No. 23-1069

United States Court of Appeals for the First Circuit

STEPHEN FOOTE, individually and as Guardian and next friend of B.F. and G.F., minors; MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors,

Plaintiffs-Appellants,

v.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, former Superintendent; LISA NEMETH, Interim Superintendent; STACY MONETTE, Principal, Baird Middle School; MARIE-CLAIRE FOLEY, school counselor, Baird Middle School; JORDAN FUNKE, former librarian, Baird Middle School; TOWN OF LUDLOW,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Massachusetts
Springfield Division
Case No. 3:22-cv-30041-MGM

BRIEF OF THE INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

This case is about whether parents may sue school administrators who secretly encourage, promote, or facilitate "gender transitions" against explicit parental instruction concerning the mental health of their children. *Amicus* writes to highlight just one of the lower court's many errors: It stated that even if Plaintiffs prevailed on substantive grounds, it would have granted the individual defendants qualified immunity.

Qualified immunity has no basis in § 1983's text. Instead, it is a judicial creation aimed at curbing the perceived risks of holding officials responsible for their unlawful conduct. Originally, this judge-made doctrine was at least tethered to a historical inquiry based in common law. But courts have abandoned qualified immunity's common law roots. The result is an unmoored and atextual doctrine that leaves citizens without recourse for swaths of unconstitutional conduct. While only the Supreme Court can fully correct this erroneous course, the shaky ground on which

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members and counsel, made any monetary contribution toward the brief's preparation or submission. The parties were given timely notice of *amicus's* intent to file, and all parties have consented to the filing of this brief.

qualified immunity rests warrants rigorously scrutinizing whether officials can claim reasonable ignorance of the unlawfulness of their actions.

Here, the defendants cannot claim they lacked fair warning. Courts must consider the context of the case when deciding whether violations of law are "clearly established." And here the school administrators did not face a split-second decision. With time to deliberate, they chose to ignore Plaintiffs' instructions regarding the mental health care and upbringing of their children, in violation of nearly a century of precedent. Qualified immunity provides no shield for such flagrant constitutional violations.

Such violations are of great concern to *amicus* Independent Women's Law Center ("IWLC"), which is a project of Independent Women's Forum ("IWF"), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. The proper scope of qualified immunity is important to IWLC's advocacy for equal opportunity, individual liberty, and respect for the rule of law.

STATEMENT

When Plaintiffs' daughter B.F. was eleven years old and in sixth grade, she received assignments from a school librarian and video suggestions on her school Google account that promoted LGTBQ+ themes. App. 24, 27.[2] Soon after, B.F. told her teacher that she was experiencing depression, insecurity, and low self-esteem; that she might be attracted to the same sex; and that she was not sure how to ask her parents for help. App. 27–28. B.F. gratefully accepted her teacher's offer to talk to her parents. App. 27. B.F.'s parents hired a therapist and emailed school officials requesting that they not have private conversations with their daughter regarding her mental health so that their family could address the matter with professionals. App. 28.

Two months later, B.F. emailed teachers and school officials stating that she was "genderqueer" and providing a new preferred name and a list of pronouns that included both she/her and he/him. App. 31–32. The school counselor then emailed teachers and school officials, referring to B.F. by male pronouns and the new preferred name, but instructing

[2] All "App." references refer to Appellants' Appendix.

school staff to refer to B.F. by her birth name and female pronouns with her parents to conceal the school's decision to socially transition the child. App. 32. The school counselor also told B.F. she could use the boys', girls', or gender-neutral bathrooms at school and arranged private meetings between B.F. and the school librarian to promote and facilitate B.F.'s social transitioning. App. 33, 35. At the same time, school officials were also facilitating the social transitioning of Plaintiffs' twelve-year-old son, G.F. App. 33–34.

When Plaintiffs learned about these actions, they met with school officials and objected to their disregard for their instructions not to counsel their children on mental health issues. App. 36–37. But the administrators rebuffed them, and Defendants continued to secretly transition Plaintiffs' children. App. 39–43.

Plaintiffs sued under § 1983, alleging violations of their fundamental parental rights. App. 11–96. The district court dismissed the complaint, concluding that Defendants' conduct did not "shock the conscience" and, alternatively, that the individual defendants were shielded by qualified immunity. App. 158–169.

SUMMARY OF ARGUMENT

Current qualified immunity doctrine is tethered to neither § 1983's text nor common-law history. Instead of trying to interpret the law as Congress wrote it, courts engage in freewheeling policymaking that belongs to the legislature, not the judiciary. This Court must, of course, abide by Supreme Court precedent. But the "growing concern with [the courts'] qualified immunity jurisprudence" shared by many citizens, scholars, and judges counsels caution in analyzing whether government officials could have been reasonably ignorant of the unconstitutionality of their actions. *Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (Thomas, J., concurring in part and concurring in the judgment).

That inquiry must consider the individual circumstances of the alleged violation, including the time afforded to defendants to evaluate the lawfulness of their decisions. There is simply no reason that school administrators should be immune from suit when they have adequate time to consider the constitutionality of their actions yet choose to pursue a course of conduct that violates clear precedent on the fundamental rights of parents. *Amicus* urges this Court to reverse.

ARGUMENT

I. Qualified Immunity Doctrine Has Become Increasingly Divorced from Statutory Text and Its Common Law Roots.

Congress spoke plainly in § 1983, stating that "*Every* person who," under color of law, "subjects, or causes to be subjected," any person with the United States' jurisdiction "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" 42 U.S.C. § 1983 (emphasis added). The statute specifies an exception for judicial officers acting in their judicial capacity, but does not grant a broad shield for *all* "government officials performing discretionary functions" so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court has recognized, then, "Qualified immunity is a judge-made construct," *Mosher v. Nelson*, 589 F.3d 488, 492 (1st Cir. 2009)—a construct that makes it extremely difficult to recover for violations of constitutional rights.

That construct was, originally, grounded in the assumption that Congress had incorporated common-law immunities for public officers "to shield them from undue interference with their duties and from

potentially disabling threats of liability." *Harlow*, 457 U.S. at 806. But before granting immunity, the Supreme Court required the official claiming it to "point to a common-law counterpart to the privilege he asserts." *Malley v. Briggs*, 475 U.S. 335, 339–40 (1986) (citation omitted). Even then, the Court did not "assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form," recognizing that some immunities would conflict with Congress's purpose in enacting § 1983. *Id.* This common-law approach was critical to ensuring that, when applying immunity, courts "interpret the intent of Congress in enacting § 1983," rather than making a "freewheeling policy choice." *Id.* at 342.

But, while the judiciary "started off by applying common-law rules" in its qualified immunity doctrine, it has long since abandoned those principles. *Ziglar v. Abbasi*, 582 U.S. 120, 158 (2017) (Thomas, J., concurring). As the Court itself recognized, it has "completely reformulated qualified immunity along principles not at all embodied in the common law[.]" *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). That reformulation, in the Supreme Court's own words, "reflects an attempt to balance competing values" of protecting the rights of citizens and protecting

government officials' ability to exercise discretion. *Harlow*, 457 U.S. at 807. But "[t]he Constitution assigns this kind of balancing to Congress, not the Courts." *Ziglar*, 582 U.S. at 160 (Thomas, J., concurring). And, as the lower court's decision shows, such balancing favors the discretion of government officials even when their actions deprive citizens of fundamental constitutional rights.

II. Qualified Immunity Should Not Apply Where, As Here, School Administrators Had Ample Time to Consider Their Unconstitutional Actions.

Although this Court is bound by atextual and ahistorical precedent that applies qualified immunity to government officials "across the board," *Ziglar*, 582 U.S. at 159 (Thomas, J., concurring) (quoting *Anderson*, 483 U.S. at 645), even under that precedent the Court must consider whether an official claiming immunity could have "reasonably misapprehend[ed] the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted). And because, for a reasonableness inquiry, "[e]verything depends on context," qualified immunity's "zone of protection has shifting boundaries." *McKenney v. Mangino*, 873 F.3d 75, 81–82 (1st Cir. 2017). Accordingly, where a

defendant had ample time to consider his unconstitutional conduct, those boundaries must be drawn more narrowly.

Just as this Court has recognized that "[t]iming is critically important in assessing the reasonableness of an officer's decision" in law enforcement, it must consider the timing of *any* government official's decision in evaluating the reasonableness of his or her conduct. *See id.* at 81. And, while the law "is comparatively generous" to law enforcement officers who face "potential danger, emergency conditions or other exigent circumstances," there is no reason to grant such wide discretion to school administrators who do not face such "borderline cases." *See id*. at 81–82 (quotation marks omitted). Simply put, what constitutes "fair notice" for "a split-second decision . . . in a dangerous setting" is a very different matter from what constitutes fair notice for school administrators "who have time to make calculated choices about enacting or enforcing unconstitutional policies." *See Hoggard v. Rhodes*, 141 S.Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari).

If the district court had correctly accepted the facts in the complaint as true, it would have been compelled to conclude that Defendants had fair notice of the unlawfulness of their conduct. Appellants' Br. 46–47.

School administrators did not need to make split-second decisions when they decided to provide Plaintiffs' children with counseling and "gender-affirming" social transitioning. Indeed, given the gravity of such decisions, the administrators should have paused to scrutinize the constitutionality and wisdom of their actions.

Defendants' failure to do so was shocking in the face of Plaintiffs' repeated instructions not to discuss mental health with or socially transition their children and their assertions that, by disregarding those instructions, Defendants were depriving them of their fundamental rights. App. 28, 36–37, 39. Where a defendant has been "specifically advised" of the unconstitutional nature of his actions, "a reasonable person would have known" his actions were unlawful and ceased such conduct. *Hope v. Pelzer*, 536 U.S. 730, 744 (2002). Instead, Defendants continue even now to usurp Plaintiffs' fundamental rights. App. 29–30. That persistent course of action is far beyond what any reasonable official could believe was constitutional, and qualified immunity thus provides Defendants with no shield for their unlawful conduct.

CONCLUSION

It has long been settled that parents, not school administrators, are entrusted with the upbringing and medical care of their children. Defendants cannot have been reasonably ignorant of that fundamental right—indeed, Plaintiffs themselves repeatedly told them they were acting unlawfully. When government officials ignore such clear warnings, they seal their own fate—and qualified immunity cannot save them. This Court should reverse.

Respectfully submitted,

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March 20, 2023

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft 365 in 14-point Century Schoolbook font.

/s/ Gene C. Schaerr
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Dated: March 20, 2023