No.20-1066

In The Supreme Court of the United States

ASHLYN HOGGARD,

Petitioner,

v.

RON RHODES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF PETITIONER

Harmeet K. Dhillon
Mark Trammell
Kristina Denapolis West
CENTER FOR AMERICAN LIBERTY
5100 Buckeystown, Suite 250
Frederick, Maryland 21704
703-687-6212

Mark Meuser
Counsel Of Record

DHILLON LAW GROUP
117 Post Street, Suite 700
San Francisco, CA 94108
415-433-1700
mmeuser@dhillonlaw.com
Counsel for Amicus Curiae

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES - Continued

INTEREST OF *AMICUS CURIAE*

The Center for American Liberty (CAL) is a national nonprofit organization dedicated to advocating for and defending individual liberties secured by the Constitution. CAL is especially active in seeking to preserve our rights under the First Amendment. This case is especially of interest to CAL because it involves the interaction between First Amendment freedoms and the doctrine of qualified immunity, which commonly acts to shield persons from liability under the law, resulting in uneven distribution of justice. CAL is committed to ensuring robust protections for free speech.[1]

[1] Rule 37 statement: The parties were notified that Amicus intended to file this brief more than 10 days before its filing and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

Arkansas State University's creation of free speech zones grant university administrators unfettered discretion to police students' right to speak on campus. These policies operate as a prior restraint on speech, mandating university approval before speech is permitted. Despite this clear violation of constitutional rights, Arkansas State University hides behind the judicially created doctrine of qualified immunity, extending the doctrine far beyond the Court's prescription in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982). This brief discusses the public policy considerations at issue in *Harlow*, and shows how those considerations do not present themselves in the public university setting. Accordingly, the Court should grant certiorari to modify qualified immunity's application in the public university setting, creating a

more just "balance between the evils" at issue. *Harlow*, 457 U.S. at 813.

ARGUMENT

I. The evolving history of qualified immunity.

While the history of absolute immunity has a substantial and stable interpretation in American jurisprudence, qualified immunity is a much newer judicial doctrine that has been inconsistently applied and has evolved substantially over time. Shortly after the Civil War, Congress passed the Ku Klux Klan Act of 1871 to provide a federal remedy in response to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern states." *Brisco v. LaHue*, 460 U.S. 325, 337 (1983). This federal remedy prescribed a criminal penalty to any person—including police officers and other government employees who perjured themselves to

defend the Klan—who "conspire[d] together…for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws." *Id*. at 338.

Not long after, Congress passed the Civil Rights Act of 1872, which "was later codified at Rev. Stat. § 1979, 42 U.S.C. § 1983 entitl[ing] an injured person to money damages if a state official violates his or her constitutional rights." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017). As Justice Thomas points out in his dissent from the denial of certiorari in *Baxter v. Bracey*, § 1983 does not prescribe defenses or immunities, rather, "it applies categorically to the deprivation of constitutional rights under color of state law." 140 S. Ct. 1862, 1862-63 (2020).

"For the first century of the law's existence, the Court did not recognize an immunity under § 1983 for good-faith official conduct." *Id*. at 1863. But all of that changed in the 1967 decision in *Pierson v. Ray* — the genesis of the qualified immunity doctrine. In *Pierson*, the Court held that the defense of good-faith and probable cause—which at the time was available in tort claims for false arrest—was also available to officers sued for unconstitutional detention and arrest under § 1983. *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967).

Just seven years later, in 1974, the Court ignored its common law analogies standard articulated in *Pierson* and redefined the scope of qualified immunity reasoning that the "final resolution of this question [of qualified immunity] must take into account the functions and responsibilities of these particular defendants in their

capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983." *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974). Then in 1975, the Court held that the "appropriate standard," to determine whether qualified immunity applies, contains "elements of both" an objective test and subjective test of good faith. *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

The requirement of both subjective and objective elements lasted merely seven years before the Court, again, dramatically modified the doctrine of qualified immunity. This time the Court removed subjectivity from its analysis. *Harlow,* 457 U.S. at 815.

The doctrine of qualified immunity has continued to evolve. In 2009, the Court in *Saucier v. Katz* applied a two-step analysis to determine whether a government official benefits from immunity. 533

U.S. 194, 200 (2001). There, the Court held that courts' "first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered…" *Id*.

However, *Saucier*'s mandated two-step procedure was short-lived. In *Pearson v. Callahan*, the Supreme Court held that the two-step *Saucier* procedure was no longer mandatory reasoning, stating that "while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Pierson, *Scheuer, Wood, Harlow*, *Saucier,* and *Pearson*, show qualified immunity's tortured evolution over the past 50 years. The doctrine has

morphed into a form hardly recognizable to its former self. Decades of evolving standards have clouded the doctrine's scope and applicability, robbing it of predictability for future litigants, and leaving its current application untethered from its original goals. Here, as a matter of public policy, justice requires the Court to modify qualified immunity's application within the postsecondary educational setting, conforming its application to bring it in line with the doctrine's original goals.

II. *Harlow*'s public policy considerations are not served by qualified immunity in the public university context.

The Court in *Harlow* recognized three public policy considerations that justify qualified immunity. These "social costs" include, 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* at

814. And while these considerations are not without merit in certain circumstances where society benefits from government officials being able to react in a crisis without fear of liability, in the public university setting, *Harlow*'s public policy considerations are not present.

A. The "expense of litigation" does not justify qualified immunity in the public university setting.

In the realm of public service, avoiding great costs—ultimately borne by taxpayers—arguably makes sense on paper. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (qualified immunity frees officials from "the concerns of litigation," including "'disruptive'" discovery). But in practice, the qualified immunity defense has actually been shown to *increase* litigation costs. As UCLA law professor Joanna Schwarz explained, "In a five-district study of approximately 1,000 cases in which a qualified

immunity defense could be raised to a § 1983 claim, the defense was raised in more than a third of all cases, and sometimes raised multiple times." Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60-61 (2017). The method for raising (or defending) a qualified immunity claim is no different than any other piece in the litigation puzzle; "[e]ach time qualified immunity is raised, it must be researched, briefed, and argued by the parties and decided by the judge." *Id.* at 60. And qualified immunity claims are not simple, being described as "a mare's nest of complexity and confusion" with "[l]ower courts…being 'hopelessly conflicted both within and among themselves.'" *Id*. As the procedural posture of this case illustrates, Professor Schwartz's observation holds true in the postsecondary academic setting.

Furthermore, "a combination of state laws, local policies, and litigation dynamics ensures that officers

are virtually never required to pay anything toward settlements and judgments entered against them." Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 Notre Dame L. Rev. 1797, 1805 (2018). Schwartz points out that, depending on one's jurisdiction or place of employment, some laws require indemnification, including cities and counties. *Id.* And if a government employer, like a city, declines to indemnify its employee, oftentimes the plaintiff can proceed against the municipality, board, or other governing body itself. *Id.*

The State of Arkansas is no exception. If an employee at Arkansas State University, or any other public university within the state, is found liable by a court or liable as the result of a settlement, and said liability arises from good faith actions within the course and scope of employment, state law says that

the State "shall pay actual, but not punitive, damages." Ark. Code Ann. § 21-9-203 (West).

B. The "diversion of official energy from pressing public issues" does not merit qualified immunity in the public university setting either.

Harlow's fear that absent qualified immunity litigation would divert "official energy from pressing public issues" does not apply in the public university context. *Harlow*, 457 U.S. at 814. First, such a fear assumes that students and other potential victims understand the nature and consequences of qualified immunity and are deterred from filing suit solely because of it. Such an assumption is a monumental stretch. *See e.g., Marks v. Clarke*, 102 F.3d 1012, 1033 (9th Cir. 1996), as amended on denial of reh'g (Feb. 26, 1997) (forty-one-page opinion by the Ninth Circuit applying qualified immunity to some but not all the various officers involved in the same incident).

Second, even if more cases are filed against public university officials, the impact on a school's day-to-day operation would be minimal. Most public universities, like Arkansas State University, have an Office of General Counsel employing a team of lawyers capable of responding to claims; Arkansas State University currently employs four attorneys in its Office of General Counsel.[2] Furthermore, public universities also have access to their local legal communities.

With such an abundance of legal expertise at its fingertips, Arkansas State University could leverage its resources to train and educate faculty and staff to protect student's free speech rights and other civil liberties, rather than violating student rights and

[2] Arkansas State University Counsel Staff Directory, https://www.asusystem.edu/staff/general-counsel/ (last visited March 7, 2021).

then trying to eschew liability. It should be the school's responsibility to proactively educate in this circumstance. Simply, there is no evidence to suggest that affording students the ability to seek redress for §1983 claims will frustrate university operations.

C. The absence of qualified immunity would not deter "able citizens from acceptance of public office."

The *Harlow* Court suggested the threat of a lawsuit could deter qualified candidates from seeking government employment. *Harlow*, 457 U.S. at 814. But while the functions of some government jobs, absent qualified immunity, may be more prone to liability, it is not true that all government jobs carry similar risks of liability. *See McCullum v. Tepe*, 693 F.3d 696, 697 (6th Cir. 2012) ("There does not seem to be a history of immunity from suit at common law for a privately paid physician working for the public, and the policy rationales that support qualified immunity

are not so strong as to justify our ignoring this history, or lack of history."). And as such, only the narrowest application of qualified immunity is necessary to avoid any deterrent effect in the postsecondary setting.

As explained by the Court in post-*Pierson* cases, "Police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). It is "sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela v. Hughes,* 138 S.Ct. 1148, 1152 (2018). For these reasons, it makes sense to extend qualified immunity to certain professions, like on-campus law enforcement.

By contrast, it is less clear how qualified immunity would be a consideration to an applicant for the vast majority of positions at public universities that do not share similar exposures to liability. Librarians, enrollment counselors, financial aid counselors, professors, teaching assistants, administrative assistants, and other administrators, as a function of their jobs, do not engage in activities that carry similar risks of liability.

The function of university officials, tasked with primarily administrative and management duties, is very different from a police officer, who oftentimes has mere seconds to think in the midst of dangerous confrontations. University policies are generally carefully reviewed and drafted; and if not, universities have an in-house legal counsel department or outside counsel to consult with and advise on a myriad of situations. Because the function of most public

university officials is either administrative or managerial in nature, it is doubtful that an applicant would ever even contemplate the reaches of qualified immunity before accepting employment.

Research has shown that the existence (or not) of qualified immunity is really not large factor in a person's decision to seek public employment. Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 Notre Dame L. Rev. 1797, 1811-1814 (2018). And there is no reason to believe that the public university setting is unique in this regard.

III. Any balance between the qualified immunity doctrine and curtailing constitutional harms swings in favor of students.

Instead of being used as a shield, in this circumstance the University utilizes the qualified immunity doctrine like a sword. Victims are abused first through the deprivation of their individual rights

and freedoms secured by our Constitution, and then again by the inability to seek proper redress for those violations in court. Our nation enjoys a "deep-rooted historic tradition that everyone should have his own day in court." *Taylor v. Sturgell,* 553 U.S. 880, 128 S.Ct. 2161, 2164, (2008) (citing *Richards v. Jefferson County,* 517 U.S. 793, 798 (1996) (internal quotation marks omitted)). The courts should protect its most vulnerable citizens, not further disenfranchise them.

And it is especially vital to correct infringements imposed upon our nation's youth, who are still in the formative stages of developing into productive, responsible, and educated citizens. "State colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* (quoting

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969)). Surely, *Pierson* was never meant to be extended in this unjust way.

Although important in any context, "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Academic freedom—the free exchange of ideas—is foundational to higher education.

The concept of free speech is in a state of crisis in America's schools. Hardly a day passes without news of student expression being suppressed, often on the basis of viewpoint. This suppression—whether it comes in the form of free speech zones, overly broad "hate speech" policies, bias-incident reporting investigations that have a chilling effect on speech, the denial of official recognition to student

organizations, the disinvitation of "controversial" speakers, and as in this case, the implementation of prior restraints on First Amendment activity—is anathema to the First Amendment.

In 1982, the Court reasoned "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813. Today, we see little balance between inevitable evils; rather, we see a paradigm where a public university can deny students their fundamental rights, leaving students powerless and without recourse.

This Court should grant cert to protect these vital freedoms.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this amicus curiae brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

/s Mark Meuser

Harmeet K. Dhillon
Mark Trammell
Kristina Denapolis West
CENTER FOR AMERICAN LIBERTY
5100 Buckeystown, Suite 250
Frederick, Maryland 21704
703-687-6212

Mark Meuser
Counsel Of Record
DHILLON LAW GROUP
117 Post Street, Suite 700
San Francisco, CA 94108
415-433-1700
mmeuser@dhillonlaw.com

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Counsel for Amicus Curiae