No. - ____

In the

Supreme Court of the United States

WILLIAM FELKNER,
Petitioner,

v.

JOHN NAZARIAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Rhode Island

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court's "qualified immunity jurisprudence stands on shaky ground." *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., statement respecting the denial of *certiorari*). Its "clearly established law" standard lacks any textual or historical link to 42 U.S.C. § 1983 and bears no resemblance to the origins of the qualified immunity doctrine, *see Pierson v. Ray*, 386 U.S. 547 (1967). The modern standard has also proven unworkable in practice, with the Court routinely using *certiorari* and *per curiam* opinions to correct lower court confusion and errors.

The policy rationales relied upon to justify qualified immunity have likewise proven misplaced. The Court has never explained why the law requires a one-size-fits-all standard that provides the same immunity to deskbound governmental officials—who have ample time to ponder decisions—as it grants to police officers in the field, who must make split-second decisions in life-or-death situations. These shortcomings have led several justices to question or even recommend reconsidering the doctrine. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of *certiorari*); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Wyatt v. Cole*, 504 U.S.

158, 171-72 (1992) (Kennedy, J., joined by Scalia, J., concurring).

The Supreme Court of Rhode Island's decision in *Felkner v. Rhode Island College*, 291 A.3d 1001 (2023) (*Felkner IV*) exemplifies the manifold defects in current qualified immunity jurisprudence, leaving Petitioner William Felkner without a remedy for the abridgement of his core First Amendment right to freedom of speech by college administrators and faculty. The Court should overrule the "clearly established law" standard on which the Supreme Court of Rhode Island relied in granting the Respondents summary judgment on Felkner's § 1983 claims. Or, at a minimum, it should limit the qualified immunity doctrine to emergent situations. Alternatively, the Court should clarify the level of specificity required for a right to be "clearly established" and hold that Felkner's free speech rights had been so established already.

Petitioner thus presents two questions for *certiorari*:

1. Whether the judge-made "clearly established law" qualified immunity standard, which lacks textual, historical, and logical support, and which does not advance its purported policy objectives, should be abolished or ?

2. Whether respondents are entitled to qualified immunity on Felkner's First Amendment claims when they had ample time to reflect and seek legal

counsel prior to engaging in a sustained course of conduct that abridged Petitioner's clearly established First Amendment right to freedom of speech?

PARTIES TO THE PROCEEDINGS

Petitioner William Felkner was the Plaintiff in the Superior Court of Rhode Island and the Appellant in the Supreme Court of Rhode Island.

Respondents are: John Nazarian, the President of Rhode Island College at the relevant time; Carol Bennett-Speight, the Dean of the School of Social Work at the relevant time; James Ryczek, an Adjunct Professor at the relevant time; Roberta Pearlmutter, a Professor of Social Work at the relevant time; and S. Scott Mueller, an Assistant Professor of Social Work at the relevant time. Respondents were Defendants in the Superior Court of Rhode Island and the Appellees in the Supreme Court of Rhode Island.[1]

RULE 29.6 STATEMENT

None of the parties is a corporation.

RELATED PROCEEDINGS

Proceedings directly related to the case are as follows:

Supreme Court of Rhode Island, No. 2021-267, *Felkner v. Rhode Island College, et al.*, 291 A.3d 1001

[1] Rhode Island College and the named Respondents, in their official capacities, were also Defendants below. Rhode Island's Supreme Court dismissed the claims against the College and the official capacity claims against the individual Defendants. *See infra* n.5.

(R.I. 2023) (*Felkner IV*).

Rhode Island Superior Court, No. PC-2007-6702, *Felkner v. Rhode Island College*, *et al.*, (August 31, 2021) (*Felkner III*).

Supreme Court of Rhode Island, No. 2016-17, *Felkner v. Rhode Island College, et al.*, 203 A.3d 433 (R.I. 2019) (*Felkner II*).

Rhode Island Superior Court, No. PC 2007-6702, *Felkner v. Rhode Island College, et al.*, (Oct. 2, 2015) (*Felkner I*).

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The state trial court's ruling granting Respondents Summary Judgment is unreported but reprinted in the Appendix at App.70a. The Rhode Island Supreme Court's decision reversing the grant of summary judgment to Respondents is reported at 203 A.3d 433 (R.I. 2019). App.69a. The state trial court's decision on remand affording Respondents qualified immunity is unreported but reprinted in the Appendix at App.23a. The Rhode Island Supreme Court's decision affirming the grant of qualified immunity to Respondents is reported at 291 A.3d 1001 (R.I. 2023). App.3a.

JURISDICTION

The Supreme Court of Rhode Island issued its opinion and directed the entry of judgment in Petitioner's case on April 20, 2023. *Id.* On June 14, 2023, Justice Jackson granted Applicant William Felkner's request for a 60-day extension of time, giving Felkner up to and including, September 17, 2023, to file a petition for a writ of certiorari. App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution, in relevant part, provides:

> Congress shall make no law … abridging the freedom of speech,

The Fourteenth Amendment to the U.S. Constitution, in relevant part, provides:

> No State shall … deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the United States Code, in relevant part, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress …

Section 1 of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871), provided in relevant part:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the

Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress * * *.

INTRODUCTION

The decision below, together with recent *per curiam* decisions from this Court, aptly illustrate how detached the textually deficient "clearly established law" standard of qualified immunity has come from its foundations. Rather than advance the policy concerns used to justify the standard, it instead "sends an alarming signal to … the public that palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (2018) (Sotomayor, J., dissenting).

The Court should grant *certiorari* to reconsider that standard and to further clarify that qualified immunity does not apply in situations where a Defendant has time to deliberate prior to engaging in the unconstitutional, or otherwise illegal, conduct. At a minimum, the Court should clarify the level of specificity required for a constitutional right to be "clearly established" and hold that Felkner's free speech rights met that standard.

STATEMENT OF THE CASE[2]

William Felkner is a conservative libertarian. *Felkner II*, App.70a. In 2004, he enrolled in the Rhode Island College (RIC) Master of Social Work program (MSW) in its School of Social Work ("School"). *Id.*

The RIC MSW faculty was ideologically antagonistic to Felkner's viewpoint. For example, in Felkner's first semester, Professor James Ryczek told Felkner the School has a mission dedicated to social and economic justice and

[2] Petitioner's Statement of the Case is based on the facts as summarized by the Rhode Island Supreme Court in *Felkner II*, which "present[ed] the admissible evidence in the manner most propitious to plaintiff, as the nonmoving party." *Felkner II*, App.71a.

that "anyone who consistently holds antithetical views to those that are espoused by the profession might ask themselves whether social work is the profession for them." *Id.* at 72a. Ryczek similarly suggested Felkner might ask himself whether RIC was "a good fit" for him. *Id.* at 91a.

A group project in Ryczek's "Policy and Organizing" class, required students to debate a social welfare issue and write a policy paper promoting the group's position. The following semester, students were required to lobby for their selected issue before the Rhode Island General Assembly. *Id.* at 95a. All of the topics provided by Ryczek in Felkner's view, took "a leftist position on social welfare issues." *Id.* at 72a.

Felkner joined a group that focused on Senate Bill 525 (SB 525)—a proposal to provide temporary cash assistance to economically struggling Rhode Islanders. *Id.* at 73a. Having later concluded that "SB 525 did not actually help people get off welfare with higher-paying jobs[,]" Felkner sought permission to argue *against* SB 525 in the class debate. *Id.*

Ryczek denied this request, telling Felkner that RIC "is a perspective school and we teach that perspective" and "if you are going to lobby on [SB 525], you're going to lobby in our perspective." *Id.* In his policy paper and debate, Felkner nonetheless argued against passage of SB 525. *Id.* Felkner received a failing grade on his paper as well as the classroom debate component of the project. *Id.* at 74a. Prior to that, the lowest grade Ryczek had *ever* assigned for the debate project had been a B+. *Id.* at 73a. Felkner's final course grade was a C+. *Id.* at 74a.

Felkner appealed the failing grades for the paper and debate to the Academic Standing Committee. *Id.* The

Committee held a hearing on Felkner's appeal but denied Felkner's request to question Ryczek. *Id.* Believing Ryczek had testified inaccurately at the hearing, Felkner announced his intent to record his future conversations with RIC professors. *Id.* The next day, the Committee denied Felkner's appeal. *Id.* Felkner then unsuccessfully appealed the matter to the chair of the MSW program and then to the School's dean. *Id.*

The MSW curriculum required students to complete the two-semester Policy and Organizing course. Based on complaints from Ryczek, for the second-semester portion of the course, Felkner was moved to a section taught by Professor Roberta Pearlmutter. *Id.* at 75a.

Pearlmutter also required students in her section of Policy and Organizing II to complete a group project based on a topic she approved. *Id.* Felkner initially proposed working to lobby RIC for an Academic Bill of Rights, but Pearlmutter rejected this proposal, noting that it did not have a direct impact on the "poor and oppressed" and did not advance "social justice." *Id.*

Felkner alternative proposal to lobby in favor of the then-governor's welfare-reform package was denied as well. *Id.* Next, Felkner proposed that he be allowed to lobby for the defeat of SB 525 in the General Assembly. *Id.* Pearlmutter agreed but told Felkner that he would be penalized if he did not work on the project with classmates. Because Felkner could not find any classmates who would work on his project, his group consisted of himself, a Brown University student and "a local radio personality." *Id.* at 76a n.6. Pearlmutter imposed the threatened penalty. *Id.* at 76a.

In discussing his project with Pearlmutter, Felkner recorded one of their conversations and then posted a

rough transcript on the internet to expose the "liberal bias" at RIC. *Id.* Pearlmutter responded by allowing Felkner's classmates to attack Felkner's postings, but without allowing him an opportunity to reply. *Id.* at 77a. "[T]he unmistakable message Defendant Pearlmutter communicated through the discussion was that only liberal/progressive ideas can help the poor and advance the cause of social justice." *Id.*

Pearlmutter also filed a complaint against Felkner with the Academic Standing Committee claiming by recording their conversation he violated the code of ethics for social workers. *Id.* The Committee agreed and required Felkner to promise not to record any future conversations without permission. *Id.*

At the end of his first year at RIC, Felkner chose the Social Work Organizing and Policy concentration to complete the MSW program. *Id.* at 78a. This concentration required Felkner to complete a field placement and an integrative project. *Id.* Felkner obtained an internship in then-Governor Donald L. Carcieri's office to work on welfare-reform legislation. *Id.*

Ryczek, who served as the director of field placements, rejected Felkner's placement because it did not "advance the concentration's objectives of promoting progressive social change." *Id.* The MSW department chair affirmed Ryczek's decision. *Id.*

After an appeal to the School's dean, Respondents eventually acceded to Felkner's proposed field placement, but refused to approve Felkner's proposed welfare reform project calling it a "toxic" subject. *Id.* at 79a. Felkner "reluctantly conceded to work on healthcare reform for his [integrative project]." This proved difficult because

his field placement research was unrelated to his integrative project. *Id.*

Felkner worked on his integrative project in the fall of 2006 and most of 2007. *Id.* In late November 2007, Felkner requested an extension to complete his integrative project. *Id.* While his extension request was pending, Felkner filed suit under § 1983 against RIC and several administrators and faculty members, alleging violations of his First and Fourteenth Amendment rights. *Id.* at 80a.

In early January 2008, the School's dean granted Felkner's extension request, giving him until May 11, 2009, to complete his degree requirements. *Id.* at 79a. The dean, however, conditioned the extension on Felkner submitting a portion of the project by April 15, 2008. *Id.* On March 17, 2008, Felkner requested an additional six-week extension. *Id.* This request was denied. Instead, the School's interim dean revoked the initial extension and dismissed Felkner from the program. According to his forensic accounting expert, dismissal cost Felkner more than $660,000 in lost lifetime earnings.

Lower Court Proceedings

In December 2007, Felkner filed suit in the Superior Court of Rhode Island against RIC, Nazarian, the President of Rhode Island College; Carol Bennett-Speight, the Dean of the School of Social Work; James Ryczek, an Adjunct Professor; Roberta Pearlmutter, a Professor of Social Work; and S. Scott Mueller, an Assistant Professor of Social Work. Felkner's claims against the administrators and faculty members were brought against them in both their individual and official capacities.

In December 2013, Felkner filed an amended complaint which listed seven causes of action—all, in substance, alleging violation of his right to freedom of speech, freedom of expression, and due process. Felkner sought damages pursuant to 42 U.S.C. §§ 1983 and 1988, as well as the Rhode Island Civil Rights Act, including punitive damages.[3] In March 2015, the trial court granted Defendants summary judgment, concluding Felkner failed to present sufficient evidence to support his constitutional and other claims.

Rhode Island Supreme Court Decision

On appeal, the Rhode Island Supreme Court reversed,[4] holding the facts, read in the light most favorable to Felkner, supported Felkner's claims that the individual Defendants had violated his rights of speech and expression. App.93a. The Court noted that it was premature to decide whether "legitimate pedagogical concerns" "tempered" Felkner's rights because the affidavit of Richard Gelles, Ph.D.—Dean of the School of Social Policy & Practice at the University of Pennsylvania and a former member of the faculty at the University of Rhode Island—concluded Defendants' conduct was "contrary to the concepts of academic freedom and constitute a substantial departure from the norms of academic debate and scholarship that should prevail at colleges and universities, as well as in programs and/or schools offering the Masters of Social Work degree." *Id.* at 91a.

The Rhode Island Supreme Court declined to address the Defendants' claim they were entitled to qualified

[3] Felkner also sought attorney's fees and injunctive relief.

[4] The Court affirmed as to remaining claims. *Id.* at 103a-119a.

immunity, instead leaving that defense for the trial court to consider on remand. *Id.* at 120a.

Lower Court Proceedings on Remand

On remand, the Rhode Island Superior Court held the Defendants were entitled to qualified immunity because it was not "clearly established" that their conduct violated Felkner's First Amendment rights. *Felkner III*, App.57a. The court reasoned that "a reasonable defendant would not have had fair warning that Felkner's constitutional rights might be violated by their decisions." App.14a. Accordingly, the trial court granted the Defendants summary judgment.

Second Appeal to Rhode Island Supreme Court

Felkner again appealed to the Rhode Island Supreme Court, arguing that qualified immunity did not apply to his request for equitable relief and that the Defendants were not entitled to qualified immunity in any event because caselaw clearly established his constitutional rights.[5] *Felkner IV*, Pet. App. at 15a-16a. Felkner also argued that qualified immunity is inappropriate in an academic setting where Defendants are not forced to make life-or-death decisions and were in fact protected from liability by a $4 million insurance policy. Appellant Brief at 22-26.

The Rhode Island Supreme Court, despite previously holding that the facts read in the light most favorable to Felkner were sufficient to establish multiple violations of

[5] The Rhode Island Supreme Court in *Felkner IV* held that Felkner had waived his claims under the Rhode Island Civil Rights Act and had waived his claims for injunctive relief under § 1983. Felkner does not seek *certiorari* to challenge those rulings.

his First Amendment rights, did an about-face. Stressing that the question before it now was whether the rights at issue were "'clearly established' at the time of defendant's alleged misconduct," *id.* at 17a (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)), it held that the standard is not met unless "every reasonable official would understand that what he is doing" is unlawful, *id.* at 18a.

The Court concluded that "[t]he precedent encompassing academic decisions by public institutions" suggested "that the law was not sufficiently clear, such that a reasonable educator would have understood what they were doing violated a student's constitutional rights." *Id.* at 21a (citing *Wesby*, 138 S. Ct. at 589). Accordingly, the Court affirmed the grant of summary judgment to the Defendants. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

Qualified immunity's modern "clearly established law" standard lacks any textual or historical grounding in 42 U.S.C. § 1983 and bears no logical connection to the original judge-made doctrine that demanded a common-law analogue. This lack of foundation leaves the lower courts hopelessly floundering when addressing qualified immunity.

There is now a "growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence" and reconsideration or clarification of the 'clearly established law' standard. *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part), *cert. denied* 141 S. Ct. 110 (2020). Several justices have also called for the doctrine's reconsideration. *See Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from denial of certiorari); *Kisela*, 138 S. Ct. at 1155

(Sotomayor, J., dissenting); *Ziglar*, 137 S. Ct. at 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment).

For several reasons, now is the time to heed these calls, and this is the case in which to grant *certiorari*.

First, over the last decade extensive scholarship and analysis of historical documents related to the codification of Section 1983 has called into question the very foundations of qualified immunity. *See, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115 (2022); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337 (2021); Baude, *Unlawful Immunity*, *supra*; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018) [hereinafter *Against Immunity*]; Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 Notre Dame L. Rev. 1999 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2 (2017) [hereinafter *Immunity Fails*]; Jeffries, *supra*.

Second, there is no real debate that the "clearly established law" standard lacks any textual or historical basis. *See Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871," but "[i]n the context of qualified immunity … we have diverged to a substantial degree from the historical standards."); *Baxter*, 140 S. Ct. at 1862 (Thomas, J. dissenting) (noting

that "our § 1983 qualified immunity doctrine appears to stray from the statutory text …").

Not only that, but the "clearly established law" standard has proven unworkable, with the question of whether conduct has violated "clearly established" law presenting "a mare's nest of complexity and confusion." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*? 62 Fla. L. Rev. 851, 852 (2010). This confusion has forced the Court to repeatedly use *certiorari* to correct the mistakes of the lower courts, while providing little more than "I know it when I see it" guidance. *See, e.g.*, *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021); *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Kisela*, 138 S. Ct. 1148; *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (all issued *per curiam*); *see also White*, 137 S. Ct. at 551 ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."); *Taylor*, 141 S. Ct. at 54-55 (Alito, J., concurring) (noting it was "hard to understand why the Court has seen fit to grant review and address" qualified immunity, "which turns entirely on an interpretation of the record in one particular case, … a quintessential example of the kind that we almost never review").

Granting *certiorari* now is particularly important for a third reason: The Court's clarification is needed given the ever-expanding efforts by state-run institutions of higher education to abridge the freedom of speech rights of students and faculty members alike. *See, e.g.*, Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harv. J. L. & Pub.

Pol'y 571, 663-679 (2022) (detailing the "counter-Millian" movement in academia).

Fourth, it is imperative for the Court to clarify whether the doctrine should apply as robustly when the constitutional violation occurs in the safe and unrushed confines of academia and in the context of First Amendment rights, as it does when the officials must make split-second decisions. The lower courts hold divergent views on this question. *Compare Holloman v. Harland*, 370 F.3d 1252, 1269–70, 1278–79 (11th Cir. 2004) (rejecting qualified immunity for a high school teacher and principal, reasoning that "the defendants—who hold themselves out as educators—[are] able to apply" the relevant legal standard "notwithstanding the lack of a case with material factual similarities") and *Intervarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) ("Why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?") (quoting *Hoggard*, 141 S. Ct. at 2422) (Thomas, J., statement respecting the denial of *certiorari*); *with Abbott v. Pastides*, 900 F.3d 160, 174 (4th Cir. 2018) ("As we and other courts have recognized, First Amendment parameters may be especially difficult to discern in the school context."); *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014) (quoting *Schalk v. Gallemore*, 906 F.2d 491, 499 (10th Cir. 1990)) ("Where there are no allegations of malice, there exists a 'presumption in favor of qualified immunity' for officials in general, and for *educators* in particular.") (emphasis added); *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) ("Many aspects of the law with respect to students'

speech … are difficult to understand and apply"). *See also Reedy v. Evanson*, 615 F.3d 197, 224 and n.37 (3rd Cir. 2010) (overturning the district court's grant of qualified immunity on summary judgment because "qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions []" but "[t]here were no 'split-second' decisions made in this case"); *Ciolino v. Gikas*, 861 F.3d 296, 304-05 (1st Cir. 2017) (rejecting qualified immunity in part due to the lack of any need to make a split-second judgment to defuse a "highly combustible" situation).

Fifth, the circuits are also hopelessly divided over the factual similarity required for a right to be clearly established. *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part) ("[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist.").

Finally, many high-profile cases involving official misconduct have prompted the public to question the wisdom of qualified immunity. *See, e.g., Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly."); William Baude, *Is Qualified Immunity Unlawful?* 106 Calif. L. Rev. 45, 48 (2018) [hereinafter *Unlawful Immunity*] ("While the Court doubles down on qualified immunity, the doctrine has also come under increasing outside criticism.").

While the Court should not allow public opinion to sway its legal analysis, given the Court's reliance on

policy concerns in formulating the judicially crafted "clearly established law" standard, the Court should consider anew whether this doctrine serves laudable goals.

These now well-developed arguments and analyses provide the Court with a rich body of scholarship not previously available which outweighs any prudential concerns that may have previously cautioned against revisiting qualified immunity precedent.

***

This case presents the ideal vehicle for the Court's analysis for four reasons.

First, the record is fully developed, with the Rhode Island Supreme Court holding that the allegations create triable questions of fact concerning whether Defendants violated Felkner's First Amendment rights, *see Felkner II*, App.69a, so *only* the application of the qualified immunity doctrine prevented trial, *Felkner IV*, App.3a. The Court is not being asked to render an advisory opinion here because qualified immunity proves outcome determinative.

Second, the detailed factual record will allow the Court to guide lower courts on the specificity required for plaintiffs to overcome qualified immunity, whether the Court reaffirms the "clearly established law" standard or, as it should, reverts to a more historically sound standard.

Third, the academic setting and the constitutional rights at issue, namely the Petitioner's free speech rights, allow the Court to consider whether the policy objectives underlying the court-created "clearly established law"

standard maintain their vitality, especially in the non-emergent context.

Finally, Petitioner raised and fully briefed the issues presented in this Petition, both preserving the issues and providing the Court the benefit of the advocacy below. *Compare with Hoggard*, 141 S. Ct. at 2422 (Thomas, J., statement respecting the denial of *certiorari*) ("The parties did not raise or brief these specific issues below. But in an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally.").

I. THE "CLEARLY ESTABLISHED LAW" STANDARD MUST BE OVERRULED

A. The Judge-Made "Clearly Established Law" Standard Lacks Any Textual or Historical Basis

Section 1983 established a remedy for individuals injured by state officials who infringed on their federal constitutional or statutory rights. 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167 (1961). Despite the clear statutory language, this Court's precedent, by affording qualified immunity to government officials unless their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), deprives injured Americans of the remedy Congress authorized. Nor can this modern standard find any shelter in the Court's (already problematic) *Pierson* decision, which at the very least grounded qualified immunity on the existence of specific common-law defenses to liability—a requirement notably absent from the current doctrine.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress … .

42 U.S.C. § 1983.

This statutory language makes no reference to immunity. To the contrary, the language "is absolute and unqualified," with "[n]o mention … made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). *See also Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("[T]he statute on its face admits of no immunities."); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (accord). Instead, the plain text's language is mandatory and applies "categorically to [every] deprivation of constitutional rights under color of state law." *Baxter*, 140 S. Ct. at 1862–63 (Thomas, J., dissenting from denial of *certiorari*) (cleaned up).

Nonetheless, and notwithstanding that "statutory interpretation … begins with the text," *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), and despite the unequivocal Congressional declaration that state actors "*shall* be liable" for constitutional violations, 42 U.S.C. § 1983 (emphasis added), the Supreme Court in *Pierson* read into the statute a good faith defense. *Pierson* reasoned § 1983 "should be read against the background of tort

liability that makes a man responsible for the natural consequences of his actions." *Pierson*, 386 U.S. at 556. The *Pierson* Court then held the defense of good faith and probable cause available to officers in a common-law action for false arrest and imprisonment also provided a "good faith" defense in § 1983 actions. *Id.* at 557.

As discussed further *infra*, at 25-33, *Pierson* itself is problematic, but at least it was grounded in the common law of 1871, which certainly served as a background to contemporaneous Congressional legislation. However, in *Harlow*, the Court bulldozed *Pierson*'s common law foundation. Whereas *Pierson* adopted a "good faith" defense based on the elements of the particular torts at issue there—false arrest and imprisonment—*Harlow* recast the defense as an "across-the-board" immunity. *See Anderson v. Creighton*, 483 U.S. 635, 642-643 (1987); *see also* Baude, *Unlawful Immunity*, *supra*, at 60-61. The now-controlling standard for qualified immunity no longer asks whether a particular defense was available in common law. Instead, it queries whether the Defendant had "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

So, not only does the current "clearly established law" standard lack any textual support, *see supra*, at 17-19, but it also lacks any analytical connection to the Court's reasoning in *Pierson*. *See Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting); *Crawford-El*, 523 U.S. at 611-12 (Scalia, J., dissenting); *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring). In short, the "clearly established law" standard is fatally flawed and should be abandoned.

B. The Court Inappropriately Assumed a Legislative Function by Balancing Policy Concerns in Adopting the "Clearly Established Law" Standard

Harlow's adoption of the "clearly established law" standard also represented an improper incursion by the Court into the legislative sphere from which the Court should retreat. To be sure, the Court has attempted to frame its "clearly established law" standard as emanating from § 1983 itself, as opposed to some "freewheeling policy choice." *Malley*, 475 U.S. at 342. *See also Rehberg v. Paulk*, 566 U. S. 356, 363 (2012); *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities from" suits brought under the Act "in the interests of what we judge to be sound public policy."). The Court's protestations do not withstand scrutiny, however: While acknowledging it lacks the "license" to grant immunities to § 1983 liability based on the interests of what the Court "judge[s] to be sound public policy," *id.*, the Court did precisely that in *Harlow* and its progeny. *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (noting "qualified immunity precedents … represent precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make") (cleaned up); *Crawford-El*, 523 U.S. at 611-12 (Scalia, J., dissenting).

The *Harlow* Court justified the "clearly established law" standard by claiming it to be the "best attainable accommodation of competing values"—the need to redress violations of federal law on one hand, and "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office[,]" on the other. *Harlow*, 457 U.S. at 814, 818. The Court took the view

that shielding state officials from financial liability and the burden of litigation is necessary to avoid deterring "able citizens from acceptance of public office," and "dampen[ing] the ardor" of officials executing their duties. *Id.* at 814.

But it was not for this Court to strike that balance. That job belongs to Congress. "It is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have" wanted. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[This Court's] job isn't to write or revise legislative policy but to apply it faithfully.") (internal citation omitted); *see Crawford-El*, 523 U.S. at 611-612 (Scalia, J., dissenting) (branding the Court's post-*Pierson* qualified immunity jurisprudence an "essentially legislative" project of "crafting a sensible scheme of qualified immunities"). The Court should now return to its lane by granting *certiorari* and, at a minimum, curtailing defenses to § 1983 liability to those which were recognized at common law as it stood in 1871.

C. Policy Reasons Do Not Justify Continued Use of the "Clearly Established Law" Standard—Particularly in the Academic Context

Overruling *Harlow* is further justified because the passage of time has shown the Court struck the wrong balance and that qualified immunity has failed to deliver on its promises.

Rather than shielding government officials from "insubstantial" claims and ensuring effective government functioning, the "clearly established law" standard works

as a one-two punch, with deprivation of rights being the first jab, and the denial of relief for egregious state misconduct providing the haymaker. *See generally* Schwartz, *Against Immunity*, *supra* (arguing qualified immunity does not achieve its intended policy goals).

The harm these outcomes cause reverberates through society at large by sending an "alarming signal" that "palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *see also Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting); *Young v. Borders*, 850 F.3d 1274, 1299-1300 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing *en banc*); Schwartz, *Against Immunity*, *supra*, at 1814-20. Rather than safeguarding dedicated civil servants' ardor, qualified immunity incentivizes unconstitutional conduct by gutting § 1983's deterrent effect. *See Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

Current qualified immunity jurisprudence also undermines government accountability by stunting the development of constitutional law. When courts sidestep constitutional questions by dismissing § 1983 claims based on qualified immunity, state officials, who base their practices, policies, and training on judicial decisions, lack a reason to take corrective action. Schwartz, *Immunity Fails*, *supra*, at 69-70. Further, "if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established." *Id.* at 65-66.

Moreover, *Harlow*'s "potentially disabling threats of liability" do not exist in practice, as most jurisdictions

indemnify state officials or, as is the case here, carry insurance to cover the cost of litigation and liability. *See* Schwartz, *Against Immunity*, *supra*, at 1840, n.45. As the Court already recognized, the "fear of unwarranted liability" holds no sway where insurance coverage exists. *Richardson v. McKnight*, 521 U.S. 399, 400, 411 (1997). Indeed, granting qualified immunity where there is indemnification is the functional equivalent of giving the government immunity to which it is not entitled. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980).

Further, the availability of this defense actually *adds* to the time and expense of the proceedings, with both qualified immunity and the merits litigated, often separately and sequentially. Schwartz, *Against Immunity*, *supra*, at 1824. Thus, rather than "avoid[ing] excessive disruption of government" by making it easier to resolve "insubstantial claims on summary judgment," *Malley*, 475 U.S at 341, more time elapses and more delays occur. Schwartz, *Against Immunity*, *supra*, at 1824; Schwartz, *Immunity Fails*, *supra*, at 69.

Nor does the interest in protecting law enforcement officers forced to make split-second decisions in volatile situations save the "clearly established law" standard.

First, it is illogical to believe in the heat-of-the moment an officer would weigh the possibility of civil liability especially with the greater deterrent of criminal liability. Second, because no liability attaches for the use of reasonable force, even absent qualified immunity, § 1983 does not require officers to be perfect—it merely requires them to act reasonably. Finally, indemnification and insurance eliminate litigation and liability costs from the equation. Joanna C. Schwartz,

Police Indemnification, 89 N.Y.U. L. Rev. 885, 890 (2014).

Thus, public policy does not support the "clearly established law" standard, even for those state officials for whom qualified immunity is arguably the most necessary. Schwartz, *Immunity Fails*, *supra*, at 71. Rather, the standard proves a "one-sided" approach that "gut[s] the deterrent effect of the Fourth Amendment." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

Moreover, even if policy concerns could justify the "clearly established law" standard in the context of high-risk, heat-of-the-moment situations, the same cannot be said for government officials safely ensconced in the ivory towers of academia, like the defendants here.

"Why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., statement respecting the denial of *certiorari*). The Court has "never offered a satisfactory explanation to this question." *Id.*

Nor could it.

In the deliberative-decision making context, where public officials have sufficient time to obtain and act upon legal advice, the risk of uncertainty should be placed on the government officials who hold the power to weigh the decision and then act—or not act—rather than on the innocent individual whose rights are involuntarily and illegally infringed. Balancing the equities in this manner promotes the protection of important rights by incentivizing care in decision making. That is especially true in the context of free

speech in the university setting because the harm from infringement accrues not only to the individual, but to society at large. *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("The 'university is a traditional sphere of free expression' that is 'fundamental to the functioning of our society.'").

Further, in the modern university setting, society would benefit from some "dampen[ing] [of] the ardor" of the ever-growing number of administrators who routinely silence student or faculty speech. *Harlow*, 457 U.S. at 814. Today, given the undeniable power exercised by the states to shape the ideological culture of government-provided education K-college and beyond, the need for robust speech on university campuses is more imperative than ever.

For all these reasons, qualified immunity does not, and should not, protect Respondents. Alternatively, as detailed *infra*, at 33-36, even under the "clearly established law" standard, the Petitioner's clearly established free speech/expression rights were violated.

II. QUALIFIED IMMUNITY WAS TEXTUALLY AND HISTORICALLY FLAWED FROM ITS INCEPTION

Even in its narrow form as announced in *Pierson*, the qualified immunity defense is an ahistorical deviation from the Congressional enactment of § 1983.

A. The Plain Language and the Historical Context of § 1983 Provide No Basis for Qualified Immunity

It is not only the "clearly established law" standard that finds no refuge in the plain language of § 1983, but the qualified immunity doctrine in general. Simply put, the *Pierson* Court erred.

As Justice Douglas's dissent in *Pierson* stressed, most people would read the statutory language "every person," to mean "every person," "not every person except judges[]" or police officers. *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting). *Pierson* cannot be reconciled with the principle that "[o]nly the written word is the law." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). Because "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011), *Pierson*'s extra-textual frolic cannot withstand scrutiny.

The historical context of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, (which eventually became § 1983) also confirms Congress did not intend to provide immunity to those acting under color of law, but rather sought to *abrogate* various state law defenses.

Congress passed that historic law, in the aftermath of the Civil War, "for the express purpose of 'enforc(ing) the Provisions of the Fourteenth Amendment.'" *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (alteration in original) (quoting 17 Stat. 13). At the time of enactment, "[a] condition of lawlessness existed in certain of the States, under which people were being denied their civil rights." *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting). "Armed with its new [Fourteenth Amendment] enforcement powers, Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'" *Baxter*, 140 S. Ct. 1862 (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983)). In response to the violence, Congress sought to establish the federal government as

the "guarantor of basic federal rights against state power[.]" *Mitchum*, 407 U.S. at 239 (cleaned up).

To achieve this goal, Congress opened "the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution[.]" *Id.* at 239. Indeed, the "very purpose" of the Act "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law[.]" *Mitchum*, 407 U.S. at 242. *See also* Reinert, *supra*, at 239 (The "legislative record is replete with evidence that supporters of the Civil Rights Act did not trust state courts to protect constitutional rights."); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 772 (1987) (noting Congress's assumption that the "shall be liable" standard "would apply to all officials—legislators, judges, and executive officers").

The historical record is clear and leaves no room to conclude Congress sought to preserve rather than abrogate various state-level defenses to claims of violations of federally guaranteed rights.

B. No Well-Established Good-Faith Defense Existed When Congress Enacted § 1983

Pierson rested on an erroneous syllogism that because state law immunities "were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554-55). But the logic is flawed.

As recent scholarship shows, *Pierson* rests on a faulty premise. "[L]awsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic," and the "'strict rule of personal official liability, even though its harshness to officials was quite clear,' was a fixture of the founding era."[6] Baude, *Unlawful Immunity*, *supra*, at 56 (quoting David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972)). *See also Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding naval officer remained liable for the illegal seizure of a vessel notwithstanding he had a "pure intention" in following an order directing the seizure because "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass"); Schwartz, *Against Immunity*, *supra*, at 1817-18; James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-64 (2010).

Likewise, in the early years following the enactment of the Civil Rights Act of 1871, this Court rejected the idea of immunity. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 378–79 (1915); *Baxter*, 140 S. Ct. at 1863 ("For the

[6] Two treatises from the late 1850s likewise confirm the unavailability of common law immunity at the time. See Joseph Story, Commentaries on the Law of Agency § 320 (5th ed. 1857) ("[Public officials] incur the same personal responsibility, and to the same extent, as private agents."); Joseph Story, Commentaries on the Constitution § 1676 (3d ed. 1858) ("If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.").

first century of the law's existence, the Court did not recognize an immunity under § 1983 for good-faith official conduct.").

Thus, even assuming that in enacting that law Congress intended to preserve common-law defenses as they existed in 1871, no such good-faith defense existed.

When the *Pierson* Court held that police officers and a local judge who enforced an unconstitutional Mississippi anti-loitering law were "excused" from liability because they acted "under a statute that [they] reasonably believed to be valid," *Pierson*, 386 U.S. at 555, it did so without addressing either the Founding or Reconstruction era precedents. The faulty premise on which *Pierson* rests saps it of any continued vitality.

C. *Pierson*'s Reliance on the "Derogation Canon" of Construction Was Unsound

A second fatal flaw impairs the Court's reasoning in *Pierson*: The decision rested on the incorrect belief, referred to as the "derogation canon" of construction, that had Congress intended to abolish immunities "well grounded in history and reason[,]" it "would have specifically so provided[.]" *Filarsky v. Delia*, 566 U.S. 377 (2012).

As an initial matter, the so-called "derogation canon" is "a relic of the courts' historical hostility to the emergence of statutory law," Reinert, *supra*, at 218 (quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012)), and for that reason should not be relied on.

Second, even assuming the soundness of that canon, "since the Founding era, the Supreme Court had only used the Derogation Canon (criticized by mid-nineteenth

courts and treatises for arrogating power to judges) to protect preexisting common law *rights*, never to import common law *defenses* into new remedial statutes." *Rogers v. Jarrett*, 63 F.4th 971, 980, n.8 (5th Cir. 2023) (Willett, J., concurring). "The more applicable canon, around which Reconstruction-era courts had coalesced, was a contrary one: remedial statutes—such as § 1983—should be read broadly." *Id.*

Likewise, it is logically unsound to believe that when Congress enacts a remedial statute "to remedy the inadequacies of the pre-existing law, including the common law[,]" it would seek to preserve the common law. *Pierson*, 386 U.S. at 561 (Douglas, J., dissenting).

D. Section 1983's Statutory History Confirms the *Pierson* Court's Error

The original text of Section 1 of the Civil Rights Act, as debated and passed by Congress, further confirms that Congress intended to abrogate rather than preserve common law defenses for government officials accused of violating citizens' federal constitutional rights.

As originally enacted, that statute provided:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, ***any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding***, be liable to the party

> injured in any action at law, suit in equity, or other proper proceeding for redress …

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added).

By including the above bolded and italicized language in Section 1, Congress made clear the person acting "under color" of law, "*shall* be liable," *notwithstanding* contrary State laws or custom and usage. To the extent that "good faith" or other immunities were available defenses, Congress thus intended liability to attach *notwithstanding* them. *See* Reinert, *supra*, at 235-36.

Soon after passage of the Civil Rights Act of 1871, Congress undertook the first codification of federal law—a process which culminated in the passage of the Revised Statutes of 1874.[7] The now-codified Section 1 of the Civil Rights Act of 1871, dropped the "notwithstanding" language clause. But for two reasons the change in the language does not signify any changes in the substance of the remedial provision.

First, the codification process sought merely to consolidate and simplify the law, rather than to substantively change it. *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938). Thus, the excision of the notwithstanding clause as part of that process strongly suggests that the clause never served a substantive purpose. Rather, the "notwithstanding" verbiage served as mere "surplusage," the deletion of which did not alter the meaning of the law. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 n.29 (1968) (concluding Congress

[7] Section 5596 of the Revised Statutes repealed all prior federal statutes covered by the revision.

dropped identical notwithstanding language from § 1982 in the codification process because it was mere "surplusage"). In other words, § 1983's codified version, which provides any person acting under color of state law "shall be liable," is no less absolute than the original language which contained the notwithstanding clause, with neither version contemplating a qualified immunity defense.

Second, to the extent § 1983's text is ambiguous, the "notwithstanding" clause confirms the "shall be liable" language was always understood to trump state law defenses, including common law immunity. Shortly after Congress first codified the federal statutes, this Court addressed the relevance of the original statutory language in interpreting the newly codified Revised Statutes of 1874. *United States v. Bowen*, 100 U.S. 508 (1879). The Court explained that "where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information."[8] *Id.* at 513; s*ee also Myer v. Car Co.*, 102

[8] *Maine v. Thiboutot*, 448 U.S. 1 (1980) is not to the contrary. Rather, *Thiboutot*, like *Bowen*, focused on the plain language of § 1983 and asked whether the phrase "and laws," "means what it says, or whether it should be limited to some subset of laws." *Thiboutot*, 448 U.S. at 4. *See Bowen*, 100 U.S. at 513 ("When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress."). Thus, the Court in *Thiboutot* held that because "Congress attached no modifiers to the phrase," "and laws," "the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." *Thiboutot*, 448 U.S. at 4. So too, § 1983's "shall be liable" language attached no modifiers or limits, but to the extent the codified language is "fairly susceptible" to two constructions, "the argument from the provision of the statute

U.S. 1, 8 (1880). Indeed, resort to the original text is not only *permissible* in such cases, but *mandatory*, because where the text of the reenacted statute is "fairly susceptible" of two meanings, "the argument from the provision of the statute as it stood before the revision [is] *conclusive*." *Bowen*, 100 U.S. at 513 (emphasis added).

Thus, to the extent there is any ambiguity in whether § 1983's "shall be liable" language allows for state law immunity defenses, the predecessor language of the statute provides "conclusive" evidence that the "shall be liable" directive trumps conflicting state law. *Id.*; *see Rogers*, 63 F.4th at 980 (Willett, J., concurring) ("The [original text of Section 1983] underscore[s] that 'what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability notwithstanding any state law to the contrary.").

III. THE SAME SPECIFICITY REQUIRED FOR A RIGHT TO BE CLEARLY ESTABLISHED IN THE FOURTH AMENDMENT CONTEXT IS NOT REQUIRED IN THE FIRST AMENDMENT CONTEXT

As detailed above, the Court should grant *certiorari* to reconsider the judge-made "clearly established law" qualified immunity standard. However, the Court should also grant *certiorari* to clarify the specificity required to satisfy the "clearly established law" standard in general and in the free speech context in particular.

Since the Court announced the "clearly established law" standard in *Harlow*, lower courts—and even this Court—have struggled to give meaning to this standard.

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as it stood before the revision would be conclusive." *Bowen*, 100 U.S. at 513.

Efforts to provide clarity have also failed, with the amorphous guidance and Delphic pronouncements from this Court creating an untenable tension between two lines of precedent, one of which warns lower courts not to "define clearly established law at a high level of generality[,]" *al-Kidd*, 563 U.S. at 742, while the other stresses that "general statements of the law are not inherently incapable of giving fair and clear warning," at least in certain "obvious" cases. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Court simultaneously requires "clearly established" law to be "'particularized' to the facts of the case[,]" *White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 640), but also cautions that case law need not be "directly on point for a right to be clearly established[.]" *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551). No wonder then lower courts remain hopelessly splintered and this Court's intervention is routinely required. The Rhode Island Supreme Court's decision illustrates the need for this Court to clarify the interplay between these two lines of precedent.

Additionally, granting *certiorari* would provide the Court the opportunity to hold that in the context of the First Amendment, the "fair and clear warning" required under *Hope* is a much lower barrier than *al-Kidd* suggests—and is more than satisfied in this case. As this Court stressed in *Mullenix*, "specificity is especially important in the Fourth Amendment context, where … '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine … will apply to the factual situation the officer confronts.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Saucier v. Katz*, 533 U.S. 194, 205).

This case provides an opportunity for this Court to explicitly state that the converse is equally true. In the First Amendment context, it is not difficult for college

officials to determine how the relevant legal doctrine applies to the facts at hand.

In *Felkner II*, the Rhode Island Supreme Court held Felkner had presented sufficient evidence to reach a jury on his free speech claims, *see Felkner II*, App.93a, and it was only qualified immunity and the State Supreme Court's improper preoccupation with locating case law presenting a nearly identical factual scenario to Felkner's that denied Petitioner his day in court.

Given the Court's command in *al-Kidd*, 563 U.S. at 741-742 (second, third, and fourth alterations in original), that courts are "not to define clearly established law at a high level of generality[]" and that to be "clearly established" "[t]he contours of [a] right" must be "sufficiently clear that every reasonable official would [have understood that what he is doing] violates that right," it is understandable that the lower court hesitated to hold Felkner's rights had been clearly established. But this is precisely why *certiorari* should be granted—to harmonize the conflicting lines of cases which will bring clarity to the lower courts' chaotic efforts to apply the "clearly established" standard.

Such clarity would confirm Felkner's free speech rights were clearly established notwithstanding the lack of an identical precedent because a reasonable college official would have understood that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). *See also Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995). And that penalizing Felkner for his viewpoint under the pretext of pedagogy offends the First Amendment. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

See also Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2012) ("The First Amendment does not permit educators to invoke curriculum as a pretext for punishing a student.") (cleaned up); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1292-93 (10th Cir. 2004) (accord); *Brown v. Li*, 308 F.2d 939, 953 (9th Cir. 2002) (accord).

This case law provides all the specificity needed in the First Amendment context to clearly establish Felkner's right not to be discriminated against based on his conservative views, or compelled to parrot liberal ideology, under the pretextual guise of pedagogy.

Even if the Court will not jettison the modern "clearly established law" standard, it should clarify the level of specificity required to meet that standard and conclude that its proper application offers Defendants no help.

IV. THE QUESTIONS PRESENTED ARE CRITICALLY IMPORTANT

Qualified immunity deprives Americans of a remedy for violations of their constitutional and statutory rights. When enacting § 1983 Congress had an opportunity to weigh the need to both deter government officials and compensate innocent victims, against the concerns over "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. Having done so, Congress chose to frame the remedy in absolute terms. In creating and then broadening the qualified immunity defense, this Court ignored both the text and history of § 1983 to improperly second-guess Congress's judgment. Members of this Court now recognize that the "clearly established law" standard lacks any historical or textual roots.

While full consideration of the force of *stare decisis* must await merits briefing, the lack of any textual foundation for the doctrine alone justifies reconsideration of qualified immunity, as does the scholarship advances which the Court has yet to address. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."). The unworkability of the "clearly established law" standard further supports reconsideration. *See* Michelman, *supra*, at 2015-17 (providing an in-depth analysis of the *stare decisis* criteria and concluding the criteria for overruling qualified immunity are amply satisfied). In short, the entrenched, "judge-made immunity regime ought not be immune from thoughtful reappraisal." *Zadeh*, 928 F.3d at 474 (Willett, J., concurring in part and dissenting in part).

The time has come for the Court to reconsider the propriety of both the current qualified immunity standard and the doctrine as a whole. Doing so will restore to Americans injured at the hands of state officials the remedy Congress explicitly provided.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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