No. 07-1089

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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> [W]e acknowledge that it is possible to argue that without a situation akin to that in *Wisconsin v. Yoder*, ... only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education.... *Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue.

App. 17-18 (*Barrow III*).

This Court should grant Smith's petition to resolve a conflict which was recognized by all three judges in *Barrow III* and to address important *legal* issues regarding qualified immunity, attorney's fees and offers of judgment. This Court is neither constrained by "law of the case" nor by its previous decision denying Smith's pre-trial petition. *See Teague v. Lane*, 489 U.S. 288, 296 (1989). This Court normally addresses issues when the case has been concluded so as to avoid unnecessary constitutional determinations. *Christopher v. Harbury*, 536 U.S. 403, 417 (2002); *United States v. Nixon*, 418 U.S. 683, 690 (1974). This case is now ripe for review in a way that it was not before.

The conflict recognized in *Barrow III* underscores the vitality of Smith's qualified immunity claim. By recognizing that rational basis scrutiny might be proper, *Barrow III* essentially admitted not only that

the law was not clearly established but that there may not have been a constitutional violation. If rational basis scrutiny applies, then no violation occurred since Smith articulated a rational basis for his conduct. If the level of scrutiny was not clearly established, then Smith is entitled to qualified immunity.

REPLY TO BRIEF IN OPPOSITION

I. THE DECISION BELOW CONFLICTS WITH PRECEDENTS ACROSS THE COUNTRY.

A. THIS COURT'S PRECEDENTS DO NOT ESTABLISH THAT THE PARENTAL RIGHT TO DIRECT THE EDUCATION OF ONE'S CHILDREN IS ENTITLED TO STRICT SCRUTINY.

Because this Court has repeatedly used the language of rational basis scrutiny when evaluating parental rights claims, Barrow's argument that there is no conflict is without merit. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("reasonable relation"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("reasonable relation"); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (rational basis scrutiny); *Runyon v. McCrary*, 427 U.S. 160, 177-79 (1976) ("reasonable government regulation").

Barrow does not explain how this Court's repeated use of rational basis scrutiny can be reconciled with her claim that strict scrutiny applies. Barrow only offers an oblique reference to *Troxel v. Granville*,

530 U.S. 57 (2000), a case decided *after* the events of the case at bar, and a citation to *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). However, *Troxel* did not "articulate the appropriate standard of review." *Id.* at 80 (Thomas, J., concurring); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3rd Cir. 2005).

Moreover, not all rights described as fundamental receive strict scrutiny. For example, rational basis scrutiny applies to anti-nepotism policies, which affect the fundamental right to marry. *Montgomery v. Carr*, 101 F.3d 1117, 1125 (6th Cir. 1996). Anti-nepotism rules "play a legitimate and laudatory role in preventing conflicts of interest" and do not prohibit the protected association, but only prevent the employment that violates the policy. *Cutts v. Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982).

The comparison between parental rights and the right to marry is particularly apt. *Cutts* upheld the FCC's anti-nepotism policy against a claim that it violated the fundamental right to marry enunciated by this Court when it struck down Virginia's miscegenation law. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Since the FCC's anti-nepotism policy did not impose a direct burden on the right to marry, it was found to be constitutional as a legitimate measure to prevent favoritism and conflicts of interest. *Cutts*, 692 F.2d at 141.

Analogously, this Court established that a state violates a parent's right to direct the education of his or her children when it prohibits parents from choosing private education for their children. *Pierce*, 268 U.S. at 534-35. In both *Loving* and *Pierce*, the state attempted to directly prevent citizens from exercising their rights. In contrast, anti-nepotism policies and school patronage policies do not directly target the exercise of rights. The patronage policy did not prevent Barrow from sending her children to private school, it only prevented her from being promoted into an administrative position in which she would have, by her own admission, created an apparent conflict of interest and possibly a decline in morale caused by her appearance of dissatisfaction with the public schools.[1] *See Cutts*, 692 F.2d at 141. The patronage policy was a reasonable regulation designed to address a legitimate governmental interest.

B. THERE IS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS.

Barrow tries to ignore the substantial conflict among the circuits regarding the level of scrutiny to apply to the parental right to direct the education of

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[1] Barrow agreed that a reasonable person could form the opinion that a school administrator lacks confidence in the public schools if she has her children enrolled in private school and that reasonable people could disagree about whether that decision would materially and substantially impair the mission of the school. R. Vol. 61, pp. 4622-23 and DN 439, pp. 244-45.

one's children. She argues that similar patronage policies have not been upheld and that there is a workable distinction between the management of the public schools and an administrator's decision regarding her children's education. Barrow's arguments are without merit.

1. Barrow's Reliance on *Barrett* and *Stough* Is Misplaced.

Barrett v. Steubenville City Schs., 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), does not support Barrow because it implies that rational basis scrutiny applies. Because *Barrett* was an interlocutory appeal from a denial of a *motion to dismiss*, the Sixth Circuit held that it must accept the allegation that Barrett "was denied employment *only* because he was exercising his right to educate his son in a manner of his choice." *Id.* at 973 n.3 (emphasis in original). The facts assumed at the motion to dismiss stage distinguished *Barrett* from *Montgomery*, in which the Sixth Circuit, after trial on the merits, upheld an anti-nepotism policy that infringed on the fundamental right to marry. *Montgomery* held that the right to marry could be infringed by a rational policy aimed at a legitimate governmental interest. 101 F.3d at 1124-26. *Barrett* held that the teacher had alleged that he was terminated because of his exercise of his parental right *only* and not because of any legitimate governmental interest such as an anticipated negative effect of his choice. 388 F.3d at 973 and n.3.

Barrow's reliance on *Stough v. Crenshaw City Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984), is also misplaced. *Stough* relied on the same Fifth Circuit case as *Barrow I* in its mistaken application of a First Amendment free speech standard to Fourteenth Amendment parental rights claims. 744 F.2d at 1480 (citing *Brantley v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983)). *Brantley*, borrowing from cases involving free speech rights in public schools, held that a school district cannot restrict an employee's choice to send his or her child to a private school without demonstrating that the choice would cause a "material and substantial" disruption to the operation of the schools. 718 F.2d at 1359 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980)).

Pickering and *Van Ooteghem* were free speech employment retaliation cases, while *Tinker* involved the regulation of student free speech. These cases did not involve parental rights claims under the Fourteenth Amendment. While *Brantley* mentioned *Meyer*, *Pierce*, and *Yoder* as embodying this Court's recognition of a right to familial privacy, *Brantley* failed to examine what level of scrutiny was employed in those cases. As the Fifth Circuit unanimously recognized in *Barrow III*, *Brantley*'s standard may be in conflict with this Court's precedents. App. 17-18.

Barrett and *Stough* support Smith's claim that this Court should grant his petition. *Barrett*, if it establishes a level of scrutiny for parental rights,

applied rational basis scrutiny. *Stough* highlights that the Fifth Circuit's erroneous application of free speech jurisprudence to Fourteenth Amendment parental rights claims is being adopted by other circuits and should be corrected before it further impedes the ability of schools to impose reasonable regulations on public school employees. The government "must have wide discretion and control over the management of its personnel." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974).

2. The Conduct of Public School Administrators Inside and Outside of Schools Cannot Be Neatly Separated.

Barrow tries to distinguish between policies which regulate the inside of public schools with those that regulate the outside, arguing that rational basis scrutiny only applies to "policies relating to what goes on at the public school." Opp. 6-7. This distinction is unworkable and inconsistent with this Court's precedents. This Court has previously noted that public school officials have a vitally important job and that it is impossible to separate their conduct inside and outside of the schools. *See Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618, 2629 (2007); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986). Because of this dual role, when a citizen enters government service the citizen must accept certain limitations on his or her freedom. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

Barrow proposes that courts ignore the fact that administrators can affect schools by the decisions they make outside the physical boundaries of their schools. The Texas Association of School Boards Legal Assistance Fund (TASB-LAF) explained that it is impossible to separate the public and private actions of administrators, particularly in small school districts such as Greenville Independent School District. *See* TASB-LAF Br. 10. Barrow's own testimony[2] confirmed that a reasonable person could form the opinion that a school administrator lacks confidence in the public schools if her children attend a private school and that reasonable people could disagree about whether that decision would materially and substantially impair the mission of the school. R. Vol. 61, pp. 4622-23 and DN 439, pp. 244-45. The distinction maintained by Barrow in her Brief and by the Fifth Circuit in *Barrow III* does not reflect the reality of how school administrators interact with their communities.

In addition, this Court and lower courts have applied rational basis scrutiny in contexts that do not involve the internal operation of public schools. In *Runyon*, this Court, applying rational basis scrutiny, upheld the application of 42 U.S.C. § 1981 to private segregated schools, holding that a parent's right to direct the education of his or her children did not entitle parents to choose schools that practiced

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[2] Barrow's deposition occurred after *Barrow I*.

segregation. 427 U.S. at 176-79. *Runyon*, which held that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation," did not relate to the internal operation of public schools. Lower courts have also applied rational basis scrutiny to parental rights claims that do not relate to the internal operation of public schools. *See, e.g., Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996) (non-public schools); *Murphy v. Arkansas*, 852 F.2d 1039, 1043-44 (8th Cir. 1988) (home-schooled children).

C. THE "MATERIAL AND SUBSTANTIAL" DISRUPTION STANDARD IS INAPPLICABLE.

Smith contends that rational basis scrutiny, not the higher "material and substantial disruption" standard, is proper. Inexplicably, Barrow responds by contending that the district court correctly excluded evidence (including Barrow's deposition testimony) that shows that a reasonable person could have believed Barrow's conduct would cause a material and substantial disruption.[3]

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[3] Barrow refers to the excluded evidence as if it is not worthy of consideration. *See* Opp. 15. The "outlandish facts" relied on by Smith, however, include Barrow's own deposition testimony.

Smith is not asking this Court to determine whether the evidence established a defense of "material and substantial" disruption because Smith contends that the parental rights claims is subject to rational basis scrutiny. Whether or not Barrow's testimony would have supported an affirmative defense, it certainly supports Smith's contention that there was a rational basis for his conduct. *Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (rational basis scrutiny requires the plaintiff to disprove all rational bases). Barrow cannot claim that Smith's rational basis argument or his claim of qualified immunity was improperly pled. In light of Smith's actual argument, there is no reason why Smith would have needed to plead an affirmative defense of "material and substantial" disruption. If rational basis scrutiny applies, then the burden would be on Barrow, not on Smith. Barrow would have had to prove that there was no rational basis for the policy and Smith would not have had to plead an affirmative defense of "material and substantial" disruption. Moreover, even if this Court holds that the "material and substantial" disruption standard applies, the law was not clearly established. The evidence excluded by the district court establishes that Smith was objectively reasonable in imposing a patronage policy on school administrators.[4]

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[4] Barrow makes much of the fact that the jury awarded punitive damages. It should come as no surprise, however, in light of the fact that the district court prohibited Smith from

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II. THE FIFTH CIRCUIT ADMITTED THAT THE LAW WAS NOT CLEAR, BUT STILL IMPOSED LIABILITY.

A. *SAUCIER*'S RIGID ORDER OF BATTLE RULE.

The elephant in the room that Barrow does not even attempt to address is the fact that the unanimous panel in *Barrow III* was unsure whether Barrow's constitutional rights were violated. As all three judges admitted, *Barrow I* and the "material and substantial" standard might conflict with this Court's decision in *Wisconsin v. Yoder*. App. 17-18.

Barrow I superficially followed the rigid order of battle mandated in *Saucier v. Katz*, 533 U.S. 194 (2001), but it failed to identify the origin of the constitutional right it was analyzing or to enunciate the applicable level of scrutiny. App. 275, 280 n.20. *Barrow III*, rather than reforming the inadequacies of *Barrow I*, perpetuated them by applying the "law of the case" to a decision that all three judges acknowledged might conflict with this Court's precedent. App. 19. *Barrow III*'s adherence to the erroneous decision in *Barrow I* ignored the fact that *Barrow I* was decided without the benefit of the jury's findings. App. 19-20.

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presenting evidence showing why such a patronage policy was reasonable.

Because interlocutory appeals and unnecessary determinations of constitutional principles are generally to be avoided, *Christopher*, 536 U.S. at 417, this Court should carefully consider how the rigid order of battle mandated in *Saucier* tends to result in confusing pre-trial decisions on constitutional matters. *See Breen v. Tex. A&M Univ.*, 485 F.3d 325, 335-37 (5th Cir.) (confusion whether a pre-trial qualified immunity appeal recognized new cause of action), *withdrawn in part*, 2007 U.S. App. Lexis 18181 (5th Cir. 2007).[5]

B. SMITH SHOULD HAVE BEEN ALLOWED TO ARGUE QUALIFIED IMMUNITY.

Permitting Smith to present evidence regarding qualified immunity at trial and to re-urge qualified immunity based on the findings of the jury follows logically from *Behrens v. Pelletier*, 516 U.S. 299 (1996), in which an adverse ruling on qualified immunity at the motion to dismiss stage did not preclude the qualified immunity defense in a later motion for summary judgment. *Id.* at 306-07. A pre-trial ruling denying qualified immunity should not be

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[5] *Also compare Kipps v. Caillier*, 197 F.3d 765, 769 n.4 (5th Cir. 1999) ("Whether a constitutional liberty interest is implicated ... is highly questionable") with the denial of rehearing in *Kipps v. Caillier*, 205 F.3d 203, 204 (5th Cir. 2000) ("we have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired.").

used as "law of the case" to strip a public official from presenting evidence of the reasonableness of his conduct in support of his qualified immunity or to counter a claim for punitive damages.

III. SMITH PRESENTS LEGAL, NOT FACTUAL, ISSUES REGARDING RULE 68 OFFERS OF JUDGMENT AND ATTORNEY'S FEES.

Smith seeks a ruling on three discrete *legal* issues: (1) whether district courts are required to award fees for time spent on numerous unreasonable and unsuccessful motions; (2) whether an award of fees can be based on unreliable billing records; and (3) whether a district court can disregard its own factual findings to thwart a Rule 68 offer of judgment.

Rather than respond to Smiths' legal arguments, Barrow presents a meritless contention regarding the alleged confidentiality of Judge Sanders' report, a report that is a public record and that the district court specifically authorized Smith to make use of it in responding to Barrow's fee application. *See, e.g.,* App. 42 n.1 ("As permitted, [Smith] adopted materials already on file [including] Judge Sanders' June 27, 2004 report."). The Fifth Circuit entirely ignored Barrow's specious argument.[6] This Court should not be distracted by Barrow's empty rhetoric describing

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[6] Barrow's reliance on the federal Alternative Dispute Resolution Act is meritless because it does not apply to the federal courts. *See* 5 U.S.C. §§ 551(1)(b), 571(1), 572, 573, 574.

this case as "fact-bound" or "procedurally entangled." The facts are simple, the procedures straightforward and the legal issues important.

In a case in which her actual damages were $15,455, Barrow could have early on accepted Smith's offers of judgment and been made whole. Instead, she decided to litigate. The costs to the parties and to the judicial system have been enormous. Barrow's attorney's fee award alone amounts to almost two-thirds of a million dollars. By granting Smith's petition, this Court can clarify the law in such a way as to ensure the just, speedy and inexpensive resolution of future civil disputes.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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