EIGHTEENTH ANNUAL CIVIL RIGHTS AND CIVIL LIBERTIES COMPETITION

CRAL

CIVIL RIGHTS AND LIBERTIES COMPETITION

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COMPETITION PROBLEM

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INSTRUCTIONS

1. Do not cite to any case decided after July 31, 2024.

2. Competitors are not to argue any other theory of municipal liability other than failure-to-train as to the City of Gutenberg.

3. The only constitutional claim raised is the substantive due process right, and there is one municipal liability claim for damages related to the alleged violation of that right. There are no individual damages claims regarding Bradbury remaining.

4. The Gutenberg Independent School District is publicly funded.

5. Assume that all motions, defenses, and appeals were timely filed in accordance with the Federal Rules of Civil Procedure.

6. When citing to the Record, use the page numbers located on the footer of each page of the Record.

7. A team may make a request for clarification or interpretation of the Problem. Any such request must be emailed by a team member or student coach to emorymootcourt@gmail.com with the subject line "Problem Clarification" before Sunday, September 15th, 2024, at 11:59 p.m. EST. All clarifications and interpretations will be posted on the CRAL website: www.law.emory.edu/cral.

No. 11-54384

IN THE

Supreme Court of the United States

OCTOBER TERM, 2024

DANTE FITZGERALD AND TONI FITZGERALD, INDIVIDUALLY AS THE PARENTS OF DORIAN FITZGERALD, THEIR DECEASED CHILD, PETITIONERS,

v.

THE CITY OF GUTENBERG, RESPONDENT.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

I. Whether and to what extent there is a substantive due process right to companionship for the Plaintiffs with their 18-year-old child.

II. Even if there is such a right, does qualified immunity for the permit official preclude a finding of municipal liability for failure to train.

IN THE UNITED STATES COURT OF APPEALS
FOR THE 14TH CIRCUIT

No. 22-118877

District Court No. 2023-CV-071820

DANTE FITZGERALD and TONI FITZGERALD,

Plaintiffs-Appellants

V.

THE CITY OF GUTENBERG,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF GENOVIA

Decided: June 24, 2024

Before: KUANG, PILGRIM, POTTER, Circuit Judges.

OPINION

KUANG, Circuit Judge:

This appeal demonstrates the tenuous tightrope local, state, and federal governments frequently walk. Municipal entities and the people they employ need flexibility to perform their day-to-day functions without being hauled into court; however, they remain servants of the people and agents of the law. This *catch-22* between discretion and compliance compelled the United States Supreme Court to craft a solution in the form of qualified immunity:

> We therefore hold that government officials performing discretionary functions, generally are shielded 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.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The rationale for this doctrine is two-fold: (1) government employees should be able to exercise their own judgment in carrying out official duties, and (2) liability should only be assigned to them directly when their actions violate "basic, unquestioned constitutional rights." *Id.* at 815 (quotation omitted). Without qualified immunity, governmental actors sit beneath a Sword of Damocles, accepting the enormous responsibility of authority at enormous risk of liability.

Plaintiff-Appellants Dante and Toni Fitzgerald (hereinafter"the Plaintiffs" or "the Fitzgeralds") allege that Defendant-Appellee the City of Gutenberg (hereinafter "the City" or "the Defendant") violated their substantive due process right to companionship with their adult son, Dorian Fitzgerald,[1] now deceased, by failing to adequately train its Permit Officer, Charlotte Bradbury (hereinafter "Bradbury" or "Defendant Bradbury"). Even assuming that the Fitzgeralds have identified a substantive right protected by the Due Process Clause, their claim cannot succeed because the City cannot be deliberately indifferent to the need to train for the protection of a constitutional right which is not clearly established. We affirm.

Factual Background

In anticipation of the 2023-2024 school year, Gutenberg Independent School District Superintendent Myrtle Atwood released a list of books to be prohibited from all school libraries and classrooms (the "Book Ban"). The Book Ban and the ensuing local

[1] Genovia State law sets the age of majority at 18 for most purposes; as such, Dorian Fitzgerald was a legal adult at the time of his death.

protests swiftly garnered widespread attention. This public profile began with the involvement of the national social welfare organization Moms for Literacy ("Moms"). During the summer of 2023, Moms organized various demonstrations throughout the county in which volunteers associated with the group would provide free copies of books listed on the Book Ban. Apparently in response, Dads Against Degeneracy ("Dads") formed and organized counter-demonstrations wherein these same books would be collected, piled, and ignited in a communal bonfire.

In Sisyphean fashion, Moms would distribute books and the Dads would burn them. These protests and ensuing counter-protests were characterized by violent clashes between the two groups. The City of Gutenberg implemented new protest permit guidelines for demonstrations in order to stem these conflicts. [*See* Plaintiffs' **Exhibit I**.] These guidelines grant broad discretion to the municipal employee tasked with reviewing permit applications, but does not include any training on how to exercise this discretion, particularly where permits are granted to competing groups. Moms applied for a permit to demonstrate at Fountainhead Park on August 14, 2023, directly across from Pencey High School and on the same road where school buses gather to pick up students leaving the school. This protest permit was approved by Charlotte Bradbury, the Gutenberg Permit Officer with the Mayor's Office for Special Events. Soon thereafter, Dads applied for a permit to counter-protest the Moms' protest. Bradbury approved this permit as well for the exact same time, date, and location.

At their authorized protest time on August 14, 2023, both the Moms and the Dads arrived at Fountainhead Park. Moms brought a collection of books subject to the Book Ban, as well as tables and signage; Dads arrived with banners, picket signs, and kindling

to start the fire that had become characteristic of their demonstrations in the park firepit. The Moms and the Dads continued arriving, each believing they had a right to the space. Both protests soon swelled in size and started to become hostile with one another.

At about 2:45 P.M., Pencey High School was dismissed for the day. Many students gathered at the bus stops situated immediately next to the park, and Moms began handing out their books to them. The fighting between protestors swiftly escalated into an all-out brawl. A student, one 18-year-old Dorian Fitzgerald, joined the fray. Police and other emergency services were called, and when the crowd was finally dispersed, Dorian was found unconscious and with severe injuries to his head, back, and torso. He was taken to the hospital, where he succumbed to his injuries and died on that same day.

Procedural History

The Fitzgeralds brought suit against Bradbury and the City of Gutenberg on August 20, 2023. In their Complaint, the Fitzgeralds asserted only an individual capacity damages claim against Bradbury pursuant to 42 U.S.C. § 1983 on the sole basis of the loss of the right to companionship with their adult son. Against the City, the Fitzgeralds asserted a single damage claim for failure-to-train its Gutenberg Permit Officer to preserve that right under a theory of liability outlined by the Supreme Court in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) and *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Bradbury moved to dismiss the Fitzgeralds' Complaint for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6). Bradbury asserted she was entitled to qualified immunity from liability for civil damages because her conduct did not violate a clearly

established constitutional right. The district court denied this motion. Thereafter, Bradbury pursued an interlocutory appeal of the denial of her assertion of qualified immunity from the Fitzgeralds' claim brought against her in her individual capacity, which was her right, as a denial of qualified immunity is an immediately appealable final decision. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

In that appeal, we declined to decide whether there was a right to companionship with one's adult child, but nevertheless held Bradbury was entitled to qualified immunity because that right could not be said to be "clearly established." As such, the Fitzgeralds' claim against the City proceeded below, while their claim against Bradbury was dismissed.

On remand, the City moved to dismiss the Fitzgeralds' Complaint, arguing that there is no constitutional right to companionship with one's adult child, and in the alternative, that this Court's grant of qualified immunity to Bradbury foreclosed the Fitzgeralds' claim against it. In deciding this motion, the district court disagreed with the City and found that there is indeed a substantive right to companionship with one's adult child. However, it ultimately held that in light of this Court's prior determination that such a right was not clearly established, the City could not be held liable for failure to train its employee. As such, it dismissed the Fitzgeralds' claim against the City.

Discussion

We review the lower court's grant of a motion to dismiss *de novo*, taking all factual allegations as true and construing them in the light most favorable to the non-moving party. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). We turn first to whether there is a substantive right at issue here to support the Fitzgeralds' claim, for without such a

right they cannot possibly prevail in this action, and second, to whether the City of Gutenberg can be held liable for violation of a right not clearly established by virtue of an alleged failure to train its Permit Officer on how to properly address permitting between groups of hostile protestors and counter-protestors.

I.

Plaintiffs Dante and Toni Fitzgerald ask us today to declare the existence of a new substantive due process right never before recognized by either the Supreme Court or this Circuit – their right to companionship with their adult child. We proceed with great caution today, because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Under *Dobbs v. Jackson Women's Health Organization*, the right alleged must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." 597 U.S. 215, 231 (2022) (quoting *Glucksberg*, 521 U.S. at 721).

The Supreme Court has repeatedly opted not to resolve this circuit split.[2] Whether there is a companionship right is therefore unclear. *See Sinclair v. City of Seattle*, 61 F.4th 674, 684 (9th Cir. 2023) *cert. denied*, 144 S. Ct. 88, 217 L. Ed. 2d 20 (2023) (Nelson, J., concurring) ("[t]he recognition of a constitutionally protected right to the mere companionship of one's children is a creature of the circuit courts."). This is a question of first impression for this Court. We concur with the majority of circuits in this country that "the parental liberty interest in the care and custody of children must cease to exist

[2] *Jones v. Hildebrant,* 550 P.2d 339 (Colo. 1976), *cert. dismissed*, 432 U.S. 183 (1977); *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982).

at the point at which a child begins to assume that critical decision-making responsibility for himself or herself." *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003).

Section 1983 provides individuals who were unjustly deprived of a constitutionally protected right a remedy by imposing liability on state actors for the deprivation of that right. Our Supreme Court precedent in this area is clearly limited to cases involving the relationship between a parent and a minor child. *See*, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Accordingly, other circuits which have considered this issue have also declined to find such a right. *See Robertson v. Hecksel*, 420 F.3d 1254 (11th Cir. 2005); *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001).

No circuit but the Ninth Circuit has ever held that a state actor can be held liable for the deprivation of a so-called right to companionship under substantive due process if the state's actions were not "specifically aimed" at the parent-child relationship. *See*, *e.g.*, *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986) ("We decline, on this record, to make the leap ourselves from the realm of governmental action directly aimed at the relationship between a parent and a young child to an incidental deprivation of the relationship between appellants and their adult relative."). Our sibling circuits often rely on binding precedent that "[h]istorically, [the] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). We also find a distinction between conduct that *incidentally* affects the parent-child relationship, and conduct *specifically aimed* at disrupting that relationship. It is highly unlikely and not foreseeable that Charlotte Bradbury's authorization of permits for a protest in Fountainhead Park was

specifically aimed at interfering with the Fitzgeralds' relationship with their son. We join the majority of circuits in affirming that plaintiffs asserting this right must prove some kind of intent by the state actor as a "logical stopping place." *See Trujillo v. Bd. of Cnty. Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

Affording the Fitzgeralds the right to recover against the City of Gutenberg here would "create the risk of constitutionalizing all torts against individuals who happen to have families." *Russ v. Watts*, 414 F.3d 783, 790 (7th Cir. 2005), *overruling Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). The Fitzgeralds' son Dorian shares a name with a character in the eponymous Oscar Wilde novel — his parents, too, tried to escape the reality of aging. But due process cannot extend into eternity. Under State law, eighteen is the age of majority for most purposes: young adults can vote, run for office, serve our country in the military or on a jury, make private healthcare decisions, and even adopt *their own* child. It is as sensible a cutoff as any for parental rights. We decline to find any right violated here.

II.

Alternatively, in the event there is, in fact, a substantive right to companionship with one's adult child, the Fitzgeralds are seeking to hold the City of Gutenberg liable for its alleged indifference to the need to train its Permit Officer in order to prevent an alleged constitutional violation. This theory stems from *Monell v. Department of Social Services*, 436 U.S. 658 (1978), wherein the United States Supreme Court held that a municipal entity may be held liable for constitutional violations arising out of 42 U.S.C. § 1983 should such violations arise out of an official policy put forth by said entity. Absent an explicit policy that violates a constitutional right, "inadequacy of . . .

training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom [government employees] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). In order to evaluate this claim, assuming there is a substantive right to companionship with one's adult child, we must address whether a municipal government can be "deliberately indifferent" to the need to train for the protection of a constitutional right which itself is not clearly established. We hold that it cannot.

Although the application of qualified immunity for municipal employees and *Monell* liability are distinct, the rationales underlying them overlap significantly. Officers of state and local governments must be allowed to exercise discretion in the facilitation of their duties, and should be "shielded 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.*" *Harlow*, 457 U.S. at 818 (emphasis added); *see also Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (holding that qualified immunity is "intended to provide government officials with the ability '*reasonably* to anticipate when their conduct may give rise to liability for damages'") (emphasis added) (citation omitted). Similarly, the municipality's decision not to institute better training can be the basis for *Monell* liability if the "need for more or different training is so obvious . . . that the policymakers of the city can *reasonably be said to have been* deliberately indifferent to the need." *Canton*, 489 U.S. at 390 (emphasis added). The operative language in *both* analyses is whether the defendant in question could have *reasonably* understood that their actions, or in the case of a failure-to-train claim, a *lack* of action, could have led to a § 1983 violation of constitutional rights.

Qualified immunity jurisprudence is clear; if no clearly established federal law exists that would put a municipal employee on notice that their actions would result in a violation of a constitutional right, then said municipal employee cannot be held liable for those actions. *See*, *e.g.*, *City of Escondido v. Emmons*, 586 U.S. 38 (2019) (holding that absent prior established case law prohibiting the officer's actions under similar circumstances, the officer could not have possibly understood that their actions would result in the violation of rights). Furthermore, "clearly established law" cannot be determined at a high level of generality – it must be specific and pointed to facts and circumstances analogous to those before us. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).[3] Just as we cannot hold an individual accountable for actions they had no way of knowing would result in a constitutional violation, we cannot say a municipality could have possibly been deliberately indifferent to the need to train its employees on their responsibilities without prior notice along a similar factual basis.[4]

In a *Monell* failure-to-train context, deliberate indifference requires a showing that the defendant "was on notice that, absent additional specified training, it was highly predictable" that a constitutional violation would occur. *Connick v. Thompson*, 563 U.S. 51, 71 (2011) (internal citation omitted). This notice requirement has historically been understood to have been met by a demonstration of analogous federal law resulting in misconduct in a qualified immunity context – it is no different in a

[3] While other circuits have held that a "broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right" is sufficient for a plaintiff to overcome qualified immunity (*see Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291-92 (11th Cir. 2009)), the U.S. Supreme Court has repeatedly warned against this type of broad analysis. *See, e.g.*, *Mullenix v. Luna*, 577 U.S. 7 (2015), *Plumhoff v. Rickard*, 572 U.S. 765 (2014), *Kisela v. Hughes*, 584 U.S. 100 (2018).

[4] This does not require identical case law to overcome a finding of qualified immunity – merely that the case law provide "fair and clear warning" that the alleged misconduct would result in the constitutional violation. *U.S. v. Lanier*, 520 U.S. 259, 271 (1997).

failure-to-train context. *Id.* at 62; *see also Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997). If the actual training is in and of itself not unconstitutional, then the results of the inadequate training must have been foreseeable and contemplated by the municipality and actively abjured. *Tuttle*, 471 U.S. 808. A municipality could not have met this threshold for a constitutional violation it had no way of knowing existed due to an absence of prior precedent or clear law. To hold otherwise would ensure that "the test set out in *Monell* will become a dead letter." *Id.* at 823.

As we have already held, Charlotte Bradbury is unquestionably entitled to qualified immunity because of the lack of clearly established law regarding the deprivation of companionship with one's adult child. In the same way she could not have expected the exercise of her discretionary duties to have violated a tenuous constitutional right, the City of Gutenberg could not have been deliberately indifferent to the need to train her not to violate such a right in these circumstances, regardless of whether such a right does in fact ambiguously exist.

Circuits throughout the country have of course come to reasoned, different conclusions regarding the relationship between a finding of qualified immunity for government officers and the liability of the municipalities under which they are employed. *Compare*, *e.g.*, *Wright v. City of Euclid*, 962 F.3d 852 (6th Cir. 2020) *with*, *e.g.*, *Kirkpatrick v. County of Washoe*, 843 F.3d 784 (9th Cir. 2016) (en banc). Ultimately, based on the rationales behind both theories, we are compelled to hold that it is impossible for a municipality to be deliberately indifferent to the need to train for the protection of a constitutional right not yet clearly established. And here, the obligation to train as to

the permit authorization decisions for conflicting groups was not obviously needed to avoid the alleged constitutional violation.

III.

We hereby AFFIRM the lower court's judgment.

POTTER, Circuit Judge, dissenting:

I disagree with the majority's conclusion on both issues.

I.

It is exceedingly convenient for the City of Gutenberg that Dorian Fitzgerald was eighteen years old when it authorized two belligerent groups to brawl in front of his school bus. Had he been seventeen, like many of his fellow classmates starting their senior year of high school, his parents would have come to this Court armed with some of the strongest precedent in American jurisprudence protecting their right to association, companionship, and care and custody of their son. Instead, the majority today decides that the accident of Dorian's age deprives them of any legal recourse.

Our Supreme Court has established several familial rights: the right to marry,[5] to procreate,[6] to live together as an extended family unit.[7] The Court has consistently recognized a parent's right "in the companionship, care, custody, and management of his or her children." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). Put simply, the Supreme Court has "made plain

[5] *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Obergefell v. Hodges*, 576 U.S. 644 (2015)

[6] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)

[7] *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 510 (1977)

beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley*, 405 U.S. at 651). This right is unquestionably deeply rooted in this Nation's history and tradition, as it is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65-66 (200) (O'Connor, J., plurality opinion).

Taking the established right to associate with one's minor children and extending it to adult children is a natural outgrowth of the fundamental liberty interest long accepted by the Supreme Court. Our sibling circuit did just that in *Sinclair v. City of Seattle*, where a mother brought a claim with striking similarities to the Fitzgeralds'. *See* 61 F.4th 674 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 88 (2023). The Ninth Circuit does not stand alone: though on First Amendment grounds, the Tenth Circuit has acknowledged a fundamental right to association with one's adult children. *See Trujillo v. Bd. of Cnty. Comm'rs*, 768 F.2d 1186, 1188–89 (10th Cir. 1985).

Many other circuits have declined to find a right to companionship not based solely on the child's age, but also on whether the conduct of the governmental actor was "specifically aimed" at the relationship. The majority opinion today cites *Daniels v. Williams* as its support for this requirement. 474 U.S. 327, 331 (1986). I find this to be a gross misreading of *Daniels*. The *Daniels* court held that mere negligent acts cannot give rise to a due process violation. *Id.* at 344; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (holding that the "Due Process Clause is violated by executive action only

when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."). Neither of these cases imposes a "specifically aimed" *mens rea* requirement on state actors who violate the companionship right. Thus, I disagree with both the majority and other circuits who impose such a requirement, finding it to be too high a bar to recovery and not mandated by our Constitution or our Supreme Court precedent. *See Chambers v. Sanders*, 63 F.4th 1092, 1102-1114 (Moore, J., dissenting). I also firmly believe that allowing two groups with a history of violent conduct to simultaneously protest and counter-protest in front of a high school "shocks the conscience" by every metric imaginable. Insofar as the City may attempt to evade liability for Dorian's death, it will find that "all the perfumes of Arabia will not sweeten [its] . . . hand." WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1, l. 50-51.

The Supreme Court found over fifty years ago that states cannot infringe on parental rights by forcing children to attend school beyond the eighth grade. *See Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972). It is "ironic indeed" that courts acknowledge a constitutional violation for state intrusion into the education of a child, but deny all legal recourse to a parent when the state terminates the relationship altogether by wantonly putting him in danger. *Myres v. Rask*, 602 F. Supp. 210, 213 (D. Colo. 1985). The Fitzgeralds surely would have exercised their right under *Yoder* and *Pierce* to keep Dorian from Pencey High School if they had known that the City of Gutenberg's Permit Officer would rubber-stamp a violent altercation at its doorstep.

II.

The second legal issue is yet another that has plagued the circuit courts throughout the country with little clear guidance from this nation's highest court. What

is clear, however, is that under no circumstances can a governmental entity be entitled to the protections of qualified immunity that their employees would otherwise be entitled to. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("How 'uniquely amiss' it would be, therefore, if the government itself – 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' – were permitted to disavow liability for the injury it has begotten," quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970)). In discussions regarding the relationship between qualified immunity and *Monell* failure-to-train claims, such guideposts are rarely so explicit. And yet, the majority here and those of a number of circuits throughout our nation have eschewed this clear instruction in favor of a *deus ex machina* legal theory that provides local and state governments derivative immunity plainly rejected by the Supreme Court over forty years ago when it held that municipalities can be held liable even if a constitutional violation is less than clear.

The majority falsely equates the requirements behind a finding of qualified immunity and liability for a *Monell* failure-to-train claim. As the Supreme Court acknowledged in *Canton*, there are instances where the need to train is so "plainly obvious" that a municipality should have known a specific policy or lack thereof would result in a risk to constitutional rights, even absent past violations. *Canton*, 489 U.S. at 390. While an individual officer may not possess the capital, knowledge, or expertise needed to effectuate proper constitutional protections absent clearly established case law, a municipality possesses these resources in droves. It should therefore be held

accountable when its complete failure to utilize the abundant tools at its disposal results in a constitutional violation – here, the tragic death of a young person.

The test for qualified immunity hinges on two prongs, but both need not be satisfied to make this determination. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Indeed, a municipal officer may be exonerated on the basis that the law is not "clearly established" without touching upon whether a constitutional violation in fact occurred. *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1186 n.7 (9th Cir. 2002), *overruled on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). Even if an individual is entitled to qualified immunity, a court could still determine that a constitutional violation occurred, and that such violation was a direct and proximate result of the municipality's policies or lack thereof.

I am inclined to agree, therefore, with the reasoning of the Ninth Circuit, which determined in the context of social workers, "the need . . . to train its employees on the constitutional limitations of separating parents and children is 'so obvious' that its failure to do so is 'properly . . . characterized as 'deliberate indifference' to [the] constitutional rights of . . . families." *Kirkpatrick v. County of Washoe*, 843 F.3d 784, 796-97 (9th Cir. 2016) (en banc) (alteration in original) (quoting *Canton*, 489 U.S. at 390 & n.10). Although the social workers in *Kirkpatrick v. County of Washoe* were granted qualified immunity due to a lack of clearly established case law analogous to the facts and circumstances of the complaint, "a reasonable jury could conclude that DSS's policy of conducting warrantless seizures of children in non-exigent circumstances was the 'moving force behind the constitutional violation.'" *Kirkpatrick*, 843 F.3d at 797 (quoting *Monell*, 436 U.S. at 694). Based on the issue before us, there remains a legitimate

question of fact to the jury as to whether the City of Gutenberg's need to train permit issuers employed through the Mayor's Office for Special Events was both obviously necessary and resulted in the alleged constitutional violation.

There is no dispute that Defendant Bradbury allowed for two groups of protestors in conflict with one another to congregate at the same time and place – that place being immediately next to a high school. Facts offered by the Plaintiffs in their complaint must be accepted as true in evaluating a motion to dismiss. *See Iqbal*, 556 U.S. at 662. Their complaint offered evidence that Moms for Literacy was concerned about violent disruption from counter-protestors [Plaintiffs' **Exhibit E**], and that there has been at least one past incident wherein protestors and counter-protestors physically clashed at a public library [Plaintiffs' **Exhibit D**]. A jury could very well find that the need for the City of Gutenberg to train its permit-issuers in exercising sound discretion was "so obvious," lest it place minor children exiting a school in close proximity to these protestors (who could cause injury to minors and adults alike). *Canton*, 489 U.S. at 390.

This court's decision today renders the long-recognized principle of *Monell* liability entirely toothless and undermines the reasoned principles of the *Owen* court. It allows for yet another avenue by which municipal governments can avoid liability in abrogation of justice, so long as it is fortunate enough to have their officers violate federally recognized rights in unique or unusual ways. Various circuits have explicitly rejected this proposition, and I urge us to follow suit. *See Kirkpatrick*, 843 F.3d 784; *Horton by Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019); *Quintana v. Santa Fe Cty. Board of Comm'rs.*, 973 F.3d 1022 (10th Cir. 2020); *Young v. Augusta, Ga.*, 59 F.3d 1160 (11th Cir. 1995).

III.

For all of the foregoing reasons, I must respectfully dissent.

ELECTRONICALLY
FILED
United States District Court
for the Central District of Genovia
08/20/2023
Clerk of the Court

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF GENOVIA

DANTE FITZGERALD and TONI FITZGERALD, individually as the parents of DORIAN FITZGERALD, their deceased child, *Plaintiffs*, v. CHARLOTTE BRADBURY, in her individual capacity, and the CITY OF GUTENBERG, a municipality, *Defendants*.	)	CIVIL ACTION FILE NO. 2023-CV-071820

PLAINTIFFS' COMPLAINT

COME NOW, Plaintiffs Dante Fitzgerald and Toni Fitzgerald (hereinafter "the Plaintiffs"), as surviving parents of Dorian Fitzgerald, and file this Complaint under 42 U.S.C. § 1983 against the above-named defendants, respectfully showing this Court as follows:

I. JURISDICTION AND VENUE

1. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 and 28 U.S.C § 1343 because this action seeks to redress the deprivation of a right under the Fourteenth Amendment of the United States Constitution by the City of Gutenberg and Charlotte Bradbury.
2. This Court has personal jurisdiction over the parties because the Defendants are located within the Central District of Genovia, specifically within the city of Gutenberg.
3. Venue is proper pursuant to 28 U.S.C. § 1391 because the actions giving rise to these claims arose in the Central District of Genovia, specifically in the city of Gutenberg.

II. PARTIES

4. Plaintiffs Dante Fitzgerald and Toni Fitzgerald reside at 451 Pemberley Drive, Gutenberg, Genovia, 01984. They had a son, Dorian Fitzgerald, who is not a party to this action but whose death gives rise to their claims in this Complaint.
5. Defendant Charlotte Bradbury works at the City of Gutenberg's Mayor's Office for Special Events. Ms. Bradbury's title or position is Gutenberg Permit Officer. This Defendant is sued in her individual capacity, as she was acting under color of state law in granting permits.
6. Defendant the City of Gutenberg is a municipality.

III. FACTS

7. For several months in 2023 before the events leading up to this cause of action, Gutenberg was besieged by protests and counter-protests against a controversial book ban ("the Book Ban") by the Gutenberg Independent School District. [See "Book Ban," attached hereto as **Exhibit A**.]
8. After the Book Ban was instituted by Gutenberg Independent School District Superintendent Myrtle Atwood on May 5, 2023, a local chapter of the national group Moms for Literacy began advocating against the Book Ban.
9. Moms for Literacy's Gutenberg chapter had formed under the leadership of Hester Hawthorne, a local mother and librarian, in 2022.
10. Moms for Literacy began to organize protests across the city in public areas at critical locations close to Gutenberg I.S.D. schools throughout the summer of 2023.

11. Moms for Literacy's protests were highly attended by local parents, and soon grew to include other concerned community members, educators, and former students.
12. Upon information and belief, Moms for Literacy would hand out books on the Book Ban list to on-foot pedestrians during their protest events, as well as hold public readings of passages from books on the Book Ban list. [See "Moms for Literacy Instagram Page," attached hereto as **Exhibit B**.]
13. In response to these protests, a group called Dads Against Degeneracy formed under the leadership of Ray Montag, a local father.
14. Dads Against Degeneracy, composed of concerned community members and religious leaders, began organizing in a similar manner and held protests at critical locations close to Gutenberg I.S.D. schools.
15. Upon information and belief, on other occasions members of Dads Against Degeneracy collected the same copies handed out by Moms for Literacy and burned them in public fire pits as a demonstration in favor of the Book Ban. [See "Facebook Post of Ray Montag," attached hereto as **Exhibit C**.]
16. These protests and counter-protests, often characterized by inflammatory rhetoric and threats of violence, grew significantly in size and achieved statewide and national attention. [See "Genovia Times Article," attached hereto as **Exhibit D**.]
17. Responding to the increasingly heated political environment engulfing Gutenberg, on June 21, 2023 the Mayor's Office For Special Events required those seeking assembly to apply for a protest permit with the city, granting broad discretion to municipal employees to approve or deny these applications. [See "Gutenberg Permit Ordinance," attached hereto as **Exhibit I**.]

18. On July 5, 2023, Moms for Literacy applied for a protest permit with the City of Gutenberg Mayor's Office. Charlotte Bradbury, as Gutenberg Permit Officer, granted the permit on July 6, 2023. [See "Moms for Literacy Permit," attached hereto as **Exhibit E**.]
19. The Moms for Literacy Permit was issued for 2:00 p.m.- 4:00 p.m. on August 14, 2023 at Fountainhead Park, directly across from Pencey High School and adjacent to the road where the buses line up for school dismissal. [See "Fountainhead Park Map," attached hereto as **Exhibit G**.]
20. On July 7, 2023, Dads Against Degeneracy applied for a protest permit for the exact same time and location. Charlotte Bradbury, again in her capacity as Permit Officer, granted the permit on July 9, 2023. [See "Dads Against Degeneracy Permit," attached hereto as **Exhibit F**.]
21. On August 14, 2023, both groups began arriving at Fountainhead Park at the scheduled protest time, 2:00 p.m., as authorized by their individual permits.
22. Members of Moms for Literacy began setting up tables full of banned books and signage.
23. Dads Against Degeneracy began placing kindling in the city firepit and displaying banners and picket signs.
24. The event grew in scale swiftly and dramatically, with members of both groups claiming they had a right to the space.
25. At about 2:45 p.m., Pencey High School began dismissal for the day. Students leaving the school caused the crowd to swell and tensions to escalate further.
26. Dorian Fitzgerald, an eighteen-year-old high school senior, was walking to his bus following dismissal when he made his way to peruse the collection of books on Moms for Literacy's tables, alongside several other high schoolers.

27. When Moms for Literacy refused to stop handing out banned books directly to students, members of Dads Against Degeneracy began to fight over the copies, taking some to be burned.

28. Physical violence and wrestling over the books escalated, with individuals being pushed into tables and hit with protest signage.

29. Police were called to disperse the crowd and Dorian Fitzgerald was found unconscious with severe injuries to his head, torso, and back.

30. Emergency Services transported Dorian Fitzgerald to Gutenberg General Hospital to be treated.

31. Dorian Fitzgerald succumbed to his injuries and was declared dead at 4:48 p.m.

IV. CLAIMS

32. Plaintiffs reallege and incorporate by reference all of the paragraphs above for each claim for relief.

33. Plaintiffs have a claim under 42 U.S.C. § 1983 for violation of their right to companionship with their adult child, Dorian Fitzgerald.

COUNT I
VIOLATION OF RIGHT TO COMPANIONSHIP WITH PLAINTIFFS' ADULT CHILD
(Claim against Bradbury, individually)

34. This action is brought by Dante and Toni Fitzgerald as the mother and father of the decedent, Dorian Fitzgerald.

35. As Permit Officer for the City of Gutenberg, Charlotte Bradbury's affirmative acts and failure to act, including scheduling a protest and a counter protest for the same time and location as one another so close to a local school, foreseeably deprived the Plaintiffs of companionship with their adult son, Dorian Fitzgerald.

COUNT II
MONELL LIABILITY
(Claim against the City of Gutenberg)

36. The City of Gutenberg Mayor's Office for Special Events is a division of the municipal government in Gutenberg, Genovia.
37. The City of Gutenberg's Office for Special Events failed to train the Gutenberg Permit Office to exercise even the most basic discretion in granting protest permits, and specifically to not grant permits for the same place and time for competing groups with a history of violent altercations near a high school. [See "Governor's Protest Guidelines," attached hereto as **Exhibit H.**]
38. The City of Gutenberg's actions and failures to act demonstrated deliberate indifference and were a "moving force" in the violation of the constitutional right of the Fitzgeralds companionship with their son.
39. As a result, the City of Gutenberg is liable for the harms and losses sustained by the Plaintiffs.

V. <u>PRAYER FOR RELIEF</u>

40. WHEREFORE, Plaintiffs pray for judgment against the defendant awarding plaintiffs the following, the exact nature and full extent of which to be proven at trial:
    a. A jury trial for all claims for damages;
    b. Compensatory damages in an amount to be determined by a jury as to all defendants;
    c. Punitive damages against Bradbury;
    d. Pre-judgment and post-judgment interest,
    e. Reasonable attorneys' fees and expenses, and;

f. Any such other relief as the Court deems just and equitable.

Respectfully submitted this 20th day of August, 2023.

/s/ REDACTED

Counsel of Record for Plaintiffs

GUTENBERG I.S.D.

FROM THE DESK OF MYRTLE ATWOOD, SUPERINTENDENT

Dear parents and members of our Gutenberg Independent School District community:

Following our most recent school board meeting, the following books will not be permitted in any Gutenberg Independent School District libraries or classrooms for the 2023-2024 school year:

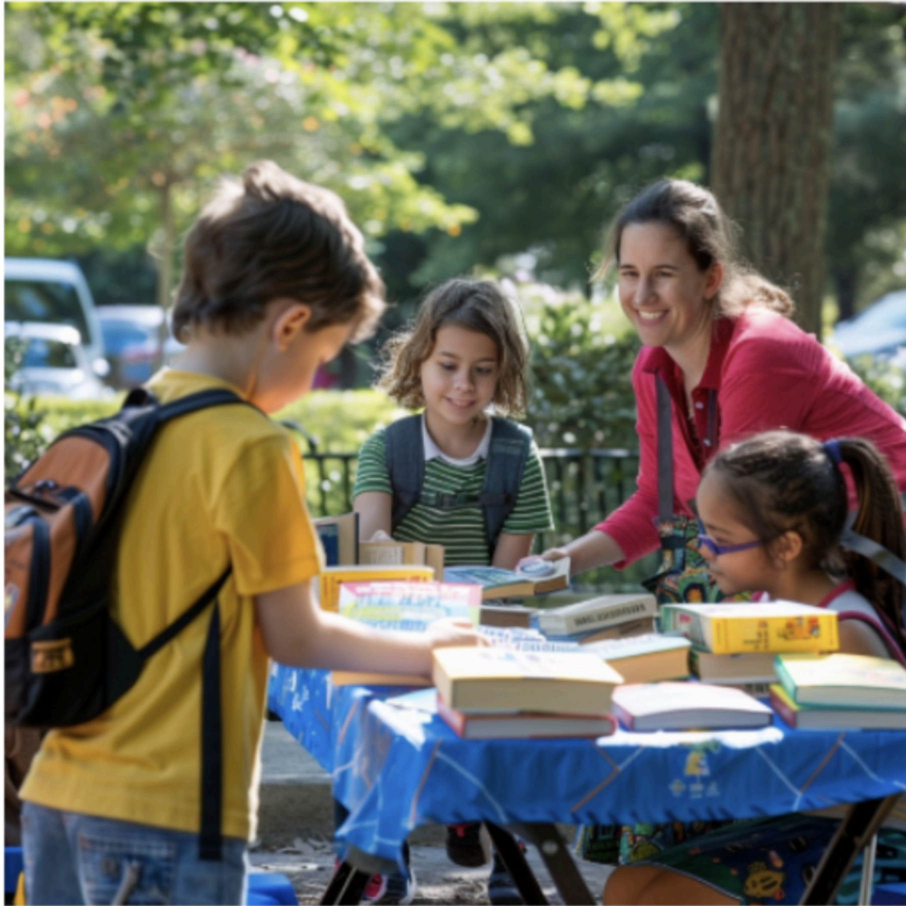
Books Banned
To Maim a Hummingbird
The Pitcher in the Sourdough
The Taker
The Barry Snotter Series
Funny House
Gender Unclear
The Old Jim Crow
Of Rats and People
The Milkmaid's Tale
On The Origin of Evolution
The Drawbacks of Being an Extrovert
The Color Magenta
Lady Talkersly's Paramour
Animal Ranch
Marked from the Beginning
Mouse I + II
Lady of the Gnats

We are looking forward to another great year.

Myrtle Atwood

Myrtle Atwood
SUPERINTENDENT

Moms For Literacy · Follow
Gutenberg, GN



2,586 likes

Moms For Literacy A big thanks to all the residents of Gutenberg who donated books this week! We'll be handing them out FOR FREE to students affected by the Atwood Book Ban ... more

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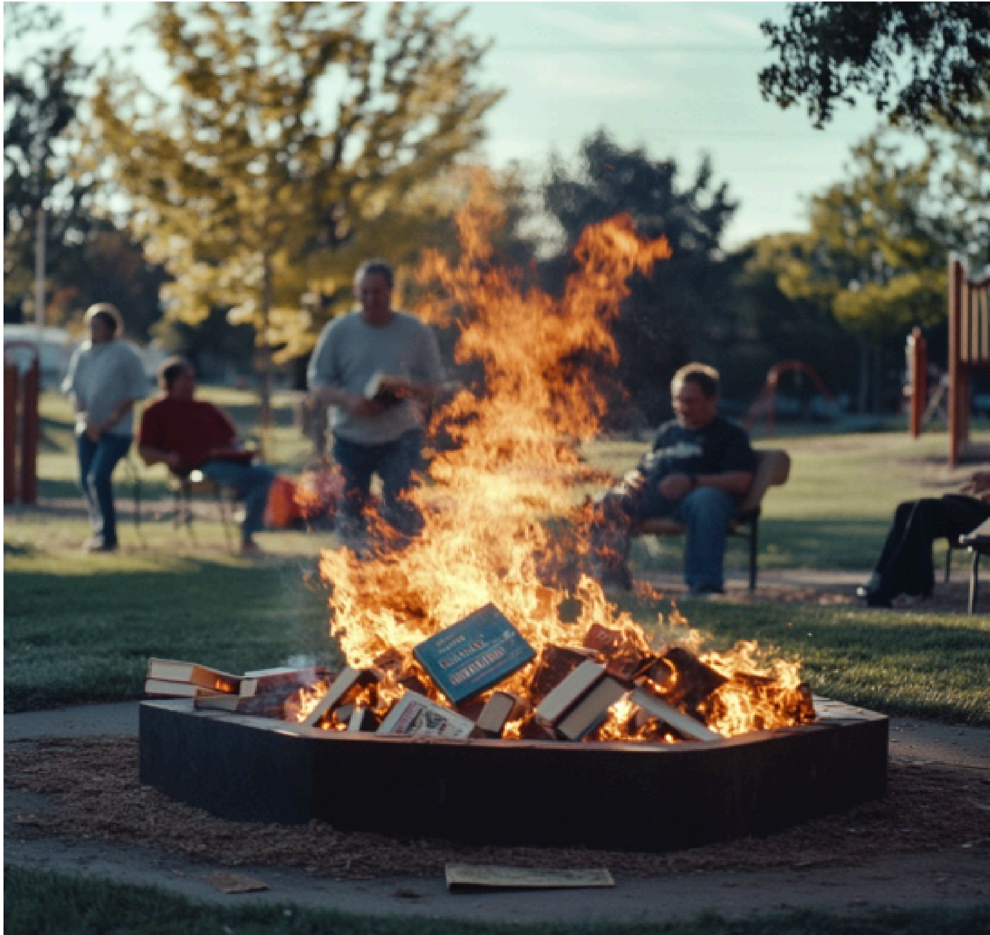
Add a comment...

6 days ago

PLAINTIFFS' EXHIBIT B

Ray Montag is with Dads Against Degeneracy
June 6th at 7:35 p.m. ·

After spending all day collecting hateful propaganda trying to be spread to impressionable minds, our message is clear - America's parents have had ENOUGH! We won't stand idly by as our children get indoctrinated. Thank you Myrtle Atwood for all you do to protect our children and uphold American values!



109 21 Comments 10 Shares

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Write a comment...

PLAINTIFFS' EXHIBIT C

Genovia Times

June 14, 2023

"NOT IN OUR SCHOOLS"

CONTROVERSIAL BOOK BAN RECEIVES NATIONAL ATTENTION

Gutenberg, GN — When Superintendent Myrtle Atwood released a letter to the parents of the City of Gutenberg Independent School District on May 5, 2023, listing books that would be prohibited in the district for the upcoming school year, she expected that the school year would proceed as normal.

"Our school board voted for these restrictions unanimously," Atwood said in a recent interview. "We've always tried to have a finger on the pulse of our community, and our community has been asking us to put these guardrails up for quite some time."

The book ban has evolved into much more than a local decision, as Gutenberg I.S.D. has now achieved statewide and national attention.

Almost immediately after the release of the now-infamous book ban, Moms For Literacy, a national organization committed to child welfare and literacy, began organizing protests, public readings, and book giveaways all around Gutenberg.

"Atwood turned the temperature in our district up to 451 degrees," said Hester Hawthorne, local librarian and founder of the Gutenberg chapter of Moms for Literacy. "I founded the Gutenberg chapter of Moms for Literacy in 2022, and it's great to see how much support we have gotten for our events lately. We have to protest censorship in all its forms."

Not everyone in Gutenberg is enthusiastic about Moms for Literacy's organizing.

"Frankly, I couldn't care less what some large, national organization with ties outside of Gutenberg has to say about Gutenberg I.S.D.'s decisions," Atwood said. "Our focus is on the well-being of our students and respecting the voices of our parents."

A smaller, local group, calling themselves Dads Against Degeneracy, has been counter-protesting Moms for Literacy events.

"Our goal is to protect our children from harmful and inappropriate content that just — you know, crosses a line," said Ray Montag, founding member of Dads Against Degeneracy. "In this country, a parent's legal rights don't end when your kid gets on the bus. We get more say than that."

Dads Against Degeneracy recently protested a book reading held by Moms For Literacy at Gutenberg Public Library, carrying megaphones and signs that read "NOT IN OUR SCHOOLS." The event escalated when members of Moms For Literacy prevented members of Dads Against Degeneracy from entering the library. The police were called to break up the fray.

"It's a public space," Montag said. "They can't keep us from a public space. We have a right to free speech. We have rights in this country."

With the school year approaching, the protests and counter-protests show no signs of abating, highlighting deep divisions over the direction of education in Gutenberg.

Reporting by Catcher S. Thompson, Genovia Times

PLAINTIFFS' EXHIBIT D

From The Office Of Mayor Jonas Lowry

Mayor's Office of Special Events
Outdoor Event Application

OFFICE USE ONLY

Permit Reviewer	Charlotte Bradbury
Date	July 6, 2023
Approval Status	APPROVED
Signature	Charlotte Bradbury

Host Event Organizer (Permit Holder)

First Name	Hester	**Last Name**	Hawthorne
Phone Number	198-555-0032	**Email Address**	booksnob451@gmail.com

Host Organization Information

Organization Name	Moms For Literacy
Point of Contact Name	Hester Hawthorne
Point of Contact Phone Number	808-555-4321
Point of Contact Email Address	HHawthorne@MFL.org
Organization Type	Social Welfare Organization (501c4)

Event Information

Event Name	MFL Book Handout	**Event Location**	Fountainhead Park
Start Date	08/14/2023	**End Date**	08/14/2023
Start Time	2:00 PM	**End Time**	4:00 PM
Anticipated Attendance	Around 100	**Event Type**	Protest

Event Description

In as much detail as possible, please describe the purpose and timeline for your event. Be sure to include any issues you foresee in the organization, facilitation, and tear-down of this event:

On August 14, 2023, Moms For Literacy plans on hosting an outdoor book give-away in protest against the Gutenberg Independent School District's recent book ban. At 2:00 PM, we plan on setting up a table with books targeted by the book ban at the edge of Fountainhead Park by Steinbeck Drive, parallel to Pencey High School. Volunteers will hold signs in protest of the ban with the following pre-approved statements:

- "Pencey High School's Real Library"
- "Take A Copy"
- "Reading Is Not A Crime"

When classes are dismissed at 2:45 PM, we plan on handing out these books t0 the students and encouraging them to engage with them. At 4:00, we will collect any remaining books left undistributed and donate them to local bookstores.

We have plenty of helpers on-hand to assist with facilitating the event, so we see no issues there. However, our recent protest efforts have been met with obstruction and harassment by local counter-protesters.

As soon as we promote an event or they learn we are organizing somewhere, counter-protestors show up. There have been physical altercations and hostile name-calling in the past between their group members and ours. If the Mayor's Office could tell them that they are not permitted to counter-protest our event, that would help. Police presence could also help prevent future violent encounters, if the City would be willing to provide it.

From The Office Of Mayor Jonas Lowry

Mayor's Office of Special Events
Outdoor Event Application

OFFICE USE ONLY

Permit Reviewer	Charlotte Bradbury
Date	July 9, 2023
Approval Status	APPROVED
Signature	Charlotte Bradbury

Host Event Organizer (Permit Holder)

First Name	RAY	**Last Name**	MONTAG
Phone Number	198-555-5397	**Email Address**	PATRIOTDAD323@GMAIL.COM

Host Organization Information

Organization Name	DADS AGAINST DEGENERACY
Point of Contact Name	RAY MONTAG
Point of Contact Phone Number	198-555-5397
Point of Contact Email Address	PATRIOTDAD323@GMAIL.COM
Organization Type	LOCAL GROUP

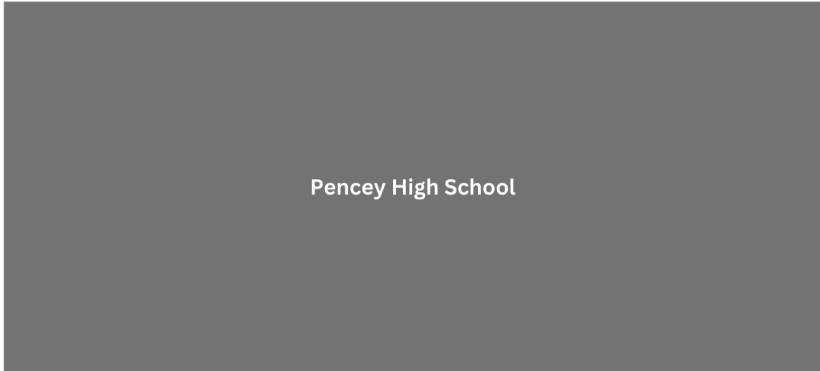
Event Information

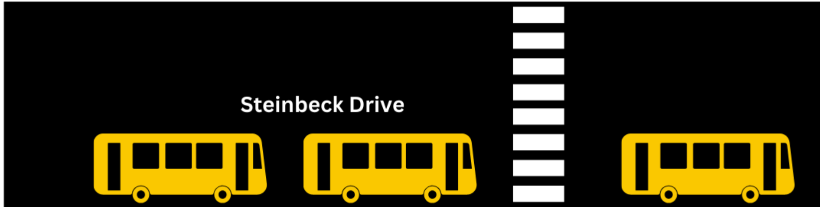
Event Name	DAD PROTEST	**Event Location**	FOUNTAINHEAD PARK
Start Date	08/14/2023	**End Date**	08/14/2023
Start Time	2:00 PM	**End Time**	4:00 PM
Anticipated Attendance	UNSURE, N/A	**Event Type**	PROTEST

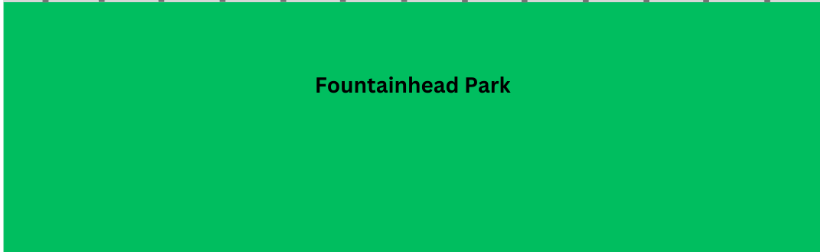
Event Description

In as much detail as possible, please describe the purpose and timeline for your event. Be sure to include any issues you foresee in the organization, facilitation, and tear-down of this event:

ON AUGUST 14, 2023, DADS AGAINST DEGENERACY PLANS ON COUNTER-PROTESTING ATTEMPTS BY LOCAL ACTIVISTS TO DISTRIBUTE UNSAVORY BOOKS TO YOUNG, IMPRESSIONABLE MINDS. THESE BOOKS HAVE BEEN APPROPRIATELY BANNED BY THE CITY OF GUTENBERG INDEPENDENT SCHOOL DISTRICT IN PUBLIC SCHOOLS AND SCHOOL LIBRARIES AND WE PLAN ON SHOWING OUR SUPPORT FOR THESE RESTRICTIONS. AT 2:00 PM, WE WILL ASSEMBLE AT FOUNTAINHEAD PARK TO RALLY AGAINST THEIR EFFORTS. THEIR PROTEST IS SET TO END AT 4:00 PM, SO WE WILL STAY THERE AS LONG AS THEY ARE THERE.


Pencey High School


Steinbeck Drive


Fountainhead Park

PLAINTIFFS'
EXHIBIT
G

THE STATE OF GENOVIA

Office of the Governor

Freedom of Assembly and Speech are pillars of our democracy and our great State that we must make every effort to maintain. As such, it is in this State's best interest to ensure that protest permits are issued in a manner that allows individuals to exercise these rights freely and fairly in compliance with the United States Constitution while remaining free from harm or suppression. When developing guidelines specific to the unique needs and circumstances of your municipalities, the following, non-exhaustive preparatory measures and permit conditions should be considered:

A Permit **MAY**	A Permit **MAY NOT**
● Require the applicant to list: ○ The name of the organization; ○ A point of contact for the organization hosting the event; ○ A description of the event, and; ○ The estimated attendance of the event. ● Impose the following restrictions: ○ Reasonable advance-notice needed to enable adequate review and approval of permit applications; ○ Limit the number of attendees that could be reasonably accommodated by the requested venue; ○ Physical separation of hostile groups; ○ A time restriction based on compelling municipal interests, or; ○ A restriction of the items to be allowed at the assembly. ● Be denied on the following grounds: ○ A permit has already been issued at the same time and place; ○ The applicant's proposed activities would be unlawful; ○ The applicant's proposed activities would endanger the safety of surrounding persons, or; ○ The applicant's proposed activities would unduly hamper pedestrian or vehicular traffic.	● Require the applicant to list: ○ Social Security Numbers; ○ Income; ○ Political Affiliation, or; ○ Any other unduly invasive information. ● Impose the following restrictions: ○ Charge more than is necessary to serve a valid municipal interest; ○ Content-based restrictions, unless such content-based restrictions are for the explicit purpose of protecting the health and safety of surrounding persons; ○ A prohibition on controversial speakers, or; ○ Reserve the right to cancel a permit in anticipation of a guideline violation. ● Be denied on the following grounds: ○ Applicant has committed a crime; ○ Applicant has violated permit-application guidelines in the past, or; ○ Personal animosity towards the applicant or their organization/movement.

CITY OF GUTENBERG CODE OF ORDINANCES
ARTICLE V: PUBLIC EVENTS
CHAPTER 100: PROTEST PERMITS
ENACTED JUNE 21, 2023

Sec 5-120: Purpose. The purpose of this Code section is to limit obstruction on the streets, roadways, sidewalks, and other thoroughfares of the city, as well as ensure law and order in Gutenberg.

Sec 5-121: Required. No person shall engage in, participate in, aid, form or start any protest unless a protest permit has been obtained from the Mayor's Office for Special Events.

Sec. 5-122. Application. A person seeking issuance of a protest permit shall file an application with the Mayor's Office for Special Events on forms provided by the Mayor's Office for Special Events not less than one day nor more than 45 days before the date on which it proposes to conduct the protest.

Sec 5-123. Issuance. A Permit Officer with the Mayor's Office for Special Events shall issue a protest permit for a specific location and time period when, from a consideration of the application and from such other information as may otherwise be obtained, it is found that the protest will not substantially interrupt the safe and orderly movement of other traffic and persons in Gutenberg.

Sec. 5-124. Alterations. The certifying Permit Officer, by certifying the permit, reserves the right to change the time or place of the protest listed on the approved form at any time, so long as they provide notice to the applicant within one day of the protest event.

Sec. 5-125: Notice of Rejection. The Mayor's Office for Special Events shall act upon the application for a protest permit within three business days after the filing thereof. If the Mayor's Office for Special Events disapproves the application, it shall mail to the applicant, within three business days after the date which the application was filed, a notice of their action stating the reasons for their denial of the permit. Notice shall be deemed complete when mailed.

Sec. 5-126: Appeal procedure. Any person aggrieved shall have the right to appeal the denial of a protest permit to the City Council as the final policymaker for permitting. The appeal shall be filed within 60 days after notice. The City Council shall act upon the appeal within 30 days after its receipt.

IN THE UNITED STATES COURT OF APPEALS
FOR THE 14TH CIRCUIT

No. 24-118473

District Court No. 2023-CV-071820

CHARLOTTE BRADBURY

Defendant-Appellant

V.

DANTE FITZGERALD and TONI FITZGERALD

Plaintiffs-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF GENOVIA
Decided: January 30, 2024
Before: KUANG, PILGRIM, POTTER, Circuit Judges.

MEMORANDUM OPINION AND ORDER ON INTERLOCUTORY APPEAL

POTTER, Circuit Judge:

I.

This interlocutory appeal comes before us after the denial of a motion to dismiss on the grounds of qualified immunity below.

On September 20, 2023, the District Court for the Central District of Genovia issued an opinion and order denying without prejudice Defendant-Appellant Bradbury's

motion to dismiss under FED. R. CIV. P. 12(b)(6). Bradbury moved to dismiss Plaintiffs-Appellees' Complaint on the grounds that she was entitled to qualified immunity. Bradbury argues that the Fitzgeralds' Complaint alleges the deprivation of a right not clearly established, namely, the right to companionship with their adult son. The trial court below was unpersuaded. On September 22, 2023, Bradbury filed a motion in this Court to certify an interlocutory appeal and stay discovery under 28 § U.S.C. 1291(d)(2). We granted the stay and subsequently heard oral arguments regarding the issue of her individual qualified immunity.

II.

There is no dispute between the parties that Bradbury was acting in her capacity as an employee of the City of Gutenberg's Mayor's Office for Special Events. As such, the relevant inquiry proscribed by the Supreme Court is determined by (1) whether the law governing Defendant's conduct was clearly established, and (2) whether a reasonable officer could have believed that their conduct violated a federal right. *See Saucier v. Katz*, 533 U.S. 194 (2001). A court may resolve the qualified immunity question based on either component, so it need not determine whether there was a constitutional violation if the right was not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

When government officials – like permit officers – perform discretionary functions, they are generally "shielded 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Accordingly, officials are protected by qualified immunity unless their actions violate a

right that is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Fitzgeralds' broad proposition of law that they have the right to companionship with their adult son is insufficient to show that that right was clearly established. While our Constitution provides general protection of family relationships, neither the Supreme Court nor this Circuit have ever recognized a claim for deprivation of familial companionship in these specific circumstances. Further, Plaintiffs-Appellees have not pointed to a single judicial opinion holding that a reasonable government official would have known they were violating such a right. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.")

A similar factual basis need not be fundamentally identical. In the instances where the Supreme Court has deviated from this analysis and not required "fundamentally similar" facts, it has still held that past decisions must at the very least provide "reasonable warning that the conduct then at issue violated constitutional rights." *United States v. Lanier*, 520 U.S. 259, 269 (1997), *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution."). In the instant case, the alleged misconduct is not so clearly unconstitutional, nor is there *any* analogous precedent or immediately obvious indication that would put Bradbury on notice that issuing two permits for the same time and place would result specifically in the deprivation of the right to companionship with one's child.

At this time, we decline to decide whether or not there is a right to companionship with one's adult child. We decide only what is necessary to reach our opinion today – that the right was not clearly established at the time that Bradbury issued her protest permits. Accordingly, Bradbury as an individual defendant is entitled to qualified immunity as to this claim.

FOR THE FOREGOING REASONS, it is ordered as follows:

1. Defendant-Appellant Charlotte Bradbury is entitled to qualified immunity as to Plaintiff-Appellees' claim against her for deprivation of companionship with their adult son.
2. The stay in discovery against Defendant City of Gutenberg is hereby lifted and the case is remanded to the lower court.