review the constitutional implications of their actions. Consequently, the need for qualified immunity—at least one of the justifications for the balancing test qualified immunity presents—is absent here.

Respondents attempt to scare this Court by claiming that lessening the protections of qualified immunity would "hamper the ability of school administration to make the *snap* decisions sometimes necessary to protect the well-being of the school community." BIO at 2 (emphasis added). But this case doesn't involve a "snap" decision at all. Nor is Petitioner arguing that school officials *could*

never receive qualified immunity. Instead, Petitioner contends that in *non-"snap"* situations, where a split-second decision in a life-or-death situation is *not* required, the qualified immunity analysis should not be the same as that which applies to a police officer who must use a weapon to save a life. Anyway, there is no evidence that a more reasonable approach to liability would hamper school operations. As far as public officials' personal liability is concerned, Respondent District can do as virtually all government entities do, and indemnify officials who a court has found liable for unlawful official actions. Police officers, for example, are virtually always indemnified against claims under Section 1983. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

Respondents further allege that "[n]othing is gained by holding school officials personal [sic] responsible in such a case, where the school official is not on notice that their act is unconstitutional." BIO at 19. But the real question is, what is to be gained by forcing the innocent party to bear the entire cost of a government official's unconstitutional conduct? In *Owen, supra*, this Court held that such costs should be borne by the government entity that commits the wrong, instead. "Elemental notions of fairness dictate that one who causes a loss should bear the loss," the Court said. 445 U.S. at 654. And while the costs may ultimately fall to the taxpayers, that creates a healthy incentive for the government to implement better policies: "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Id.* at 656.

Rather than the "judicial 'policymaking' implicated in fashioning the substantive and procedural framework of qualified immunity," *Crawford-El*, 93 F.3d at 829 (Cir. J. Silberman, concurring), a better approach would be to focus on the individual's rights and the constitutionality of the challenged action. This would be closer to the original understanding of the courts' role in suits against government officials for conduct that violates the Constitution.

For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804), this Court held a naval officer liable for seizing—on Presidential orders—a Dutch ship during the quasi-war between the United States and France. Chief Justice Marshall, writing for the Court, explained that instructions of a commander—even a president—simply "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* "Captain Little then must be answerable in damages to the owner of this neutral vessel." *Id*. Importantly, he concluded that the Court could only look to the law and whether Little had violated it. *Id*. Because the answer was yes, the Court held Little liable. *Id*.[4]

4. *See also Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806) (holding a fine collector strictly liable for seizing the property from a Justice of the Peace even though ordered to do so by a court martial because the court martial was acting beyond its statutory authority so the fine collector was powerless to seize the property); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1851) (holding that a military officer was liable for the seizure of a merchant's property in Mexico even though it was on the orders of his commander).

The older cases thus recognized the foundational principle that the innocent individual should not bear the cost of a government officer's mistake of law. Now, this Court has recognized that an immunity doctrine might be proper in specific situations, such as law enforcement officers making instantaneous decisions when there is a pressing threat to public safety—but those concerns are not present here. This petition then presents the opportunity that Justice Thomas requested in *Hoggard* to "reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally." 141 S. Ct. at 2422.

CONCLUSION

The Court should grant review.

Respectfully submitted,

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