No. 22-293

In The Supreme Court of the United States

ANTHONY NOVAK,

Petitioner,

v.

CITY OF PARMA, OHIO, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an officer is entitled to qualified immunity for arresting an individual based solely on speech parodying the government, so long as no case has previously held the particular speech is protected.

2. Whether the Court should reconsider the doctrine of qualified immunity.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. Recently, FIRE expanded its mission to protect free expression beyond colleges and universities.[2] It currently represents various plaintiffs in lawsuits seeking damages for First Amendment violations under 42 U.S.C. § 1983.

Because of its decades of experience defending freedom of expression, FIRE is keenly aware of the need for a legal remedy when government officials violate First Amendment rights on- and off-campus. FIRE writes to urge the Court to grant *certiorari* and reverse the decision below, making clear that courts should preserve that legal remedy and deny qualified immunity when clearly established First Amendment

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[1] Under Rule 37.6, FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. Counsel for all parties consent to FIRE filing this brief, and FIRE provided timely notice under Rule 37.2.

[2] Formerly known as the Foundation for Individual Rights in Education, FIRE recently changed its name to reflect its expanded mission.

principles would have given public servants fair warning of a constitutional violation, especially when the officials responsible had time to recognize those principles.

SUMMARY OF THE ARGUMENT

Anthony Novak lampooned the government. He exercised a form of expression so rooted in our Nation's tradition that even those who find parody distasteful must concede the First Amendment protects it. Yet the Parma, Ohio police chose to arrest Novak for his protected speech instead of honoring their oath to obey the Constitution.

Novak's plight exemplifies an alarming wave of government officials criminalizing and punishing exercises of clearly established First Amendment rights. Upholding Section 1983's promise of a damages remedy against these abuses is essential to preserving expressive freedoms. Indeed, damages are often the only remedy available for First Amendment violations.

That is why denying officials qualified immunity for First Amendment violations should be the rule, not the exception. Above all, courts should deny qualified immunity when officials violate the First Amendment despite having time to recognize the established constitutional principles limiting their acts. As the Court explained in *Hope v. Pelzer*, when settled constitutional principles "apply with obvious clarity" to give "fair warning" of a constitutional violation,

that satisfies the "clearly established" question and defeats qualified immunity.[3]

Yet courts keep granting qualified immunity even for obvious First Amendment violations. This problem suggests that courts are struggling with mixed signals about "fair warning" and "clearly established." More than once, the Court has stressed that plaintiffs need not produce factually similar precedent to show an official violated a "clearly established" right.[4] But at other times, the Court has suggested that factually similar precedent is needed to show a "clearly established" right and defeat qualified immunity.[5]

So even when settled First Amendment principles show an obvious violation, courts still grant officials qualified immunity absent factually similar precedent. Of course, analogous precedent can also overcome qualified immunity. But the need for factual similarity fades absent exigent circumstances, as is usually the case with First Amendment violations. At bottom, when established principles show an obvious First Amendment violation, the inquiry ends and a court should deny qualified immunity.

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[3] 536 U.S. 730, 741 (2002).

[4] *Id.*; *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

[5] *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam); *City of Tahlequah, Okla. v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam).

But the Sixth Circuit did the opposite here. At first, it recognized Novak's "clearly established" First Amendment right to parody the government.[6] Yet it later affirmed qualified immunity because Novak could not show precedent with matching facts.[7]

It defies the heart of our constitutional order to deny citizens like Novak a remedy just because no official in the past so blatantly violated the First Amendment. Both citizens and the Constitution itself expect courts to protect free expression, not officials who trample it.

Novak's case invites the Court to fix this problem and protect free expression against obvious First Amendment violations by taking two steps. *First*, reaffirming that established First Amendment principles suffice to give "fair warning" of an obvious constitutional violation, even absent on-point precedent. *Second,* making clear that the case for qualified immunity fades when officials violate First Amendment rights absent exigent circumstances, as is typical. These steps will also restore constitutional accountability more closely to Section 1983's text and purpose.

For these reasons, *amicus* FIRE urges the Court to grant *certiorari*.

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[6] *Novak v. City of Parma*, 932 F.3d 421, 424, 427 (6th Cir. 2019) ("*Novak I*").

[7] *Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022) ("*Novak II*").

ARGUMENT

I. Officials Regularly Violate Established First Amendment Rights On- and Off-Campus.

Over decades, this Court has recognized steadfast First Amendment principles protecting expression from the state's coercive power. These include the rights to speak out on matters of public concern,[8] criticize public officials,[9] and parody public figures.[10] They also include the freedom to refuse uttering something one does not believe.[11] And the Court has cemented clear First Amendment protection for lawfully gathering news and publishing it without prior restraint.[12]

Yet officials still defy these essential First Amendment protections. In over 20 years of defending speech on college campuses, FIRE has seen administrators respond to student and faculty exercises of core First Amendment rights with

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[8] *See, e.g., Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988).

[9] *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *Bridges v. State of California*, 314 U.S. 252, 270 (1941).

[10] *Hustler,* 485 U.S. at 56–57 (1988); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

[11] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

[12] *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

censorship, suspension, termination, and more. Just consider these recent examples:

- ***Colleges punish student groups because of their viewpoint.*** A conservative student group at Clovis Community College wanted to post anti-abortion flyers on a central bulletin board maintained for student expression. Rather than uphold the group's First Amendment right to use a public forum regardless of its viewpoint,[13] the college banished the flyers to a kiosk on campus's edge.[14] Similarly, after student groups at Tennessee Technological University hosted a drag show at the school's theater—an obvious public forum—the university's president canceled the groups' other events and launched an investigation.[15] So too did a student group advocating for nationalized healthcare at Eastern Virginia Medical School face blatant viewpoint discrimination. Claiming to exclude

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[13] *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975).

[14] Order Granting Motion for Preliminary Injunction, *Flores v. Bennett,* No. 1:22-cv-01003-JLT-HBK (E.D. Cal. Oct. 14, 2022); "Clovis Community College: California College Censors Conservatives on Campus," FIRE (2022) https://www.thefire.org/cases/clovis-community-college-california-college-censors-conservatives-on-campus [https://perma.cc/6ALC-9U3Z].

[15] Amanda Nordstrom, *FIRE dresses down Tennessee Tech for punishing student groups over drag show,* FIRE (Sep. 19, 2022), https://www.thefire.org/cases/tennessee-technological-university-president-punishes-student-groups-over-drag-show [https://perma.cc/U3MR-8C4K].

"clubs based on opinions," the student government denied the group formal recognition, despite recognizing groups based on Christian fellowship, pro-choice advocacy, and social inequality.[16]

- ***Faculty terminated for controversial viewpoints.*** After Professor Jeff Klinzman shared "antifascist" views on his Facebook account, an offended few insisted that Kirkwood College terminate Klinzman. Rather than back the professor's right to speak as a private citizen on matters of public concern free from retaliation,[17] the public college placed him on leave and forced him to resign.[18] Likewise, after professor Thomas Thibeault criticized East Georgia College's sexual harassment policy

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[16] *Eastern Virginia Medical School: Medical Student Unconstitutionally Prohibited from Starting Student Club Promoting Healthcare Reform,* FIRE (2021) https://www.thefire.org/cases/eastern-virginia-medical-school-medical-student-unconstitutionally-prohibited-from-starting-student-club-promoting-healthcare-reform [https://perma.cc/HQA9-85JC].

[17] *Lane v. Franks,* 573 U.S. 228, 240 (2014).

[18] Adam Steinbaugh, *Kirkwood Community College parts ways with 'antifa' professor, raising First Amendment concerns*, FIRE (Aug. 27 2019), https://www.thefire.org/kirkwood-community-college-parts-ways-with-antifa-professor-raising-first-amendment-concerns [https://perma.cc/A96Q-Q2QW].

because it offered no protection for the accused, the college fired him.[19]

- ***Censoring the student press.*** At the University of California—San Diego, a satirical student newspaper mocked "safe spaces." Rather than uphold the newspaper's right to satirize public issues, the chancellor-backed student government defunded *all* student print publications.[20] And at Haskell Indian Nations University, after the award-winning school newspaper criticized the administration, the president forbade the student editor-in-chief from basic newsgathering and threatened discipline.[21]

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[19] *East Georgia College Settles Lawsuit for $50,000 After Firing Professor Who Criticized Sexual Harassment Policy*, FIRE (Sept. 6, 2021), https://www.thefire.org/east-georgia-college-settles-lawsuit-for-50000-after-firing-professor-who-criticized-sexual-harassment-policy [https://perma.cc/3S5E-LQ75].

[20] 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 [https://perma.cc/TMC5-EWC8].

[21] *Haskell Indian Nations University: Administration Sends Censorial "Directives" to Student Newspaper Editor and University Employees*, FIRE (2020), https://www.thefire.org/cases/haskell-indian-nations-university-president-sends-directive-to-student-newspaper-editor-about-respect-for-administrators [https://perma.cc/P9QC-NV3Z].

These examples have two common threads. First, clear and longstanding First Amendment principles made it obvious that the students or faculty were engaged in protected speech. Second, administrators defied those principles despite having ample time to recognize them. No reasonable administrator would have done the same.

One can find equally glaring examples off-campus. Start with the Parma police. Novak's Facebook page dripped with obvious parody. Pet. for Cert. at 5–6. Yet the Parma police *publicly announced* a criminal investigation of the page. *Novak II*, 33 F.4th at 303. Then, *after* Novak took his page down, they manufactured an arrest warrant, locked Novak up, and dragged him through a criminal trial. *Id.* All despite the "clearly established" right to parody the government rooted in our Nation's history. *Novak I,* 932 F.3d at 424.

Or consider the case of Priscilla Villarreal, a citizen journalist on the Texas border known for her hard-nosed reporting on local police and government. Months after she asked a police officer for newsworthy information—something the press does every day—local officials orchestrated her arrest under an obscure Texas law. *Villarreal v. City of Laredo, Texas*, 44 F.4th 363, 368-69 (5th Cir. 2022), *pet. for reh'g filed*.[22]

Or take Noah Petersen, an Iowa man attending a city council meeting to peacefully criticize the police,

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[22] *Amicus* currently represents Villarreal before the United States Court of Appeals for the Fifth Circuit.

a First Amendment staple. When he kept exercising that right over the mayor's objections, police handcuffed him, forced him from the meeting, and charged him with disorderly conduct—twice.[23]

These examples, like those from college campuses, show officials defying clear First Amendment principles to punish critics and unpopular speech. And they show something more: a pattern of officials abusing "laws not for their intended purposes but to silence those who voice unpopular ideas." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part). If officials escape accountability for these abuses, "little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age." *Id.*

That danger to free expression stresses why the Court should take this case and emphasize that courts must not deny a legal remedy for obvious First Amendment violations.

II. Reaffirming the "Fair Warning" Standard Will Preserve Remedies for Obvious First Amendment Violations.

Applying *Hope*'*s* fair warning standard, courts *should* readily deny qualified immunity for obvious

[23] William Morris, *Activist's arrests at Newton council meetings raise First Amendment concerns*, Des Moines Register (Oct. 27, 2022), https://www.desmoinesregister.com/story/news/crime-and-courts/2022/10/27/iowa-activist-faces-criminal-charges-calling-newton-mayor-police-chief-fascists/69593477007 [https://perma.cc/C6SM-J8C4].

First Amendment violations, even without factually similar precedent. Yet courts keep demanding on-point precedent for obvious violations. This problem reveals confusion about the flexibility of the "clearly established law" test in the First Amendment context.

This case offers a chance to resolve any confusion, affirm that established First Amendment principles meet *Hope's* fair warning standard, and stop courts from twisting qualified immunity into a one-size-fits-all doctrine.

A. Without clarity, courts will continue granting qualified immunity for obvious constitutional violations.

Qualified immunity does not shield government officials who violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the Court has reiterated, "clearly established" does not require precedent with matching facts, because "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741; *see also Anderson*, 483 U.S. at 640; *al-Kidd*, 563 U.S. at 741. Rather, as the Court explained in *Hope*, courts should deny qualified immunity if the law gave "fair warning" to an official that their conduct was unlawful. 536 U.S. at 740–41. In essence, "fair warning" embraces obvious violations: "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.*

(quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997) (internal quotation marks and citation omitted)).

The Court's recent decision in *Taylor v. Riojas* shows *Hope* is alive and well. 141 S. Ct. 52 (2020) (per curiam). There, the Court looked to *Hope* in reversing a grant of qualified immunity, because "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." *Id.* at 53–54 (citing *Hope*, 536 U.S. at 741); *see also McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (Mem.), *granting, vacating, and remanding*, 950 F.3d 226 (5th Cir. 2020) (directing reconsideration "in light of *Taylor*").

But other decisions involving the urgent use of force have muddled the fair warning standard and the Court's teaching that plaintiffs can show a "clearly established" right without on-point precedent. For example, the Court *per curiam* recently reversed a denial of qualified immunity where "neither the panel majority nor the respondent has identified a single precedent finding a Fourth Amendment violation under similar circumstances." *City of Tahlequah,* 142 S. Ct. at 12. That same day, the Court issued *Rivas-Villegas*, also reversing a qualified immunity denial. 142 S. Ct. at 9. While *Rivas-Villegas* notes that even Fourth Amendment violations can be obvious, it also suggests that *only* an on-point "Supreme Court case" can overcome qualified immunity absent an obvious violation. *Id.* at 8.

The disparity between decisions like *Hope* and *Taylor* and those like *Rivas-Villegas* and *City of Tahlequah* creates ambiguity for courts. If this ambiguity lingers, some courts will feel obliged to grant qualified immunity absent on-point precedent, even when First Amendment principles "apply with obvious clarity" to show a constitutional violation any reasonable official would recognize. That outcome imperils free expression.

B. A rigid view of "clearly established" endangers free expression.

When lower courts squeeze even obvious constitutional violations into a rigid test demanding matching precedent, it undermines constitutional accountability by "letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) (emphasis in original). A citizen who endures a blatant First Amendment violation should not be denied a remedy just because no official before dared to act so brazenly.

Novak's plight exemplifies this problem. Any reasonable person would have viewed Novak's page as parody. Even the Sixth Circuit first rejected the officers' "claim that his Facebook page was false and meant to mislead the public, not a parody," stating, "they are wrong to think that we just look to a few confused people to determine if the page is protected parody." *Novak* I, 932 F.3d at 427. What's more, it strongly hinted that Novak's arrest was an obvious

First Amendment violation, recognizing "[o]ur Nation's long-held First Amendment protection for parody. . . ." *Id.* at 428 (citing *Hustler*, 485 U.S. at 56–57).

Yet the Sixth Circuit still granted qualified immunity because "Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech." *Novak II*, 33 F.4th at 305. Neither of those factors would have made the parody less obvious to a reasonable official. After all, "the genius of parody is that it comes close enough to reality to spark a moment of doubt in the reader's mind before she realizes the joke." *Novak I*, 932 F.3d at 427 (citing *Campbell*, 510 U.S. at 580).

By holding Novak to a near-impossible test, the Sixth Circuit gave government officials the breathing room that Novak's protected parody deserved. This is not a one-off result. In fact, it echoes a recent grant of qualified immunity to a detective who orchestrated a man's arrest for posting obvious political satire about COVID-19 and police shooting "THE INFECTED"—the hashtag "#weneedyoubradpitt" making the satire even more obvious. *Bailey v. Iles*, Case 1:20-cv-01211, 2022 WL 2836239, at *1, 8 (W.D. La. July 20, 2022).

Cases from college campuses often fare no better. For instance, University of Kentucky administrators terminated professor Ehab Shehata for refusing to sign a sworn statement admitting to fraud—something he vehemently denied. *Shehata v. Blackwell*, No. 3:20-cv-00012-GFVT-EBA, 2021 WL 4943421, at *13 (E.D. Ky. Oct. 22, 2021). Although Dr. Shehata showed "the law clearly establishes that a

public employee's free speech rights encompass the right not to speak," the Sixth Circuit affirmed qualified immunity for the administrators because the cases establishing that right were not factually similar. *Cunningham v. Blackwell*, 41 F.4th 530, 533–44 (6th Cir. 2022), *reh'g denied*, Aug. 22, 2022.

Or take Paul Hunt, a former medical student at the University of New Mexico. Hunt sued university officials after they punished him for speaking out on his personal Facebook page about political issues like abortion, accusing some of "supporting genocide against the unborn." *Hunt v. Bd. of Regents of the Univ. of N.M.*, 792 Fed. App'x 595, 597–98 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 885 (2020). The Tenth Circuit recognized the First Amendment principles forbidding Hunt's punishment: "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 602–03 (quoting *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973)). Still, the court affirmed qualified immunity because no precedent "sent sufficiently clear signals to reasonable medical school administrators that sanctioning a student's off-campus, online speech for the purpose of instilling professional norms is unconstitutional." *Id.* at 605.

The effects of these cases are grim. Novak's plight creates a fear of arrest over political parody, chilling expression that "[f]rom the viewpoint of history it is clear [ ] our political discourse would have been considerably poorer without. . . ." *Hustler,* 485 U.S. at 55. College faculty in the Sixth Circuit risk retaliation without remedy if they refuse compelled speech. And

professional students in the Tenth Circuit must choose between self-censorship or risking punishment for political speech, with scant recourse.

C. Reaffirming *Hope*'s "fair warning" standard will ensure broad protection for free expression.

To avoid those speech-chilling results, the Court should make clear that established First Amendment principles can "apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful," *Hope*, 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 271). Some recent decisions offer guidance.

For example, in the Fifth Circuit, a panel majority recently denied qualified immunity for the officials who orchestrated Priscilla Villarreal's arrest for asking a police officer about newsworthy facts. *Villarreal*, 44 F.4th at 371–73. Relying on *Hope*'s "fair warning" standard, the panel majority found Villarreal alleged an obvious violation of her constitutional rights based on several established First Amendment principles. *Id.* at 370–71. Judge Ho summed it up well: "It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment." *Id.* at 373.

Likewise, the Ninth Circuit denied a detective qualified immunity after he singled out activists for arrest because they "chalked" anti-police messages on public sidewalks. *Ballentine v. Tucker,* 28 F.4th 54, 66–67 (9th Cir. 2022). The court held that "a

reasonable officer in Detective Tucker's position had fair notice that the First Amendment prohibited arresting Plaintiffs for the content of their speech, notwithstanding probable cause" and a lack of factually identical precedent. *Id.*; *see also Thompson v. Ragland*, 23 F.4th 1252, 1255–56, 1259–60 (10th Cir. 2022) ("To be sure, we cannot point to a precedent with identical facts. But the law was clear that discipline cannot be imposed on student speech without good reason.")

These cases show how established First Amendment principles give "fair warning" of a violation, even without on-point precedent. And they also highlight a key distinction between "fair warning" in the First Amendment context and "fair warning" for a police officer making a split-second use-of-force decision under duress. The latter might require factually closer precedent—if the violation is not obvious. *See Mullenix v. Luna,* 577 U.S. 7, 12 (2015) (per curiam). As *amicus* explains next, the availability of qualified immunity is best confined to exigent circumstances, something usually absent from First Amendment violations.[24]

Amicus urges the Court to confirm that courts should not grant qualified immunity where clear First Amendment principles give fair warning of a constitutional violation, even without factually similar precedent. This is a key step toward reversing qualified immunity's slide into a one-size-fits-all

[24] *See infra* Section III.

defense that denies a remedy for obvious First Amendment violations.

III. Because Qualified Immunity Is Best Limited to Exigent Situations, It Is Hardly Apt for the First Amendment Context.

Novak's plight presents another way for the Court to protect freedom of expression and stop qualified immunity from expanding to absurd results. As Justice Thomas recently asked: "But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari).

Amicus urges the Court to answer that question by affirming that absent exigent or extraordinary circumstances, courts should seldom grant qualified immunity to government officials who violate the Constitution. This principle is especially fitting in the First Amendment context, where exigent circumstances are largely absent.

Not even the usual justifications for qualified immunity support an inflexible doctrine that lets officials escape consequences when they defy clear First Amendment principles warning of an obvious violation. In the end, confining qualified immunity to exigent or exceptional circumstances furthers the history and purpose of Section 1983, guaranteeing

that remedies and accountability for constitutional violations are the rule rather than the exception.

A. Qualified immunity should not be governed by a one-size-fits-all standard.

As *amicus* explains, too often lower courts wrongly reduce qualified immunity to a rigid test: is there a case on all fours?[25] The result is that "the same qualified immunity standard applies regardless of the circumstances under which the officer acted. Qualified immunity thus creates a least common denominator that favors government officials. It operates on the assumption that officers make all decisions under the worst-case scenario."[26]

Nothing justifies this inflexible approach. Even the "good-faith" common law immunity for police officers was limited to certain discretionary police duties, like making arrests. *Pierson v. Ray,* 386 U.S. 547, 555 (1967). Arguably, that historical immunity was even more limited, covering only quasi-judicial acts.[27] And there remains a question of why the same qualified immunity inquiry applies regardless of the

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[25] *See supra* Section II.B.

[26] F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 Wake Forest L. Rev. 501, 529 (2021).

[27] William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 116 (2022).

constitutional right at hand.[28] By any measure, there is scant support for the one-size-fits-all standard courts often use. [29]

A flexible approach to qualified immunity is more sensible. After all, different officials exercise different duties in different situations. "Qualified immunity might be particularly forgiving when the relevant actor is, say, a police officer making a split-second decision, as opposed to an executive branch policymaker with access to an expert legal staff."[30] Thus, "immunity is less warranted in situations where officers have more opportunity to ensure that their decisions comply with the law."[31]

The Court should take this case to "mitigate qualified immunity's worst excesses" and clarify that the "clearly established law" standard "need not be the same for split second official decisions as for less

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[28] *E.g., Gonzalez v. Trevino,* 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting).

[29] Against this backdrop, many have questioned the qualified immunity doctrine. *E.g.,* William Baude, *Is Qualified Immunity Unlawful?,* 106 Calif. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 Notre Dame L. Rev. 1797 (2018); *Hessick,* supra note 26*; but see* Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1354 (2021). And Novak has asked the Court to reconsider qualified immunity altogether. Novak Pet. for Cert. at i, 33–36.

[30] Richard M. Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1497, 1545 (2019).

[31] Hessick, *supra* note 26 at 529.

exigent circumstances."[32] An adaptable standard harmonizes with *Hope*, as fair warning of a constitutional violation will differ with the time an official has to consider the law limiting his acts. And it is vital for First Amendment liberties, as courts must not shield officials who defy clear First Amendment principles at free expression's expense.

B. Limiting qualified immunity to acts made under exigent circumstances meets Section 1983's purpose.

"The original system of constitutional remedies worked as follows: If an officer violated one of your constitutional rights, you could sue him as an individual, and you would win because he would have no defense for his wrongful act."[33] And the Court's earlier decisions confirm a history of strict liability for government officials. *E.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Bates v. Clark*, 95 U.S. 204, 209 (1877); *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1836).

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[32] Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation, the Collapse of Constitutional Remedies by Aziz Z. Huq*, 131 Yale L.J. 2126, 2193 n.355 (2022).

[33] Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. Rev. 132, 138, 145–48 (2012); *see generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

At the same time, Congress maintained the power to immunize or indemnify an official.[34] Sometimes it granted petitions for indemnification.[35] And when Congress believed immunity was the right policy, it said so through statute.[36] Only when an official acted within the plain scope of his legal duties would the courts consider granting an official immunity.[37]

In short, "the legal backdrop to Section 1983 promised official accountability, not immunity."[38] With that in mind, Congress included no express immunity in the Ku Klux Klan Act of 1871, the forerunner to Section 1983.[39] That was no accident. Crafted to remedy post-Civil War constitutional violations, Section 1983 was to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired,

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[34] James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871–75, 1924–26 (2010).

[35] *Id.* at 1897.

[36] *Id.* at 1924–25.

[37] *E.g., Spalding v. Vilas*, 161 U.S. 483, 493 (1896).

[38] David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 Cardozo L. Rev. (de•novo) 90, 103 (2022).

[39] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

affording an injured party redress in the United States courts against any person violating his rights as a citizen under claim or color of State authority."[40] So in the decades after the Act's passage, the Court kept treating claims against officials as it had historically done—applying strict liability.[41]

This historical framework and Section 1983's text support cutting off qualified immunity's "worst excesses" that shelter officials at the expense of vindicating constitutional rights.[42] If anything, courts should uphold Section 1983's guarantee of constitutional remedies, at most shielding officials from damages only when difficult circumstances set a high bar for fair warning of a constitutional violation.

C. Traditional reasons for qualified immunity weaken beyond exigent circumstances.

The Court has given various reasons for maintaining qualified immunity. These include the availability of common law immunities;[43] "objective reasonableness" striking a balance between remedy

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[40] Gans, *supra* note 38 at 97–98 (quoting Cong. Globe, 42d Cong., 1st Sess. 376, app. 313 (1871) (internal quotation marks omitted).

[41] *Myers v. Anderson*, 238 U.S. 368, 377–78 (1915); *see also Poindexter v. Greenhow*, 114 U.S. 270, 297 (1885).

[42] *See* Willett, *supra* note 32 at 2193 n.355.

[43] *Pierson,* 386 U.S. at 555.

and immunity;[44] and giving police breathing space when making split-second decisions.[45] But none of these reasons justify immunity for officials who violate the Constitution despite having time to recognize the established constitutional principles forbidding their acts.

In *Pierson,* the Court found common law immunities like probable cause and good faith befitted immunity for police officers sued after they arrested a group of ministers on-the-spot for peacefully sitting in a "Whites Only" area at a Mississippi bus station. 386 U.S. at 557. On its facts, *Pierson* established a limited qualified immunity; one for the unique position of police officers making *immediate* decisions about whether a statute authorizes an act. *Id.* at 555–57. Yet *Pierson* did not identify any common law immunity for officials who made less immediate decisions, including those outside their authorized duties.

If anything, it defies good faith for an official to act unlawfully despite having time to recognize clear constitutional principles limiting the scope of his authority. Thus, any common law immunities *Pierson* relied on do not validate an "across the board" immunity doctrine that shields officials for obvious constitutional violations, regardless of "the precise nature of their duties."[46]

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[44] *Harlow*, 457 U.S. 800.

[45] *Graham v. Connor*, 490 U.S. 386, 396 (1989).

[46] *See* Baude, *supra* note 27 at 116 n.12 (citations omitted).

Nor does the current standard from *Harlow*—"objective reasonableness . . . measured by reference to clearly established law"[47]—validate an immunity doctrine that treats constitutional violations under exigent circumstances the same as more calculated ones. In a forerunner to *Harlow*, the Court explained reasonableness turns on "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." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). So if an official's duties involve no danger and allow time to recognize the constitutional limits to his authority, there is little reason to grant that official qualified immunity when he violates the Constitution, even without on-point precedent.[48]

This outcome aligns with *Harlow's* balancing "the importance of a damages remedy to protect the rights of citizens" against "'the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority.'" 457 U.S. at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). Shielding officials who defy clear constitutional principles does not encourage vigorous exercise of official authority. Rather, it encourages vigorous abuse of that authority. On the other hand, discouraging deliberative abuse of official authority vindicates a damages remedy critical to protecting rights. *Id.*

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[47] *Harlow*, 457 U.S. at 818.

[48] Hessick, *supra* note 26 at 543.

Finally, limiting qualified immunity to exigent or extraordinary circumstances harmonizes with *Hope's* fair warning standard. The more time an official has to reflect on his actions, the more likely he will have fair warning of a constitutional violation.

So at most, "qualified immunity makes more sense in situations where decisions are made under circumstances that increase the likelihood that they will be erroneous," like police making split-second decisions about use-of-force.[49] In those exigent situations, "clearly established law" may require more factual specificity. *E.g. Heien v. North Carolina*, 574 U.S. 54, 66 (2014); *Mullenix*, 577 U.S. at 12 (2015). But courts often twist this into giving any police decision the same deference as a split-second one.[50]

Of course, most decisions police officers and other officials make are not "split-second." Thus, while exigent circumstances may support some deference to police officers on the "clearly established" question, there is no basis to extend that deference to officials acting in less urgent situations. Nor should courts extend that deference to obvious constitutional violations.

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[49] *Id.*

[50] Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261, 322 (2003) ("Many of the lower federal courts have become mesmerized by the concept that police officers are forced to make decisions about the use of force in split seconds.")

By affirming that the "clearly established" question must account for the time an official has to recognize relevant constitutional principles, the Court can preserve constitutional remedies and halt a runaway qualified immunity doctrine.

D. Reining in qualified immunity will protect First Amendment liberties.

As *amicus* explains, decades of decisions have recognized clear First Amendment principles about protections for speech (and refusals to speak).[51] Rarely do government officials lack time to consider those First Amendment principles. For instance, unlike police facing imminent danger on the street, officials reading a mocking Facebook post or administering campus forums have ample time to recognize the First Amendment rights at stake.

So if officials, even police officers, have "premediated plans" to violate a First Amendment right clearly established by settled constitutional principles, it "present[s] an especially weak basis for invoking qualified immunity." *Villarreal*, 44 F.4th at 371. Nor does it matter if officials "turned a blind eye to decades of First Amendment jurisprudence" instead of knowingly violating the First Amendment; a court still should deny those officials qualified immunity. *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021).

In sum, qualified immunity should be an exception for First Amendment violations, not the norm. As

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[51] *See supra*, Section I.

James Madison rightly put it: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong., p. 934 (1794). But if the people have scarce remedy to hold government officials accountable when they flout clear First Amendment principles, the government wields censorial power over the people. This case provides a vehicle to preserve the broad protections for free expression the Founders envisioned by affirming that courts should not shelter officials who defy established First Amendment principles.

CONCLUSION

For all of these reasons, the petition for writ of *certiorari* should be granted.

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