No. 21-6172

In the United States Court of Appeals for the Sixth Circuit

DOCTOR EHAB SHEHATA,

Plaintiff-Appellant,

v.

DAVID W. BLACKWELL, Individually;
DOCTOR LARRY HOLLOWAY, Individually;
WILLIAM EUGENE THRO, Individually;
UNIVERSITY OF KENTUCKY,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky, No. 3:20-cv-00012.
The Honorable **Gregory F. Van Tatenhove**, Judge Presiding.

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Sixth Circuit
Case Number: 21-6172 Case Name: Shehata v. Blackwell

Name of counsel: Ronald G. London

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I certify that on February 22, 2022 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 G. 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 the expressive rights of faculty and students at campuses nationwide. FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to advance these rights.

In the First Amendment context, expansive application of qualified immunity impedes the ability of faculty and students to vindicate violations of their constitutional rights. Courts too often apply the same standard for identifying "clearly established" law to university administrators as to police officers, despite clear differences in their functional roles germane to the boundaries of their constitutional authority. FIRE thus submits this brief to urge the Court to deny qualified immunity to administrators who violate the First Amendment

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

where it would be sufficiently clear to a reasonable administrator their actions are unconstitutional.

SUMMARY OF ARGUMENT

"Yes harm, no foul." That's how the district court dismissed Dr. Shehata's First Amendment retaliation claim. Yes, University of Kentucky administrators violated Dr. Shehata's First Amendment rights by firing him for refusing to admit to healthcare fraud—a crime he steadfastly denies committing. But, according to the district court, University of Kentucky administrators are not liable because, under the doctrine of qualified immunity, the law was not clearly established. Specifically, the court ruled, "whether an employee could be forced to speak by his public employer" is a "concept of first impression in this Circuit." *Shehata v. Blackwell*, No. 3:20-cv-00012-GFVT-EBA, 2021 WL 4943421, at *16 (E.D. Ky. Oct. 22, 2021). In addition to being wrong, this ruling illustrates how qualified immunity analysis is increasingly being distorted to deny remedies to plaintiffs whose rights have been violated.

As detailed in Section I, the district court improperly narrowed its clearly established law analysis. It wrongly discounted Sixth Circuit precedent, which taken together makes pellucid that a public employer

cannot fire an employee for refusing to speak. It then compounded its error by looking for an in-circuit case directly on point while ignoring a "consensus . . . of persuasive authority" confirming the combined effect of Sixth Circuit case law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Other circuits consistently have held public employers cannot fire employees for refusing to speak on matters of public concern. But the district court's most insidious error was requiring **any** prior case at all and granting immunity for a patently obvious First Amendment violation, even if in a novel factual circumstance.

This myopic view of "clearly established law" cannot be squared with qualified immunity's doctrinal antecedent. As explained in Section II, the narrow judicial focus on finding a case with identical facts flies in the face of the historical common law roots of qualified immunity—where reasonableness served as the touchstone for immunizing officials for unconstitutional acts. When the Supreme Court first recognized qualified immunity for executive officials in Section 1983 actions, it noted the doctrine's application would vary based on the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action." *Scheuer v. Rhodes*, 416 U.S. 232, 247

(1974). Eventually, while the Supreme Court jettisoned qualified immunity's subjective element of "good faith," it still grounded the inquiry in objective reasonableness. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Relatedly, the district court's ruling illustrates the problem with applying a "one-size-fits-all doctrine" to immunize officials "who exercise a wide range of responsibilities and functions." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement in denial of cert). Considering whether officials acted reasonably within the lawful bounds of their discretion requires a custom-tailored inquiry. For example, there is a big difference between "split-second decisions" by police officers to use force and a calculated decision by university administrators to fire an employee for refusing to publicly avow something he did not believe.

Although the Court has, since *Harlow*, described "clearly established law" in ways that may appear to diverge,[2] it has always maintained that immunity should be granted only to officials whose actions reflect a reasonable decision for someone in their position.

[2] *Compare Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (equating "clearly established" to "fair notice"); *with al-Kidd*, 563 U.S. at 735, 741 (holding "clearly established," law must be "beyond debate").

Qualified immunity should not protect "university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies," in the same way "as a police officer who makes a split-second decision to use force in a dangerous setting[.]" *Id.* at 2422.

Ultimately, the ruling below—which reaffirms the existence of a right, but denies any remedy—highlights the "kudzu-like creep"[3] of overly narrow interpretations of clearly established law that have transformed the doctrine into one 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." *Zadeh*, 928 F. 3d at 479 (Willet, J. concurring in part, dissenting in part). This Court should accordingly reverse the grant of qualified immunity on Dr. Shehata's claim of First Amendment retaliation. A right without a remedy is simply not a right.

[3] *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willet, J. concurring dubitante), *opinion withdrawn on reh'g,* 928 F.3d 457 (5th Cir. 2019).

ARGUMENT

I. The District Court Erred in Granting University of Kentucky Administrators Qualified Immunity for First Amendment Retaliation.

Although the district court held that University of Kentucky administrators violated Dr. Shehata's First Amendment rights, it erroneously concluded they were entitled to qualified immunity because the law was not clearly established. The district court's full explanation comprises but a single sentence:

> [A]lthough the case law that Dr. Shehata cites does describe concepts that have been clearly established, this case involves whether an employee could be forced to speak by his public employer, an apparent concept of first impression in this Circuit.

Shehata, 2021 WL 4943421, at *16.

Not only has this Circuit addressed the issue of a public employee's First Amendment right to refuse forced speech, other circuits have as well, creating clearly established law. The district court also erred by directly contradicting the Supreme Court's repeated admonitions that, for law to be clearly established, there need not be **any** case directly on point. *al-Kidd*, 563 U.S. at 741.

A. Under well-settled precedent, the First Amendment prohibits firing public employees for refusing to avow something they don't believe.

This Court has made clear that a public employer cannot fire an employee in retaliation for refusing to speak. Over thirty years ago, it held the First Amendment rights of public employees include that to refrain from speaking on a matter of public concern. *Langford v. Lane*, 921 F.2d 677, 680 (6th Cir. 1991). In so holding, the Court relied on long-standing Supreme Court precedent. *Id.* (First Amendment protection "extends equally to 'the right to speak freely and the right to refrain from speaking at all.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977))). In turn, *Wooley* relied on the Court's seminal decision in *Board of Education v. Barnette* to recognize that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting 319 U.S. 624, 637 (1943) (holding compulsory flag salute and recitation of Pledge of Allegiance violated First and Fourteenth Amendments)).

Similarly, it is clearly established in this Circuit that the First Amendment prohibits retaliation for protected conduct. Indeed, almost thirty years ago, this Circuit recognized "the contours of the public

employee's right to be free from adverse employment action on the basis of protected speech" were clearly established. *Williams v. Kentucky*, 24 F.3d 1526, 1537 (6th Cir. 1994); *see also Kiessel v. Oltersdorf*, 459 Fed. Appx. 510, 515 (6th Cir. 2012) ("In the Sixth Circuit, a public employee's First Amendment right against retaliation for protected speech has been clearly established for nearly two decades.").

Together, these precedents make clear public employers cannot fire employees in retaliation for protected conduct, whether an employee's speech or the refusal to speak. Tying together well-settled precedent to deny qualified immunity is nothing new for this Court. In *Kesterson v. Kent State University*, for example, the Court invoked several principles of well-settled law to hold an administrator had violated a student's clearly established First Amendment rights. 967 F.3d 519, 525 (6th Cir. 2020).[4] That precedent compels the same result here.

Even setting aside controlling Circuit precedent, a "consensus of . . . persuasive authority" precludes the grant of qualified immunity here. *See*

[4] Nor is this Circuit alone in taking this approach. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (tying together two strands of Supreme Court precedent to deny qualified immunity to officers who arrested a bystander for filming them as they conducted official duties).

al-Kidd, 563 U.S. at 742; *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 898 (6th Cir. 2019) ("To determine whether a constitutional right is clearly established, we must look first to decisions of the Supreme Court, then to decisions of this [C]ourt and other courts within our circuit, and finally to decisions of other circuits."). Other circuits have consistently held public employers cannot retaliate against employees for refusing to speak on matters of public concern. In *Sykes v. McDowell*, the Eleventh Circuit held the First Amendment did not permit a sheriff to fire a deputy for refusing to sign ads supporting a political candidate. 786 F.2d 1098, 1106 (11th Cir. 1986). And in *Jackler v. Byrne*, the Second Circuit held a police chief could not constitutionally fire an officer for refusing to submit a false report. 658 F.3d 225, 243–44 (2d Cir. 2011). Both cases demonstrate—each relying, like *Langford*, on *Wooley*—that just as the First Amendment prevents a public employer from retaliating against an employee for speaking, it equally prevents retaliation for refusing to speak. *Sykes*, 786 F.2d at 1105; *Jackler*, 658 F.3d at 238.

In 2019, reasonable university administrators would have known that retaliating against Dr. Shehata for refusing to speak violated the First Amendment.

B. The Supreme Court has repeatedly instructed that qualified immunity does not require a plaintiff to cite binding case law or a case involving identical facts.

Even if there wasn't binding Sixth Circuit precedent or a consensus of persuasive authority, University administrators still would not enjoy qualified immunity for their patently "obvious" violation of Dr. Shehata's First Amendment rights. As the Supreme Court has repeatedly held, government officials who commit patently "obvious" constitutional violations do not receive qualified immunity. *Hope*, 536 U.S. at 740. A "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id.* at 740 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In *Hope*, prison guards handcuffed a prisoner to a hitching post for seven hours in the sun without letting him use the bathroom. 536 U.S. at 734–35. Instead of offering him water, guards gave it to dogs, then brought the water cooler closer to him only to spill it all out. *Id.* at 735. Although no prior case finding an Eighth Amendment violation under "materially similar" facts existed, the Supreme Court denied qualified immunity because of the guards' "obvious cruelty." *Id.* at 745; *see also*

Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) ("[N]o reasonable correctional officer could have concluded that . . . it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions" as cells containing massive amounts of feces over a period of six days.).

Similarly, in *Sause v. Bauer*, after police officers, responding to a noise complaint, entered the plaintiff's living room, they stopped her from praying when she knelt to do so, without any law-enforcement justification for their command. 138 S. Ct. 2561 (2018). The Tenth Circuit granted qualified immunity because plaintiff did not "identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Sause v. Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017). The Supreme Court reversed, holding "[t]here can be no doubt that the First Amendment protects the right to pray," which "unquestionably constitutes the 'exercise' of religion." *Sause*, 138 S. Ct. at 2562.

There likewise can be no doubt the First Amendment protects the rights not to speak and to be free of forced speech, and that it prohibits retaliation for protected conduct. *See supra* Section I.A. It should thus

have been obvious to University administrators that the First Amendment prohibited firing Dr. Shehata for refusing to avow something he did not believe.

By improperly fixating on a factually identical in-Circuit case, the district court overlooked that the touchstone of qualified immunity is the reasonableness of the officials' actions.

II. Qualified Immunity for Executive Officials Is Premised on Reasonable Exercise of Lawful Discretion.

Objective reasonableness has always been the touchstone of the Supreme Court's qualified immunity doctrine. Since it first granted protection to police officers in Section 1983 actions, the Court has premised grants of qualified immunity on the reasonableness of the conduct at issue based on the boundaries of the officer's lawful authority. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). When the Court later extended the common law doctrine of qualified immunity to officials other than police officers, it recognized the doctrine's availability would vary depending on the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action." *Scheuer*, 416 U.S. at 247. Even though *Harlow* jettisoned the "good faith" element of the *Scheuer* standard, the question of objective

reasonableness remained. 457 U.S. at 814. Consequently, so did the requirement that courts account for differences between officials like police officers and university administrators when evaluating a grant of qualified immunity.

A. Immunity for executive officials derives from common law.

Damages actions against government officials for violating individual rights are "an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Nevertheless, the Supreme Court has held that "effective functioning of government" requires bestowing on officials a qualified immunity derived from common law. *Id.* at 481, 496. The history of the Court's qualified immunity doctrine reveals that balancing those two interests requires determining whether public officials—be it police officers or university administrators—acted within the boundaries of their lawful authority.

The Court first addressed the availability of qualified immunity for executive officials under Section 1983 in 1967, in *Pierson*, 386 U.S. at 557. After three police officers arrested a group of black clergymen for entering a "White Only" waiting room, the clergymen sued under Section 1983. Recognizing that the statute created a cause of action against state

actors, the Court held the absence of language granting defendants immunity did not deprive them of protections that would have been available at common law at the time of the statute's enactment. *Id.* at 554.

The Court had previously held that, under Section 1983, legislators retained their common law immunity for legislative acts, and thereafter circuit courts consistently held judicial immunity remained as well. *Id.* at 554, 555 n.9 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). Immunity for police officers, grounded in the common law defense of good faith and in probable cause serving as a shield to tort liability for false arrest, existed in the same vein. *Id.* at 557. As the Court explained:

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. [. . .] Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied.

Id. at 555. The Court recognized qualified immunity in *Pierson* specifically for this unique position of police officers, who must decide immediately whether the law permits them to act. *Id.* Therefore, any understanding of the development of the doctrine, as later extended to

university administrators, must consider that those who do not face the need to decide the lawfulness of their actions at a moment's notice—like the administrators here—should not be granted the same leeway regarding the limits of their power.

At common law, from which qualified immunity derived, the boundaries of officers' constitutional authority circumscribed their discretion to arrest or use force. *Id.* at 554, 555. As the Supreme Court later explained in *Butz*, the common law denied officers immunity where they "failed to observe the limitations on their authority by making seizures not within the category or type of seizures they were authorized to make." 438 U.S. at 491.

In *Little v. Barreme*, the Court held an American warship commander liable for trespass after seizing a Danish ship coming **from** a French port, where Congress had authorized seizure only of vessels going **to** France. 6 U.S. (2 Cranch) 170, 2 L. Ed. 243 (1804). Similarly, in *Bates v. Clark*, officers that seized a shipment of whiskey pursuant to a statute authorizing them to do so only in "Indian country" were not entitled to immunity when they were not, in fact, in "Indian Country." 95 U.S. 204, 209 (1877). Nor did good faith absolve the officers' actions,

because they were "utterly without any authority in the premises[.]" *Id.* Conversely, in *Spalding v. Vilas*, the Court granted a Postmaster General immunity for an allegedly malicious act because it "was not unauthorized by law, nor beyond the scope of his official duties." 161 U.S. 483, 493 (1896). These cases illustrate that the common law recognized by *Pierson*, in existence at Section 1983's enactment, granted immunity only where officers' discretionary acts were within the lawful scope of their official duties.

Scheuer in turn relied on *Pierson* to extend availability of the defense from law enforcement officers to executive officials generally—including administrators in higher education. 416 U.S. 232, 247–48 (1974). After National Guardsmen killed three students at Kent State University in May 1970, their estates sued the Governor of Ohio, the President of Kent State, and various other officials for damages under Section 1983. *Id.* at 234. Building on *Spalding*, the Court limited executive officer immunity to "matters committed by law to his control or supervision." *Id.* at 247 (quoting *Spalding*, 161 U.S. at 498).

The Court held that context mattered:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, **the variation being**

> **dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action** on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247–48 (emphasis added). That is, the Court expressly stated that variations in circumstances officials face dictate the availability of qualified immunity. As Justice Thomas put it in *Hoggard*, and as the case before this Court illustrates, university administrators cannot typically claim to encounter the same challenges as law enforcement officers that would prevent them from reasonably appreciating the boundaries of their power. 141 S. Ct. at 2422.

Crucially, the *Scheuer* Court premised the availability of qualified immunity to executive officials on the concept that they do sometimes need to act like police officers when ascertaining facts on curtailed timelines, as in Kent State with the decision to deploy the National Guard. *Scheuer*, 416 U.S. at 246–47. *Scheuer*, therefore, asked whether an official's actions were reasonable, relative to the scope of their lawful authority—a question which the Court would later hold depends on whether the law, at the time, was "clearly established."

B. The "clearly established" standard incorporates common law limitations on immunity for officials.

Per the Supreme Court's instruction that the availability of qualified immunity to executive officials is limited by the bounds of their lawful authority, *see Pierson*, 386 U.S. at 555; *Sheuer*, 416 U.S. at 247–48, the operative question became whether officials could reasonably ascertain those boundaries—in other words, whether the law was "clearly established" at the time of their unconstitutional act. *Wood v. Strickland*, 420 U.S. 308, 322 (1975), *abrogated by Harlow*, 457 U.S. 800. Building on doctrine from prior cases, the "clearly established" standard maintained the requirement that unconstitutional acts of police officers and university officials must be considered differently for purposes of granting immunity.

The Supreme Court first added the words "clearly established" to its qualified immunity calculation in *Wood*, 420 U.S. at 322. Relying upon common law and public policy to extend protection from liability to school board members, the Court held damage awards lie only where officials act "with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.* In *Procunier v. Navarette*, the Court thereafter

held that, under *Wood*'s application of the *Scheuer* standard, immunity would be unavailable to prison officials "if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." 434 U.S. 555, 562 (1978).

Each of these cases incorporated the common law calculation for qualified immunity first described for police in *Pierson* and made more broadly available in *Scheuer*. *Wood* identified both "subjective" and "objective" tests in *Scheuer*. 420 U.S. at 321. The Court established that framing the objective test with reference to clearly established law "imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system." *Id.* at 321–22. This approach recognized the importance of considering variation in offices when deciding whether to grant qualified immunity: The job of university administrators, for example, will necessarily require a different kind of

deliberative ability than that of police officers, granting the former greater opportunity to understand the boundaries of their authority.

In *Butz*, the Court announced a policy interest in ensuring officials "are not harassed by frivolous lawsuits." 438 U.S. at 507–08.[5] Even so, the Court maintained the *Scheuer* test would serve this interest, and held executive officials were entitled **only** to the qualified immunity described in *Scheuer*. *Id.* Emphasizing the importance of damages as a tool to prevent erosion of constitutional protections, the Court cited to *Scheuer* and *Pierson*'s adoptions of common law protections in concluding that "insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 504–07. In relying on *Scheuer*, the Court maintained an immunity doctrine in which plaintiffs could still obtain damages against officials whose actions exceeded the reasonably comprehensible constitutional boundaries of their authority.

[5] While *Butz* considered the actions of federal officials, the Court held it was "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials." *Id.* at 504.

C. The objective reasonableness test retains the requirement that officials act within the scope of their discretion.

The Supreme Court eventually jettisoned *Scheuer*'s "good faith" element but, even in doing so, held onto the requirement that courts consider the scope of an official's responsibilities and discretion when granting qualified immunity. *Harlow*, 457 U.S. at 815. University administrators, therefore, with greater opportunity to apprehend the limits of their authority, still receive less protection from suit than police officers.

The *Harlow* Court held the availability of qualified immunity would no longer depend on an official's subjective intent—which could lead to issues of disputed fact and, therefore, trial—but should instead rest only on the objective element of the *Scheuer* inquiry, which could be resolved at summary judgment without broad-reaching discovery. *Id.* at 818. This, the Court opined, would relieve the societal costs of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," in addition to the danger that failure to dismiss "insubstantial lawsuits" without trial would cause officials to hesitate in the discharge of their

duties. *Id.* at 814. Under the new rule, government officials would be immune from liability for damages as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

However, even under that new standard with greater emphasis on avoiding protracted litigation, qualified immunity for executive officials still rested, as had been so in *Scheuer*, on "the objective reasonableness of an official's conduct." *Id. Davis v. Scherer* soon after expressly confirmed that, although *Scheuer* and *Wood* applied separate inquiries—objective reasonableness and subjective state-of-mind—*Harlow* abandoned only the subjective element. 468 U.S. at 191. This left in place the requirement that courts consider the variation in "scope of discretion and responsibilities of office" when determining whether executive officials receive immunity. *Scheuer*, 416 U.S. at 247. Therefore, *Harlow*'s "reasonable person," and the rights of which they "would have known," would vary depending on those same factors. *Harlow*, 457 U.S. at 818.

Even while creating a new rule, *Harlow* retained the recognition, originating at common law, that immunity should lie only for officials whose actions reasonably fell within the scope of their lawful power. The

objective test—the test for qualified immunity that persists to this day—examines the boundary of an official's authority, as a "reasonable person" in their position would understand it at the time of their actions. As the development of the doctrine demonstrates, this means university administrators, unburdened by circumstances requiring them to exercise discretion at a moment's notice, should receive less protection from suit than police officers.

III. "Objective Reasonableness" Requires Different Treatment of Administrators From Police Officers in Qualified Immunity Analysis.

The Supreme Court has consistently maintained that immunity should be granted only to executive officials whose actions reflect a reasonable decision for someone in their position, even as subsequent cases honed the definition of "clearly established law" as a point of reference for the boundary of an official's constitutional power. *Anderson*, 483 U.S. at 640. Exigent circumstances may make it difficult for police officers to determine whether the facts of a particular scenario permit them to constitutionally make an arrest or use force. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2018). But university officials do not face this issue when enforcing policies that violate the First Amendment,

and this Court has in the past denied qualified immunity to a university administrator who violated the First Amendment without a case specifically on point. *Kesterson*, 967 F.3d 519, 526.

A. "Clearly established law" still sets "reasonableness" as the boundary.

After *Harlow*, whether the law was "clearly established" at the time of an alleged constitutional violation represented an objective test that measured whether reasonable administrators would have understood the lawful boundaries of their authority. In *Anderson*, the Court called "objective legal reasonableness" the "touchstone of *Harlow*." 483 U.S. at 639. Holding the *Harlow* standard does not deny officials immunity based on "abstract" allegations of constitutional violations such that it renders qualified immunity a mere "rule of pleading," the Court elucidated the meaning of "clearly established" as follows:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: **The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right**.

Id. at 639–40 (emphasis added). The Court would continue to rely on this understanding in its subsequent cases, though it would sometimes describe it in different ways.

In *Hope*, the Court rejected the Eleventh Circuit's assertion that law is only "clearly established" where the facts of previous cases are "materially similar," holding, as in *Anderson*, that the phrase requires only that a reasonable official would recognize the violation. 536 U.S. at 739. The Court equated this standard to the "fair warning" to which defendants are entitled in criminal actions for willfully, and under color of law, depriving a person of constitutional rights. *Id.* at 739–40 (citing *United States v. Lanier*, 520 U.S. 259, 269 (1997) (equating, in turn, the notice of unlawfulness necessary to substantiate a criminal violation to the standard for qualified immunity)).

In *al-Kidd*, the Court introduced the idea that, for the law to be "clearly established," it must be "beyond debate." 563 U.S. at 735, 741. However, even this description of the Court's conception of qualified immunity did not narrow the path available to plaintiffs seeking damages any further than *Anderson*, as it expressly maintained the standard articulated in that case. *Id.* Granting qualified immunity to the

U.S. Attorney General, who allegedly authorized U.S. Attorneys to lawfully obtain material-witness warrants to arrest terrorism suspects whom they did not have probable cause to arrest otherwise, the Court advised that courts should "not define clearly established at a high level of generality," such that general propositions, such as "unreasonable search or seizure violates the Fourth Amendment," are of little help to the inquiry. *Id.* at 742.

However, in *al-Kidd*, the Court **also** noted that the "clearly established" test does "not require a case directly on point." *Id.* at 741. Relying on *Anderson*, the Court indicated instead that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* For even this proposition, however, the Court insisted on maintaining the objective reasonableness test as set forth in *Anderson*, simultaneously holding that a "clearly established" right means "every 'reasonable official would [have understood] that what he is doing violates that right.'" *Id.* (quoting *Anderson*, 483 U.S. at 640). Consequently—particularly in light of *al-Kidd*'s addition of "every" to this quote from *Anderson*—the words "beyond debate" should be understood to mean "beyond debate among reasonable officials." This is

consistent with the reasonable apprehension, first described in *Scheuer*, that every executive official should have regarding the constitutional boundaries of their discretion. It is also in line with *Hope*'s articulation that "clearly established" means reasonable officials have been given "fair warning" of those boundaries. 536 U.S. at 741.

The Court's First Amendment cases after *al-Kidd* have confirmed this understanding of the "clearly established" standard. In *Reichle v. Howards*, the Court *expressly* equated *al-Kidd*'s "beyond debate" language to its "every reasonable official" test:

> To be clearly established, a right must be sufficiently clear "that every reasonable official would have understood that what he is doing violates that right." **In other words**, "existing precedent must have placed the statutory or constitutional question beyond debate."

566 U.S. 658, 664 (2012) (citations and brackets omitted, emphasis added). Likewise, in *Wood v. Moss*, the Court cited *al-Kidd* for the proposition that the right allegedly violated must have been "clearly established" at the time, while describing the dispositive inquiry as "whether it would [have been] clear to a reasonable officer" in the agents' position "that [their] conduct was unlawful in the situation [they]

confronted." 572 U.S. 744, 758 (2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).[6]

This Court likewise relied on *Anderson*, *Hope*, and *al-Kidd* in holding the "*sine qua non* of the 'clearly established' inquiry is 'fair warning'" and that "there does not need to be a case directly on point," to provide such warning. *Cahoo*, 912 F.3d at 898. From its inception in *Scheuer*, qualified immunity has required courts to consider the responsibilities and discretion of the office in question in deciding whether to grant qualified immunity. *Anderson* and its progeny make clear that applying the objective reasonableness test requires understanding "clearly established" law **relative to** the variations in these responsibilities, which inform the reasonable official's understanding of the limits of their power. Consequently, the "reasonable official" concept itself varies with the responsibilities of office, requiring varying measures of protection under qualified immunity for university administrators and polices officers.

[6] *See also Lane v. Franks,* 573 U.S. 228, 243 (2014) (citing *al-Kidd* for the "clearly established" standard while holding the relevant question was whether a school administrator could have reasonably believed his actions were constitutional).

B. Exigent circumstances differentiate the acts of police from those of university administrators.

The job of the reasonable university administrator differs greatly from that of the reasonable police officer, and the Supreme Court has articulated why: Unlike the day-to-day discretionary acts of a university administrator, police officers' responsibilities require deciding whether to arrest or use force at a moment's notice, often in life-or-death situations. In *Kisela*, a woman shot by police sued the officer for using excessive force in violation of the Fourth Amendment. 138 S. Ct. at 1151. She had been holding a kitchen knife and, shortly after the officer's arrival, moved toward another woman, despite officers' multiple commands to drop the knife. *Id.* The Court held the officer was entitled to qualified immunity. *Id.* at 1154–55.

Citing *al-Kidd*, the Court declined to define the unconstitutional use of excessive force by police officers at a high level of generality. *Id.* at 1152. But it went on to make clear that specificity is "especially important in the Fourth Amendment context," as "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Id.* at 1152–53 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). This

approach recognizes the reasonableness of a police officer's conduct will necessarily depend on specific facts of the situation the officer faces, in circumstances that require officers to exercise on-the-spot discretion. In *Kisela*, within "perhaps just a minute" of arriving in response to a report of a woman "hacking a tree with a kitchen knife," the officer encountered a woman of the suspect's description who ignored officers' commands and moved with a knife toward another person. *Id.* at 1151. As the Court pointed out, the officer had only a moment to determine whether exercising the discretion to use force in those circumstances would violate the Constitution.

University administrators will rarely (if ever) be confronted with such a situation. The history of the qualified immunity doctrine under Section 1983 dictates that courts should not grant so broad a protection as would allow officials to ignore the constitutional boundary of their authority in circumstances that allow that boundary to be reasonably ascertained. The administrator has neither the powers of arrest nor use of force, so need not evaluate at a moment's notice whether discretion counsels the use of either. The typical situation subject to a university administrator's exercise of discretion, rather, permits both investigation

of facts and determinations regarding the constitutionality of any proposed action. *Scheuer*, filed in the wake of the Kent State shootings, illustrates the exception that proves the rule: Rarely will an administrator have to decide whether to, *e.g.*, request immediate assistance from the National Guard—and, even then, duty requires only the law enforcement officer, not the administrator, to decide whether circumstances constitutionally permit actual use of force.

More typical for a university administrator is another, more recent, Kent State case, in which this Court confronted the question of qualified immunity in the First Amendment context. *Kesterson*, 967 F.3d at 519. After a Kent State student athlete reported that her softball coach's son had sexually assaulted her, the coach retaliated by removing the student from her starting shortstop position, among other alleged adverse treatment over the course of the season. *Id.* at 525.

This Court held the law prohibiting a coach at a state university from retaliating against a student athlete for their speech had been clearly established at the time of the events. *Id.* at 525–26. In doing so, the Court followed the standard relied on in *al-Kidd*, holding "[u]nless a reasonable official, confronted with the same facts, would know that the

challenged actions violate the law, qualified immunity bars liability." *Id.* at 524. While the Court cited dicta from an earlier case in this Circuit for the proposition that coaches cannot retaliate against players "for reporting improprieties," it principally relied on several other statements of law that, together, established that reasonable officials should have known the coach's conduct was unconstitutional, namely:

> For decades, employees at "state colleges and universities" have known that those institutions "are not enclaves immune from the sweep of the First Amendment." *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Students may exercise their First Amendment rights unless doing so would "materially and substantially disrupt" school operations. *see Healy v. James*, 408 U.S. 169, 189 (1972); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272, (1988). And school officials may not retaliate against students based on their protected speech. *see Papish* 410 U.S. at 670; *see also Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001).

Id. at 525.

The circumstances in *Kesterson* more accurately reflect the typical case of First Amendment violation by university officials, as compared with Fourth Amendment cases involving police. This Court correctly recognized that a reasonable official in the softball coach's position had every opportunity to understand the constitutional boundaries of their power prohibited acting against protected expression. Such a ruling

adheres to the Supreme Court's qualified immunity doctrine, from *Scheuer* through *al-Kidd*, measuring whether the law is "clearly established" relative to the responsibilities and discretion of office. That is the doctrine this Court must maintain when evaluating Dr. Shehata's claims—and it instructs that the Court should deny defendants qualified immunity and hold them accountable for exceeding the easily ascertainable boundaries of their constitutional authority in retaliating against Dr. Shehata.

CONCLUSION

To ensure that public university faculty like Dr. Shehata are able to successfully vindicate their First Amendment rights when violated, this Court should reverse the decision below.

Dated: February 22, 2022

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