No. 21-3290

In the United States Court of Appeals for the Sixth Circuit

ANTHONY NOVAK,

Plaintiff-Appellant,

v.

CITY OF PARMA, OH; KEVIN RILEY, Individually and in his Official Capacity as an Employee of the City of Parma, OH; THOMAS CONNOR, Individually and in his Official Capacity as an Employee of the City of Parma, OH,

Defendants-Appellees,

and

JOHN DOE, Individually and as a member of the Ohio Internet Crimes Against Children Task Force,

Defendant.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland, No. 1:17-cv-02148.
The Honorable **Dan A. Polster**, Judge Presiding.

AMICUS CURIAE BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

RONALD LONDON*
JOSHUA BLEISCH
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
700 Pennsylvania Ave., S.E.
Suite 230
Washington, DC 20003
(215) 717-3473
*Counsel of Record

ADAM STEINBAUGH
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut St.
Suite 1250
Philadelphia, PA 19106
(215) 717-3473

Counsel for Amicus Curiae
Foundation for Individual Rights in Education

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Sixth Circuit
Case Number: 21-3290 Case Name: Novak v. City of Parma

Name of counsel: Ronald London

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I certify that on August 6, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Ronald London

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student and faculty rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech and academic freedom rights. FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to advance these rights.

The significance of this case extends well beyond how police officers react to criticism. Students and faculty often express themselves through satire, or air viewpoints that college or university officials dislike. In turn, those officials may seek to punish that expression—analogous to how Parma's Police Department responded to Appellant Anthony

[1] Because Appellees did not consent to its filing, this *amicus curiae* brief is submitted with an accompanying motion for leave under Fed. R. App. P. 29(a)(3). Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus* states that no counsel for a party authored this brief in whole or part and no person made a monetary contribution to its preparation or submission, other than *amicus*, its members, or its counsel.

Novak—in ways that rest upon or adopt the public's reaction to the expression, thus effectuating an unconstitutional "heckler's veto." When that occurs, as in other First Amendment contexts, expansive application of qualified immunity impedes the ability of students or faculty to vindicate violations of their constitutional rights. FIRE thus seeks to reinforce that speech like Novak's enjoys full constitutional protection, and to urge application of a "fair notice" standard when government officials invoke qualified immunity to avoid liability for clear violations of First Amendment rights.

INTRODUCTION AND BACKGROUND

Satire and criticism of government actors have a long history in this country, and there is no doubt the First Amendment protects them.[2] The First Amendment mattered little, however, to the City of Parma's police, who targeted Novak for parodying them in a satirical Facebook profile. Op. & Order at 3–4, Feb. 24, 2021, ECF No. 128. The City of Parma charged Novak under Ohio Rev. Code § 2909.04(B) with knowingly using computers and electronic and online devices with intent to disrupt,

[2] *See, e.g.*, *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also infra* Section I.

interrupt, or impair police or other public operations. *Id.* at 6. The police also testified before the grand jury and in the ensuing prosecution, in ways Novak claims were misleading. *Id.* at 12–13, 27–28, 32.

The City's effort to silence Novak finds parallels on college campuses nationwide. Virtually every day, students or faculty—whether by posting on social media, teaching or participating in classrooms, inviting speakers, tabling and leafleting, or myriad other means—express themselves in ways someone finds objectionable. In response to provocative but protected expression, campuses should model our national ethos of "more speech, not enforced silence." *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 234 (6th Cir. 2015) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

But provocative speech prompts demands for discipline—and campus officials too often oblige. *See infra* Section II.A. Worse, when faculty or students seek to vindicate their rights in court, campus officials regularly invoke qualified immunity to shield themselves from liability, claiming either no right was violated, or that the right was not clearly established when they acted, or both. Sometimes, constitutional

precedent bars qualified immunity.[3] Too often for comfort, though, it prevails, leaving students or faculty whose First Amendment rights were violated without a remedy for that past harm.[4]

SUMMARY OF ARGUMENT

While all the district court's errors are troubling—its ruling effectively allows Parma police to punish those who make fun of them, in violation of clearly established First Amendment rights—*amicus* FIRE addresses here three areas of concern that resonate in particular in educational settings.

First, Novak's parody of the Facebook page of Parma's police department is plainly protected by the First Amendment. Parody and satire—which are purposefully false—require audiences to understand the speech to express something beyond its literal meaning.

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[3] *See, e.g.*, *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, No. 19-3389, 2021 WL 3008743, at *7–8 (8th Cir. July 16, 2021); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 565–66 (4th Cir. 2011); *Higbee v. E. Mich. Univ.*, 399 F. Supp. 3d 694, 704–05 (E.D. Mich. 2019).

[4] *See, e.g.*, *Hunt v. Bd. of Regents of the Univ. of N.M.*, 792 F. App'x 595, 606 (10th Cir. 2019); *Buchanan v. Alexander*, 919 F.3d 847, 855–56 (5th Cir. 2019); *Abbott v. Pastides*, 900 F.3d 160, 174–75 (4th Cir. 2018).

Characterizing any resulting confusion or anger as "disruption" in order to punish the speech violates the First Amendment.

Second, the City effectuated an impermissible heckler's veto in targeting Novak based on public reaction. When the government asserts that some form of disruption warrants censoring or punishing speech, courts must be skeptical. In FIRE's experience, officials often exaggerate claims of disruption resulting from controversial speech to justify suppression, repackaging negative reactions as a safety concern.

Third, the court below too strictly and mechanically construed the concept of "clearly established" rights for qualified immunity, effectively allowing government actors—including police and college officials—who violate the Constitution in *slightly novel* ways to do so with impunity. This one-size-fits-all approach, recently criticized by Justice Thomas as "stand[ing] on shaky ground," *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., on denial of *certiorari*), is inapt in situations like (and including) the present case. When state actors have ample time to deliberate actions that may implicate constitutional rights, the justifications for qualified immunity evaporate. To the extent that it finds that qualified immunity does apply, this Court should use the "fair

notice" standard for whether rights are clearly established, to better serve First Amendment interests.

ARGUMENT

The district court's grant of summary judgment to defendants was reversible error for several reasons. Not least of these was that it failed to first decide whether the First Amendment protected Novak's speech and only then to consider if, as the sole basis for arrest, it could constitutionally act as probable cause.[5] Making the First Amendment determination at the outset is required by settled Circuit law that holds protected speech cannot serve as the basis for probable cause. *Swiecicki v. Delgado*, 463 F.3d 489, 498 (6th Cir. 2006) (citing *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997)).

Instead, the district court bypassed analyzing whether Novak's parodic Facebook page was constitutionally protected. In fact, it acknowledged it "may very well be protected by the First Amendment" and that, "[a]t the very least, there is a genuine dispute of material fact on that," but nevertheless held "the Court does not even have to resolve

[5] *See* Appellant's Br. at 2–19, 24–29, 40–43. The court also decided fact issues and made inferences adverse to Novak on summary judgment.

the First Amendment issue." Op. & Order at 2–3, ECF No. 128. Rather, all that mattered was whether defendants "had probable cause to believe" Novak violated § 2909.04(B) by disrupting police operations, *id*. at 3, even if solely through constitutionally protected speech because, the court held, there is no First Amendment right to be free from retaliatory arrest supported by probable cause. *Id*. at 15–28. By ignoring the constitutional protection that parody and satire enjoy, as well as the bar against effectuating a heckler's veto, and by consequently posing the wrong question at the outset of the qualified immunity analysis, the district court erroneously allowed the City's violation of Novak's clearly established rights to stand.

I. Although Clearly Established First Amendment Law Protects Parodies, They Are Still Punished, Including on Campus.

As this Court has recognized—in this very case—"it is clearly established" that "parody . . . is protected speech." *Novak*, 932 F.3d at 427.[6] Parody and satire are forms of figurative speech in which, as here,

[6] With respect to satirizing or parodying the police, the First Amendment right to criticize law enforcement without suffering retaliation is well-established. *See*, *e.g.*, *Clemons v. Couch*, 768 F. App'x 432, 438 (6th Cir. 2019) (citing *City of Houston v. Hill*, 482 U.S. 451, 461 (1987); *Kennedy v. City of Villa Hills*, 635 F.3d 210, 215–16 (6th Cir. 2011)); *Barnes v. Wright*, 449 F.3d 709, 718 (6th Cir. 2006); *Harless v.*

"for comic effect or social commentary, [one] closely imitates the style" of another. *Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225, 1227 (7th Cir. 1993) (quoting *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992)); *see also* Jonathan Greenberg, *The Cambridge Introduction to Satire* 33–34 (2019) ("[I]n *parodying* texts writers often thereby *satirize* the ideas, values, or attitudes embodied in them."). Satire and parody are exercises in purposefully false speech, conveying a message other than that expressly stated.

This form of criticism *necessarily requires* falsity, and the knowing falsehoods of parody and satire are not the type that "have little value in and of themselves." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51–52 (1988). Rather, the *Hustler* Court recognized that "our political discourse" would be "considerably poorer without them." *Id.* at 55. This is true even if some believe satire to be sincere, because having a "superficial degree of plausibility" is a "hallmark of satire." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 160–61 (Tex. 2004). Consider, for example, whether the panic over the *War of the Worlds* broadcast would have justified Orson

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City of Columbus, 183 F. Supp. 2d 1024, 1030–31 (S.D. Ohio 2002) (citing *Hill*, 482 U.S. at 461).

Welles' arrest had Parma citizens—like their counterparts in Trenton, New Jersey—called police to complain.[7]

Amicus FIRE is frequently called upon to defend satire and parody in higher education—often because of complaints by the pilloried, as those who identify with those under "satiric attack" will "receive [it] differently from the person who identifies with the satirist." Greenberg at 24. Some illustrative examples follow.

This past spring, Stanford University threatened to withhold a law student's degree while it investigated his email lampooning the Federalist Society for some members' failure to condemn violence at the U.S. Capitol.[8] The January 25, 2021, email, which purported to promote an event "upcoming" on January 6, claimed prominent Federalist Society speakers would discuss "doing a coup" and an "Originalist Case for

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[7] Letter from Paul Morton, City Manager, City of Trenton, N.J., to Federal Communications Commission (Oct. 31, 1938) (complaining that Trenton police had received 2,000 phone calls over two hours), https://www.wellesnet.com/national-archives-the-fcc-and-the-war-of-the-worlds-radio-broadcast.

[8] Jaclyn Peiser, *A Stanford student bashed the Federalist Society with a satirical flier. He nearly missed getting his diploma.*, Wash. Post (June 3, 2021), https://www.washingtonpost.com/nation/2021/06/03/stanford-law-nicholas-wallace-federalist-society.

Inciting Insurrection." The complaint precipitating the investigation asserted that the satirical email somehow "defamed" Senator Josh Hawley and Stanford Law members of the Federalist Society by tying them to the fictional event.

George Washington University campus police initiated an investigation in 2007 to identify an anonymous satirist who lampooned a conservative group's "Islamo-Fascism Awareness Week" by posting flyers ascribed to the group, which sought members who "Hate Muslims" (identifiable, the flyer urged, by their "lasers in eyes" and "peg-leg for smuggling children and heroin").[9] A decade later, the campus police opened a new investigation after someone distributed the flyers again.[10]

At the University of California at San Diego, an administrator sought a "creative legal solution" to a satirical newspaper after an article

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[9] Susan Kinzie, *Anti-Muslim Fliers Cause Uproar*, Wash. Post (Oct. 9, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/10/08/AR2007100801442.html.

[10] Adam Steinbaugh, *George Washington University police investigating posters lampooning conservative group — again*, FIRE (Sept. 13, 2017), https://www.thefire.org/george-washington-university-police-investigating-posters-lampooning-conservative-group-again.

satirizing "safe spaces" led to outrage.[11] That solution—defunding *every* publication to avoid the First Amendment's disdain of defunding a lone offending outlet—was firmly rejected by the Ninth Circuit. *Koala v. Khosla*, 931 F.3d 887, 898–99 (9th Cir. 2019); *see also Barnes v. Zaccari*, 592 Fed. App'x 859 (11th Cir. 2015) (holding university violated Constitution by expelling student over satirical collage criticizing proposed campus parking garage).

II. Courts Must Be Skeptical of Government Claims of Disruption to Avoid Effectuating Heckler's Vetoes.

The First Amendment requires vigilant skepticism of authorities' claims that public safety requires silencing or punishing a speaker. When government actors invoke public safety to justify censorship premised on the hostile reaction of others to speech, they risk effectuating a "heckler's veto," a "type of odious viewpoint discrimination" this Court has condemned. *Bible Believers*, 805 F.3d at 248. As recognized in the educational setting, but true universally, "[o]ne of the most persistent and insidious threats to first amendment rights has been . . . the

[11] Adam Steinbaugh, *In landmark victory for student press rights, Ninth Circuit rebukes UCSD's censorship of satirical student newspaper*, FIRE (July 24, 2019), https://www.thefire.org/in-landmark-victory-ninth-circuit-rebukes-ucsds-censorship-of-satirical-student-newspaper.

'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at the peril of suffering disruptions of public order." *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991) (quoting *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985)), *aff'd* 993 F.2d 386 (4th Cir. 1993).

In *Bible Believers*, this Court held that "a heckler's veto effectuated by the police will nearly always be susceptible to being reimagined and repackaged as a means for protecting the public, or the speaker himself, from actual or impending harm." 805 F.3d at 255. Such claims thus warrant skepticism, and authorities must show "bona fide efforts" to advance public safety "by other, less restrictive means" than silencing the speaker, *id.*, something Parma failed to do here. *See infra* Section II.B. Skepticism is especially warranted when, as here, authorities have a self-interest in repackaging speech as disruption. As *amicus* FIRE's experience shows, claims of need to preserve public safety and order are often indulged—if not fabricated outright—as pretext for suppressing unpopular speech that is contrary to an institution's public-relations goals.

A. Government officials often exaggerate "disruption" by critics or unpopular speakers.

When officials claim disruption, disturbance, or harm caused by speech that is directed against the government, courts should be especially circumspect for two reasons. First, because public safety is typically deemed a compelling government interest often granted deference by the public and our legal system,[12] government actors may exaggerate the effects of claimed disruption to justify actions against unpopular speakers.[13] Second, the risks are exacerbated when there is no functionally transparent tool by which to challenge claimed interests in preserving public order. FIRE has encountered such situations myriad times, and offers the following illustrative examples.

Essex County College. In June 2017, after Lisa Durden appeared on Tucker Carlson's Fox News program to discuss a controversial Black

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[12] *See, e.g.*, *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 479–80 (6th Cir. 1991).

[13] *See* Jonathan S. Masur, *Probability Thresholds*, 92 Iowa L. Rev. 1293, 1323–24 ("[T]he government . . . will tend to exaggerate the threat of these harms, to constitutional effect."); *see also id.* at 1325–26, 1331, 1338. *Cf.* Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 Temp. L. Rev. 1, 23 (2003) ("[P]olitical institutions . . . will still respond disproportionately if the public outcry is sufficiently great[.]").

Lives Matter event, her appearance went viral online.[14] Although Durden's role as an instructor at Essex County College was not mentioned during the broadcast, the school's president issued a statement denouncing the appearance. He explained that after Durden's appearance, the college "was immediately inundated with feedback from students, faculty and prospective students and their families expressing frustration, concern and even fear" about Durden's views. *Id*. The college suspended and then terminated Durden.

Yet when FIRE sued to obtain copies of public records concerning the president's claim of having been "immediately inundated" with complaints, they revealed only *three* emails in the twelve days after Durden's appearance—all received *after* administrators had already decided to suspend her. Durden's suit against the college remains pending. *Durden v. Essex Cnty. Coll.*, No. ESX-L-002498-18 (N.J. Super. Ct. Law Div. filed Apr. 9, 2018).

[14] Adam Steinbaugh, *After FIRE lawsuit, Essex County College finally turns over documents about firing of Black Lives Matter advocate*, FIRE (Jan. 23, 2018), https://www.thefire.org/after-fire-lawsuit-essex-county-college-finally-turns-over-documents-about-firing-of-black-lives-matter-advocate.

Babson College. A similar scene played out at Babson College[15] after then-President Trump's tweet that the United States had "targeted" 52 Iranian cultural sites for attack.[16] Asheen Phansey, an adjunct professor, remarked sardonically on his personal Facebook page, lampooning American culture and Trump alike: "In retaliation, Ayatollah Khomeini should tweet a list of 52 sites of beloved American cultural heritage that he would bomb. Um... Mall of America? ...Kardashian residence?"

After the post attracted public criticism, Babson announced it would conduct a "thorough investigation" and claimed it was "cooperating with local, state and federal authorities."[17] After Babson terminated

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[15] Teo Armus, *Adjunct professor who jokingly said Iran should list 52 U.S. cultural sites to bomb has been fired*, Wash. Post (Jan. 10, 2020), https://www.washingtonpost.com/nation/2020/01/10/babson-professor-iran. While Babson College is a private institution, it commits to the expressive freedom of its students and faculty. *See* Adam Steinbaugh, *Babson College abandons freedom of expression, fires professor over Facebook post criticizing Trump threat to bomb Iran cultural sites*, FIRE (Jan. 9, 2020), https://www.thefire.org/babson-college-abandons-freedom-of-expression-fires-professor-over-facebook-post-criticizing-trump-threat-to-bomb-iran-cultural-sites.

[16] Dennis Romero & Yuliya Talmazan, *Trump threatens attacks on 52 sites if Iran retaliates for Soleimani killing*, NBC News (Jan. 4, 2020), https://www.nbcnews.com/news/world/trump-threatens-iran-attacks-52-sites-n1110511.

[17] Adam Steinbaugh, *Babson falsely claimed it was 'cooperating' with Massachusetts State Police over professor's 'threatening' Facebook post*,

Phansey, its claims that it "cooperated" with authorities proved misleading: Massachusetts state police had no records of any reports, and local police records showed the college was not concerned with "threatening" messages but rather the possibility of a media presence on campus. Even the college's own police had no record of complaints. In short, Babson dressed up public relations interests as "public safety" concerns in conjunction with Phansey's firing.

Rutgers University. Tenured history professor James Livingston took to Facebook to vent frustration with what he perceived as growing gentrification in his Harlem neighborhood, writing: "OK, officially, I now hate white people. I am a white people, for God's sake, but can we keep them—us—out of my neighborhood?"[18] He then sarcastically announced his resignation "from my race." After the posts drew negative media coverage, an administrator ruled that Livingston spoke as a private

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FIRE (Feb. 17, 2020), https://www.thefire.org/babson-falsely-claimed-it-was-cooperating-with-massachusetts-state-police-over-professors-threatening-facebook-post.

[18] Press Release, FIRE, *Rutgers caves to outrage mob: Professor faces punishment for Facebook posts about white people, Harlem gentrification* (Aug. 21, 2018), https://www.thefire.org/rutgers-caves-to-outrage-mob-professor-faces-punishment-for-facebook-posts-about-white-people-harlem-gentrification.

citizen on matters of public concern, satisfying the first two prongs of the test under *Pickering v. Board of Education*, 391 U.S. 563 (1968), for when faculty speech receives First Amendment protection.

Nevertheless, the university asserted the posts were unprotected because a "core function of educating a diverse student body *may* be disrupted" by such comments, and because "disruption has already been felt" when the university "received numerous complaints," negative publicity, and criticism in "mainstream media."[19] Though no student had complained, the university argued its action was justified because public criticism itself was "disruptive."[20] Rutgers reversed this finding only after FIRE threatened litigation.[21]

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[19] Memorandum From Carolyn Dellatore, Assoc. Dir., Off. of Emp. Equity, Rutgers Univ., 7 (July 31, 2018), https://www.thefire.org/rutgers-investigation-report (emphasis added).

[20] Letter from Marieke Tuthill Beck-Coon, Dir. of Litigation, FIRE, to Robert Barchi, President, Rutgers Univ. (Aug. 20, 2018), https://www.thefire.org/fire-letter-to-rutgers-university.

[21] Press Release, FIRE, *VICTORY: Rutgers reverses finding against professor who posted about resigning from the white race on Facebook* (Nov. 15, 2018), https://www.thefire.org/victory-rutgers-reverses-punishment-of-professor-who-posted-about-resigning-from-the-white-race-on-facebook. *See also* Samantha K. Harris, *Have a Little (Good) Faith: Towards a Better Balance in the Qualified Immunity Doctrine*, 93 Temple L. Rev. 511, 512–16 (2021), for additional examples.

B. To deter heckler's vetoes, this Court should refuse to ratify the self-interested claims that Parma's police were "disrupted."

If skepticism is merited when authorities claim public order justifies punishing an unpopular speaker, that skepticism should be especially pronounced when speech is unpopular with the authorities in particular. The police "may reasonably be expected to exercise a higher degree of restraint than the average citizen," as "freedom . . . to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Hill*, 482 U.S. at 462–63 (cleaned up). The police cannot be allowed to subvert this principle by claiming public reaction to speech critical of law enforcement warrants silencing or sanctioning it.

This appeal presents a case-in-point. Parma's police—the targets of Novak's lampoons—exaggerated the "disruption" occasioned by his satirical Facebook page. This Court's independent review of the record, necessitated by Novak's assertion of First Amendment rights, *see*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453–54 (2011); *Langford v. Lane*, 921 F.2d 677, 680 (6th Cir. 1991), should explicitly confirm as much.

First, there was no *actual disruption* of Parma's police department. There is no indication anyone contacted Novak when they meant to contact the police. The lifespan of Novak's page, after all, is appropriately measured in hours—too short for search engines to inadvertently index and thereby enable unsuspecting members of the public in urgent need to mistake Novak's parody for the police website.

Instead, Novak's posts generated minimal additional outreach to the police, a modicum by those who mistakenly believed it genuine and sought to complain. However, the "main reason for these calls" was not because people were fooled, but simply upset about the parody, as they were calling "to alert the city . . . ." Op. & Order at 4, ECF No. 128. In total, the number of calls to the dispatch line barely cracked double-digits and together lasted all of 12 minutes. *Id*. at 25; Op. & Order at 6, 10, Apr. 5, 2021, ECF No. 19.

Police justified their efforts to identify and shut down the page by citing concern that it was "reasonably foreseeable that people would be confused and call,"[22] echoing the standard for speech of schoolchildren in *Tinker v. Des Moines Independent Community School District*, 393 U.S.

[22] City of Parma's Mem. Supp. Mot. Summ. J. at 8, ECF No. 100-5.

503, 509 (1969). But even in the context of primary and secondary education, where the government's interest in preventing disruption is considerable, officials must show, as the Supreme Court recently explained, more than "discomfort and unpleasantness" or "disturbance" to justify intruding on the constitutional right of, and the public interest in, free expression. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2048 (2021) (quoting, in part, *Tinker*, 393 U.S. at 509). Possible future disruption is insufficient to strip speech of constitutional protection, as the government must show "recited harms are real, not merely conjectural . . . ." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994).

The balance of the "disruption"—comments posted on or removed from Novak's page—did not consume even negligible resources. *See infra* p. 29. The only considerable resources expended resulted not from Novak's speech, but from police efforts to identify, arrest, and seek prosecution of their critic. Even if some were confused by Novak's page, that possibility is an unavoidable byproduct of satire, as this Court explicitly recognized the first time this case was before it. *Novak*, 932 F.3d at 427.

Further, the reach of the internet means every satire or parody might reach a broader audience than poison pens of the past. So, too, is it easier for the fooled to reveal themselves, either by announcing it or by contacting the satire's subject to complain. This Court should accordingly reject as contrary to clearly established constitutional law the view that momentary contacts from the public amount to "disruption" sufficient to erode the right to speak to a broad audience.

III. Qualified Immunity Is a Blunt Instrument Inappropriate in Some Contexts, But Where It Applies, Rights Are Clearly Established if the Law Provides "Fair Notice" of Their Contours.

This Court should analyze Appellees' claim of qualified immunity with recognition that the Supreme Court has taken divergent approaches in deciding if a constitutional right is clearly established, and should apply a "fair notice" standard in cases like this one. As a product of the Supreme Court's inconsistency—which diminishes opportunities to vindicate constitutional rights—the district court construed too strictly what it means for a right to be clearly established. Qualified immunity, when applied as it was below to prevent Novak from vindicating his rights, is an unduly blunt instrument that courts should take special care in applying. The justifications for qualified immunity that may apply in

other law-enforcement contexts simply do not apply here, or in similar cases like those that predominate free speech transgressions, including in higher education.

A. The Supreme Court has created a malleable test for whether constitutional rights are clearly established.

In the time since the Supreme Court first held "government officials performing discretionary functions generally are shielded from liability for civil damages [if] their conduct does not violate clearly established . . . rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court has not spoken uniformly regarding when rights are "clearly established." In *Hope v. Pelzer*, it held there need not be a decision exactly on point for a right to be clearly established—rather, it is clearly established if the law provides "fair notice" conduct is unlawful as "a general constitutional rule . . . in the decisional law [that] may apply with obvious clarity to [] specific conduct . . . ." 536 U.S. 730, 741 (2002). Then for the first time, in *Ashcroft v. al-Kidd*, the Court expressed this in terms that "existing precedent must have placed the . . . constitutional question beyond debate." 563 U.S. 731, 741 (2011). In the wake of these decisions, this Court has used both

standards, with "beyond debate" appearing conceptually stricter than "fair notice" (because one can be on notice that a constitutional right is clearly established without it having been litigated beyond all debate).

In *Bible Believers*, this Court explained that "[a]lthough 'existing precedent must have placed the . . . constitutional question beyond debate,' '[a] case directly on point,' is not a prerequisite" for a right to be clearly established. 805 F.3d at 258 (quoting *al-Kidd*, 563 U.S. at 741). But in *Clemons v. Couch*, this Court quoted both "fair warning" and the stricter "beyond debate" standards in holding it was clearly established the community-caretaker exception did not apply to warrantless entry into plaintiff's home. 2021 WL 2821074, at *4 (6th Cir. July 7, 2021). *Ouza v. City of Dearborn Heights* affirmed denial of qualified immunity to police officers on excessive force and false arrest claims, on grounds that a single witness's unreliable accusation lacking corroboration was insufficient for probable cause. 969 F.3d 265 (6th Cir. 2020). In doing so, the Court quoted *al-Kidd*'s "beyond debate" standard, but in its analysis concluded the officer "had 'fair warning' that his conduct [was] unlawful." *Id.* at 282.

This Court should commit to the standard articulated in *Hope* and *Ouza* that the law is "clearly established" when it provides "fair notice" that conduct is unconstitutional, particularly (but not necessarily limited to) when government actors have time to deliberate and consider their actions. If qualified immunity is instead interpreted to require near mathematical precision as to factual circumstances—a risk under the "beyond debate" standard as used below—those who have had constitutional rights infringed are doubly harmed, because they are later impeded in vindicating those rights. *See Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting) (arguing that qualified immunity "formalizes a rights-remedies gap through which untold constitutional violations [go] unchecked," making it more like "qualified impunity: 'letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly'") (emphasis original). Conversely, repeat violations of constitutional rights by state actors are less likely when injured parties can litigate their claims to judgment. This in turn allows them to create precedent that clarifies the law, helping potential future litigants and further clarifying for state actors what is and is not lawful. *See* Joanna

C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65–66 (2017).

By proceeding in this manner, the Court would join sister Circuits that have applied a "fair notice" standard. For example, the Ninth Circuit in *Sandoval v. County of San Diego* held county jail nurses were not entitled to qualified immunity for failing to provide life-saving care to a detainee in obvious medical need over the course of nearly eight hours. 985 F.3d 657, 678–81 (9th Cir. 2021). Similarly, the Tenth Circuit held a prosecutor who fabricated evidence for a murder prosecution was not entitled to qualified immunity because, though the facts did not match prior cases, there were "consistent factual strands . . . that put the prosecutor *on notice* that his alleged conduct violated [plaintiff's] rights." *Truman v. Orem City*, 1 F.4th 1227, 1239 (10th Cir. 2021) (emphasis added). Committing to a "fair notice" standard and utilizing it in this case will help ensure state officials cannot violate a person's constitutional rights with impunity just because they do so in a slightly novel manner.

B. Justifications for qualified immunity that may apply in other law-enforcement contexts are weaker here.

The animating logic of qualified immunity supports use of the fair notice standard. When Congress passed the Civil Rights Act of 1871, thus creating "Section 1983 actions" to vindicate constitutional rights, there was no reference to immunity. *See* 42 U.S.C. § 1983. Given this absence, the most widely proffered justification for qualified immunity is that it derives from a historical good-faith defense in the common law for government officers in tort actions for false arrest and imprisonment. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 51–53 (2018). This historical, pre-Section 1983 good-faith defense came from a time when litigants asserted constitutional rights through general torts rather than freestanding claims. *Id.* at 52.

The precursor of qualified immunity as it is known today did not arise until 1967, when the Supreme Court decided *Pierson v. Ray*, 386 U.S. 547 (1967). In *Pierson*, police arrested a group of clergy for trying to use a segregated bus terminal and violating an anti-loitering law. *Id.* at 548–49. The Court held that the officers were immune from suit, even though they enforced an unconstitutional statute, because the subjective

"defense of good faith and probable cause" applicable to common-law false arrest claims was "also available . . . under § 1983." *Id.* at 557.

It wasn't until 1982, 111 years after passage of the original Civil Rights Act, that the Court eliminated the need to examine officials' subjective intent. *See Harlow*, 457 U.S. at 818. With adoption of an objective-reasonableness qualified immunity test, subjective intent or bad faith became irrelevant. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018) (citing *Mullenix v. Luna*, 577 U.S. 7, 24 (2015) (Sotomayor, J., dissenting)).

In addition to the historical common-law good faith justification for qualified immunity being illusory,[23] modern justifications based on public policy do not apply in cases like that at bar. Often, qualified immunity is

[23] Several Justices have suggested the Court revisit qualified immunity, most notably Justice Thomas. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("[O]ur [qualified immunity] analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act . . . ."); *accord Hoggard*, 141 S. Ct. at 2421 (Thomas, J., on denial of *certiorari*) ("[O]ur qualified immunity . . . test cannot be located in § 1983's text and may have little basis in history."). Justice Kennedy also suggested narrowing the scope of qualified immunity in *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) ("We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity . . . in light of those policy considerations. But I would not extend that approach to other contexts.").

granted when police confront split-second decisions, sometimes involving life and death, that violate a plaintiff's constitutional rights.[24] The rationale for qualified immunity carries more weight in such cases, where officers make heat-of-the-moment decisions.

But that is not true of this case and others like it, which present a poor fit for qualified immunity. In contrast to the above-described split-second decisions, the City's conduct in investigating and arresting Novak was deliberate, considered, devised and pursued over a matter of weeks, giving officers ample time to determine whether they would be violating Novak's constitutional rights. Op. & Order at 4–6, ECF No. 128. Detective Connor observed Novak's parody Facebook page (which was live for only *12 hours*) on March 2, 2016, then took days to investigate, and did not arrest him until March 25, 2016. *Id*. And even that arrest did

[24] *See, e.g.*, *Gray v. Cummings*, 917 F.3d 1 (1st Cir. 2019) (qualified immunity for officer who used taser in attempting to regain custody of mentally ill person); *Morrow v. Meachum*, 917 F.3d 870 (5th Cir. 2019) (qualified immunity for officer who attempted to stop suspect fleeing on a motorcycle by performing a "rolling bloc," thereby crashing and killing the suspect); *Brown v. City of New York*, 862 F.3d 182 (2d Cir. 2017) (qualified immunity for officer who used pepper spray on plaintiff who was resisting arrest); *Mason-Funk v. City of Neenah*, 296 F. Supp. 3d 1006 (E.D. Wis. 2017) (qualified immunity for officer who mistakenly shot fleeing hostage who was holding a handgun).

not occur until a week after Judge Fink had issued the arrest warrant. *Id.* at 6. There was no hot pursuit, nor was there a situation in which failing to act quickly could result in significant harm. The department received all of 12 minutes of calls, total, from Parma residents. *Id.* The stark difference in the perilousness of the situation here compared to cases where police officers receive qualified immunity counsels that it should not apply in this or similar cases.

Rather, where a constitutional violation occurs after decisions were deliberated and there was time for consideration before taking action, qualified immunity should not apply. Otherwise, it remains a blunt tool that courts apply to vastly different situations and types of officials. Such a "one-size-fits-all doctrine is [] an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions." *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., on denial of *certiorari*). The Eighth Circuit recently put a fine point on it that echoes FIRE's concerns here: "[A]s Justice Thomas asked . . . '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 . . .?'"

Intervarsity Christian Fellowship, 2021 WL 3008743 at *8 (citing *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., on denial of *certiorari*)).

Instead, courts should recognize that what constitutes "fair notice" for police officers in cases of hot pursuit or potentially dangerous public interactions can be quite different from "fair notice" when the official has time to deliberate before exercising his or her discretion. In the latter situations, state actors have a better opportunity to know the state of the law (or seek out guidance on it), and the Court should thus limit grants of qualified immunity when that opportunity exists.

C. Defendants are not entitled to qualified immunity under any standard.

The district court erred by viewing qualified immunity entirely through the prism of probable cause, when it should have conducted a First Amendment analysis *before* determining whether officers could properly arrest Novak. *See* Appellant's Br. 24–30. Clearly established precedent of this Court holds protected speech cannot serve as the basis for a probable cause determination. *See, e.g.*, *Swiecicki*, 463 F.3d at 498 (citing *Sandul*, 119 F.3d at 1256). Qualified immunity analysis as originally articulated required "first inquiry [into] whether a constitutional right would have been violated on the facts alleged" and

"second, assuming the violation is established, . . . whether the right was clearly established . . . ." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). While the Supreme Court later clarified this order was not mandatory, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), it "is often appropriate" and "beneficial" to follow that order, *id.*—as certainly would have been the case here.

If, after first undertaking its constitutional analysis, the district court had correctly found Novak engaged in protected expression, it could not then find the officers had probable cause to arrest. *See Swiecicki*, 463 F.3d at 498. This would have led not to the inquiry the district court conducted—whether there is a First Amendment right to be free from a retaliatory arrest supported by probable cause, Op. & Order at 15, ECF No. 128—but rather to the correct inquiry of whether the First Amendment right to parody government officials was clearly established. And on that score, there can be no question, as explained in Section I, *supra*. Thus, whether using "fair notice" as advocated here, or a "beyond debate" standard (which this Court should avoid), Appellees are not entitled to qualified immunity, because they violated Novak's clearly established First Amendment right to parody the police.

CONCLUSION

This Court should reverse the grant of summary judgment to Appellees and order entry of judgment for Novak. In doing so, it should reaffirm the First Amendment protection afforded to satire and criticism of government officials, and the impermissibility of effectuating heckler's vetoes, and hold Parma's police had more than fair notice that these rights were clearly established so as to preclude qualified immunity. Only by doing so can the Court ensure such speech as arises in other contexts—including at public universities and colleges—receives the fullest First Amendment protection, and that speakers can vindicate those rights if public officials violate them.

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Respectfully submitted,

/s/ Ronald London
Ronald London*
Joshua Bleisch
*Counsel of Record
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE)
700 Pennsylvania Ave., S.E.
Suite 230
Washington, DC 20003
(215) 717-3473

Adam Steinbaugh
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE)
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 6,383 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: August 6, 2021

/s/ Ronald London
Ronald London
Counsel of Record
FOUNDATION FOR
INDIVIDUAL RIGHTS
IN EDUCATION
700 Pennsylvania Ave., S.E.
Suite 230
Washington, DC 20003
(215) 717-3473

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned certifies that on August 6, 2021, an electronic copy of the *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of the Plaintiff-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system.

Dated: August 6, 2021

/s/ Ronald London
Ronald London
Counsel of Record
FOUNDATION FOR
INDIVIDUAL RIGHTS
IN EDUCATION
700 Pennsylvania Ave., S.E.
Suite 230
Washington, DC 20003
(215) 717-3473

Counsel for Amicus Curiae