No. 20-1066

In the
Supreme Court of the United States

ASHLYN HOGGARD,

***Petitioner*,**

v.

RON RHODES, *et al*.,

***Respondent*.**

On Petition for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* YOUNG AMERICANS FOR LIBERTY, TURNING POINT USA, THE NATIONAL LEGAL FOUNDATION, AND THE PACIFIC JUSTICE INSTITUTE

in Support of Petitioner

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INTERESTS OF THE *AMICI CURIAE*[1]

Young Americans for Liberty ("YAL") is a national, 501(c)(3) non-profit that is committed to identifying, educating, and mobilizing campus activists in order to pursue a free and peaceful government. As of the time of this writing, YAL has chapters on 548 campuses across the country and hosts multiple leadership training events and national conventions.

YAL students engage daily with their peers and classmates, and the existence of the organization relies on students being able to talk and share the message of Liberty with other students. Since 2016, by YAL's count, administrations on 182 campuses have actively violated the First Amendment rights of YAL students. As part of YAL's "Fight for Free Speech" initiative, YAL is committed to defending student rights on campuses and holding campus administrators who offend those rights accountable for their actions.

Turning Point USA is a 501(c)(3) non-profit organization founded in 2012 by Charlie Kirk. The organization's mission is to identify, educate, train, and organize students to promote the principles of freedom, free markets, and limited government. Since its founding, Turning Point USA has built the most

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[1] The parties were provided timely notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

organized, active, and powerful conservative grassroots activist network on high school and college campuses across the country. With a presence on over 2,500 campuses in all 50 states, and a network over nearly 400,000 student activists, Turning Point USA is the largest and fastest-growing youth organization in America. Given its mission to promote America's founding principles, its focus on high school and college students, and the Petitioner's strong affiliation with the organization, Turning Point USA believes it is absolutely vital that the Constitutional right to free speech is protected nationwide, on every school campus, and for every student.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Arkansas, seek to ensure that free speech is protected in all places, including college campuses.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who exercise their first amendment rights in public forums, including those located on institutions of higher learning. As such, PJI has a strong interest in the development of the law in this area.

SUMMARY OF ARGUMENT

The case provides an excellent vehicle to reenforce the principle that, when determining whether qualified immunity applies, *all the circumstances* must be considered. Many courts, including the Eighth Circuit below, have given government officials immunity as if they were policemen making split-second decisions about whether a crime has been committed. That is especially inappropriate here. First, public university officials considering and approving policies do so deliberately, without need for haste, and with the availability of counsel. What is reasonable in the circumstances of an arrest is a very different animal than what is reasonable for university officials approving policies. Second, free speech, especially by students and faculty, is essential to our universities. Without it, and the diversity of opinions and associations it fosters, the mission of higher education is thwarted.

ARGUMENT

I. Section 1983 Immunity Must Be Reasonable in the Particular Circumstances, and University Policy Making and Ratification Is Very Different Than Split-Second Police Action

This Court has established a uniform, two-pronged standard for application of qualified immunity: (a) whether an applicable right has been violated; and (b) if so, whether that right was clearly established at the time of the violation. *See, e.g.*, *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). At the same time, and in part due to the

broad range of circumstances in which the standard is applied, this Court has emphasized that, when examining the "clearly established" prong, courts must be cognizant of the particular circumstances involved. *See Wesby*, 138 S. Ct. at 590; *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Mullenix*, 136 S. Ct. at 308. The standard looks to reasonableness measured objectively: what would a reasonable person have known and done in the circumstances. *See id.*

Many of this Court's § 1983 decisions have arisen in the context of police officers making arrests, with the key consideration being whether it was clearly established that a reasonable officer, in the circumstances, had probable cause. *See, e.g.*, *Wesby*, 138 S. Ct. at 592; *Anderson v. Creighton*, 483 U.S. 635 (1987). But not all cases involve arrests or probable cause. *See*, *e.g.*, *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1198-99 (10th Cir. 2019) (finding that an equal protection challenge, to be clearly established, needs lesser overlap in prior precedent than a probable cause for arrest situation). This Court's most recent decision in the context of an arrest, *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), provides a helpful roadmap to illustrate that an arrest scene involves very different circumstances than a university official reviewing and approving campus speech policies, the situation presented here.

This Court in *Nieves* set out seven characteristics of its prior cases for why probable cause should typically (but not always) insulate an arresting officer from § 1983 liability, even when the arrestee argues that the officer was retaliating for the arrestee's exercise of protected speech. Those characteristics helpfully distinguish the situation presented here.

1. *Causal Connection.* The *Nieves* Court first noted that cases alleging an arrest in retaliation for free speech for which there is also probable cause "present a tenuous causal connection between the defendant's alleged [retaliatory] animus and the plaintiff's injury." *Id.* at 1723 (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)). In other words, in "retaliatory arrest" cases, probable cause for the arrest on grounds independent of the alleged retaliation for the protected speech normally breaks the "but for" connection needed to prove retaliatory causation.

This is not true for campus free speech policies. If such policies are defective, they have a direct, causal connection to the violation of students' free speech rights.

2. *Speech Content.* The *Nieves* Court next noted that the § 1983 inquiry also becomes "complex" in retaliatory speech cases "because protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." 139 S. Ct. at 1724 (quoting and citing *Reichle*, 566 U.S. at 668, and *Lozman v. Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)).

Of course, in an open forum situation on campus, if the content of the speech is a consideration, there is automatically a clear constitutional violation absent compelling countervailing interests. *See Reed v. Town of Gilbert*, 576 U.S. 155 (2015). And even in limited public forums, the use of content to regulate is carefully circumscribed. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981).

3. *Split-Second Judgments.* This Court in *Nieves*, as it has in many previous decisions, also put great stress on the fact that police officers "frequently must make 'split-second judgments' when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is 'ready to cooperate' or rather 'present[s] a continuing threat.'" 139 S. Ct. at 1724 (quoting *Lozman*, 136 S. Ct. at 1953, and citing *Wesby*, 138 S. Ct. at 587-88).

This important factor also is not present when university officials make or approve campus policies. Instead, a reasonable official when reviewing free speech policies is in a setting that allows for calm and careful deliberation. Moreover, it must be assumed that the reasonable senior official of a public university has access to legal counsel. And, of course, as discussed further below, it should be well known to every reasonable official that First Amendment rights are among our most sacred and that colleges and universities are places in which free speech and assembly are most important. "Indeed, those who govern and administer the University, above all, should most clearly recognize the peculiar importance of the University as a 'marketplace of ideas' and should insist that their policies and regulations make adequate provision to that end." *Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004).

4. *Evidentiary Weight.* The *Nieves* Court next explained that the presence or absence of probable cause for a challenged arrest will "provide weighty evidence" of retaliatory intent by the officer, one way or the other. 139 S. Ct. at 1724. Nevertheless, the Court crafted a new exception to the rule immunizing

an officer if there were probable cause when the arrestee can show that arrests were not typically made by officers in similar situations. *Id.* at 1727.

Again, when a university official reviews or adopts a campus speech policy, the situation is very different. An official is not presented with a multifaceted situation requiring a balancing of different, independent rationales for action. The reasonable official has a single-minded focus to assure that First Amendment freedoms are not improperly curtailed and that any limitations are fully justified by, and narrowly tailored to, legitimate, content-neutral interests.

5. *Criminal Activity.* Of course, as the *Nieves* Court next pointed out, an officer when making an arrest is assessing "potentially criminal conduct." *Id.* at 1724. This raises the stakes and the need to protect police officers, as they must act swiftly to apprehend and stop criminal behavior and there is a strong public interest in allowing them to do so.

No such interests come into play when university officials consider campus free speech policies. The policies deal with regulation of cherished freedoms, not criminal behavior that is likely to have adverse consequences on innocent individuals. Indeed, this Court long ago established that free speech, even if objectionable to many or most of its listeners, must be protected:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates

> dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949); *accord Snyder v. Phelps*, 562 U.S. 443 (2011) (finding speech including posters stating "America is Doomed," "Semper Fi Fags," "God Hates Fags," "Pope in Hell," and "You're Going to Hell" to be constitutionally protected).

6. *Undue Apprehension.* Related to the need for prompt action when potentially criminal activity is involved, the *Nieves* Court next observed that it is important to "ensure that officers may go about their work without undue apprehension of being sued," noting that police make approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in "circumstances that are tense, uncertain, and rapidly evolving." 139 S. Ct. at 1725 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989).)

University officials when reviewing free speech policies are not engaging in a "dangerous task"—unless the danger is understood to be that they may improperly restrict the free speech and assembly rights of students and others. That officials lack a "safe harbor" like police enjoy with the probable cause

standard for arrests cannot reasonably give them "undue apprehension" when they are performing their policy work. Indeed, the fact that such work can be done by them and other high-ranking officials in a deliberative fashion, on their own schedules, underscores that, in their circumstances, trustees have little excuse to approve unconstitutional policies.

7. *Unflinching and Evenhanded Enforcement.* Finally, the *Nieves* Court expressed concern that, if a subjective test were used, it might put a pall over officers and lead to unequal enforcement throughout the country:

> As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett's standard would thus "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) (Learned Hand, C.J.). It would also compromise evenhanded application of the law by making the constitutionality of an arrest "vary from place to place and from time to time" depending on the personal motives of individual officers. *Devenpeck [v. Alford]*, 543 U.S. [146,] at 154 [(2004)]. Yet another "predictable consequence" of such a rule is that officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off. *Id.* at 155.

139 S. Ct. at 1725.

We do not argue for a subjective test for university officials. But we do note that, once again, the concerns that motivate this Court in § 1983 actions challenging police arrests are not present for public officials adopting campus policies: they are not responding quickly to dangerous and rapidly evolving situations; they are not directly interacting with the public; they are deliberative when performing their duties properly; and they may seek counsel before acting. University officials are applying constitutional standards that are uniform throughout the country, and they have easy access to court decisions, not just issued by this Court and their own circuit court, but also those issued by other courts, such that they can reasonably and readily be held to know when there is a general consensus of views about relevant First Amendment issues. *See Wesby*, 138 S. Ct. at 589 ("robust consensus" of decisions).

II. A Qualified Immunity Determination Must Also Consider That This Case Arises in the Context of a Public University, Where Free Speech and Assembly Have the Strongest Protection

It is also highly relevant to the qualified immunity analysis that the events here took place on a public university campus involving a university student. It has long been settled that a public university, far from being a constitution-free zone, is where the free speech and association rights of its students must be enforced most robustly. As this Court stated in *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), "[t]he

vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *See also Healy v. James*, 408 U.S. 169, 180 (1972) ("state colleges and universities are not enclaves immune from the sweep of the First Amendment"); *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

"The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" *Healy*, 480 U.S. at 180 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Indeed, the "campus of a public university, at least for its students, possesses many characteristics of a public forum." *Widmar*, 454 U.S. at 267 n.5. "The campus's function as the site of a community of full-time residents makes it 'a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment,' and suggests an intended role more akin to a public street or park than a non-public forum." *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 651 (1981), and citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Particularly apropos here are this Court's teachings in *Healy*, in which it struck down a public university's refusal to recognize as a campus club a local Students for Democratic Society chapter. This Court noted, "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of

association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." 408 U.S. at 181 (citing *Baird* v. *State Bar of Ariz.,* 401 U.S. 1, 6 (1971); *NAACP* v. *Button,* 371 U.S. 415, 430 (1963); *La. ex rel. Gremillion* v. *NAACP,* 366 U.S. 293, 296 (1961); *NAACP* v. *Ala. ex rel. Patterson,* 357 U.S. 449 (1958)). In *Healy*, the students' associational and speech rights were inhibited by, among other things, lack of access to areas of campus available to others:

> If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.

Id. at 181-82.

Because of the critical importance of speech and association on campus, this Court in *Healy* noted what the Eighth Circuit below ignored when performing its qualified immunity analysis, i.e., that the burden on state actors to justify restrictions on first amendment rights on campus has long been established as being of the highest:

> It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners'

> organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action.

Id. at 184 (citing *Near v. Minn.*, 283 U.S. 697, 713-716 (1931); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *Freedman v. Md.*, 380 U.S. 51, 57 (1965)). Even regulations that regulate only the time, place, and manner of speech must be content-neutral, "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

CONCLUSION

When applying §1983 principles to high-ranking officials of a public college or university who draft, review, or approve free speech and assembly policies, it is inappropriate to afford them the liberality shown police in making split-second judgment calls. Instead, such officials should be held to the highest standards. If performing their job correctly, they are dealing, in a deliberative and protective fashion, with First Amendment rights that are their institutions' life blood. They have the time and resources to get it right, the first time, and they should be held liable when they do not.

This Court should grant the petition to clarify that a qualified immunity determination must take into

account the particular context of the violation of civil rights. This Court should clarify that its qualified immunity precedent governing arrests involves a significantly different context than university speech and assembly policies.

Respectfully submitted
this 8th day of March 2021,

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