No. 15-54

IN THE

Supreme Court of the United States

DR. NANCY SCHOTT, PH.D.,

Petitioner,

v.

PETER AND ROBIN WENK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND AMICI CURIAE BRIEF OF OHIO SCHOOL BOARDS ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND FIFTEEN OTHER NATIONAL AND STATE ORGANIZATIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL AMICI CURIAE

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American Professional Society on Abuse of Children ("APSAC")
American School Counselors Association ("ASCA")
Buckeye Association of School Administrators ("BASA")
Council of Administrators of Special Education ("CASE")
Council for Exceptional Children ("CEC")
International Municipal Lawyers Association ("IMLA")
National Association of Elementary School Principals ("NAESP")
National Association of School Psychologists ("NASP")
National Association of Secondary School Principals ("NAESP")
National Association of State Directors of Special Education ("NASDSE")
Ohio Association of School Business Officials ("OASBO")
Ohio Educational Service Center Association ("OESCA")
Ohio Federation of Teachers ("OFT")
School Social Workers of America Association ("SSWAA")

MOTION OF OHIO SCHOOL BOARDS ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND FIFTEEN OTHER NATIONAL AND STATE ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

The Ohio School Boards Association ("OSBA"), National School Boards Association ("NSBA"), American Association of School Administrators ("AASA"), American Professional Society on Abuse of Children ("APSAC"), American School Counselors Association ("ASCA"), Buckeye Association of School Administrators ("BASA"), Council of Administrators of Special Education ("CASE"), Council for Exceptional Children ("CEC"), International Municipal Lawyers Association ("IMLA"), National Association of Elementary School Principals ("NAESP"), National Association of School Psychologists ("NASP"), National Association of Secondary School Principals ("NASSP"), National Association of State Directors of Special Education ("NASDSE"), Ohio Association of School Business Officials ("OASBO"), Ohio Educational Service Center Association ("OESCA"), Ohio Federation of Teachers ("OFT"), and School Social Workers of America Association ("SSWAA"), move this Court pursuant to Supreme Court Rule 37.2(a) for leave to participate as *amici curiae* herein for the purpose of filing the attached brief.

In support of their motion, *amici* state the following:

Counsel of record for both parties have received timely notice of *amici*'s intent to file the attached brief as required under Supreme Court Rule 37.2(a). Petitioner has consented to the filing of the brief, and Respondents have declined consent.

OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly all the 714 district boards throughout Ohio are members of OSBA, whose activities include extensive informational support, advocacy, board development and training, legal information, labor relations representation, and policy service and analysis.

NSBA through its state associations of school boards represents the nation's 95,000 school board members who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

AASA, the professional association of over 14,000 local school system leaders across America, supports and develops effective school administrators who are dedicated to the highest quality education for all children.

APSAC is the leading national organization supporting professionals who serve children and families affected by child maltreatment. As a multidisciplinary group of professionals, APSAC achieves its mission through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles. With a central role in the development of professional

guidelines addressing child abuse and neglect, APSAC is a premiere organization in the discipline of child maltreatment.

ASCA is a nonprofit, 501(c)(3) professional organization that supports school counselors' efforts to help students focus on academic, personal/social and career development. ASCA provides professional development, publications and other resources, research and advocacy to nearly 30,000 school counselors around the globe.

BASA, a statewide 501(c)(6) organization representing over 95% of school district superintendents in Ohio, is dedicated to assisting its members to more effectively serve the needs of the school administrators and their school districts. BASA provides extensive informational support, advocacy, and professional development in an effort to support their professional practice.

CASE, an international non-profit professional organization, provides leadership and support to approximately 4800 members by influencing policies and practices to improve the quality of education. The majority of CASE members are special education administrators in local education agencies. CASE is a division of the Council for Exceptional Children (CEC), the largest professional organization representing teachers, administrators, parents, and others concerned with the education of children with disabilities.

CEC is the largest international professional organization dedicated to improving the educational success of individuals with disabilities and/or gifts and talents. CEC advocates for appropriate governmental policies, sets professional standards,

provides professional development, advocates for individuals with exceptionalities, and helps professionals obtain conditions and resources necessary for effective professional practice.

IMLA, a non-profit, nonpartisan professional organization, consists of more than 2500 local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. As the oldest and largest association of attorneys representing United States municipalities, counties and special districts, IMLA advances the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court and other federal and state courts.

NAESP is a professional organization of elementary and middle school principals dedicated to the progress and wellbeing of the individual child. As the leading advocate for 65,000 elementary and middle level principals in the United States and worldwide, NAESP advances the profession through policy development, advocacy, professional development and resources for instructional leadership.

NASSP, the leading organization of and voice for middle level and high school principals, assistant principals, and school leaders from across the United States and 35 countries, connects and engages school leaders through advocacy, research, education, and student programs. NASSP also promotes the intellectual growth, academic achievement, character

and leadership development, and physical well-being of youth.

NASP represents more than 25,000 school psychologists and related professionals throughout the United States and 25 foreign countries. The world's largest organization of school psychologists, NASP recognizes and supports the basic human rights of children, including their fair treatment and equal access to education and mental health supports within all schools. NASP empowers school psychologists to ensure that all children and youth attain optimal learning and mental health.

NASDSE, a not-for-profit organization, promotes and supports education programs and related services for children and youth with disabilities. NASDSE's, primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

OASBO is a nonprofit 501(c)(6) organization representing over 1200 school business officials in Ohio. Dedicated to assisting its members to more effectively serve the needs of the boards of education and school administration of their school districts, it provides extensive informational support, advocacy, professional development, business services and search services for SBOs.

OESCA is a non-profit 501(c)(6) professional trade association representing more than 16,000 personnel and governing board members of Ohio's 52 Educational Service Centers. OESCA promotes excellence in education through quality, cost-effective shared services provided by its member

organizations. OESCA provides legislative updates, coordinates member lobbying efforts, organizes communications among its members, and offers professional development opportunities.

OFT is a union of professionals that envisions an Ohio where all citizens have access to the high quality public education and public services they need to develop to their full potential. OFT advances the social and economic well-being of its members, Ohio's children, families, working people and communities through community engagement, organizing, collective bargaining and political activism, and the work of its members.

SSWAA is a national organization representing the profession of school social work. Its members work to enhance the social and emotional growth and academic outcomes of all students by addressing barriers to learning and connecting families, schools and communities to ensure the well-being of children and youth.

In keeping with their longstanding commitment to the security and wellbeing of all children, *Amici* frequently engage in advocacy before this Court and other federal and state courts, legislatures, and agencies. *Amici* seeks to ensure that the governmental entities that make, interpret and administer the law and policies that affect the ability of public servants to carry out their responsibility to care for children understand the special needs and concerns that should inform their decisions. Because of the expertise their members bring to bear on issues concerning the safety and welfare of children, *Amici* are well qualified to advise the Court of the exceptional importance of granting the petition in this

case. *Amici* consider this Court's review of the Sixth Circuit's decision to be of the utmost urgency to preserve the effectiveness of child abuse reporting laws and to provide much needed guidance on the availability of qualified immunity under Section 1983 for individuals acting in accordance with mandatory duties under state law and national public policy.

For these reasons, OSBA, NSBA and their fifteen joint *amici* respectfully urge this Court to grant this motion and allow them to provide additional information that will assist the Court in determining the need to review this case.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

Amici are seventeen national and state organizations that believe the Sixth Circuit's decision raises issues of exceptional importance warranting this Court's review. Their identities and interests are fully set forth in the Motion for Leave to File that accompanies this brief.

SUMMARY OF ARGUMENT

This Court's review is critical to maintaining the strength of mandatory reporting as the first line of defense established to protect thousands of children suffering from ongoing abuse and neglect. By making mandatory reporters vulnerable to federal lawsuits brought under Section 1983 by suspected abusers, the Sixth Circuit's decision not only errs constitutionally but also disrupts unnecessarily the policies and procedures adopted by all states to ensure that children are protected from continuing maltreatment. The decision imposes a Hobson's choice for mandatory reporters: either fulfill their responsibility under state law to report suspected or known abuse and risk federal litigation and potential personal liability; or

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. In accordance with Supreme Court Rule 37.2(a), counsel for both parties received timely notice of *amici's* intention to file this brief and Petitioner granted consent; the requisite consent letter has been filed with the Clerk of this Court. The Respondent denied consent, and a motion for leave to file is herewith presented to the Court.

fail to report and invoke the possibility of civil and criminal penalties for that failure. Such a dilemma inevitably deters or delays reporting, ultimately causing irreparable harm to children suffering ongoing maltreatment and to our society at large.

Amici urge this Court to grant review, and to rectify this intolerable result by correcting the constitutional errors that infect the Sixth Circuit's decision. The appeals court has cast the right at stake too broadly and denied qualified immunity; its rationale demonstrates the inability of standard First Amendment retaliation analysis to properly account for both the compelling protective interest and mandatory nature of the alleged retaliatory act. Ignoring the importance of these and other factors, the Sixth Circuit made critical mistakes in its adverse action and causation analyses that require this Court's correction. *Amici* ask this Court to review these mistakes and to require plaintiffs who assert a First Amendment claim based on a mandatory child abuse report to plead and prove absence of reasonable suspicion. Finally, *Amici* urge this Court to accept review to establish that Petitioner's actions were neither incompetent nor a knowing violation of clearly established law and she is therefore entitled to qualified immunity.

REASONS FOR GRANTING THE WRIT

Each day in 2012, 1,825 children in the United States were confirmed victims of child abuse and neglect,[2] amounting to a yearly total exceeding

[2] In this brief the term "abuse" is used to refer to all forms of child maltreatment subject to mandatory reporting laws.

670,000 maltreated children. Of this sum, nearly 90,000 lived in the states comprising the Sixth Circuit. These statistics represent immeasurable harms in lost lives, significant physical, emotional, and mental damage to children and families, and economic and social costs of more than $80 billion a year.[3] A substantial majority of these cases were detected because someone reported her suspicions to law enforcement or child protective services in keeping with mandatory child abuse reporting laws or her own conscience. Mandatory reporters form a critical first line of defense for abused children. A significant percentage of them are school personnel and other public servants who will be deterred from reporting by the Sixth Circuit's decision.

I. THE SIXTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY TO MANDA-TORY REPORTERS WHO KNOW OF OR REASONABLY SUSPECT CHILD ABUSE CRIPPLES LONGSTANDING PUBLIC POLICY TO PROTECT CHILDREN FROM ABUSE.

A. Federal Policy Directly Supports Mandatory Reporting of Child Abuse as Essential to Protecting Children and Contemplates Immunity for Good Faith Reporters.

In 1963, the U.S. Children's Bureau (now part of the U.S. Department of Health & Human Services)

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[3] *See* CHILDREN'S DEF. FUND, THE STATE OF AMERICA'S CHILDREN 2014 36, 74 (2014).

released a model statute requiring doctors and hospitals to report suspected incidences of child abuse.[4] Based on the seminal work of Dr. C. Henry Kempe,[5] this model served as a template for the mandatory reporting laws passed by all fifty states by 1967. Over time, the states have expanded the definition of "mandatory reporter" to include many other professionals and laypeople. The clear purpose of these efforts has always been preventing abuse and protecting children.

In January 1974, Congress reinforced the state reporting schemes by enacting the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101-5119c, one of the first federal programs "specifically designed to address concerns regarding child abuse and neglect in this country."[6] CAPTA provides financial assistance for identifying, preventing, and treating child abuse and neglect.[7] To be eligible to receive CAPTA funding, "states [are] required to establish systems for reporting and investigating child abuse and neglect [...]."[8] States must also include provisions granting immunity from prosecution under any state or local law to those persons making good faith reports of suspected or known child abuse.[9]

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[4] U.S. DEP'T OF HEALTH & HUMAN SERVS., THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA'S CHILDREN 3-4 (2014).

[5] C. Henry Kempe, *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

[6] S. REP. NO. 111-378 at 3 (2010).

[7] *Id*.

[8] *Id*. at 4; *see also* 42 U.S.C. § 5106a(b)(2)(B)(i) (2015).

[9] 42 U.S.C. § 5106a(b)(2)(B)(vii) (2015).

Reporter immunity is crucial to encourage reporting without fear of legal repercussions for complying with a statutory duty. "Immunity helps to promote the gravity and necessity of ensuring that children are protected and provided a safe foundation for growth into adulthood."[10] While CAPTA does not specifically address immunity from federal constitutional claims, its framework and legislative history support the view that the federal government considers the protection of children to be such a compelling governmental interest that it outweighs the rights of suspected abusers to redress for injuries that the law might otherwise countenance.

Congress maintained this view in CAPTA's 2010 reauthorization, which was "intended to strengthen and support families with children; [and] to protect children from abuse, neglect and maltreatment; [...]."[11] As part of CAPTA's reauthorization, Congress required the Secretary of Health & Human Services to conduct a study to "examine how immunity from prosecution under state and local laws and regulations facilitate or inhibit individuals cooperating, consulting, or assisting in making good faith reports of suspected child abuse or neglect."[12] The HHS report noted, "Immunity from

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[10] Jon M. Hogelin, *To Prevent and to Protect: The Reporting of Child Abuse by Educators*, 2013 BYU EDUC. & L.J. 225, 243 (2013), *available at* http://digitalcommons.law.byu.edu/elj/vol2013/iss2/3.

[11] *See* note 6.

[12] U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, REPORT TO CONGRESS ON IMMUNITY FROM PROSECUTION FOR PROFESSIONAL CONSULTATION IN SUSPECTED AND KNOWN INSTANCES OF CHILD ABUSE AND NEGLECT 3 (June

prosecution is an important issue facing professionals involved with responding to and investigating child abuse and neglect,"[13] and concluded that "providing stronger protection to allow professionals to work on child maltreatment cases without fear of being sued for providing assistance to vulnerable children"[14] is critical. The Sixth Circuit's decision drastically weakens, rather than strengthens, the immunity shield.

B. Consistent with CAPTA, All States Encourage Good Faith Reporting of Child Abuse Through Low Reporting Thresholds, Statutory Grants of Immunity, and Penalties for Failure to Report.

1. Low reporting thresholds

Almost every state in the country has laws requiring certain professionals to report suspected or known child abuse.[15] In Ohio, such individuals include health care professionals, attorneys, psychologists, school personnel, and generally anyone who interacts with children.[16] Other states, like

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2013), *available at* http://www.acf.hhs.gov/sites /default/files/cb/capta_immunity_rptcongress.pdf

[13] *Id.*

[14] *Id.* at 20.

[15] CHILD WELFARE INFORMATION GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (Nov. 2013) [hereinafter MANDATORY REPORTERS], *available at* https://www.childwelfare.gov/pubPDFs/manda.pdf. New Jersey and Wyoming require all persons to report. *Id.* at 40, 64.

[16] OHIO REV. CODE § 2151.421(A)(1)(b) (2015); MANDATORY REPORTERS, *supra* note 15 at 1 (lists reporters for all states).

Tennessee and Kentucky, have broad statutes making *everyone* a mandatory reporter.[17] To encourage reporting, the degree of certainty that triggers an obligation to report is set low; most states use terms such as "reason to believe," "reason to suspect," "reasonable cause to believe," or "reasonable cause to suspect" that child abuse has occurred. Some states use a combination of "know," "suspect," or "believe."[18] Typically, the reporter must make the report immediately, and has neither a duty nor authority to investigate. For example, the state of Ohio instructs school personnel:

> Early reporting to the children services agency is encouraged to prevent injury or harm to a child. . . . It is not [school employees'] responsibility to determine if abuse or neglect is in fact occurring or if any of the circumstance surrounding suspected incidents of abuse or neglect actually happened. Making this determination is the legally mandated function of the public children services agency.[19]

Ignoring the import of setting the reporting threshold low, the Sixth Circuit's decision complicates

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[17] TENN. CODE ANN. § 37-1-403(a)(1) (2015); KY. REV. STAT. ANN. § 620.030(1) (2015).

[18] *See* Tonya Foreman and William Bernet, *A misunderstanding regarding the duty to report suspected abuse*, CHILD MALTREATMENT, Vol. 5, No. 2 (June 2000) at 190-96.

[19] OHIO DEP'T OF JOB AND FAMILY SERVS., OFFICE OF FAMILIES AND CHILDREN, *Child Abuse & Neglect: A Reference for Educators* 8-9 (Oct. 2013).

a mandatory reporter's determination of whether she has met the statutory trigger to report her suspicions. After the Sixth Circuit's ruling, the reporter necessarily must consider whether her report would constitute an adverse action in violation of the suspected abuser's constitutional rights. This extra layer of consideration is likely to deter or delay reports of child abuse that meet the state threshold. The Sixth Circuit has substantially diminished, therefore, an abused child's chance of receiving help.

2. Statutory grants of immunity

All states extend some form of immunity from civil and criminal liability to good faith reporters.[20] The immunity shield is so essential to the effectiveness of child abuse prevention statutes that as of 2011, 17 states presumed good faith,[21] 26 extended immunity beyond reporters to individuals participating in investigations of maltreatment,[22] and 36 states and the District of Columbia protected participants in any subsequent judicial proceedings.[23]

Ohio state courts have addressed the public policy rationale undergirding immunity for mandatory reporters of child abuse. In *Gersper v.*

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[20] OHIO REV. CODE § 2151.421(G)(1)(a) (2015); Hogelin, *supra* note 10 at 251; CHILD WELFARE INFORMATION GATEWAY, IMMUNITY FOR REPORTERS OF CHILD ABUSE AND NEGLECT 2 (Dec. 2011) [hereinafter IMMUNITY FOR REPORTERS], *available at* https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/immunity/ (lists immunity provisions for all states).

[21] IMMUNITY FOR REPORTERS, *supra* note 20 at 2 n.3.

[22] *Id*. at 2.

[23] *Id.*

Ashtabula County Children Services Board, the Ohio Supreme Court concluded that the purpose of the immunity provision (Ohio Rev. Code § 2151.421(G)), is "to encourage those who know or suspect that a child has fallen victim to abuse or neglect to report the incident to the proper authorities and/or participate in the judicial proceedings to secure the child's safety without fear of being exposed to civil or criminal liability."[24] In *Liedtke v. Carrington*, the court of appeals found it "clear that the legislature believed that the societal benefits of preventing child abuse outweigh the individual harm that might arise from the filing of a false report."[25] Similarly, in *Walters v. The Enrichment Center of Wishing Well, Inc.*, the appeals court stated:

> the societal benefits of preventing child abuse outweigh the individual harm which might arise from the filing of an occasional false report. The grant of immunity [...] for those persons reporting under the mandatory provisions [...] similarly promotes the public policy goal of protecting children from physical and mental abuse by ensuring that those persons who are required by law to report such abuse are not deterred from this duty by the daunting prospect of expensive and time-consuming litigation.[26]

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[24] 570 N.E.2d 1120, 1123 (Ohio 1991).
[25] 763 N.E.2d 213, 216 (Ohio Ct. App. 2001).
[26] 726 N.E.2d 1058, 1063 (Ohio Ct. App. 1999).

3. Penalties for failure to report

States take very seriously their responsibility to protect children. With only two exceptions, all states and the District of Columbia impose penalties on mandatory reporters for failing to make a report of known or suspected abuse.[27] The penalties can take a variety of forms, from a monetary sanction to a criminal charge. In Ohio, a mandatory reporter who fails to make a report could be found guilty of a misdemeanor.[28] In Kentucky, the state agency has a progressive disciplinary structure under which repeated failures to report ultimately can result in felony charges.[29] In Tennessee, failing to file a mandatory report could result in misdemeanor jail time, a monetary fine, or both.[30]

Without concomitant qualified immunity from federal claims, the state protections afforded good faith reporters ring hollow. Indeed, the Sixth Circuit's decision creates a Hobson's choice for mandatory reporters: report the abuse and face a possible federal lawsuit filed by the suspected abuser, or do not report, possibly leaving the child in danger of further abuse, and be sanctioned by the state. Placing mandatory reporters in such a legal and

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[27] CHILD WELFARE INFORMATION GATEWAY, PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 2 n.2 (Nov. 2013) [hereinafter PENALTIES], *available at* https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/report/ (lists of state penalty systems).

[28] OHIO REV. CODE § 2151.99(C)(1) (2015).

[29] KY. REV. STAT. ANN. §§ 620.030(6), 620.990 (2015).

[30] TENN. CODE ANN. § 37-1-412(a) (2015); TENN. DEP'T OF CHILDREN'S SERVS., *Reporting Abuse FAQ* (undated), *available at* www.tn.gov/dcs/article/reporting-abuse-faq.

moral dilemma runs counter to the very purpose of state child abuse prevention policies: "to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect [... so that] the protective services of the state shall be brought to bear on the situation to prevent further abuses, to safeguard and enhance the welfare of children, and to preserve family life."[31]

C. Local Policies Promote the Protective Goals of Federal and State Laws.

School boards and other local entities who employ mandatory reporters generally have adopted policies and procedures that promote the protection of children, including requirements that their staff and volunteers comply with their obligations under child abuse reporting laws. The five largest school districts in the Sixth Circuit have specifically incorporated mandatory reporting requirements into their school board policies and/or regulations.[32] To implement these policies, school districts provide training to ensure mandatory reporters know how to recognize abuse and understand the statutory reporting

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[31] TENN. CODE ANN. § 37-1-402(a) (2015).

[32] COLUMBUS CITY SCH. DIST. (OH), *Policy 5161.8: Students - Elementary, Middle, and High School - Welfare - Health* (revised Sept. 20, 2005); GRANDVIEW HEIGHTS CITY SCH. DIST. (OH), *Policy JHG: Reporting Child Abuse* (readopted Apr. 13, 2010); JEFFERSON CNTY. PUB. SCHS., *Policy 09.2211: Employee Reports of Criminal Activity* (amended Jan. 27, 2014); DETROIT BD. OF EDUC. (MI), *Policy 9.29: Reporting Child Abuse, Neglect or Under the Influence of Controlled Substance* (effective Sept. 8, 2008); SHELBY CNTY. BD. OF EDUC. (TN), *Policy 6017: Child Abuse and Neglect and Child Sexual Abuse* (revised Sept. 17, 2013).

thresholds, the procedures to fulfill their reporting duties, the immunities afforded to them, and the penalties for failing to report.

The Sixth Circuit's ruling will result in confusion for mandatory reporters that will lessen the likelihood of prompt and effective reporting. School policies and training will direct them to comply with their mandatory duties under state law, but cannot assure them of protection from federal lawsuits for doing so.

II. THE SIXTH CIRCUIT'S DECISION ALLOWING CONSTITUTIONAL RETALIATION CLAIMS AGAINST MANDATORY REPORTERS OF CHILD ABUSE, EVEN WHERE A REASONABLE BASIS EXISTS TO SUSPECT ABUSE, RAISES IMPORTANT QUESTIONS UNDER SECTION 1983 THAT THIS COURT MUST RESOLVE.

Ignoring the compelling purpose of the widely adopted protective provisions in child abuse reporting laws, the Sixth Circuit erroneously held that every "report of child abuse – even if it is not materially false and there is evidence in the record that could support a 'reasonable basis' to suspect child abuse – is actionable if the reporter actually made the report *at least in part* for retaliatory motives." *Wenk v. O'Reilly*, 783 F.3d 585, 595 (6th Cir. 2015). Under this decision, a mandatory reporter who fulfills her legal duty under state law to protect children risks being held personally liable in federal court for alleged First Amendment retaliation. *Amici* could find no decision in this Court's Section 1983 jurisprudence holding

that a state or local government official's action mandated by a state law, the constitutionality of which is not in question, can nonetheless support a claim of unconstitutional retaliation. *Amici* urge this Court to grant review and find that such a claim cannot be sustained; therefore, a government official who makes a child abuse report supported by reasonable suspicion sufficient to trigger the mandatory duty to report is entitled to qualified immunity.

A. This Court's review is crucial to establish the plaintiff's burden to plead and prove absence of a reasonable basis in order to state a *prima facie* First Amendment retaliation claim based on a mandatory report of suspected abuse.

1. The governments' compelling interest in protecting the safety of children justifies a constitutional analysis distinct from the inquiry applicable to ordinary First Amendment retaliation claims.

Amici agree with Petitioner's point that the Constitution goes far in accommodating the protective purpose of mandatory child abuse reports. Petition at 14-16. *Amici* contend that this compelling purpose requires an analysis distinct[33] from the

[33] *Cf. Morse v. Frederick*, 551 U.S. 393 (2007) (in light of school's responsibility for student welfare, school official does not violate First Amendment by regulating student speech protected in other contexts); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)

ordinary claim of First Amendment retaliation to determine whether a plaintiff has met the burden of establishing the elements of a constitutional violation. If the Sixth Circuit's application of traditional First Amendment analysis in retaliatory child abuse cases is correct, then Section 1983 would sanction constitutional retaliation claims against mandatory reporters who properly fulfill their duty to report child maltreatment, including severe cases of abuse, of which the reporter has actual knowledge or which every reasonable person would suspect based on the information known to the reporter.

Without discussing the protective purpose underlying mandatory reporting laws, the Sixth Circuit permits such claims to survive summary judgment by erroneously placing on a defendant whose actions comport with her legal responsibilities an additional burden "to show that she actually believed that her duty to report was triggered and that she made the report because of that duty." *Wenk*, 783 F.3d at 597. This hurdle would deny qualified immunity in virtually all cases asserting First Amendment retaliation against child abuse reporters regardless of their compliance with their legal obligations.

The Sixth Circuit erred in placing such a burden on mandatory reporters because it gave precedence to the suspected abuser's free speech rights over the protective purpose of the child abuse reporting law that compelled the alleged retaliatory action. This Court's review is necessary to give proper

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(reasonable suspicion, not probable cause, required to justify school official's search of student given school's responsibility for student safety).

consideration to these and other factors that weigh in favor of a constitutional analysis for First Amendment claims of retaliatory child abuse reporting that places on plaintiffs additional burdens that restrict viable claims to those where there is strong evidence that the defendant lacked reasonable grounds for the suspected abuse she reported.

2. Traditional First Amendment retaliation analysis fails to account for legally *mandated* actions challenged as unconstitutional.

This Court's decisions involving Section 1983 claims of First Amendment retaliation uniformly concern permissive actions that the governmental official was not duty-bound to take. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (alleged retaliatory job elimination); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (alleged retaliatory delay in delivery of prisoner's property); *Hartman v. Moore,* 547 U.S. 250 (2006) (alleged retaliatory prosecution); *Reichle v. Howards,* 132 S. Ct. 2088 (2012) (alleged retaliatory arrest). Because each alleged retaliatory action was undertaken voluntarily by the government official, the propriety of the official's motive in choosing to act was arguably fairly in play. That is not so where an official, such as a mandatory reporter, is legally obligated to take an action despite any retaliatory motive.

As previously discussed, *see supra* Part I.B.1, state child abuse prevention statutes universally require mandatory reporters to notify the designated investigative agency(ies) once reasonable grounds

exist to suspect abuse. Once this purposely low bar is met, the mandatory reporter loses any discretion she may have had to refrain from reporting her suspicions. Any retaliatory motive the reporter may also happen to harbor does not change the duty to report, and is irrelevant to determining whether a reporter has satisfied her legal obligation to act to protect children from continuing abuse. This preserves the protective purposes of child abuse reporting laws and is reflected in the unanimous grant of immunity by states.

Because mandatory reporters have no discretion about whether to report suspected child abuse once reasonable grounds exist, this Court should review the appropriateness of the application of the adverse action and causation elements of the standard First Amendment retaliation analysis[34] to the claim here.

3. Determinations of adverse action are inapposite to legally mandated duties necessary to protect children.

Child abuse reports made in compliance with child abuse prevention laws should not be deemed an adverse action for First Amendment retaliation purposes. When a reasonable basis exists to suspect abuse, any retaliatory animus the mandatory reporter may harbor does not diminish the protective effect of the report. State provisions compelling reports of suspected abuse make no exception for situations where a mandatory reporter recognizes she has mixed motives that include some degree of

[34] The protected speech element is not in dispute here.

retaliation. She must report the suspected maltreatment despite any retaliatory motive, or risk criminal and civil penalties.

This differs markedly from other First Amendment retaliation cases where the alleged retaliatory acts are *permissive* actions that the government official can choose to take to satisfy a retaliatory impulse. But because child abuse reports supported by reasonable grounds are compelled by force of law, any retaliatory motive of the reporter becomes irrelevant. Many states, including Ohio, confirm this notion by presuming that all child abuse reports are made in good faith. Other state laws create powerful incentives for reporters to act in good faith by making good faith a prerequisite for receiving the shield of immunity and/or penalizing bad faith reports.[35] This Court has recently recognized that in practice, mandatory reporters act in good faith primarily out of concern for the child's safety and not a desire to punish the suspected abuser. *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015).

The Sixth Circuit did not consider these important distinctions and erroneously concluded that all child abuse reports are adverse actions because they *may* invoke intrusive investigations with possible removal of a child – harms sufficient to dissuade the exercise of constitutional rights. (*See infra* Part II.A.4 on significant causation problems.) The two circuit decisions cited by the court lend little support, because their findings are easily distinguishable.

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[35] Twenty-nine states impose penalties on any person who willfully or intentionally makes a report that the reporter knows is false. PENALTIES, *supra* note 27 at 2.

In *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580 (6th Cir. 2008), the determination of adverse action stemmed from an administrator's *false* report[36] to child protective services in conjunction with dismissal of the child from school and refusal to provide tutoring services. Nothing in *Jenkins* endorses the notion that a report of abuse supported by reasonable grounds by itself constitutes an adverse action. The other case, *A.C. ex rel. J.C. v. Shelby County Bd. of Educ.*, 711 F.3d 687 (6th Cir. 2013), involved a retaliation claim under the Americans with Disabilities Act. There, the court specifically explained that in contrast to the analysis in a First Amendment case, a plaintiff's burden to show adversity at the *prima facie* stage in an ADA retaliation case is very low and courts should not consider the government official's asserted non-retaliatory grounds in determining adverse action.

4. The causation analysis in First Amendment retaliation cases based on mandated child abuse reports must take into account important factors the Sixth Circuit ignored.

The Sixth Circuit's causation analysis similarly errs in its disregard for the impact of mandatory reporting obligations. Citing *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998), and other cases involving acts of deliberate choice (public

[36] *Amici* do not contend that intentionally and materially fabricated reports of child abuse are categorically not an adverse action.

release of truthful information in rape case, termination of employment, denial of business permits, phone call to plaintiff's employer), the Sixth Circuit emphasizes that "an act taken in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act when taken for a different reason, would have been proper." *Wenk*, 783 F.3d at 595 (citations omitted). While this rationale has some force when considering an act that absent the retaliatory motive would have been otherwise permitted by law, *i.e.*, "proper", it has none here where the act is not simply permitted, but mandated by law regardless of the presence or absence of a retaliatory motive.

In the Sixth Circuit's view, the mandatory nature of a report of child abuse supported by reasonable grounds is insufficient to forestall a First Amendment retaliation claim, but instead is merely "relevant" to meeting the defendant's burden of showing that the report would have been made even in the absence of protected conduct by the suspected abuser. Additionally, the mandatory reporter must show that she reported only non-fabricated allegations that she believed established reasonable cause and that her own actions support this belief. Despite its assurance that this would suffice in most instances to resolve cases summarily in defendants' favor, the Sixth Circuit's own analysis of competing circumstantial evidence demonstrates why this rarely would be true. Mandatory reporters could avert fact-intensive inquiries about state of mind issues on motions for summary judgment and again at trial only by failing, in violation of state law, to report suspected abuse.

The Sixth Circuit's causation analysis also fails to account for three significant factors similar to those this Court deemed relevant in *Hartman*, 547 U.S. 520, to justify an additional pleading burden on plaintiffs in retaliatory prosecution cases. In retaliatory child abuse cases: First, evidence of reasonable grounds to suspect child abuse is available and apt to prove or disprove retaliatory causation. Secondly, the requisite causation between the reporter's alleged retaliatory animus and the plaintiff's injury (intrusive investigations and subsequent child abuse proceedings) is more complex than in typical retaliation cases as reports of child abuse do not automatically trigger abuse investigations. Nationally, over 39% of reports of suspected abuse were screened out (not investigated) in 2013, resulting in no consequences to the suspected abuser.[37] The decision to initiate an investigation is made by child protective services or law enforcement. These agencies also determine the scope, intensity and length of the investigation, and the need to impose remedial/restrictive conditions or to pursue criminal or removal proceedings. Because these decisions are not within the reporter's control, a wide gap exists between the alleged retaliatory animus and the injury. The third *Hartman* factor is that a presumption of regularity exists that reporters are acting in good faith to protect children (*see supra* Part

[37] In 2013, state screen out rates varied from 0% (3 states) to 82.9%. Ohio's screen out rate was 51.7%. U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. OF CHILDREN, YOUTH & FAMILIES, *Child Maltreatment 2013*, Table 2-1, *available at* http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2013-data-tables.

I.B.2). These factors in the context of the protective purpose of mandatory child abuse reports support placing an additional burden on plaintiffs asserting First Amendment claims of alleged retaliatory child abuse reporting to plead and prove absence of reasonable grounds to suspect abuse; the burden should not be on a mandatory reporter to justify and prove, even in cases where the existence of reasonable grounds is not disputed, the reasons for her compliance with her mandatory duty under state law.

B. The Sixth Circuit's Denial of Qualified Immunity Is Erroneous and Subjects Mandatory Reporters to the Threat of Burdensome Litigation, Thereby Imperiling Children Suffering from Ongoing Neglect and Abuse.

1. At the time of Petitioner's report, the law was not clearly established such that a reasonable school official would have understood that mandatory report of child abuse violated the suspected abuser's First Amendment rights.

Citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the Sixth Circuit acknowledges that "[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." With little discussion, the court casts the right broadly, declaring that the law at the time of Petitioner's report clearly

established that government officials may not retaliate against an individual for exercising his First Amendment rights. While "the law is settled in that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, . . . for speaking out," *Hartman*, 547 U.S. at 256, this Court has explained that the "right allegedly violated must be established 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours of the right are clear to a reasonable official.'" *E.g.*, *Reichle*, 132 S. Ct. at 2094 (citations omitted). *Amici* submit that the right in question here is the specific right to be free from a retaliatory child abuse report otherwise supported by reasonable suspicion or knowledge of child abuse. This Court has never held that such a right exists and should accept this case for review to make clear that such a right was not clearly established at the time of Petitioner's report to child protective services such that qualified immunity should have been granted.

When viewing the right within its proper contours, a mandatory reporter, finding no specific authority from this Court, reasonably may have questioned how to reconcile this Court's decisions prohibiting First Amendment retaliation with those recognizing the state's compelling interest in child protection. *See* Pet. at 14-16. As just explained, Sixth Circuit precedent does not assist in discerning a right "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citations omitted). Outside circuit precedents asserting constitutional violations in connection with child abuse investigations (not mandatory reports)

have held that official actions supported by reasonable grounds would pass constitutional muster. *See, e.g.*, *Hutch v. Dep't for Children, Youth, and Their Families,* 274 F.3d 12 (1st Cir. 2001); *Thomason v. SCAN Volunteer Services*, 85 F.3d 1365, 1371 (8th Cir. 1996).

Beyond a lack of clear authority, a mandatory reporter reasonably could have believed that this Court's *Hartman* decision affected claims of retaliatory child abuse reporting. *Cf. Reichle,* 132 S. Ct. 2088 (finding law enforcement officers reasonably could have believed *Hartman* applied to retaliatory arrests). In extending the no probable cause requirement to retaliatory arrests, the Sixth Circuit reasoned that the *Hartman* "rule sweeps broadly." *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006). Although child abuse reports do not necessarily lead to criminal proceedings, given the close similarities to the *Hartman* factors, *see supra* Part II.A.4, a mandatory reporter reasonably could have interpreted *Hartman* to support a no reasonable suspicion rule applicable to claims of retaliatory child abuse reporting. Thus, existing precedent at the time of Petitioner's report failed to place "the constitutional question beyond debate," *al-Kidd*, 131 S. Ct. at 2083 (citations omitted), and her actions were neither incompetent nor a knowing violation of the law. *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2011). In sum, a reasonable school official would not have understood that her report of child abuse made in compliance with her mandatory duty violated the suspected abuser's First Amendment rights; she is therefore entitled to qualified immunity.

2. The protection of qualified immunity from federal constitutional claims is especially important in the school context.

According qualified immunity to mandatory reporters against First Amendment retaliation claims is particularly important for school staff who routinely communicate and interact with parents, staff, and students. Unfortunately, these interactions may sometimes become contentious or hostile. Indeed, disputes over appropriate special education services, the context surrounding the protected speech here, are common. Parent-school interactions often produce protected speech providing the basis for a First Amendment claim as well as evidence suggesting hostile animus.[38] Under the Sixth Circuit's decision, school personnel wary of potential federal litigation – whether or not overtly threatened by the suspected abuser – may delay or refrain from making a mandated report concerning an individual with whom they have had previous negative interactions. The mandatory reporter may question her own motives and refrain from reporting to avoid the inevitable scrutiny of her mindset that a federal retaliation case would entail. Because of the substantial role school personnel play in reporting

[38] Information elicited during the child abuse intake and investigation process may also provide circumstantial evidence of retaliatory motive. For example, Ohio's Office of Families and Children instructs educators to include in reports of suspected child abuse "what is known about the behavior and functioning of the caretaker of the alleged child victim." *Child Abuse and Neglect: A Reference for Educators*, *supra* note 19 at 31.

child abuse, this outcome is especially detrimental to protecting children from continuing abuse.

3. Denying qualified immunity from federal constitutional claims to mandatory reporters of child abuse creates intolerable burdens that ultimately harm children.

Hesitation about reporting reasonable suspicions of child abuse is virtually certain given the untenable legal (and moral) dilemma a mandatory reporter will face if the Sixth Circuit's decision remains intact: either make the report, potentially inviting the burdens of litigation and exposure to personal liability for a federal constitutional violation; or refrain from making the report and induce a state criminal or civil penalty and a conscience burdened by knowledge that a child potentially remains at risk of continued maltreatment. If the at-risk child or another child should later be injured or die at the hands of the suspected abuser, failure to report could also result in civil litigation seeking substantial damages.[39] Mandatory reporters who already recognize the serious implications of making a child abuse report should not have to weigh such choices that further delay and discourage reporting.

Regardless of whether litigation actually ensues in a particular case or in the aggregate, the threat itself imposes undue harm because it directly

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[39] *See, e.g.*, *Beggs v. Washington Dep't of Social & Health Servs.*, 247 P.2d 421 (Wash. 2011) (mandatory reporter statute implies a cause of action for failure to report abuse).

impedes reporting of suspected abuse and places vulnerable children at substantial risk of continuing maltreatment. It causes exactly the kind of hesitation and second-guessing the granting of qualified immunity seeks to avoid. In *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012), this Court stated, "the government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business [is] 'the most important special government immunity-producing concern.' Ensuring that those who serve the government do so 'with the decisiveness and the judgment required by the public good,' is of vital importance. . ." (citations omitted). In no case could decisiveness be more vitally important than to ensure child abuse reports are made immediately when reasonable suspicions dictate such action, thereby justifying the grant of qualified immunity. The welfare of our children, a public good of the highest order, depends on it.

CONCLUSION

For these reasons, *Amici* respectfully urge this Court to grant review and correct the Sixth Circuit's grievous errors that threaten the protection of children.

Respectfully submitted,

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