No. 23-274

IN THE
Supreme Court of the United States

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WILLIAM FELKNER,
Petitioner,
v.

JOHN NAZARIAN, ET AL.,
Respondents.

———————————

On Petition for Writ of Certiorari to the Rhode Island Supreme Court

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BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Moral Law is an Alabama-based legal organization dedicated to the strict interpretation of the Constitution as intended by its Framers to ensure the protection of the God-given rights enshrined within. The Foundation believes that the Court's current qualified immunity jurisprudence has led to significant and unjust barriers to the vindication of constitutional rights, particularly in novel circumstances such as the recent Covid-19 pandemic.

Believing that protecting our God-given rights is key to maintaining a free society, the Foundation for Moral Law has filed lawsuits and *amicus* briefs to seek justice for constitutional violations. Today's qualified immunity doctrine has become akin to a "get out of jail free card" for the administrative government official that violates constitutional rights. The doctrine prevents constitutional violations from being brought to justice and stagnates the whole body of constitutional law as a result.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *Amicus Curiae*'s intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amicus Curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

As Judge Willet of the United States Court of Appeals for the Fifth Circuit has noted, "to some observers, qualified immunity smacks 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 v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018). This is not a mere observation. It is now commonplace for courts to acknowledge that a public official violated constitutional rights, but nevertheless hold that he has no liability thanks to qualified immunity. *See e.g.*, *Case v. Ivey*, 542 F. Supp. 3d 1245, 1275 (M.D. Ala. 2021) (finding that a challenged Covid-19 order was "likely a violation of the Free Exercise Clause" under *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), but nevertheless holding defendants protected under qualified immunity).

Today's qualified immunity doctrine has no basis in the Founding era, is detached from its supposed source in law, and should be reworked so that government can be held accountable for violating constitutional rights. In a case like William Felkner's present petition, the unreasonable barrier to justice is particularly stark. Rhode Island College's claim to be a "perspective school" that enables it to discriminate against Felkner's beliefs, ideas, and expression is "palpably unreasonable" under the First Amendment. Yet, only this Court has the power to right this wrong.

ARGUMENT

I. The current qualified immunity doctrine is an unjust barrier to the vindication of constitutional rights and should be reworked.

The facts of this case indicate that it should have been a slam dunk in favor of Felkner's freedom of speech. Rhode Island College is a public college owned by the State of Rhode Island. School officials expressly informed Felkner that his perspective was not favored because it was not liberal enough, and school officials treated him progressively worse over a period of four years until the school ultimately dismissed him from the program. In simplest terms, a public school professed itself to hold an exclusive ideology and failed a student for holding and seeking to express different ideas. Despite such a clear case of First Amendment injury, the court below ruled that the school officials were immune from liability.

The fact that this case has languished since 2007 is a sad testament of our legal system and the barriers to obtaining justice for constitutional injury caused by qualified immunity, a doctrine that has no basis in the Founding, is detached from its origin in the law, leads to "palpably unreasonable" results, and should be reworked.

A. Qualified immunity has no basis in either the Founding Era or Section 1983.

Qualified immunity was born in 1967 with this Court's decision in *Pierson v. Ray*. 386 U.S. 547, 553–558. *Pierson* interpreted 42 U.S.C § 1983 (known as the Ku Klux Klan Act), originally passed in the Civil Rights Act of 1871, finding that police

officers were entitled to the common law defenses of good faith and probable cause in Section 1983 claims for false arrest and imprisonment. *Id.*

Notably, the Court based this holding on the common law at the time Section 1983 was passed, which did not provide "absolute and unqualified immunity" to police. *Id.* at 555. In fact, if we look at the common law of the Founding Era and the nineteenth century, strict liability of public officials for violating the constitution was the rule, and good faith was not a defense. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 56 (2018). Chief Justice John Marshall provides the reasoning for the Founding Era's principle of strict liability of public officials in the 1804 case, *Little v. Barreme*, 6 U.S. (2 Cranch) 170.

Captain George Little had been sued for his capture of a Danish ship, The Flying-Fish during hostilities between America and France in 1799. *Id.* at 176. As Professor Baude explains, the Court held that Captain Little's good-faith reliance on orders issued by President Adam was not a defense to liability—"what mattered was legality." Baude, *supra*, at 56. Despite Chief Justice Marshall's stated personal bias that "though the instructions of the executive could not give a right, they might yet excuse from damages," particularly because of the "implicit obedience which military men usually pay to the orders of their superiors," he nevertheless found that Captain Little must be held to the same standard as public officials at home—that is, strictly liable. *Id.*, *citing Little*, 6 U.S. (2 Cranch) at 179.

The Court also rejected the good-faith defense in claims for constitutional injury in a case immediately after Section 1983's enactment, *Myers v. Anderson*. In *Myers*, state government officials argued they could not be liable for a statute that violated the Fifteenth Amendment ban racial discrimination in voting because they believed in good faith that the law was constitutional. *Myers v. Anderson*, 238 U.S. 368, 378-79 (1915). The Court upheld the lower court's finding of liability. *Id.*

So where did the defense of good faith in *Pierson* come from in the common law? The Court actually told us specifically: "[Section] 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Pierson*, 386 U.S. at 556. In other words, good faith was only a valid defense in *Pierson* because "the lack of good faith" was an element of false-arrest claims at common law. *See* Baude, *supra*, at 53–54, 59.

Following principles of the Founding Era, the original meaning of Section 1983, and even the original reasoning of the *Pierson* decision there should be no qualified immunity of public officials regardless of good faith unless the lack of good faith is an element under the common law of a particular claim.

Claims like Felkner's that allege violations of constitutional rights by public officials should be determined on the basis of strict liability. If there is a question of harshness, then the public official is

not without precedent of remedy. They can petition Congress for indemnification just like in the Founding Era and nineteenth century where it was a regular practice. Baude, *supra*, at 56–57. Congress would be able to use indemnification as both a check that would assist those officials deemed to have pure intentions and also as a way to facilitate broader legislative debate on particular issues.

B. Qualified immunity leads to "palpably unreasonable" results.

A return to the Founding Era's principle for strict liability of public officials for breaking the law and violating the Constitution is necessary because qualified immunity has become "unqualified impunity" that leads to "palpably unreasonable" results.

The absurdity of qualified immunity may be best illustrated by *Jessop v. City of Fresno*, 936 F.3d 937, 939 (9th Cir. 2019). In *Jessop*, police officers stole over $225,000 by seizing $151,380 in cash and $125,000 in rare coins, yet only providing an inventory list of approximately $50,000. *Id.* at 939–940. Because there had not been a case with the exact same facts, the Ninth Circuit held that although stealing $225,000 is "morally wrong, the officers did not have clear notice that it violated the Fourth Amendment." *Id.* at 942.

However, perhaps an even better illustration is an example of the havoc that qualified immunity enabled during Covid-19. In *Case v. Ivey*, the court found that Alabama's "Stay at Home" order likely violated the Free Exercise Clause because it limited

attendance to religious services to fewer than 10 people whereas it had no such limits on visits to big box retailers, liquor stores, or supermarkets. 542 F. Supp. 3d at 1275. However, the court held that because Governor Ivey and State Health Officer Scott Harris did not have "the benefit of the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn*," 141 S. Ct. 63 (2020), the law was not clearly established under qualified immunity, and they could not be liable. *Id.*

There is a major issue with this reasoning that plagues a disturbing number of qualified immunity cases: Governor Cuomo did not have the benefit of *Roman Catholic Diocese of Brooklyn*, either. Yet, he was ultimately still held liable for violating the Free Exercise Clause under the same case law that Governor Ivey and Dr. Harris were found to have likely violated, yet nevertheless were ruled to be immune from.

Qualified immunity has enabled public officials to "shoot first, ask questions" later. In instances of split-second life and death decisions that police officers make, this is understandable. But for officials like governors, mayors, and school presidents who have the benefit of seeking legal counsel—almost always funded by taxpayer dollars—qualified immunity is a palpably unreasonable barrier to the vindication of constitutional rights.

II. Rhode Island College's claim to be a "perspective school" clearly violates the Free Speech Clause of the First Amendment.

As presented to this Court, the issue is whether the doctrine of qualified immunity should apply to the facts of this case.

Some courts have said qualified immunity only applies if the constitutional issue is well settled. As stated *supra*, the Foundation believes the doctrine of qualified immunity should be reworked. Nevertheless, the Foundation further believes the constitutional issue in this case is well-settled—especially in an academic setting in which intelligent people can reflect rather than making rushed decisions, and especially in a state institution in which professors and administrators have ready access to attorneys who can clear up any questions.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

But that is precisely what Rhode Island College has done. By creating a "perspective school" with the

objective of “promoting progressive social change” and reserving the right to discipline or dismiss “anyone who consistently holds antithetical views, “Rhode island College has “prescribe[d] what shall be orthodox” and has “force[d] citizens to confess by word or act their faith therein.”

Because his convictions required him to oppose rather than support Rhode Island SB521 which provided temporary cash assistance to struggling Rhode Islanders, Felkner received an “F” on the assignment even though he had never before received any grade lower than “B+”. Clearly, he was discriminated against in grading and dismissed from an academic program solely because his “perspective” was different from the orthodox position of this “perspective school.”

As this Court stated in *Shelton v. Tucker*, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” 364 U.S. 479, 487 (1960). This Court further stated in *Sweezy v. New Hampshire*:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new

> discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. 234, 250 (1957).

Although this Court has recognized that public elementary and high schools may impose some restrictions on free speech when the speech raises a substantial threat of disruption, *Tinker v. Des Moines Independent Community School District*, even in that case the Court recognized that "[n]either students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969). And this case does not involve a high school but rather a master's degree program at a state college, involving older and more mature students. And there was no disruption whatsoever except possibly to the college's unconstitutional advancement of its leftist "perspective."

The Foundation fails to see any legitimate governmental purpose for creating a "perspective school," nor any purpose at all other than to force a leftist agenda upon the public at the public's expense, but as this Court said in *Shelton v. Tucker*,

"even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. at 488.

A. Rhode Island College's policy is unconstitutional viewpoint discrimination.

This Court has recognized that content discrimination is disfavored, and viewpoint discrimination is highly disfavored. *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Burnett*, 139 S. Ct. 2294 (2019). It is hard to imagine a more blatant case of viewpoint discrimination than has occurred in this case, in which Rhode Island College calls itself a "perspective school" and dismisses a student "who consistently holds antithetical views."

B. Rhode Island College's policy constitutes "compelled speech" in violation of the First Amendment.

This Court has consistently held that a person may not be compelled to express ideas that they disagree with. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (public school students may not be forced to say Pledge of Allegiance); *Wooley v. Maynard,* 430 U.S. 705 (1977) (no person can be forced to display New Hampshire "Live Free or Die" motto on license plate); *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (crisis pregnancy center may not be forced to display information directing people to abortion clinics); *303 Creative v. Elenis*, 600 U.S. 570 (2023) (producer of Christian

videos may not be compelled to create video of same-sex wedding).

But that is exactly what Rhode Island College has done. By compelling Felkner to argue for viewpoints that are contrary to his convictions and to lobby for legislation that he believes to be wrong, Rhode Island has required Felkner to either (1) violate his convictions and speak contrary to his beliefs, or (2) forego a substantial state benefit, the opportunity to participate in a master's degree program for which he is fully qualified except for his "antithetical" perspective. This Court has repeatedly held that placing a person in such a "Hobson's choice" position violates the First Amendment, *Sherbert v. Verner,* 374 U.S. 398 (1963) (Seventh Day Adventist required to work on Saturday sabbath); *Thomas v. Review Board,* 450 U.S. 707 (1981) (Jehovah's Witness required to work on tank turrets). *Sherbert* and *Thomas* both involved the Free Exercise Clause, but the same principle would apply to the Free Speech Clause.

Compelled speech is even more egregious than prohibited speech. It is more offensive to be forced to say something contrary to one's beliefs, than to force one to be silent about one's beliefs.

CONCLUSION

The Foundation urges this Court to grant William Felkner's Petition for a Writ of Certiorari.

Respectfully submitted,

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