IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRENT GAY *Plaintiff*, v. **UNION LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*** *Defendants.*	Case No. 2:25-cv-00652 Judge Edmund A. Sargus, Jr. Magistrate Judge Kimberly A. Jolson

PLAINTIFF BRENT GAY'S MOTION FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56(A)

Plaintiff Brent Gay respectfully moves this Court under Fed. R. Civ. P. 56(a) for summary judgment against all Defendants. Gay is entitled to judgment as a matter of law on all claims because there are no genuine issues of disputed fact. A memorandum in support relying on Defendants' admissions, documentary evidence from Defendants, and video footage follows.

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I. ISSUES PRESENTED

A. First Amendment retaliation. To prevail under 42 U.S.C. § 1983, plaintiffs must show that a defendant acting under color of state law deprived them of a constitutional or federal right. Defendant Vaughn Butler, a public-school coach, attacked Brent Gay during a game Butler was coaching, in retaliation for Gay's protected speech. Did Butler deprive Gay of his free-speech rights while acting under color of his government job?

1. **Color of state law.** State employees acting under the appearance and authority of their offices who cause constitutional violations act under the color of state law. Butler admitted that during the football game in which he attacked Gay, he was working for the district as a coach, was acting as a district representative, and was on the job during the attack. Was Butler acting under color of state law?

2. **Retaliation.** To establish a First Amendment–retaliation claim, plaintiffs must show they engaged in protected speech, an official took adverse action against them that would chill an ordinary person, and causation. When Gay criticized a public official, he engaged in protected speech, and Butler attacked him in response to his speech. Did Butler violate Gay's First Amendment rights?

   a. **Protected speech.** Criticism of public officials is fundamentally protected speech under the First Amendment, and the government may regulate very few categories of speech. Butler attacked Gay immediately after Gay criticized him. Gay's conduct was not intended to incite violence or disorder, so he did not use fighting words. Was Gay's speech protected?

   b. **Adverse action.** Threatening physical harm over speech is an adverse action that would deter a person of ordinary firmness from speaking. Going beyond threats, Butler shoved Gay at least in part because of Gay's words. Butler admitted that people, after seeing his attack on Gay, would be less likely to criticize. Did Butler engage in adverse actions?

   c. **Causation.** Plaintiffs satisfy the causation element when they show their speech was a substantial or motivating factor in defendant's adverse action. Butler admitted that he understood Gay's comment to be a criticism and that he attacked Gay because of those words. Was Gay's comment a motivating factor in Butler's decision to shove him?

3. ***Monell* local-governmental liability.** Local governments are liable for § 1983 violations when they are caused by their official policies, which can be created by final decisionmakers or when they have a policy of inadequate training. Union Local delegated to Butler the authority to handle and resolve directly, without further review, criticism from community members. And it failed to train him on his First

Amendment obligations. Is the district liable under *Monell*?

a. **Final decisionmaker.** Municipal employees are final decisionmakers when their decisions are final and unreviewable. Under the district's public-complaints policy, Butler could review and resolve criticism without consulting a superior or the board. When, on the spot, he addressed Gay's criticism with violence, was Butler a final decisionmaker?

b. **Failure to train.** A municipal organization is liable if it fails to train its employees to respond to inevitable problems that will lead to conduct likely to violate a constitutional right. The district failed to train its coaches on their First Amendment obligation to refrain from retaliation, even though handling criticism is a regular part of their job. Is the district liable for Butler's First Amendment retaliation because it never trained him on his constitutional obligations?

4. **Qualified immunity.** The Sixth Circuit clearly established the right to criticize public officials, specifically public-school coaches. Gay criticized Butler, a public-school football coach. Is Butler entitled to qualified immunity?

B. Civil liability for criminal acts. Ohio Rev. Code § 2307.60 establishes a civil cause of action for damages caused by a defendant's criminal acts, even if the defendant was never prosecuted. Butler's own admissions and third-party evidence establish every element of criminal assault, interference with civil and statutory rights, falsification, and disorderly conduct. Should the Court grant Gay summary judgment on these claims?

1. **Assault.** No person shall knowingly—aware of the probable or certain result—cause or attempt to cause physical harm to another. Butler admits he purposefully and roughly shoved Gay with two hands. Is Butler liable under § 2307.60 for assault?

2. **Interference with civil and statutory rights.** No public servant under color of their office shall deprive any person of a constitutional or statutory right. Butler deprived Gay of his First Amendment rights and statutory rights against being a crime victim when he retaliated against him by attacking him for his protected speech. Did Butler interfere with Gay's civil and statutory rights?

3. **Falsification.** No person shall knowingly make a false statement with the purpose to incriminate another or mislead public officials in performing their official functions. Butler made false statements to Superintendent Shutler and Lt. Tippie during their respective investigations that Gay attacked him from behind—even though video footage and third-party witnesses refute that allegation. Did Butler make false statements seeking to mislead public officials?

4. **Disorderly conduct.** No person shall recklessly cause annoyance or alarm to another by engaging in fighting, in threatening to harm someone, or in violent or turbulent behavior. Butler admits he initiated a physical confrontation with Gay, which resulted

in a fight. Did Butler engage in disorderly conduct?

C. Civil assault and battery. Civil assault and battery go hand in hand. By causing the offensive contact that a plaintiff reasonably feared, civil battery is the consummation of civil assault. Butler admitted to intentionally shoving Gay with both hands. Should the Court grant Gay summary judgment on his civil-assault and battery claims?

D. Intentional infliction of emotional distress. Defendants intentionally inflict emotional distress when they cause serious emotional distress by extreme and outrageous conduct. Physical violence is intolerable in a civil society, and Butler assaulted Gay, and according to his doctor's notes, this caused Gay serious emotional distress. Should the Court grant Gay summary judgment on his intentional-infliction-of-emotional-distress claim?

E. First Amendment violations. The First Amendment protects the right of citizens to criticize public officials, and with few exceptions, all speech is protected. Union Local enacted a policy banning critical speech at school-sponsored athletic events, and it applied that policy to Gay. Should the Court grant Gay summary judgment based on Union Local violating both facial First Amendment rights and specifically Gay's rights?

1. **Facial violation.** Content-based restrictions on speech must survive strict scrutiny—the most rigorous constitutional standard. On its face, Union Local's overbroad and unconstitutionally vague policy restricted speech based solely on its content with no permissible reason, tied to any discernible state interest. Given the content-based speech restriction, the district can't excuse its policies as permissible time, place, and manner regulation. Does the policy, on its face, violate the First Amendment?

2. **As-applied violation.** The government cannot enforce a policy when doing so would violate someone's First Amendment rights. Union Local enforced its unconstitutional policy restricting speech by Butler's attack on Gay for criticizing him. Is the policy, as applied to Gay, unconstitutional?

F. Reckless hiring and retention. When an employer continues to rehire an employee with a history of misconduct, then it is liable for the employee's foreseeable misconduct. The district and its officials admitted that they knew about Butler's violent history of driving with a child locked in his car's storage compartment. But it still retained him as a football coach, disregarding the risk Butler would be violent again. Is Gay entitled to summary judgment as to Union Local's reckless retention of Butler?

II. INTRODUCTION

On October 25, 2024, Coach Vaughn Butler, someone Brent Gay has known for decades, assaulted spectator Gay amid an abysmal Union Local School District (the "district") football performance because, according to Butler, Gay, at halftime, leveled a simple criticism:

"Did you guys watch any fucking film this week?" Butler Dep. 94:17–18, attached as Ex. 38.[1]

Though Butler admits he was the first to put hands on Gay (Butler Dep. 100:10–12, attached as Ex. 38), he was never prosecuted. And Union Local failed to so much as discipline Butler, instead sliding a benign letter from the prosecutor into his personnel file without telling him it was discipline. Butler Dep. 145:3–146:8; 150:13–152:1. Gay can't obtain justice in Belmont County. Federal court is his only hope.

This lack of accountability is astonishing considering the facts that all parties and district employees agree to here: Gay engaged in speech criticizing Butler's coaching ability, and Butler, in response, pushed him with both hands in Gay's chest. *Id.* at 87:21–22; 100:1–2; 100:10–12; 73:22–74:7; 96:17–19.

Union Local is responsible for its coach's actions. It delegated to Butler final decision-making authority to address complaints through a written board policy. *See* Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553; District 30(b)(6) (Shutler) Dep. 17:8–19 (authenticating district policy and stating that it was active during the incident), attached as Ex. 43. And it failed to train its public-employee coach about his obligations to refrain from engaging in First Amendment retaliation. Butler Dep. 52:1–17.

This anti-First Amendment attitude seeped down from the district's highest levels. The Board of Education promulgated an unconstitutional restriction on speech it expected its athletics staff to enforce. And in the days after Butler's attack on Gay, its superintendent openly discouraged public criticism of district coaches like Butler. @ULSchools1, X.COM (Oct. 30,

[1] Third parties do not report that Gay cursed, and Gay also says he didn't (*see* D. Goodson Aff. ¶ 4; R. Gainer Aff. ¶ 4, Ex. 2, ECF No. 70-2, PageID#1467); Gay Dep. 81:7–10 (attached as Ex. 39)), but that dispute is not material because, as explained below, it is well-established that cursing is protected speech.

2024, 12:42 PM), https://x.com/Ulschools1/status/1851666076150448472, Ex. 13, ECF No. 70-6, PageID#1478; District 30(b)(6) (Shutler) Dep. 102:18–21 (authenticating Ex. 13 video). This anti-speech policy formed the basis of Butler's attack on Gay.

This Court should grant summary judgment in Gay's favor on all claims. As Gay shows below, there is no genuine dispute of material fact; Gay relies on the district's, its own senior employees', and Butler's own admissions, and, to a lesser extent, affidavits from two neutral third-party witnesses. Based on that evidence, Gay is entitled to judgment as a matter of law on all—or, at the very least, most—of the elements of his claims. If the Court does not find for Gay on each element of each claim—which it should—he respectfully asks the Court to decide on those it can to narrow the issues for trial.

III. FACTS

A bricklayer and former coal miner, Plaintiff Brent Gay built a life with his wife near his *alma mater*, Union Local High School. Brent Gay Dep. 12:3–8, attached as Ex. 39. When he was in high school, Gay played football. Even after graduating, he consistently supported the team, attending games and donating money. *Id.* 17:18–24, 20:11–24. For many seasons, he showed up, even when Union Local was a losing team. *Id.* 37:22–23. He was a true fan.

A. Gay was attacked for criticizing a Union Local coach—and public official—in front of his friends and neighbors.

On October 25, 2024, Gay and his wife attended the backyard-rivalry match between the Union Local Jets and the Barnesville Shamrocks. By halftime, Union Local trailed its conference rival 0-41. Butler Dep. 92:17–21. Gay saw enough—he walked down the bleachers to leave before the beating got worse. Gay Dep. 71:13–20.

Unfortunately for Gay, the real conflict had not yet begun. Shortly after Gay descended

the bleachers, Defendant Vaughn Butler followed. Butler Dep. 93:13–18. Butler was Gay's former classmate and teammate, someone he'd known for more than 40 years. *Id.* at 47:22–48:7. Gay helped build a patio at Butler's house. *Id.* at 62:13–19. There was neither bad blood nor grudges between them. *Id.* at 63:2–9. Butler even described them as friends. *Id. at 62*:20–24.

That night, Butler was working as an assistant coach for the district's football team, donning his official Union Local red coaching jacket. *Id.* at 91:4–10; Butler Answ. ¶¶ 8, 15, 87, ECF No. 71, PageID#1556, 1557, 1570. At halftime, Butler walked down the bleachers from the press box toward the locker room. Butler Dep. 93:10–12. He provided conflicting testimony about whether he saw Gay before they met at the bottom of the steps. *Compare* Butler Dep. 93:13–18 ("Q: And as you were walking down [the bleachers], you saw Brent Gay? A: Yes…he was near the bleachers.") *with id.* at 95:3 ("A: [He came] up on me without my seeing him"). In any case, the two met near the bleachers.

Next, Gay asked Butler a question. As Butler remembered it, Gay said, "Did you guys watch any fucking film this week?" Butler Dep. 94:17–18. (Gay recalls saying, "Did you guys happen to watch any film this week?" Gay Dep. 81:7–10. A witness with no connection to or interest in any party heard, "Did you guys happen to watch any films?" David Goodson Aff. ¶ 4, ECF No. 70-3, PageID#1470. Another uninterested witness heard him ask "whether [Butler] watched any film that week." Rebecca Gainer Aff. ¶ 4, Ex. 2, ECF No. 70-2, PageID#1467.) Butler understood it as a criticism.[2] Butler Dep. 96:17–18; Gay Dep. 90:15–17.

Immediately upon hearing the question, Butler, with both hands, shoved Gay in the chest or midsection. Butler Dep. 101:20–102:13. He didn't gently move him aside. *Id.* at

[2] As discussed below, while this factual dispute over the words used might be genuine, it is not material.

102:15–103:3. As a third-party witness said—which Butler does not dispute—he shoved Gay with all his might. Rebecca Gainer Aff. ¶ 6, ECF No. 70-2, PageID#1467; Butler Dep. 107:14–19. As Butler admitted, the shove was his immediate reaction to Gay's words. *Id.* at 103:20–22.

Before the attack, Butler knew Gay had the right to criticize him. Butler Dep. 77:18–78:2. He admitted that Gay made no threats nor any calls to violence. *Id.* at 79:6–17, 82:11–23. Because the incident occurred amid the game, while he was walking to the locker room, Butler was on duty. *Id.* at 96:6–7; 177:16–22; *see also* 178:5–8 (admitting the walk was within his workplace). Union Local acknowledged Butler was still its employee during halftime. District 30(b)(6) Dep. (Shutler) 83:20–22 ("a fan chose to confront a coach while he was working on his way to the locker room"), 163:6–10 ("I didn't understand why somebody would…confront an employee while they were working"). Union Local paid Butler to represent it at the game. Former Athletic Director Nick Nardo Dep. 107:12–20; 108:16–19, attached as Ex. 41.

While on duty as a public official, Butler admitted that he was not supposed to react to criticism like this. Butler Dep. at 85:10–13. After seeing how he reacted to Gay, Butler knew others would be less likely to speak up. *Id.* at 86:10–22. Even Butler admitted he would think twice before criticizing someone if that person had just hit another critic. *Id.* at 89:1–5.

After the district indulged him with an hour to ponder his story, Butler claimed he shoved Gay to remove him from the path to the locker room. Lt. Tippie bodycam footage, ECF No. 2, Ex. 33-B at 00:00:40–47 (Oct. 25, 2024 9:11 PM); Butler Dep. 138:18–139:15. But Butler didn't ask Gay to move; nor did he try to walk around Gay, though he had plenty of space to do so. *Id.* at 100:13–18. After he shoved Gay, Butler also claimed that Gay attacked him from behind, an event no other witness can support. *Id.* at 109:21–110:4. Video footage shows Gay backpedaling while Butler pressed him backward. Lt. Tippie bodycam footage (slowed),

00:00:01–25 (Oct. 25, 2024 8:05 PM), attached as Ex. 33-A to B. Gay Decl. (authenticated in ¶ 6). While granular details about what happened after the shove may be in dispute, these events occurred only after the initial shove, launched by Butler. Butler Dep. 109:21–110:4. And the fact that camera footage supports Gay's, Gainer's, and Goodson's account means that the dispute cannot be genuine. *Akima v. Peca*, 85 F.4th 416, 422 (6th Cir. 2023) ("Where, as here, the record contains 'a videotape capturing the events in question' we must adopt a version of the facts that a reasonable jury could accept consistent with the video evidence."). Lt. Tippie body-worn camera footage (slowed), 00:00:01–25 (Oct. 25, 2024 8:05 PM), attached as Ex. 33-A.

Later, Butler claimed that he shoved Gay because he felt threatened. *Id.* at 83:23–24, 188:10–17. But his testimony contradicts this. He didn't feel his life was in danger. *Id.* at 83:21–22. He admitted that Gay made no threats—he just asked a question but "with an angry voice." *Id.* at 95:17–20. Gay held no weapons. *Id.* at 98:21–24. He raised no fists to Butler, nor did he step within a couple feet of him. *Id.* at 99:1–17. Butler had room to walk around Gay—he just chose not to. *Id.* at 101:8–14. Even in the scuffle, Butler was not injured. Lt. Tippie body-worn camera footage, ECF No. 2, Ex. 33-B at 00:00:48–51 (Oct. 25, 2024 9:11 PM).

After the dust settled, local police detained and handcuffed Gay before a crowd of his friends and neighbors. Gay Dep. 100:10–18; Lt. Tippie bodycam footage (slowed), Ex. 33-A, 00:00:01–25 (Oct. 25, 2024 8:05 PM). Once allowed to leave, Gay filed a police report at the local station. Gay Dep. 123:1–10. Then, he went to the emergency room. *Id.* He had visible cuts and bruises on his face and chest, along with painful bruises along his chest and ribs. Although the X-ray did not show a broken rib, his doctor said it could still possibly be an occult, nondisplaced rib fracture. Gay Medical Records (Oct. 25, 2024), filed separately under seal as Ex. 33-E to B. Gay's Decl. (authenticated in ¶ 8). For weeks after the incident, Gay suffered

severe pain, making it difficult to breathe and move. Gay Medical Records (Nov. 1, 2024), at 4, filed separately under seal as Ex. 33-F to B. Gay's Decl. (authenticated in ¶ 9); Gay Medical Records (Nov. 20, 2024), at 1, filed separately under seal as Ex. 33-G to B. Gay's Decl. (authenticated in ¶ 10). He was later diagnosed with costochondritis, a painful inflammation of the cartilage connecting ribs to the sternum.[3] B. Gay Decl. Ex. 33-G, at 5.

Along with his physical injuries, Gay was left with crippling anxiety. *Id.* at 1 ("[Gay] has been having a lot of anxiety"), 3 ("[Gay] remains very anxious"). His doctors noted that he was "clearly anxious and distressed" as a "consequence of the situation," prescribing him anxiety medication to ease his symptoms. B. Gay Decl. Ex. 33-F, at 2, 4. Even over a year since the incident, his symptoms persist. Gay Medical Records (May 1, 2026), at 1–2, filed separately under seal as Ex. 33-H to B. Gay's Decl. (authenticated in ¶ 11). Since that night, Gay has not attended any Union Local sporting event for fear of running into Butler. Gay Dep. 29:2–13.

B. Union Local protected Butler from facing any consequences for acting violently while working with children, just like it did in the past.

Meanwhile, Butler got off scot-free—both physically and professionally. He had no injuries. Lt. Tippie's bodycam footage, Ex. 33-B, ECF No. 2, at 00:00:48–51 (Oct. 25, 2024 9:11 PM). Local police interviewed him once, waiting almost an hour after the fight to take Butler's statement. *See id.* at 00:00:40–47. Butler told the Barnesville police, "A guy came in front of me and got in my face and I just kind of pushed him away from me so I could walk through. Before I knew it, I was tackled." *Id.* The officer let Butler decide whether he wanted to come to the station to write a statement—Butler declined. *Id.* at 00:01:50–02:00.

[3] Cleveland Clinic, Costchondritis, https://my.clevelandclinic.org/health/diseases/22167-costochondritis (updated Nov. 30, 2023).

Union Local superintendent Zac Shutler gave Butler more than two days to provide a written statement about the fight. District 30(b)(6) (Shutler) Dep. 127:18–128:7; Butler Dep. 138:16–21. Butler wrote:

> As I was walking from the visitors' stands to the locker room, I was confronted by an irate male individual (Brent Gay). He was in the front of me and yelled, "Do you guys ever watch any fucking film?" At that time, I felt threatened and I removed him out of my way, continuing to walk towards the locker room. As I continued to walk, I was attacked from behind and a struggle occurred. I continued towards the locker room after I was freed from the struggle with the help of bystanders. He (Brent Gay) was seen earlier standing in the crowd making hand gestures towards the press box.

Email, Vaughn Butler to Zac Shutler (Oct. 28, 2024 8:41 AM), attached as Ex. 7; Butler Dep. 138:5–15 (reading and authenticating his written statement).

Butler had no regrets. Butler Dep. 153:20–154:7. He believes he did nothing wrong. *Id.* Union Local agreed, he thought, because it did not discipline him. Butler Dep. 146:5–8.

Instead, Shutler slipped a benign letter from Belmont County's assistant prosecutor into Butler's personnel file. District 30(b)(6) (Shutler) Dep. 76:11–16. This letter documented the prosecutor's decision not to bring charges against Butler after a supposed "investigation." *See* Belmont County Prosecutor Letter, ECF No. 70-11, Ex. 31. Butler was never told that the letter served as a form of discipline. Butler Dep. 146:14–18. Union Local never closed its investigation with a final report. It neither made fact findings nor documented its "discipline" in writing. Union Local provided no evidence that it disciplined Butler.

Privately, Shutler, Nardo, and principal Tom Daley knew Butler should face discipline. Nardo Dep. 54:13–21. Shutler texted board member Larry Cain, "Was Vaughn [Butler] wrong for the shove? Yes." Z. Shutler, iMessage (May 15, 2025) Ex. 6, ECF No. 70-4, PageID#1473; Cain Dep. 80:8–81:22, attached as Ex. 35 (authenticating the message). Cain agreed. Cain Dep.

81:24–82:2. So did board president, Dylan Fowkes. After re-hiring Butler in May 2025, months after he attacked Gay, he texted Nardo, "I personally wouldn't have hired him for the past 15 years." D. Fowkes, iMessage, (May 15, 2025) Ex. 9, ECF No. 70-5, PageID#1475–76; Fowkes Dep. 7:4–19, attached as Ex. 36 (authenticating the message).

This was not the first time Union Local disregarded Butler's violent acts. District 30(b)(6) (Menges) Dep. 36:13–37:4, attached as Ex. 37; Cain Dep. 78:6–79:14; Fowkes Dep. 13:12–14:23, attached as Ex. 36. Butler previously forced a child into his car's storage compartment while working for a behavioral-health provider. Butler Dep. 20:20–21:19. He then drove the child home, still locked in the compartment. *Id.* A county judge found Butler guilty of a crime, and the child's family sued him civilly. *Id.* at 24:12–25:17, 19:19–20:3. Butler believed he and his employer settled the lawsuit with the family. *Id.* at 30:7–19. Union Local hired Butler years *before* this incident and chose to maintain his employment despite his criminal conviction. *Id.* at 14:7–9; Union Local Answ. ¶ 67, ECF No. 76, PageID#1591.

Then, Union Local knew about the allegations against Butler. District 30(b)(6) (Menges) Dep. 36:13–37:4; Union Local Answ. ¶ 71, ECF No. 76, PageID#1591; Union Local Supp. Resp. to Pl.'s First Interrog. 9, attached as Ex. 40; Union Local Supp. Resp. to Pl.'s First Req. for Admis. 3. Every year, it voted to renew Butler's one-year coaching contract, knowing about his violent history. District 30(b)(6) (Menges) Dep. 11:12–15. It continued to rehire him with "no clue" if anyone at the district investigated the allegation. *Id.* at 16:18–17:4. Even if no one investigated, board members and employees knew for years—including, in 2024, before Butler attacked Gay—that Butler was accused of driving his car with a child locked in the compartment. *Id.* at 36:13–37:4; Nardo Dep. 88:21–89:9, 92:18–22; Thompson Dep. 26:14–27:10 (current Union Local head football coach), attached as Ex. 44.

Yet Union Local had no problem continuing to employ Butler without investigating the child's or Gay's incident. District 30(b)(6) (Shutler) 54:18–55:13 (admitting there are no records to produce to show Union Local investigated the 1996 incident). Every year, including just a few months after the October 25, 2024 football game, the board voted to rehire Butler upon Shutler's recommendation. Board meeting minutes, Ex. 17, ECF No. 70-9, PageID#1546 (May 15, 2025); District 30(b)(6) (Shutler) Dep. 65:12–16. Union Local voted to rehire him dozens of times even though it knew Butler displayed a pattern of violent, retaliatory behavior.

C. Union Local's existing policies reflected a disregard for its constitutional obligations and Gay's rights.

Union Local did not want to hear negative feedback—so it banned it. Spectator Code of Conduct, Ex. 14, ECF No. 70-7, PageID#1522–23. The district had a policy against public criticism of coaches. Nardo Dep. 164:20–166:9. At Union Local events, the district banned speech that is "offensive to others," specifically booing, swearing, vulgarity, and verbal harassment directed at coaches. Spectator Code of Conduct, Ex. 14, ECF No. 70-7, PageID#1522. It required spectators to use "proper language," without ever defining the term. *Id.* If a spectator violated the policy, then the district could kick them out and ban them from future events. *Id.*, PageID#1523. Even further, the policy authorized other adults at the game to "police their own ranks" and enforce the spectator policy themselves. *Id.*, PageID#1522.

This policy banned criticism of coaches as "verbal harassment." Nardo Dep. 173:5–11. When asked whether Gay's speech at the game would have constituted verbal harassment under the policy, Nardo, in charge of enforcing the policy, said "[w]hen you come up to somebody and you ask them in the middle of a game … they're questioning their thought processes as a coach,

so yes." *Id.* at 173:9–11.[4] He added "[c]riticism is verbal harassing [*sic*] somebody." *Id.* at 173:24.

> The superintendent reiterated this anti-speech policy via social media. Shutler said:
>
> > I also want to…send a message out to our fans, our parents, our community members. That our coaches and our players are always giving their best effort, they dedicate a lot of time, they have a lot of commitment to their craft, and, **negative behavior, yelling at coaches, criticizing coaches publicly, speaking negatively of the players, it's not helpful**. And, we're all a team, we're all working together to provide the best educational experience for our students, and that includes our fans, our parents, and our community members…we need to address concerns and issues in private, behind closed doors…

@ULSchools1, X.COM (Oct. 30, 2024, 12:42 PM), https://x.com/Ulschools1/status /1851666076150448472, Ex. 13, ECF No. 70-6, PageID#1478 (emphasis added); District 30(b)(6) (Shutler) Dep. 102:18–24 (authenticating video; speaking for district). Shutler shared this video five days after Butler attacked Gay for criticizing him. District 30(b)(6) (Shutler) Dep. 103:16–22. Rather than stating that Union Local does not tolerate violence, Shutler declared that Union Local rejects public criticism or finds it unhelpful. *Id.* at 105:7–9.

Union Local also maintained a policy requiring its employees to resolve complaints directly with its community before board involvement. Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553. The policy was in effect on October 25, 2024, when Butler attacked Gay. District 30(b)(6) (Shutler) Dep. 17:13–16. It gives staff authority to deal with complaints in their realm. *Id.* at 18:1–4. It says, "The Board believes that complaints and grievances are best handled and resolved as close to their origin as possible. The staff should be given the opportunity to consider the issues and attempt to resolve the problems prior to involvement by the Board." Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553.

[4] During his 30(b)(6) deposition, Shutler endorsed Nardo's testimony, stating that Nardo answered questions during his deposition honestly and accurately. District 30(b)(6) (Shutler) Dep. 14:12–23.

And Butler understood that Union Local gave him the discretion to interact with spectators. Butler Dep. 49:16–21. He dealt with criticism daily. *Id.* at 51:15–18. The head coach delegated his authority to cooperate with interested spectators to his assistant coaches as appropriate. Coach's Evaluation Form, Ex. 14, ECF No. 70-7, PageID#1536–37 (listing head coach's duty to "delegate authority with responsibility" along with the duty to cooperate with "interested spectators"); District 30(b)(6) Dep. (Thompson) 21:2–7 ("I would trust my assistant coach to answer the question valid [*sic.*], and if they didn't have the answer, then they would send them to me"), attached as Ex. 42. And Union Local had no policy requiring a higher-level employee to supervise a coach's interactions with the public. Nardo Dep. 64:11–14.[5] It had no policy regarding its employees' First Amendment obligations. District 30(b)(6) (Shutler) Dep. 98:17–23.

But Union Local never trained its public-official employees on how to respond or cooperate properly with spectators. Nardo Dep. 74:16–21, 75:6–76:23; District 30(b)(6) (Thompson) Dep. 45:10–18; Butler Dep. 197:23–198:5. No one ever mentioned the First Amendment and a coach's obligation to respond to criticism without retaliating. Nardo Dep. 75:20–76:8; District 30(b)(6) (Shutler) Dep. 100:7–12. Instead, the district left its coaches to talk to fans and address their complaints with no specific instruction. District 30(b)(6) (Thompson) Dep. 17:24–25. The district only provided instruction to head coaches. District 30(b)(6) (Shutler) Dep. 109:1–8, 110:3–8; District 30(b)(6) (Thompson) Dep. 44:16–22.

By the time Butler met Gay near the bleachers on October 25, 2024, he had no training

[5] During his 30(b)(6) deposition, Shutler endorsed Nardo's testimony, stating that Nardo answered questions during his deposition honestly and accurately. District 30(b)(6) (Shutler) Dep. 14:12–23.

or instruction from the district on how to respond appropriately. Butler Dep. 57:23–58:4. He was armed only with the district policy prohibiting speech it found offensive. *Id*. at 163:5–9.

IV. LAW AND ARGUMENT

A party may seek, and a Court may grant, summary judgment on each claim or defense or ***part*** of each claim or defense. Fed. R. Civ. P. 56(a). Here, Gay seeks summary judgment on all his claims, but if the Court cannot resolve the entirety of a claim, he seeks partial summary judgment on any element for which he meets Fed. R. Civ. P. 56's standard.

This Court must grant summary judgment when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The central issue is "whether the evidence presents such a disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). "Plaintiffs may not always move for summary judgment, but when they do, they're entitled to summary judgment when their evidence is 'so powerful that no reasonable jury would be free to disbelieve it.'" *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002).

To prevail, the moving party must show there is no genuine dispute of material. *Ask Chems., LP v. Comput. Packages, Inc.*, 593 F. App'x 506, 508 (6th Cir. 2014). "A dispute is genuine only if based on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party." *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 487 (6th Cir. 2006). A fact is material only "if its resolution might affect the outcome of the suit under the governing substantive law." *Id*. The moving party may meet its burden by showing "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat

an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson,* 477 U.S. at 247–48 (emphasis in original).

Here, there are no genuine issues of material fact. Gay relies on statements from Union Local School District employees, the district's 30(b)(6) witnesses, and disinterested third-party witnesses. Because Gay succeeds as a matter of law and because there are no genuine issues of material fact, the Court should grant Gay's summary-judgment motion.

A. Butler, a public employee, retaliated against Gay for his protected speech when he shoved him in response to criticism over his coaching performance.

Butler retaliated against Gay in violation of the First Amendment when, in response to a criticism about whether Union Local coaches watched film before the pre-halftime blowout, Butler pushed or struck him. To prevail under a § 1983 claim, a plaintiff must prove:

(1) the deprivation of a right secured by the Constitution or laws of the United States;

(2) caused by a person acting under the color of state law.

Shadrick v. Hopkins Cnty., 805 F.3d 724, 736 (6th Cir. 2015); *Monell v. N.Y. City Dep't of Soc. Serv.*, 436 U.S. 658, 692 (1978).

1. Butler, a Union Local employee and representative, acted under color of state law when he retaliated against Gay's protected speech.

Butler once argued that he was not acting under color of state law when he pushed Gay in retaliation for his speech. *See generally* Def. Butler's Mot. for J. on the Pleadings, ECF No. 44. But Butler's arguments were not only contrary to the law, they also evaporated during his deposition testimony. Gay incorporates here his briefing in his opposition to Butler's motion for judgment on the pleadings and his supplement to that opposition. *See* Pl.'s Opp. to Mot. for J. on the Pleadings, ECF No. 46, PageID#421–29 (legal arguments); Pl.'s Supp. to his Opp. to Mot. for J. on the Pleadings, ECF No. 57, PageID#466–69 (Butler deposition testimony).

If state actors cause a constitutional or legal deprivation, and their action was fairly attributable to the state, then that deprivation occurred under the color of state law. *Littler v. Ohio Ass'n of Pub. Sch. Emps.*, 88 F.4th 1176, 1180–81 (6th Cir. 2023). "State employment is generally sufficient to render the defendant a state actor," especially when the state actor is "acting while in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 49–50 (1988).

Butler was a state actor because he violated Gay's First Amendment rights while he performed his government job, which authorized him to interact with fans and spectators. Union Local is an Ohio local-government agency. *See* Ohio Rev. Code § 125.04(B)(1)(c)–(d). It first hired Butler to coach football about 30 years ago, and on the night he attacked Gay, he was a coach. Butler Dep. 12:1–2; 90:21–23. Butler admitted in his deposition that:

- When he interacted with fans and spectators, he was acting as a district representative. Butler Dep. 40:21–41:1; 42:5–43:13.
- When he was acting as a football coach, he was acting with the appearance or authority of his public job. *Id.* at 66:22–67:4.
- At the October 25, 2024 football game, Butler attended as a coach. *Id.* at 91:6–7.
- He was wearing his coaching jacket, literally draped in the authority of his public office. *Id.* at 91:8–9.
- During games, including on October 25, 2024, he was on the job. *Id.* at 177:16–22.
- When he interacted with Gay, he was still on duty. *Id.* at 96:6–7.
- The walk between the press box and the locker room—where he attacked Gay—is within his workplace. *Id.* at 178:5–8. And during that attack, he was on the job. *Id.*
- The school district had no rule telling him not to interact with spectators, and he was, indeed, permitted to talk to them. *Id.* at 48:20–49:6.
- The district gave him discretion to interact with spectators. *Id.* at 49:16–21. Indeed,

the district's complaint policy enshrines this authority. Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553.

Union Local, too, admitted that Butler was on the clock during the interaction. District 30(b)(6) Dep. (Shutler) 83:20–22 ("a fan chose to confront a coach while he was working on his way to the locker room"), 163:6–10 ("I didn't understand why somebody would…confront an employee while they were working").

And the district's athletic director, Nick Nardo confirmed that Butler was at the game in his capacity as a public-employee coach, was being compensated to be there, was on the clock, and was representing Union Local. Nardo Dep. 107:12–20; 108:16–19.[6]

And Butler acted under the authority Union Local bestowed on him. District policy specifically gives Butler, as a front-line employee, the ability to respond to complaints. *See* Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553. Butler acknowledged this during his deposition, admitting that the district gave him discretion to interact with spectators. Butler Dep. 49:16–21. Athletic Director Nardo also addressed Butler's authority as a coach:

- The school district delegated authority to the coaches to make game-time decisions. Nardo Dep. 59:18–60:3.
- As a natural course of a coach's duties, interacting with a spectator is part of those duties—indeed, it's part of their responsibilities. *Id.* at 61:19–24.
- The district allows coaches and assistant coaches, like Butler, to exercise their own judgment on how to respond to spectators. *Id.* at 62:20–24. Indeed, this power is delegated to them. *Id.* at 63:2–5.
- In sum, the district delegated authority to the coaches and assistant coaches to decide how to interact with spectators. *Id.* at 79:17–23.

[6] During his 30(b)(6) deposition, Shutler endorsed Nardo's testimony, stating that Nardo answered questions during his deposition honestly and accurately. District 30(b)(6) (Shutler) Dep. 14:12–23.

State authority need not be explicit or actual; it is enough that the conduct arose from an "apparent" duty or authority of the actor's office. *Waters v. City of Morristown, Tenn.*, 242 F.3d 353, 359 (6th Cir. 2001). And "[i]n some situations, an official might possess the required state authority even if the state did *not* permit the conduct." *MacKey v. Rising*, 106 F.4th 552, 560 (6th Cir. 2024) (emphasis in original). Section 1983 covers state actors when they exercise state authority "whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Union Local's complaint policy also gave Butler the authority to respond to Gay's criticism or complaint and discretion under school policies to decide the form of that interaction.

Butler was thus acting under the color of state law when he interacted with Gay in his official capacity while on the clock as a state-government employee. The Court should hold that Gay, as a matter of law, has established that element.

2. Butler deprived Gay of his First Amendment rights because he publicly attacked Gay in retaliation for criticizing his ability to perform as a public-school employee.

"As a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). As a public-school employee, Defendant Butler was a government official. *See Littler*, 88 F.4th at 1181; Butler Dep. 91:6–9; 96:6–7.

To establish a First Amendment–retaliation claim, a plaintiff must show that:

(1) he engaged in constitutionally protected speech;

(2) officials took an adverse action against him that caused him to suffer an injury that would likely chill a person of ordinary firmness from continuing that activity; and

(3) the officials were motivated, at least in part, by the exercise of his constitutional rights.

McElhaney, 81 F.4th 550, 556 (6th Cir. 2023). Once the plaintiff establishes a *prima facie* case, "the defendants can avoid liability by showing that [they] would have taken the same action even in the absence of the protected conduct." *Wenk v. O'Reilly*, 783 F.3d 585, 593 (6th Cir. 2015). If no reasonable juror could fail to return a verdict in favor of the plaintiff, then summary judgment is appropriate. *See id.* at 594.

a. Gay engaged in protected speech—regardless of his tone, manner, or word choice—by criticizing a public official.

Whether Gay said what he and third-party witnesses claim or, as Butler claims, he used an expletive, Gay engaged in protected speech. Variations in recollection over his exact words is immaterial because it does not affect the First Amendment analysis.

The bedrock principle behind the First Amendment's free-speech guarantee "is that states cannot prohibit speech merely because it offends the sensibilities of others." *Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 734 (6th Cir. 2020) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). "Speech does not lose its protected status simply because it is provocative and challenging or has profound unsettling effects." *Christensen v. Carter*, No. 2:25-cv-1062, 2026 WL 100717, at *6 (Sargus, J.) (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

As such, "other than 'in a few limited areas,'" almost all speech is protected from governmental interference. *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)); *see also Cohen v. California*, 403 U.S. 15, 24 (1971). When government censorship hinges on the views expressed within the speech, it is especially heinous. *McElhaney*, 81 F.4th at 557.

"The right to criticize public officials is safely within that protected speech zone." *Id.*

Criticism of public-school officials is off limits from governmental regulation. *Id.*; *Jenkins v. Rock Hill Loc. Sch. Dist.,* 513 F.3d 580, 588 (6th Cir. 2008) (holding parent's right to complain about public-school officials was clearly established as protected speech); *Wenk*, 783 F.3d at 599 (same).

Butler testified that Gay asked, "Did you guys watch any fucking film this week?" Butler Dep. 94:17–18. (Witness David Goodson said that Gay said, "Did you guys happen to watch any films?" Goodson Aff. ¶ 4, Ex. 3, ECF No. 70-3, PageID#1470. Witness Rebecca Gainer heard him ask "whether he'd [Butler had] watched any film that week." Gainer Aff. ¶ 4, Ex. 2, ECF No. 70-2, PageID#1467. Gay testified that he asked, "Did you guys happen to watch any film this week?" Gay Dep. 81:7–10.) In any case, Butler immediately recognized Gay's question as a criticism. Butler Dep. at 73:22–74:7; 96:17–19. Nardo said the district's investigation concluded that Butler attacked Gay for just his words. Nardo Dep. 152:9–19.

Whether or not Gay cursed, he engaged in protected speech and only in protected speech. Though some may see it as distasteful, cursing is still protected speech. *Cohen v. California*, 403 U.S. at 18 (holding that jacket with the words "Fuck the draft" was First Amendment protected). As the *Cohen* Court put it:

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id. at 25.

Nor was Gay engaged in fighting words. Under *Chaplinsky v. New Hampshire*, fighting words, which are not protected speech, are those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). "[I]f a reasonable onlooker would regard the expressive conduct as a direct personal

insult or an invitation to exchange fisticuffs, it is not entitled to First Amendment protection." *Knight Riders of Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43, 46 (6th Cir. 1995) (cleaned up). A court must look at the circumstances surrounding the speech and determine if the expression is geared toward producing imminent lawless action and if it is likely to incite or produce that action. *Id.* Fighting words "is a small class of expressive conduct… ." *Id.* Indeed, the Supreme Court has only upheld a restriction on fighting words once: in *Chaplinsky* itself. *Id.* at n.3.

Here, Butler did not view Gay's words as inviting him to physically fight. Butler Dep. 82:11–18. He admitted that Gay asking whether he watched any film was not a call for violence. *Id.* at 79:6–17. Butler didn't interpret what Gay said as trying to incite a riot. *Id.* at 81:17–82:1. And he never felt his life was in danger. *Id.* at 83:21–22. In sum, Gay didn't use fighting words.

Witnesses observed that Gay was not aggressive with Butler or in his face. *See* Goodson Aff. ¶ 8, ECF No. 70-3, PageID#1470; Gainer Aff ¶ 4, 10, ECF No. 70-2, PageID#1467. Nardo, who led the investigation, said the only information gathered about Gay's actions is that he spoke about watching film—that he engaged in speech. Nardo Dep. 152:9–19.

Butler said he and Gay were friends. Butler Dep. 48:6–7. No bad blood or grudges existed. *Id.* at 63:2–9. In the decades they'd known each other, Gay never physically attacked or threatened Butler. *Id.* at 63:24–64:7. Gay was never a danger to Butler. *Id.* at 64:8–9.

Despite this longstanding history of goodwill and friendship, Butler claimed that Gay's "tone of voice" made him feel so threatened he had no choice but to attack Gay. *Id.* at 84:3–13. He claims that Gay stood "within two feet of my path to the locker room," not inches away from Butler's face as he portrayed. *Id.* at 99:4–15. But Butler never asked Gay to move out of his way. *Id.* at 100:13–15. And he never tried to walk around Gay, even though there was enough room to do so. *Id.* at 100:16–18; 101:8–14. He chose not to. *Id.* at 101:11–14. Instead, his reaction was

to immediately shove a man he's known for decades *right after Gay criticized him*. *Id.* at 103:5–22.

Butler ultimately admitted that Gay engaged in "just words." Butler Dep. 82:20–23. By Butler's own admissions, this is not a case of "speech plus." Butler agreed that the reason he acted was "all because he asked [Butler] if [he] watched any f'n film." Butler Dep. 221:16–222:8. Not because of anything Gay did. His retaliation was based solely on Gay's comments.

But a speaker does not lose First Amendment protection just because of his allegedly provocative demeanor or vaguely threatening words. *Christensen v. Carter*, 2026 WL 100717, at *7–8 (holding speech was not incitement, in part, because the speaker made no verbal call for violent action, and his emotionally charged demeanor did not change that). Gay's speech, even if Butler interpreted his tone as being threatening, was still protected.

Because Gay's speech fell into no narrow category like fighting words and because Butler admits that it was "just words," Gay's speech was First Amendment protected. The Court should hold that, as a matter of law, he has established the first element of this claim.

b. Butler took an adverse action against Gay—assaulting him—in a way that would likely chill a person of ordinary firmness from criticizing district officials.

The second element of a First Amendment–retaliation claim requires plaintiffs to show that the defendant took an adverse action against the plaintiffs, causing them to suffer an injury that would likely chill a person of ordinary firmness from continuing that activity. *McElhaney*, 81 F.4th at 556. Here, when Butler shoved Gay, Butler engaged in an adverse action. Butler Dep. 87:21–22; 100:1–2.

For First Amendment–retaliation purposes, adverse actions are those that might cause a person of ordinary firmness to refrain from engaging in free speech. *Buddenberg v. Weisdack*, 939 F.3d 732, 740 (6th Cir. 2019). Adverse actions "beyond those that create only de minimis

negative consequences offend the Constitution." *Kubala v. Smith*, 984 F.3d 1132, 1139 (6th Cir. 2021). "An individual who has been subjected to direct and intentional retaliation for having exercised the protected constitutional right of expression continues to suffer irreparable injury." *Newson v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989); *see also Christensen*, 2026 WL 100717 at *6. (S.D. Ohio Jan. 14, 2026) (Sargus, J.).

An official action is adverse when it could deter persons of ordinary firmness from exercising their rights. *MacIntosh v. Clous*, 69 F.4th 309, 316 (6th Cir. 2023). Because "nothing justifies harassing people for exercising their constitutional rights, a deterrent effect on speech need not be great." *Id.* (quotations omitted).

The Sixth Circuit has often held that "when an official responds to speech with threats of physical harm, that response constitutes an adverse action that would deter a person of ordinary firmness from speaking." *Id.* Butler's actions went beyond *threats* of harm. And Butler concedes that one would be less likely to speak up after seeing him attack Gay. Butler Dep. 86:18–22.

Because threats of harm—and, indeed, inflicting it—satisfy a First Amendment–retaliation claim's adverse-action element, and because Butler pushed Gay, the Court should hold that, as a matter of law, Gay has established this element of his claim.

c. Butler was motivated to attack Gay at least in part by his constitutionally protected criticism.

A causal connection exists between the protected conduct and the adverse action if Defendant's adverse actions were caused at least *in part* by the plaintiff's exercise of protected speech. *Buddenberg*, 939 F.3d at 741. Plaintiffs must show that their speech was "a substantial or motivating factor" in the defendants' decision to take adverse actions against them. *Id.*

Butler immediately understood Gay's comment to be a criticism of Butler's performance.

Butler Dep. 73:22–74:7; 96:17–19. But because he felt that criticism was undeserved (*id.* at 96:24–97:2), Butler attacked Gay. He started the physical altercation. *Id.* at 122:19–22. And his immediate response to Gay's words was to shove him. *Id.* at 103:5–14; 103:20–22.

Butler may try to argue that Gay's words did not motivate his attack; rather Gay's *tone* and approach motivated it. Someone's tone is necessarily part of their speech. And again, as discussed above, considering the pair's longstanding friendship and goodwill and Butler's ability to easily walk around Gay, that argument fails. Butler testified:

> Q. Gay had not physically attacked you, correct?
>
> ***
>
> A. Verbally.
>
> Q. Mr. Gay — don't rewrite my question, sir. Mr. Gay had not physically attacked you, correct?
>
> ***
>
> A. Correct.

Id. at 123:7–15.

Butler agreed that the reason he was allegedly in imminent fear of an attack was "all because he asked [Butler] if [he] watched any f'n film." Butler Dep. 221:16–222:8. Not because of anything Gay did. So Gay's words were at least a substantial or motivating factor in Butler's decision to strike Gay.

But even if he did subjectively feel fear over Gay's words, this Court has not accepted such meager excuses about self-defense or protection of others. *See Christensen v. Carter*, 2026 WL 100717, at *11. In *Christensen*, this Court granted a student's preliminary-injunction motion based on his high likelihood of success on his First Amendment–retaliation claim. *Id.* It rejected

the public school's position that it took the adverse action only to protect student and campus safety, not to punish the student for his speech's content. *Id.* The school's argument, this Court said, was a "difference without distinction." *Id.*

So also, Butler's claims that he attacked Gay out of fear of his words are a "difference without distinction." That's especially so when Butler himself admitted he shoved Gay as an immediate reaction to his *words*. Butler Dep. 103:5–14, 103:20–22. Butler's attack was substantially motivated by words—protected speech.

Because Butler immediately attacked Gay in reaction to Gay's words (Butler Dep. 103:20–22), he was motivated, at least in part, by Gay's exercise of his First Amendment right to criticize public officials. Butler cannot be excused if he claims he was motivated only by the school's Spectator Policy. As the Sixth Circuit explained, content-based restrictions on speech are "foul territory." *McElhaney*, 81 F.4th at 559. So no matter how he tries to spin it, Butler was substantially motivated by the content of Gay's protected speech.

Because he establishes each element, the Court should hold that Gay has established his First Amendment–retaliation claim (Claim 2) as a matter of law, and grant summary judgment on it against Butler, and, as explained immediately below, against Union Local, too.

3. Union Local is liable under *Monell* for Butler's retaliation because it delegated to him final decision-making authority on interactions with spectators and had a policy of inadequate training and supervision.

To hold a municipal entity liable for a § 1983 claim, a plaintiff must show that the execution of the municipality's policies or customs inflicted the injury—or in other words, constituted the moving force behind the violation. *Monell,* 436 U.S. at 694; *Shadrick*, 805 F.3d at 737. A plaintiff can establish a policy or custom through

(1) the municipality's legislative enactments or official agency policies;

(2) actions taken by officials with final decision-making authority;

(3) a policy of inadequate training or supervision; or

(4) a custom of tolerance or acquiescence of federal rights violations.

Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005) (citing, among others, *Monell*, 436 U.S. at 694; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)). Here, Union Local delegated Butler final decision-making authority regarding responding to complaints or to spectators *and* it has a policy of inadequate training and supervision.

a. Union Local delegated to Butler the authority to respond to criticism without review or constraint.

Under the final-decisionmaker theory, a local-government policy exists under *Monell* if the local government delegated final authority to an official to make the decision that caused the constitutional violation. *Pembaur*, 475 U.S. at 480–81; *Lemaster v. Lawrence Cnty.*, 65 F.4th 302, 313 (6th Cir. 2023). It is irrelevant whether the official's act occurs only once or repeatedly. *Bible Believers v. Wayne Cty., Mich.*, 805 F. 3d 228, 260 (6th Cir. 2015).

To establish this route to *Monell* liability, a plaintiff must show that the municipal "employee exercised policymaking authority and that the employee's decision was 'final and unreviewable' and so unconstrained 'by the official policies of superior officials.'" *Lemaster*, 65 F.4th at 313 (quoting *Miller v. Calhoun Cty.*, 408 F.3d 803, 814 (6th Cir. 2005)); *see City of St. Louis v. Prapotnik*, 485 U.S. 112, 12 (1998) (plurality opinion). "Whether a particular official has final policymaking authority is a question of state law." *Prapotnik*, 485 U.S. at 123.

If the official is "constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 127; *see Binelli v. Charter Twp. of Flint*, 488 F. App'x 95, 99 (6th Cir. 2012). That is, when a subordinate

acts within his authority, properly delegated by his superior or the municipal policies, then his actions are the municipality's actions. *See Meyers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994). Thus, *Monell* liability attaches. *See id.*

Here, Union Local is liable because Butler acted within his delegated authority to implement final policy decisions regarding complaints from fans or spectators. Ohio authorized public-school boards to manage and control its schools. Ohio Rev. Code § 3313.47. Union Local's board implemented the Public Complaints Policy, which was operative on October 25, 2024, when Butler attacked Gay. District 30(b)(6) (Shutler) Dep. 17:13–16. It reads:

> The Board believes that complaints and grievances are best handled and resolved as close to their origin as possible. The staff should be given the opportunity to consider the issues and attempt to resolve the problems prior to involvement by the Board.

Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553.

Specifically, the policy discusses criticism. *Id.* ("Constructive criticism is welcomed"); District 30(b)(6) (Shutler) Dep. 18:9–11; 19:19–23. Superintendent Shutler testified for the district that the policy gave staff members authority to resolve problems that crop up in their realm. *Id.* at 19:9–12. Only when staff members cannot resolve a problem must they escalate the complaint or criticism to the school board or district leadership. *Id.* at 19:13–18. Specifically, the Board expects staff to receive complaints within their realms and reply. *Id.* at 26:17–20. That "would be the proper way to handle things if you can help the customer at your area, at your service point." *Id.* at 26:21–27:5. The policy applies to coaches, like Butler. *Id.* at 27:15–17. In conclusion, each employee is empowered to resolve a complaint without the board's input.

So this policy confers final decision-making authority to line staff members to resolve community criticism or complaints without further input from anyone higher in the chain of

command, much less the board. This includes coaches hearing criticism from spectators. Nardo admitted the district delegated authority to coaches to decide how to interact with spectators. Nardo Dep. 63:2–5. When Butler interacted with a spectator, a superior couldn't review or reverse his interaction. *Id.* at 60:5–61:7; Butler Dep. 35:9–18, 104:9–20. Butler had discretion to respond to spectators as he saw fit, with no supervisor instruction. Butler Dep. 36:19–23, 37:21–38:2, 38:19–39:2. No one interfered with his judgment. *Id.* at 39:19–40:2; 58:21–59–3. As a practical matter, board members or the superintendent cannot be present for every interaction between coaches and spectators at games. District 30(b)(6) (Shutler) Dep. 28:1–5. As head coach Thompson put it for the district, assistant coaches had final authority when responding to fans or spectators. District 30(b)(6) Dep. (Thompson) 16:6–9, 16:20–17:10.

Union Local delegated final policymaking authority to Butler regarding spectator interactions—and *Monell* liability follows because Butler shoved Gay as a direct response to his criticism. As discussed above, both Butler and the district admit that Gay's comment to Butler about watching film was a criticism. Butler Dep. 96:17–18; District 30(b)(6) (Shutler) Dep. 26:1–6. The district expressly allowed, if not required, employees to resolve complaints at the source. Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553; District 30(b)(6) (Shutler) Dep. 26:17–20 (Shutler stated that it "would be the proper way to handle things if you can help the customer at your area, at your service point."). Notably, the policy does not dictate how to resolve the complaint—that was up to Butler. *See* Butler Dep. at 36:19–23, 37:21–38:2, 38:19–39:2. Butler decided to attack Gay for criticizing him. *Id.* at 103:20–22. No supervisor or policy constrained his decision. *See* District 30(b)(6) Dep. (Thompson) 16:6–9, 16:20–17:10. Nor could they review his decision. District 30(b)(6) (Shutler) Dep. 28:1–5.

So Butler acted within his properly delegated and final-policymaking authority to resolve

spectator complaints. Because he chose to resolve it by retaliating against Gay, Butler caused the constitutional violation. And because Union Local delegated this authority to him, under *Monell*, the district is liable for the constitutional violation.

b. Union Local is also liable because it failed to train coaches on their First Amendment obligation to not retaliate against critics—a foreseeable scenario.

Not only is Union Local liable under *Monell* because Butler was a final decisionmaker, but it is liable because of its policy of inadequate training. If a municipality remained deliberately indifferent to constitutional violations likely to result from its inadequate training program, then it is liable under a failure-to-train theory. *City of Canton v. Harris*, 489 U.S. 378, 390–92 (1989). To succeed, a plaintiff must show that the:

(1) training program is inadequate to the tasks that officers must perform;

(2) inadequacy is the result of the city's deliberate indifference; and

(3) inadequacy is closely related to or actually caused the injury.

Jackson v. City of Cleveland, 925 F.3d 793, 834 (6th Cir. 2019) (citation modified). The court should evaluate the "adequacy of the training program in relation to the tasks the particular officers must perform." *Id.*; *see also Howell v. NaphCare, Inc.,* 67 F.4th 302, 320 (6th Cir. 2023) ("Failure-to-train liability is concerned with the substance of the training").

A court can find failure-to-train liability if the subdivision has a history of constitutional violations or if the "unconstitutional consequences of failing to train could be so patently obvious" or highly predictable. *Connick v. Thompson*, 563 U.S. 51, 64 (2011); *Morningstar v. Worthy*, 454 F. App'x 391, 406 (6th Cir. 2011). At the time of the violation, it must be "obvious that the failure to train will lead to certain conduct, *and* it must be obvious (*i.e.*, clearly established) that the conduct will violate constitutional rights." *Arrington-Bey v. City of Bedford*

Heights, 858 F.3d 988, 995 (6th Cir. 2017) (emphasis in original); *see Beard v. Whitmore Lake Sch. Dist.*, 244 F. App'x 607, 612 (6th Cir. 2007).

Here, Union Local failed to instruct its employees on their First Amendment obligations—even when it knew coaches regularly faced criticism from parents and spectators. As a 30-year coach, Butler had to deal with criticism daily. Butler Dep. 51:15–18. That's a fairly predictable phenomenon. *Id.* at 55:6–12. Criticism is common in sports (Butler Dep. 72:8–9; Nardo Dep. 64:17–24)—often when a team isn't winning. District 30(b)(6) (Thompson) Dep. 41:16–21. Union Local let coaches talk to fans and address those complaints or criticisms. *Id.* at 17:24–25. *See also* Public Complaints Policy, Ex. 26, ECF No. 70-10, PageID#1553.

Despite constant interactions, Union Local failed to train Butler on how to interact with complaining spectators. No one told Butler the proper ways to interact with fans or spectators. Butler Dep. 37:21–38:2. No one ever gave him training on his obligations as a public official to respect the First Amendment. *Id.* at 52:1–17. No one told him what when faced with spectator criticism. District 30(b)(6) (Thompson) Dep. 45:10–18. He received no training warning him not to retaliate against critics. *Id.* at 58:16–59:6. And no one at the district ever provided training that he shouldn't get physical with a spectator. *Id.* at 58:16–59:6.

Union Local never held *any* training conveying to coaches that spectator criticism of their jobs as public employees is protected speech. Nardo Dep. 72:21–73:7. Nor has there been training informing coaches that retaliating against a spectator for criticizing their coaching is prohibited; nor on the First Amendment implications of a coach silencing a critic through physical force. *Id.* at 75:20–76:8. Even worse, Union Local gave no training on the First Amendment's right to free speech. District 30(b)(6) (Shutler) Dep. 100:7–12. Shutler knew of no First Amendment training Butler received. *Id.* at 109:1–8. With no instruction on how to

resolve complaints while respecting citizens' rights, Union Local failed to adequately prepare its coaches to perform a frequent, fundamental job function.

While Union Local provided some training—only to its head coaches, not to assistant coaches like Butler—it ignored the coaches' First Amendment obligations and failed to instruct them on how to respond to critics. Shutler claims there was training on de-escalation in August 2024, but neither he nor anyone else could produce a record of the training's content nor its attendees. And, in any case, Butler wasn't invited to that training. District 30(b)(6) (Shutler) Dep. 110:3–8; District 30(b)(6) (Thompson) Dep. 45:8–9. Thompson testified for the district that head coaches—not assistant coaches like Butler—attend coach training. District 30(b)(6) (Thompson) Dep. 44:15–22. Union Local failed to train its assistant coaches at all.

But Union Local left Butler to his own devices to figure out how to address critics. Butler Dep. 57:23–58:4. The district expected its own personnel, with no training benefit, to decide what to do when confronted. Nardo Dep. 76:24–77:5. Shutler, who organized the training program, couldn't even remember if it informed coaches how to respond to an angry fan. District 30(b)(6) (Shutler) Dep. 111:1–6. Union Local also had no official policies regarding the First Amendment. *Id.* at 98:17–23.

Faced with a known risk, Union Local deliberately abandoned its assistant coaches to handle game-time criticism. This inadequacy directly led to Gay's injury. Butler, an assistant coach, violently retaliated against Gay's protected speech. Given the tension in games, it was highly predictable that failing to train assistant coaches would lead to inappropriate reactions to criticism. And a total lack of First Amendment training left government officials with no knowledge of what speech they must tolerate. And, as shown below, by October 25, 2024, Gay's right to criticize a coach was clearly established. So the District's failure to train its assistant

coaches caused Gay's constitutional violation, and, under *Monell,* Union Local is liable.

4. Butler is not entitled to qualified immunity because the Sixth Circuit has held that the right to criticize public-school coaches is clearly established.

Qualified immunity shields public officials from liability "unless their actions violate clearly established rights." *McElhaney*, 81 F.4th at 556. To overcome qualified immunity, a plaintiff must "show both that (1) school officials violated his constitutional rights, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Qualified immunity applies only to individuals, not government-entity defendants. *See Owen v. City of Independence,* 445 U.S. 622, 650 (1980).

A right is clearly established when precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point, places the constitutional question beyond debate. *Ashcroft,* 563 U.S. at 741; *McElhaney*, 81 F.4th at 557. Still, public officials could "be on notice that their conduct violates established law even in novel factual circumstances" if the conduct's unlawfulness is apparent. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Gasper v. Ohio Dep't of Youth Servs.,* 648 F.3d 400, 417 (6th Cir. 2011). If the right was "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it," then the defendant cannot benefit from qualified immunity. *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). No earlier case need be directly on point. *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 275 (6th Cir. 2020).

The Sixth Circuit, as recently as, 2023 reaffirmed that the right to criticize public-school coaches is clearly established law in *McElhaney v. Williams*. *McElhaney,* 81 F.4th at 553–54. In *McElhaney*, a school district banned a parent from attending his daughter's high-school softball game after he criticized the head coach. *Id.* at 555. The Sixth Circuit expressly held the right to

criticize a coach was already clearly established, reversing the district court's granting of qualified immunity. *Id.* at 559. The Court wrote that, since its adoption, the First Amendment was primarily meant to safeguard criticism of public officials. *Id.* at 557–58. Neither party disputed that the coach was a public official—so the parent's criticism was protected speech. *See id.* The coach and school district argued, under *Tinker*, it could restrict parent speech to implement its policy requiring parents to be "supportive" and "refrain from negativity." *Id.* at 554, 558. The Sixth Circuit firmly rejected this argument, and thus, the policy itself: "Retaliating against speech *on the basis of its content*, as alleged here, drifts into foul territory." *Id.* at 559 (emphasis added).

Like *McElhaney*, Gay was engaged in simple criticism of a public-school coach. Butler admitted that he understood Gay's comment to be a criticism of Butler's performance. Butler Dep. 73:22–74:7; 96:17–19. Superintendent Shutler acknowledged that Gay's words were "a pointed criticism." District 30(b)(6) (Shutler) Dep. 26:1–6.

And like the district in *McElhaney*, Union Local tries too hard to police what is acceptable spectator speech. Like the school policy in *McElhaney*, Union Local's Spectator Policy targeted adult speech and specifically restricted it based on its content. Spectator Policy, Ex. 14, ECF No. 70-7, PageID#1522. And, as with *McElhaney*, the coach punished Gay for his speech's content. Gay's "run-of-the-mill adult speech targeting school officials" is protected. *McElhaney*, 81 F.4th at 558. His right to voice that criticism was clearly established. *Id.*

So the district and Butler violated Gay's First Amendment rights when Butler retaliated against him over criticism. And because Gay's right to criticize a public-school coach was clearly established by October 25, 2024, Butler doesn't deserve qualified immunity.

B. Butler is civilly liable for his criminal acts because his conduct, which caused Gay's physical and emotional injury, meets every element of criminal assault, interference with civil rights, falsification, and disorderly conduct.

Ohio Rev. Code § 2307.60(A)(1) creates a statutory cause of action for damages resulting from any criminal act, regardless of whether the perpetrator was convicted of that act. *Buddenberg v. Weisdack*, 161 N.E.3d 603, 606 (Ohio 2020). It provides crime victims with a civil remedy for injury or loss "based on the violation of any criminal statute, unless an exception applies." *Jacobson v. Kaforey*, 75 N.E.3d 203, 206 (Ohio 2016). "Because Ohio Revised Code § 2307.60 provides a civil remedy, [a plaintiff] is not required to prove this underlying criminal act beyond a reasonable doubt." *Genworth Life & Annuity Ins. Co. v. Case*, No. 1:22-cv-435, 2024 WL 1209554, at *11 (S.D. Ohio Mar. 21, 2024) (citing *Roseman Bldg. Co., LLC v. Vision Power Sys., Inc.*, No. 2009CA00009, 2010 WL 310586, at *5 (Ohio Ct. App. Jan. 25, 2010)).

Political-subdivision employees are often immune from civil actions brought "to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function." Ohio Rev. Code § 2744.03(A). But employees are liable when their acts or omissions were "with malicious purpose, in bad faith, or in a wanton or reckless manner." *Id.* § 2744.03(A)(6)(b). Wanton misconduct is "the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson v. Massillon,* 983 N.E.2d 266, 273 (Ohio 2012). Reckless conduct is "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Smathers v. Glass*, 222 N.E.3d 554, 564 (Ohio 2022). Ohio law does not require "that a person had actual, subjective knowledge of a known or obvious risk of harm to conclude that he acted recklessly." *Wilson v. Gregory*, 3 F.4th 844, 861 (6th Cir. 2021). "Taken together, this standard [wanton or reckless]… requires either intentional wrongdoing or a total disregard of a clear risk of harm." *Id.* So, if Butler acted wantonly or recklessly, he isn't

entitled to political-subdivision immunity.

Gay can prevail under Ohio Rev. Code § 2307.60 if the undisputed facts in the record establish that Butler committed each element of the crimes detailed below. Because Gay meets this threshold, the Court should award summary judgment on Gay's § 2307 claims.

1. When Butler pushed Gay, he knowingly caused physical harm to him, meeting the definition of assault under Ohio Rev. Code § 2903.13(A).

"No person shall knowingly cause or attempt to cause physical harm to another." Ohio Rev. Code § 2903.13(A). "Physical harm to persons means any injury, illness, or other physiological impairment, regardless of its gravity or duration." *Id.* § 2901.01(3). "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." *Id.* § 2901.22(B). "The relevant mental state is the assaulter's, not the victim's." *Harris v. United States*, 422 F.3d 322, 329 (6th Cir. 2005) (interpreting Ohio's criminal-assault statute). With the requisite intent, a shove, push, or grab can be criminal assault. *State v. Turner,* 236 N.E.3d 945, 967 (Ohio Ct. App. 2024).

Here, Butler criminally assaulted Gay when he shoved him for standing in front of him and asking a question. Butler Dep. 101:24–2:11; 221:23–222:8. As a former football player and a coaching-staff veteran, Butler knew the probable result or nature of a two-handed shove to the chest would be to cause physical harm. He intended that harm when he roughly moved Gay out of his way. *Id.* 102:15–103:3 ("Q: You didn't try to gently move him aside, correct? … A: Oh, move him gently aside, no"). Butler's assault caused physical harm. Gay documented the resulting injury with bloody photos, supported by hospital records. Gay Aff. ¶ 6 (cited only to authenticate records); Gay Dep. 133:23–134:20; 218:10–21. The emergency-department doctor

wrote in his chart that Gay may have an occult, nondisplaced rib fracture even if it didn't show up in his X-ray. Gay Medical Records, Ex. 33-E (Oct. 25, 2024). For weeks after the attack, Gay struggled to breathe. Gay Medical Records, Ex. 33-F, at 4 (Nov. 1, 2024); Ex. 33-G (Nov. 20, 2024). Thus, Butler committed each element of criminal assault—knowingly causing physical harm to another.

And Butler was not acting in self-defense because, as a matter of law, that argument fails. To establish self-defense in an instance of non-deadly force, the defendant must show that:

> (1) he was not at fault in creating the situation giving rise to the altercation;
>
> (2) he had reasonable grounds to believe and an honest belief, even if mistaken, that the defendant was in imminent danger of bodily harm; and
>
> (3) the only means of protecting himself…from that danger was by the use of force not likely to cause death or great bodily harm.

State v. Brennan, 254 N.E.3d 697, 705 (Ohio Ct. App. 2024); *see also State v. Barnes*, 759 N.E.2d 1240, 1244 (Ohio 2002). A defendant's *bona fide* belief of imminent bodily harm must both be objectively reasonable under the circumstances and subjectively honest in his belief that he needed to resort to force. *Brennan*, 254 N.E.3d at 706; *State v. Knipp*, 2024 WL 2835217, at *5 (Ohio Ct. App. June 4, 2024).

"Neither words alone nor fear itself will constitute evidence of serious provocation" to justify the use of force. *Knipp*, 2024 WL 2835217, at *5. "Implicit in the second element of self-defense is the requirement that the degree of force used was warranted under the circumstances and proportionate to the perceived threat." *Id.* at *6. An appellate court held that, when a defendant offered only his own testimony as proof of his *bona fide* fear of injury and the jury didn't believe him, it properly rejected his self-defense argument. *State v. Herron*, No. 28146, 2019 WL 3851682, at *9 (Ohio Ct. App. Aug. 16, 2019). In *Herron*, a man killed his ex-

girlfriend. *Id.* at *2. He testified that he feared for his safety because she was drunk and started a fight with him. *Id.* The defendant's testimony was the only evidence supporting any threat of imminent harm. *Id.* at *9. The appeals court affirmed the defendant's conviction after the jury rejected his self-defense argument. *Id.* Circumstantial evidence contradicted the defendant's testimony—he suffered no physical injuries and apparently held no remorse, falling asleep shortly after the attack. *Id.* Thus, he could not hide behind self-defense to avoid liability. *Id.*

Butler is civilly liable for criminal assault because self-defense doesn't excuse his criminal act—he had no good-faith belief that he or anyone else was in imminent danger from which he could not escape. Butler himself admitted: he was not in fear for his life. Butler Dep. 83:21–22 ("Q: You felt your life was in danger? A: No"). He also admitted that Gay has never physically attacked him in the 40 years they've known each other. *Id.* 123:7–15. Butler expressly agreed that the reason he was allegedly in imminent fear of an attack was "all because he asked [Butler] if [he] watched any f'n film." Butler Dep. 221:16–222:8. And words alone are insufficient to establish a self-defense argument. *Knipp*, 2024 WL 2835217, at *5.

Gay was never a danger to Butler. Butler Dep. at 64:8–9. Witnesses swore that Butler started the fight. R. Gainer Aff. ¶¶ 5–6, 10, May 8, 2025; D. Goodson Aff. ¶ 5, May 12, 2025. Gay and Butler were friends for decades before this incident, making Butler's fear argument even more dubious. Butler Dep. 47:22–48:9. Unlike Butler, Gay had no history of acting violently, let alone of making threats to Butler. *Id.* 221:1–9. He wasn't brandishing a weapon. *Id.* 98:15–24. Even Butler's own testimony about being afraid is questionable. In the moments after the assault, when talking to head coach Bernie Thompson, he never said he was scared or that he felt threatened. Thompson Dep. 12:25–13:3. Not until the next day did he fabricate a tale about Gay approaching him in an "aggressive manner." *Id.* at 13:9–11.

Even if his profession of fear is honest, subjective fear alone doesn't make his alleged belief of imminent harm reasonable. Gay stood before Butler, perhaps took a few steps toward him, and asked him a question. And yet Butler attacked a decades-long friend, unprovoked by either threat, weapon, or violence. No interpretation of those facts justifies a *bona fide* belief that Gay would cause Butler or others any harm.

Butler may argue there is a genuine dispute over material facts because Gay denies using a cuss word and being drunk at the game. Even if the dispute is genuine, it isn't material. If Gay used the f-word, this fact alone doesn't manifest a *bona fide* fear of imminent bodily harm. As discussed above, words alone cannot justify a reasonable belief of imminent harm. *Knipp*, 2024 WL 2835217, at *5. So Gay using the f-word would be irrelevant to the self-defense analysis.

Even if the facts could show a good-faith fear—which they don't—Butler knew he had means other than force to escape the supposed danger. He chose not to use them. Butler Dep. 101:8–14. Butler admitted there was enough room for him to walk around Gay. *Id.* He chose not to. *Id.* Rather, he reacted immediately to Gay's question with violence. *Id.* 103:5–22. So Butler cannot satisfy the second or third self-defense elements. He's liable for criminal assault.

Political-subdivision immunity doesn't apply to Butler's wanton and reckless conduct. As shown above, Butler used both hands to strike Gay's midsection. *Id.* at 101:20–102:3. He did it with purpose—it was no accident. *Id.* 100:1–18. Butler disregarded his duty to refrain from causing physical harm to another. Ohio Rev. Code § 2903.13(A). Butler also shoved Gay knowing the probable result was that his conduct would start a fight and cause Gay harm. Knowledge is a state of mind worse than negligence and sufficient to prove criminal recklessness, a higher standard than civil recklessness. *See* Ohio Rev. Code § 2901.22(E). Besides, the risk of

harm was so obvious that, even if Butler did not subjectively know about it, he still acted recklessly. Thus, Butler acted wantonly and, at least, recklessly. So he isn't immune.

Because Butler isn't immune and intentionally shoved Gay, causing physical harm, he is liable as a matter of law under Ohio Rev. Code §§ 2307.60 and 2903.13(A) for assault (Claim 5(a)). And because he could not reasonably believe they was in imminent danger of bodily harm from Gay's words alone and had other means to protect himself, he cannot successfully argue self-defense. The Court should grant Gay summary judgment on this claim.

2. Because Butler retaliated against Gay for exercising his First Amendment right to criticize a public official, Butler interfered with his civil rights in violation of Ohio Rev. Code § 2921.45.

"No public servant, under color of the public servant's office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right." Ohio Rev. Code § 2921.45(A). A "public servant" is "(1) any public official…" *Id.* § 2921.01(B). A "public official" is "any…employee or agent of the state or any political subdivision, whether in a temporary or permanent capacity…" *Id.* § 2921.01(A).

As shown above, during his attack, Butler is a public servant acting under color of his office, employment, or authority. And Butler retaliated against Gay for exercising his First Amendment right to criticize him. Thus, under Ohio Rev. Code § 2821.45(A), Butler interfered with Gay's *constitutional* rights.

Butler also violated Gay's *statutory* rights to be free from assault, falsification, and disorderly conduct. As shown above, Butler assaulted Gay. And, as shown below, Butler also engaged in falsification when he made false statements to police and Superintendent Shutler, misleading them in their performance of official functions. Assault and falsification already require knowledge as the state of mind. Ohio Rev. Code §§ 2903.13(A), 2921.13(A). If Butler

criminally assaulted Gay, then, as shown below, it directly follows that he engaged in disorderly conduct. So, if Gay is entitled to summary judgment on those claims—and he is—then Gay is also entitled to summary judgment here for interference with civil and statutory rights.

Again, Butler isn't immune. He disregarded his duty to refrain from interfering with Gay's civil and statutory rights. As for the assault and falsification claims, he knowingly violated Gay's rights—a state of mind worse than negligence and sufficient to prove criminal recklessness, which is higher than the recklessness standard in a civil context. *See* Ohio Rev. Code § 2901.22(E).

So the Court should grant summary judgment on Gay's Ohio Rev. Code §§ 2307.60 and 2921.45 claim (Claim 5(B)).

3. Butler lied to both a police officer and the superintendent to mislead them in performing their official functions, making false statements in direct violation of Ohio Rev. Code § 2921.13(A) and (G).

Ohio Rev. Code § 2921.13(A)(1)–(3) provides that

> No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when:
>
> (1) the statement is made in any official proceeding;
>
> (2) the statement is made with purpose to incriminate another;
>
> (3) the statement is made with purpose to mislead a public official in performing the public official's official function.

Ohio Rev. Code § 2921.13(A)(1)–(3) (cleaned up). A person violating this section is civilly liable "to any person harmed by the violation as a result of the commission of the offense and for reasonable attorney's fees, court costs, and other expenses incurred as a result of prosecuting the civil action commenced under this division." *Id.* § 2921.13(G).

A "public official" is "any…employee or agent of the state or any political subdivision,

whether in a temporary or permanent capacity…" *Id.* § 2921.01(A). Police officers are public officials. *State v. Collier*, 722 N.E.2d 1096, 1099 (Ohio Ct. App. 1998). So are school employees, like Superintendent Shutler.

A person acts with purpose when it is "the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." *Id.* § 2901.22(A). There is no requirement that charges be filed to find that a person acted with purpose to incriminate another. *Kanode v. Columbus*, 277 N.E.3d 1060, 1074 (Ohio 2025).

Butler knowingly made a false statement when he told Lt. Tippie, "[Gay] got in my face so I just kinda pushed him away from me so I could get in the locker room, and before I knew it, I was tackled." Ex. 33-B, ECF No. 2, at 00:40–00:47 (Oct. 25, 2024 9:11 PM). Later, Butler knowingly made another false statement to Shutler when he told him that Gay attacked him from behind. On October 28, 2024, Butler sent Shutler an email where he wrote:

> As I was walking from the visitors' stands to the locker room, I was confronted by an irate male individual (Brent Gay). He was in the front of me and yelled, "Do you guys ever watch any fucking film?" At that time, I felt threatened and I removed him out of my way, continuing to walk towards the locker room. **As I continued to walk, I was attacked from behind** and a struggle occurred. I continued towards the locker room after I was freed from the struggle with the help of bystanders. He (Brent Gay) was seen earlier standing in the crowd making hand gestures towards the press box.

V. Butler, Email (Oct. 28, 2024 8:41 AM), attached as Ex. 7 (emphasis added); Butler Dep. 138:18–139:15 (authenticating Ex. 7 as true and accurate copy of email).

But neither video evidence nor third-party witnesses support Butler's statements. First, Lt. Tippie's bodycam footage showed Butler grabbing Gay with two hands while Gay stumbles

backward, eventually falling on the ground. *See* Lt. Tippie bodycam footage (slowed), Ex. 33-A, at 00:00:01–25 (Oct. 25, 2024 8:05 PM); Butler Dep. 116:17-21 (admitting he can't dispute who in the video was wearing a red jacket); Butler Answ. ¶ 47, ECF No. 71, PageID#1563 (admitting Butler was wearing a red quarter-zip jacket that night). Gay could not have attacked Butler from behind if Butler was driving him backward with two hands.

Second, both third-party witnesses saw Butler shove Gay first—they did not see Gay tackle Butler from behind. *See* Gainer Aff. ¶¶ 5–6, 10; Goodson Aff. ¶ 5.

Butler knowingly made these statements with purpose to mislead Shutler in his investigation of what happened to determine whether discipline was appropriate, and to mislead Lt. Tippie in the criminal investigation into the fight.

As part of his normal duties, Shutler personally directed the investigation into Butler's conduct. District 30(b)(6) (Shutler) Dep. 28:6–29:20, 30:4–24 (describing, in general, how the District handled investigations into employee misconduct); *Id.* 31:9–12 (admitting he directed Butler to submit a written statement to him as part of this specific investigation). Butler lied with purpose to mislead Shutler in his official investigation. He wanted to avoid discipline by painting Gay as the aggressor. Butler described Gay as "irate," causing him to feel "threatened." Email, Ex. 7. Butler only wanted to save his job, as his self-defense argument lacks merit, but Shutler believed him. *See* District 30(b)(6) (Shutler) Dep. 83:22–23. So not only did he *intend* to mislead Shutler, but Butler indeed succeeded.

Butler also lied to police with the purpose to incriminate Gay or to mislead a public official. He told Lt. Tippie, a Barnesville police officer, that he was tackled, even though witnesses and video evidence refute that. In the false statement, he accused Gay of a specific

crime—assault. By purposely making a false statement, Butler violated the prohibition against lying to a public official to incriminate another, falsifying his statement to police after the attack.

And, because Butler misled Shutler and Tippie, Gay was injured. He never saw Butler held accountable, forcing Gay to seek accountability through this civil lawsuit. He felt isolated and mocked by his neighbors repeating Butler's false statements. Gay Dep. 151:7–21. District employees mocked him, too, calling for a wrestling match between Gay and Butler. Nardo Dep. 212:8–17. Gay felt persistently distressed that his community would see him as an aggressor, contributing to his severe anxiety. Gay Dep. 151:7–21.

Like the preceding claims, Butler is not entitled to immunity for his reckless and wanton conduct. He disregarded his duty to refrain from making false statements in an official proceeding, to incriminate Gay, and to mislead a public official. Butler knowingly lied—a state of mind far worse than negligence and sufficient to prove criminal recklessness, a higher standard than civil recklessness. *See* Ohio Rev. Code § 2901.22(E). So Butler is not immune.

Thus, Butler's lies to Lt. Tippie and Superintendent Shutler meet falsification's elements. The Court should grant summary judgment on Gay's Ohio Rev. Code §§ 2307.60 and 2921.13(A) and (G) claims (Claim 5(C)).

4. Because he criminally assaulted Gay and, in the process, caused him alarm and distress, Butler is liable for disorderly conduct under Ohio Rev. Code § 2917.11(A)(1) and (5).

No person shall recklessly cause inconvenience, annoyance, or alarm to another by "[e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior" or "[c]reating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender." Ohio Rev. Code § 2917.11(A)(1), (5). Several Ohio courts held that disorderly

conduct is a "lesser included offense of assault." *State v. Burgess*, 607 N.E.2d 918, 920 (Ohio Ct. App. 1992). So, if found guilty of criminal assault, a defendant is also guilty of disorderly conduct as its lesser included offense. *Id.* at 919–20. If engaging in disorderly conduct near a school, the minor misdemeanor is ratcheted up to a fourth-degree misdemeanor. Ohio Rev. Code § 2917.11(E)(3)(b).

"Recklessness is a perverse disregard of a known risk." *O'Toole v. Denihan*, 889 N.E.2d 505, 517 (Ohio 2008). It's "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Smathers*, 222 N.E.3d at 564.

Butler shoved Gay in a crowd of people with no regard for the physical harm and, in turn, the inconvenience, annoyance, and alarm he caused Gay. As established above, Butler criminally assaulted Gay. By his own words, Butler placed two hands on Gay and pushed. Butler Dep. 100:1–18. As discussed above, this shove created physical harm, or the risk of it, for no lawful and reasonable purpose. And as discussed above, the undisputed, material facts do not support a self-defense claim—Butler himself admitted that he could have moved around Gay and that his fear of harm was based solely on Gay's words. *Id.* at 82:20–23101:8–14. So Butler is liable for disorderly conduct, a lesser-included offense of assault.

By assaulting Gay, Butler also disregarded a known risk that he would cause physical harm, inconvenience, annoyance, and alarm. To Butler, it is common sense not to be violent toward spectators—he said, "I've been involved with football long enough and around people long enough to know that." Butler Dep. 181:8–15. But Butler disregarded his common sense and the known risk that his actions would create inconvenience, annoyance, and alarm for Gay. Thus, Butler committed disorderly conduct. Because the state of mind for disorderly conduct is

recklessness, Butler is not statutorily immune from this claim, as described above.

Thus, the Court should grant Gay summary judgment for his Ohio Rev. Code §§ 2307.60 and 2917.11(A)(1) and (5) claims (Claim 5(D)).

C. Butler put Gay in fear of offensive contact, and then he followed through by shoving him with both hands, making him liable for civil assault and battery.

Civil assault is the "willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact." *Krewina v. United Specialty Ins. Co.,* 221 N.E.3d 819, 823 (Ohio 2023). In other words, civil assault requires an intentional threat or use of force on another that would cause a reasonable person to be in fear or apprehension of imminent harm. *Id.* The actor must have known with "substantial certainty that his or her act would bring about harmful or offensive contact." *Watkins v. Millennium Sch.*, 290 F. Supp. 2d 890, 896 (S.D. Ohio 2003) (citing *Smith v. John Deere Co.*, 614 N.E.2d 1148, 1154 (Ohio Ct. App. 1993)). Assault and battery go hand in hand: "assault is the beginning of an act which, if consummated, would constitute battery." *Staton v. Perrone*, No. 1:24-cv-592, 2025 WL 976562, at *4 (S.D. Ohio Apr. 1, 2025).

To be liable for civil battery, a person must act intending to cause a harmful or offensive contact and, in fact, a harmful contact results. *Love v. City of Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988). A harmful or offensive contact is an "intentional, unconsented-to touching." *Anderson v. St. Francis-St. George Hosp., Inc.,* 671 N.E.2d 225, 227 (Ohio 1996). The defendant is liable for harm proximately caused by his intentional touching. *Id.* Proximate cause is generally "limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *State v. Balmert*, 281 N.E.3d 1075, 1080 (Ohio 2025). The more foreseeable the harm, the more likely the court will find proximate cause. *See id.*

Butler's shove meets all elements of both civil assault and battery. Butler admitted that he put his hands on Gay. Butler Dep. 87:21–22; 100:1–2. He made first physical contact with Gay. *Id.* at 100: 10–12. Butler shoved Gay with both hands with neither permission nor invitation. *Id.* at 82:11–18, 100:10–18. Butler knew it would bring about offensive contact—he said that he moved his arms toward Gay to effect the non-consensual touch. *Id.* at 100:1–9. Butler's use of force—a two-handed shove—would put a reasonable person in fear of imminent harm or contact. Not only did Butler intend to cause such contact, but also, without his initial shove, offensive contact would not have occurred at all. Butler consummated his shove by making first contact with Gay, taking his act from civil assault to assault and battery.

By taking both hands to push Gay in his chest—in a crowd of people no less—Butler knew or should have known that he would harm Gay. The harm is reasonably foreseeable, especially considering Gay's age and the crowded, gravel walkway. While Butler might claim others like the police officer or a bystander caused harm, even if so, Butler shoved Gay into harm's way. *See* Lt. Tippie bodycam footage (slowed), Ex. 33-A, at 00:00:01–25 (Oct. 25, 2024 8:05 PM). His shove precipitated the foreseeable altercation that followed involving police and bystander intervention. The ensuing harm to Gay is a foreseeable consequential damage.

Self-defense can be an affirmative defense to civil assault and battery. *Niskanen v. Giant Eagle, Inc.*, 912 N.E.2d 595, 600 (Ohio 2009). As discussed above, Butler cannot claim self-defense when he had no reasonable, *bona fide* belief that he was imminently at risk of physical harm. So Butler is liable for civil assault and battery.

As discussed above, a political-subdivision employee is liable when his acts or omissions were "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). Butler disregarded the risk of substantial harm to Gay by intentionally

shoving him in a crowd of people, so he acted wantonly and recklessly. Thus, the Court should grant summary judgment on Gay's civil-assault and battery claims (Claims 6 and 7).

D. Butler is liable for intentional infliction of emotional distress for violently shoving his old friend at a high-school football game, causing Gay severe anxiety and emotional distress.

"To prove a claim of [IIED], the plaintiff must show that the defendant intentionally or recklessly caused [him] serious emotional distress by extreme and outrageous conduct." *Watkins*, 290 F. Supp. 2d at 903. "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 453 N.E.2d 666, 671 (Ohio 1983) (overruled in part on other grounds). The liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*

If one party behaves in "a manner which if the story is told would extract the exclamation of 'outrageous!' from a reasonable person," then a court can find they are liable for intentional infliction of emotional distress. *Pyle v. Pyle*, 463 N.E.2d 98, 104 (Ohio Ct. App. 1983). This is a fact-specific and context-specific inquiry—a push in one context might not be outrageous enough, but in another, it could. *Wilhelm v. Knox Cnty.,* No. 2:03-CV-786, 2005 WL 1126817, at *9 (S.D. Ohio May 12, 2005). For example, it was extreme and outrageous for a car-rental agent to threaten a customer over the phone that he would "tear his face off" unless he returned the vehicle. *Reamsnyder v. Jaskolski*, 462 N.E.2d 392, 393, 395 (Ohio 1984).

Here, Butler's behavior rises to a level sufficient for a reasonable person to think "outrageous!" because he physically and intentionally attacked not only a fan, but a friend. Butler's shove was no accident. Butler Dep. 100:1–18. If, in *Reamsnyder*, it was outrageous

enough for an employee to threaten a customer *over the phone* with violence, then it is likewise outrageous enough for Butler to not just threaten violence but *inflict it* on Gay. Thus, Gay can establish the extreme and outrageous element of intentional infliction of emotional distress.

Next, plaintiffs must present evidence beyond their own testimony that they "experienced emotional distress due to the defendant's actions," such as proof of medical or psychological treatment. *Daly v. Certo*, 263 N.E.3d 939, 968 (Ohio Ct. App. 2025). "Serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances." *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983). It must "go beyond trifling mental disturbance, mere upset or hurt feelings." *Id.* "A plaintiff's own testimony, in combination with the facts and circumstances of a particular case, can suffice to sustain the plaintiff's burden on causation." *Peterson v. Ruppright*, 452 F. Supp. 3d 735, 744 (N.D. Ohio 2020) (quoting *Hollingsworth v. Time Warner Cable*, 861 N.E.2d 580, 593 (Ohio Ct. App. 2006)).

Gay experienced severe anxiety because of Butler's conduct. Gay Dep. 151:3–9, 158:11–14. His doctor prescribed anxiety medication and described him as "clearly anxious and distressed," looking distinctly uncomfortable. B. Gay Decl. Ex. 33-F at 4.

As discussed above, a political-subdivision employee can be held liable when his acts or omissions were "with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b). Butler disregarded the risk of substantial, emotional harm to Gay by attacking him so publicly at a school sporting event. Thus, the Court should grant Gay summary judgment on his intention-infliction-of-emotional-distress claim (Claim 8).

E. Union Local's spectator code of conduct states a preference for some kinds of speech over others, violating the First Amendment both on its face and as applied against Gay.

The First Amendment to the U.S. Constitution states, "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. Amend I. The Fourteenth Amendment incorporated that prohibition against the states. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019). "The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'central to the meaning of the First Amendment.'" *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) (*quoting N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964)). The First Amendment right to criticize public officials was clear "[s]ince the day the ink dried on the Bill of Rights." *McCurdy v. Montgomery Cnty., Ohio*, 240 F.3d 512, 520 (6th Cir. 2001).

Other than in a few limited areas, almost all speech is protected from government interference. *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019). That is especially true when government censorship is based on the views expressed within the speech. *McElhaney v. Williams*, 81 F.4th 550, 557 (6th Cir. 2023).

Both on its face and as applied to Gay, Union Local's Spectator Policy cannot survive strict scrutiny. *See* Spectator Code of Conduct, Ex. 14, ECF No. 70-7, PageID#1522–23 (*see also* District 30(b)(6) (Thompson) Dep. 22:15–18, authenticating the policy).

1. Union Local's overbroad and vague spectator policy regulates content, expressing a preference for certain types of language, and thus is unconstitutional on its face.

A facial challenge to a law's constitutionality is "an effort 'to invalidate the law in each of its applications, to take the law off the books completely.'" *Speet v. Schuette*, 726 F.3d 867, 871 (6th Cir. 2013) (quoting *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009). To determine whether a law is facially invalid under the First Amendment, "the question is whether a substantial number of the law's applications are unconstitutional, judged in relation to the

statute's plainly legitimate sweep." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (citation modified).

In other constitutional facial challenges, the plaintiff is held to a much higher standard. *United States v. Hansen*, 599 U.S. 762, 769 (2023). But to make room for free expression, the Supreme Court applies a lower standard for First Amendment facial challenges. *Id.*; *Moody*, 603 U.S. at 723. A facial challenge is an "overbreadth challenge." *Speet*, 726 F.3d at 872. Rather than having to prove that **no** circumstances exist in which the enforcement of the statute would be constitutional, a plaintiff challenging a law or policy on First Amendment grounds must show that a **substantial number** of instances exist in which the law cannot be applied constitutionally." *Id.* (emphasis added). To do so, the plaintiff must rely on the statute's text and fact. *Id.* at 873.

The first step in a facial analysis is to assess the law's scope. *Moody*, 603 U.S. at 724. Only then can the court proceed to decide which of the law's applications violates the First Amendment. *Id.* at 725. If the unconstitutional applications substantially outweigh the constitutional, then the law is facially invalid. *Id.* at 723.

Here, Union Local's Spectator policy provides as follows:

> WHAT IS EXPECTED OF ALL SPECTATORS (SPECIFIC)
>
> - Proper language is to be used. No swearing or language which is offensive to others will be tolerated. School events are a family activity. Individual and group vulgarity is unacceptable, as is verbal harassment and BOOING of players, coaches, and officials.

Spectator Policy, Ex. 14, ECF No. 70–7, PageID#1522.

Far from merely setting expectations, the policy comes with enforcement mechanisms for those who violate it:

> CONSEQUENCES IN EFFECT FOR ALL EVENTS

- Violation of rules may cause: Being evicted from the event/premises; student(s) receiving in-school suspension or suspension from school; prohibition from attending future events; possible cancellation of spectators from attending an event; possible cancellation of event.

Id., PageID#1523. The district can prohibit a fan it perceives as breaking this policy from attending future events. District 30(b)(6) (Thompson) Dep. 34:9–17.

On its face, the policy regulates speech, banning certain kinds of it based on its content. For example, the policy requires that "proper language" be used. *Id.* at 23:14–18. It bans swearing and "language which is offensive to others." *Id.* at 24:15–17. It also prohibits "verbal harassment and BOOING of players, coaches and officials." *Id.* at 24:21–24; 25:8–12.

This policy's overbroad scope captures a substantial amount of protected speech. The policy isn't geared toward any of the unprotected categories of speech—true threats, fighting words, obscenity (which requires sexual content), fraud, etc. Instead, it dissects speech based on its content—whether it is "proper" or "verbal harassment" and the specific words used.

Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). A court must consider whether the policy draws a distinction based on the message the speaker conveys. *Id.* "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* If a regulation is content-based, its promulgator is precluded from arguing that it is a content-neutral time, place, or manner regulation. *Pagan v. Fruchey*, 492 F.3d 766, 778–79 (6th Cir. 2007).

Here, the spectator policy draws distinctions on speech based on its content. The district agreed that the policy expressed a preference for one type of language over another. District

30(b)(6) (Thompson) Dep. at 24:9–14. He said that the policy "means that people in the stands cannot scream and yell verbally unacceptable things at our players and/or coaches." *Id.* at 25:24–26:1. He added that "[i]f someone is aggressively yelling or asking something at a player or coach, I think that crosses the line to verbal harassment." *Id.* at 29:17–19. Meanwhile, "proper" language is allowed.

"Content-based laws—those that target speech based on its communicative content—*are presumptively unconstitutional* and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (emphasis added). When analyzing a statute for a First Amendment violation, the court will apply strict scrutiny if the law is content-based. *NetChoice, LLC v. Yost*, 180 F.4th 268, 287 (6th Cir. 2026).

Strict scrutiny requires the government to prove that the "restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed,* 576 U.S. at 171. The state must provide "an actual problem in need of solving," and "the curtailment of speech must be actually necessary to the solution." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011). The regulation on speech must be the least restrictive means of solving the problem or achieving the objective. *NetChoice*, 180 F.4th at 289. This standard is demanding—a law restricting speech because of its content is rarely permissible. *Brown*, 564 U.S. at 799.

Here, Union Local cannot meet its burden to show it has a compelling interest in regulating community speech. Since Union Local hired Shutler as superintendent, Shutler could not recall one incident where a fan's criticism caused a "major ordeal" with a coach. District 30(b)(6) (Shutler) Dep. 48:9–11. Indeed, fan criticism—which Athletic Director Nardo deemed violates the policy as harassment of a coach (Nardo Dep. 173:24)—is common. Butler Dep. 72:8–9; Nardo Dep. 64:17–24; District 30(b)(6) (Thompson) Dep. 41:16–21. There's a reason

that the term "armchair quarterback" is common vernacular.

The kind of speech allowed under the policy may be kind and sportsman-like. It may promote order and help keep tensions down during a sporting match. But those sorts of justifications do not survive strict scrutiny. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed*, 576 U.S. at 167.

Nor is the district's policy narrowly tailored to achieve its interest. The policy is overbroad and vague, banning "verbal harassment" and promoting "proper language." These categories are so vague—so susceptible to subjective interpretation—that they could catch a large amount of speech and fail to notify speakers of what is acceptable under the policy and what isn't. A regulation on speech is still unconstitutional, even if it does not reach a substantial amount of constitutionally protected conduct, if it is impermissibly vague and fails to establish standards "that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). A regulation must give fair notice of the conduct that is forbidden or required. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 421 (6th Cir. 2014). And the district's vague insistence on "proper language" and ban on "verbal harassment" does not give spectators notice of what sort of speech they can engage in without violating the policy and risking being banned from future games.

Because the policy engages in content-based regulation, and because the district has no compelling interest in regulating spectators' speech at games and the policy is not narrowly tailored, it violates the First Amendment on its face. It is both overbroad and unconstitutionally vague. For that reason, the Court should grant summary judgment on Gay's third claim and grant him permanent-injunctive relief by invalidating the policy.

2. Union Local's spectator policy is unconstitutional as applied to Gay's speech, which Union Local officials affirm violated the policy.

In contrast to a facial challenge, an as-applied challenge argues that a law is unconstitutional as enforced against the plaintiffs. *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013). As discussed above, the policy is an unconstitutional content-based regulation on speech. Applied to Gay's speech, that analysis is no different.

The spectator policy was in place on October 25, 2024, when Butler attacked Gay. District 30(b)(6) (Thompson) Dep. 22:19–22. All coaches, including Butler, are expected to follow the manual containing this policy. *Id.* at 22:23–23:6.

Here, Gay either asked Butler (1) whether he watched any film or (2) whether he watched any "fucking" film. When asked whether Gay's comment—questioning whether Butler had watched any film, no cursing involved—violated the policy, the district testified that "it depends on the circumstance and the situation and how it was delivered," like "if there was aggression behind it." *Id.* at 26:20–27:13. When asked to clarify what type of aggression he meant, Thompson said he meant "as in verbally—verbal harassment and swearing." *Id.* at 27:16–18. He added that "[i]f someone is aggressively yelling **or asking something at a player or coach**, I think that crosses the line to verbal harassment." *Id.* at 29:17–19 (emphasis added). If Gay indeed used the word "fucking"—as Butler contends—that would violate the policy as verbal harassment, the district testified. District 30(b)(6) (Thompson) Dep. 32:2–7.

Normally, the athletic director would oversee promulgating the spectator policy. The district testified that, if the athletic director weren't present—he wasn't on October 25, 2024 (Nardo Dep. 109:6–10)—the coach would decide whether the comment or criticism violated the policy by being verbal harassment. District 30(b)(6) (Thompson) Dep. 30:4–13. And, as Butler

understood the policy on October 24, 2025, Gay violated it. Butler Dep. 163:11–23.

And Butler testified his response to Gay's speech was consistent with enforcing the spectator policy. *Id.* at 164:23–165:12. He was reacting to Gay's criticism. In the moment, he understood Gay's comment to be a criticism of his performance (*Id.* at 73:22–74:7). And athletic director Nardo declared that violated the policy:

> Q: So in your view … criticism would also be verbal harassment; is that right?
>
> A: Criticism is verbal harassing somebody, yes.

Nardo Dep. 173:5–24.

Because the policy is an unconstitutional, content-based regulation on speech, and because Butler, applied the policy to Gay, Gay should prevail on his as-applied claim—and the Court should grant summary judgment on this claim (Claim 4) and enjoin the policy.

F. The district recklessly retained Butler, though it knew for years about Butler's violent history, and serially rehired him in conscious disregard of and indifference to the clear risk he would act violently again.

An employer is liable for a third party's injuries caused by an employee's unlawful conduct if the employer's reckless hiring, supervision, or retention was the but-for cause. *Evans v. Akron Gen. Med. Ctr.*, 170 N.E.3d 1, 4–5 (Ohio 2020). The employer's failure is reckless when it is "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson v. Massillon*, 983 N.E.2d 266, 273 (Ohio 2012).

To prove negligent (or reckless) hiring, training, supervision, and retention claim, a plaintiff must show:

(1) existence of an employment relationship;

(2) the employee's incompetence;

(3) the employer's actual or constructive knowledge of such incompetence;

(4) the employee's act or omission causing the plaintiff's injuries; and

(5) the employer's negligence [or recklessness] in hiring or retaining [or supervising, etc.] the employee as the proximate cause of plaintiff's injuries.

Est. of Barney v, PNC Bank Nat. Ass'n, 714 F.3d 920, 929 (6th Cir. 2013): *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 872 N.E.2d 295, 305 (Ohio Ct. App. 2007); *Steppe v. Kmart Stores*, 737 N.E.2d 58, 66 (Ohio Ct. App. 1999); *Peterson v. Buckeye Steel Casings*, 729 N.E.2d 813, 823 (Ohio Ct. App. 1999).

Even after learning of Butler's violent history, Union Local still retained him, giving him the leeway to attack Gay. Butler previously faced criminal charges and a civil lawsuit after, while working at a behavioral-health facility, he forced a child into the rear storage compartment of his car and drove around with him. Butler Dep. 20:20–21:19. A judge found Butler guilty of a crime. *Id.* at 24:12–25:17. This happened concurrently with Butler's Union Local employment, but district officials rehired him year after year despite those violent, criminal actions. *Id.* at 14:7–9; Union Local Answ. ¶ 67, ECF No. 76, PageID#1591.

The district admitted, through its 30(b)(6) witness, that it knew about Butler driving with a child locked in his trunk while at work. District 30(b)(6) (Menges) Dep. 36:13–37:4. It knew for years, even decades, without investigating it. When Butler violently shoved Gay just for criticizing him, Union Local knew it wasn't Butler's first time engaging in violent, criminal behavior on the job. It did nothing to prevent further incompetence, as established above through its failure to train assistant coaches like Butler. It continued to rehire him every year, despite the district's board president knowing Butler had engaged in violent conduct. Dylan

Fowkes Dep. 13:12–14:23. Had the district, once it discovered Butler's incompetence, not rehired him, then he wouldn't have been at the October 25, 2024 game to inflict violence on Brent Gay. So Union Local's serially reckless hiring and retention of, and failure to train and supervise Butler, caused Gay's injury, and the Court should grant summary judgment on this claim (Claim 8), too.

V. CONCLUSION

Relying on Defendants' own admission and those of their employees, Gay is entitled to summary judgment for the above reasons. Butler attacked Gay after he engaged in "just words." And those words were protected speech, whether he cursed or not.

Union Local is liable for Butler's constitutional violation because it conferred on him, through board policy, final decision-making authority to resolve community complaints and criticism. And it failed to train Butler and every other coach on their First Amendment obligations, even though they are public officials who often encounter dissent and criticism. All this stems from Union Local's anti-First Amendment attitude, including its speech-selective spectator code of conduct policy, which itself is unconstitutional, both on its face and as applied.

Because there are no genuine issues of material fact—Gay relies on Defendants' and their agents' own words—and Gay is entitled to judgment as a matter of law, this Court should grant Gay's summary-judgment motion.

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Respectfully submitted,

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