No. 23-274

In the Supreme Court of the United States

WILLIAM FELKNER,

Petitioner,

v.

JOHN NAZARIAN, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, MANHATTAN INSTITUTE, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Americans for Prosperity Foundation ("AFPF"), is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, AFPF has litigated to protect First Amendment rights, *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); and regularly files *amicus* briefs supporting speech rights, *e.g.*, *Mahanoy Area School District v. B. L.*, 141 S. Ct. 2038 (2021), encouraging this Court to reconsider the doctrine of qualified immunity, *e.g.*, *Jessop v. City of Fresno, California*, 140 S. Ct. 2793 (2020); *Taylor v. Riojas*, 141 S. Ct. 52 (2020), and highlighting the particularly pernicious effect of applying qualified immunity in the university setting to suppress speech. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). Throughout our nation's history, the fight for civil rights has relied on the exercise of civil liberties, which is one reason they must be protected. AFPF is interested in this case because the protection of the freedoms of expression and association, guaranteed by the First Amendment, is necessary for an open and diverse society.

The Manhattan Institute ("MI") is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were notified of *amici's* intent to file this brief greater than ten days prior to the date to respond.

end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas. Its scholars regularly speak on college and graduate-school campuses, and likewise have faced protest, shutdown, and cancelation. MI also runs the Adam Smith Society, which brings together business-school students and alumni for discussion and debate on how the free market has contributed to human flourishing and opportunity for all.

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g.*, *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (*amicus curiae* in support of petitioner); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (*amicus curiae* in support of petitioners).

This case concerns *amici* because it involves blatant violations of well-established First Amendment protections by a state actor.

SUMMARY OF ARGUMENT

Two policy considerations have traditionally been asserted as the rationalization for qualified immunity: to ensure fair notice before imposing monetary liability against state officials; and to provide

breathing room for split-second decisions in dangerous situations that may arise in the course of law enforcement.

To the extent this Court intends to continue to apply the doctrine of qualified immunity for claims brought under 42 U.S.C. § 1983, the doctrine should be limited to these purposes. Qualified immunity as a shield for constitutional infringement has no place where the doctrine is not necessary to providing fair notice to officials, or where it is untethered to any quick-response law enforcement purpose. It is especially problematic when it protects officials who have plenty of time to consider, reflect, and seek legal advice before engaging in their unconstitutional conduct.

Under the First Amendment, for which bedrock principles are well established and public discussion is ubiquitous, it would be rare, if not impossible, for solicitous protection of speech to diminish effective and timely law enforcement measures. In the same vein, the timeframe over which infringing activity takes place should inform whether the government official's understanding of the law was reasonable. The longer the timeframe, the greater the ability to reduce uncertainty regarding the law—regardless of whether the uncertainty was reasonable *ab initio*. Qualified immunity in such cases serves no purpose other than to disincentivize getting the law right and to shift the cost of willful ignorance from the perpetrator of a constitutional violation to the victim of the unconstitutional misconduct.

But regardless of the timing issue, premeditated, policy-based, viewpoint discrimination is all too common on college campuses where institutions

suppress speech through slow-moving and deliberate application of their policies, which have generally been developed by professionals who have expertise in the law or at least easy access to government-provided legal counsel. Similarly, these academic officials have no duty to enforce any criminal law on which public safety depends. But applying qualified immunity to educational administrators has real consequences: schools may repeatedly infringe on constitutional rights while shrouded in the protection of qualified immunity.

Moreover, because schools are able to game the issue of whether precedent is established—by settling or mooting disputes in cases where they fairly anticipate court losses—the doctrine of qualified immunity creates a vicious cycle where precedent would otherwise discourage future violations. Not only does this "anti-precedent trap" leave students without a remedy for obvious infringement—it also teaches students that education administrators can successfully curb or eliminate rights by cultivating their own ignorance.

This is a case in point. Here, Mr. Felkner made numerous complaints that his speech rights were being infringed by Rhode Island College (RIC) over a period of several years. There was no question that RIC was on notice that its policies and practices implicated First Amendment rights. And any purported ignorance that its specific actions were unlawful—almost never enough on its own to show a lack of fair notice—was all the more unreasonable here because the College had ample time to seek advice from its legal counsel. Similarly, because there was no alleged unlawful behavior by Mr. Felkner, any

potential error on the side of free speech—to the extent such an "error" is even possible—could have no chilling effect on "vigorous law enforcement."

Thus, neither policy justification for invoking qualified immunity would have applied. Yet the Rhode Island Supreme Court shielded the constitutional violations here simply because there was no existing precedent involving a university's infringement of a student's rights in exactly the same way as RIC did here—or reached adjudication for such infringement. The effect of applying qualified immunity in this suit thus "sprang" the anti-precedent trap: RIC reaped the benefit of other institutions having avoided final judgments on their questionable actions. This Court should reject a doctrine wherein players can game the system today to shelter tomorrow's violations by evading adjudication of First Amendment claims.

ARGUMENT

I. Qualified Immunity Should Not Shield Constitutional Infringement in Slow Moving First Amendment Cases.

In cases of alleged infringement of First Amendment rights, particularly where, as here, a slow-moving chain of events unfurls over a substantial period of time, qualified immunity should not apply. This is because, "[t]he crucial question . . . is whether 'a reasonable official would understand that what he is doing violates [a constitutional] right.'" *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In cases silencing or punishing bedrock First Amendment activity, a legal doctrine that excuses ignorance is a poor fit.

A. As a Foundational Matter, Qualified Immunity is on Tenuous Footing.

It can be argued that qualified immunity serves two policy interests: (1) to ensure fair notice for the government employee before liability can be imposed (which, properly understood, is co-extensive with the constitutional due process requirement of fair notice for anyone, government official or not); and (2) to promote official action necessary to society. *See* 1 Thomas M. Cooley, *A Treatise on The Law of Torts or The Wrongs Which Arise Independently of Contract 326* (John Lewis ed., 3d ed. 1906) (citation omitted) (explaining historical basis for qualified immunity). This Court has applied qualified immunity in cases involving danger and time-sensitive decision-making for law enforcement officers. *See, e.g.*, *Mullenix v. Luna*, 577 U.S. 7 (2015) (applying qualified immunity where law enforcement chose among dangerous alternatives in regard to a high-speed car chase).

Even crediting this tradition, of course, the law enforcement justification for qualified immunity breaks down entirely in cases like Mr. Felkner's where there is no allegation of lawbreaking or danger to officers. In such cases there is no reason for society, the law, or the courts, to create a safe harbor for public officials who engage in aggressive suppression or compulsion of speech. Nor would such an approach be consistent with the First Amendment in which protection of speech is the default rule and criminalization of speech is the exception. It is thus hard to imagine a situation in which public officials ought to be encouraged to engage in vigorous law enforcement with respect to speech. Indeed, this Court has steadfastly held the line against declaring

"new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010). Thus, invoking the societal benefit from vigorous law enforcement in any but the most extraordinary circumstances—and limited to historically unprotected category of speech—makes little constitutional sense. *Id*.

The fair-notice rationale for qualified immunity also breaks down in cases like Mr. Felkner's. The contours of fair notice implicate due process, the availability or ambiguity of positive law, the chronology and factual similarity of clarifying court opinions, and the amount of time the state actor has available to evaluate the constitutionality of the proposed course of action—with the latter being also or even more relevant to the "reasonableness" of the official's actions under the circumstances.

At a fundamental level, the mere fact that a government official (or anyone else for that matter) claims to have been unaware that his or her conduct was unlawful is insufficient to show a lack of fair notice. This is reflected in the age-old maxim that ignorance of the law is no excuse.[2] That said, certain narrow exceptions have evolved over time based on situational features that show a lack of fair notice. Put another way, there is a distinction between

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[2] *See* Mark D. Yochum, *The Death of A Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT, St. John's University School of Law (Spring 1999) ('Ignorance of the law is no excuse'" is taken from the latin phrases ignorantia legis neminem excusat or ignorantia juris non excusat."), at https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1306&context=jcred

unclear or erroneous laws for which a government actor could not reasonably be deemed to have fair notice, on one hand, and acts a government actor should be expected to know are unlawful, even if they profess personal ignorance, on the other.

As an example of the first category, "imagine an officer engages in conduct that has been explicitly blessed by the Supreme Court but nonetheless is sued for it, and in the course of that litigation, the Supreme Court overrules its prior decision. Presumably imposing liability on that officer would offend principles of fair notice." Aaron L. Neilson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, n.57 (2018) (cleaned up). In that case, it would be unreasonable to hold the officer to a higher standard of knowledge than the Court itself.

On the other hand, absent the kind of reasonable misunderstanding outlined above, a public official is always bound by the law. This can be true even in the face of contrary commands from a superior. For example, in a case from the early days of the Republic, this Court held that a ship captain was legally responsible for the unlawful seizure of another ship even though he relied on the President's interpretation of the underlying statutory authority. *See Little v. Barreme*, 6 U.S. 170, 170 (1804). It was not enough in *Little* that the error in law could be traced directly to the President's order; the captain of the ship was responsible for complying with the law as enacted. In essence, the mismatch between the President's command and the underlying law could not effect a change in the law that would excuse the unlawful seizure. *See id.* at 179 (holding "instructions

cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass"). The rationale in *Little*—which rejects the ability of officials to shield themselves from liability by relying on a patently invalid law has stood the test of time. *See, e.g.*, *Illinois v. Krull*, 480 U.S. 340, 355 (1987) ("A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.").

And, in the vast majority of cases where a government actor is faced with neither the "gotcha" of an intervening Supreme Court reversal of its prior holdings nor an erroneous instruction from a superior, the default maxim that "ignorance of the law is no excuse," ought to provide the rule of decision. Like everyone else, state actors cannot say that they lacked fair notice of what the law requires merely because they are purportedly ignorant of that law.

B. The Right to Free Speech Is So Well-Known that Time Pressure Has Significantly Less Relevance.

Whether qualified immunity is interpreted under the original understanding of § 1983, such that immunity is granted according to analogous common law, *see Imbler v. Pachtman*, 424 U.S. 409, 421 (1976), or under the "clearly established" standard where government officials are immune unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have

known, *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978), fair notice that speech is protected is readily satisfied because claims of First Amendment infringement are among the most frequently discussed and hotly asserted constitutional rights. Indeed, this Court has heard First Amendment speech cases on a consistent basis for years, often arising from educational settings. *See, e.g., Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407 (2022); *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). *See also* various iconic rulings, such as *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); and *W. Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943).

It is thus quite reasonable to expect public officials with even the most rudimentary understanding of our constitutional system to be well aware that government attempts to suppress speech should be met with a jaundiced eye and—at a minimum—that they out to seek legal guidance if the lawful course of action is unclear. As the Court held in *Harlow v. Fitzgerald*, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." 457 U.S. 800, 815–19 (1982).

Speech rights are so well-established that even short time horizons should suffice to allow public officials to recognize when they are infringing the First Amendment. For example, in *Jordan v. Jenkins*, the Tenth Circuit rejected qualified immunity for law enforcement officers who arrested a man for orally challenging their treatment of his nephew at the site

of a car accident because it is well known that the First Amendment protects citizens observing and speaking to police. *Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023).

There, John Jordan received word that his nephew, J.J., had been in a car accident while driving Mr. Jordan's company truck. *Id.* at 1165. Mr. Jordan traveled to the scene of the accident, and when he arrived, he learned that J.J. could not locate the truck's insurance card. *Id*. While he called his office to see if someone could track down the insurance information, Mr. Jordan could hear his nephew being questioned by the police. The form of the questioning sounded to him as if the police were trying to influence the content of his nephew's official statement. *Id*. When Mr. Jordan objected to the police officer's behavior, the police told him to leave, and when he refused, the police deputy "commanded Mr. Jordan to put his hands behind his back." *Id*. 1166. When Mr. Jordan did not immediately comply, the deputy knocked Mr. Jordan down. *Id*. Mr. Jordan stuck out his right arm to catch the ground but after he was on his knees the deputy kicked out his arm, causing his face to hit the dirt. *Id*. at 1166–67. "Mr. Jordan was arrested and charged with obstruction of justice and resisting arrest." *Id.* at 1167. The charges, unsurprisingly, were eventually dropped. *Id*.

Mr. Jordan brought a civil suit, "arguing . . . that he had a First Amendment right under the U.S. Constitution to engage in the conduct for which he was arrested and prosecuted." *Id*. at 1167. The Tenth Circuit held that the officers were not protected by qualified immunity because Mr. Jordan's "verbal criticism was clearly protected by the First

Amendment . . . meaning that there could be no arguable probable cause for his arrest based on that conduct." *Id*, at 1168. This was so because in *City of Houston v. Hill*, this Court stated that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Id*. at 1168 (quoting 482 U.S. 451, 453–54, (1987)).

Thus, even though the deputies argued that *Hill* was distinguishable because it involved an anti-harassment statute, rather than an unlawful arrest claim under the Fourth Amendment, "[t]he Constitution does not allow such speech to be made a crime." *Jordan*, 73 F.4th at 1169 (quoting *Hill*, 482 U.S. at 462). And, because the First Amendment protects the right to criticize police, it must *a fortiori* protect the right to remain in the area to be able to criticize the observable police conduct. "Otherwise, an officer could easily stop the protected criticism by simply asking the individual to leave, thereby forcing them to either depart (which would effectively silence them) or face arrest." *Id*. at 1169–70. Accordingly, qualified immunity did not apply in *Jordan* even though the infringement took place during actual law-enforcement activity.

Moreover, some forms of protected speech are so well entrenched in broad terms that the doctrine of qualified immunity actually incentivizes state actors to *avoid* seeking legal advice from legal counsel who may tell them those broad legal principles apply to their specific circumstances. One potential example is the compelled speech context.

For instance, in *Barnette*, the Court held that a school could not compel students to salute the American flag. 319 U.S. 624, 642 (1943). That case

upheld the right of students to remain silent in the face of government demands that they speak and fashioned one of the most oft-cited syntheses of free speech jurisprudence: "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." *Barnette*, 319 U.S. at 642.

Eighty years later, the constitutional right against government-compelled speech remains vibrant. Just last term, in *303 Creative LLC v. Elenis*, this Court held that it would violate the First Amendment for the state of Colorado to compel a small business owner to create speech she did not believe. 143 S. Ct. 2298, 2322 (2023). In *303 Creative*, Colorado attempted to create ambiguity around its public accommodations law, by insisting that it was regulating conduct only, and not speech; and similarly, that the law required 303 Creative only offer a "full menu" to every customer, regardless of sexual orientation. The Court properly and squarely rejected Colorado's effort to insert ambiguity into the legal status of the speech in question. Nevertheless, this Court can observe how state actors may assert meaningless distinctions between cases, based on the argument that the exact fact-pattern has never occurred before.

Similarly, the prohibition on viewpoint discrimination is so well-established that any government efforts in that area should immediately raise red flags. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (holding when the government targets "particular views taken by speakers on a subject, the violation of

the First Amendment is all the more blatant."). The government's burden to justify viewpoint discrimination stands in stark contrast to the presumption that qualified immunity applies, unless there is ample precedent that squarely prohibits the government's action, because "[t]his Court's precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (cleaned up) ("*NIFLA*"). The significant gap between what state actors owe to citizens and what state actors may be liable for in court defies sound legal reasoning, particularly in cases where time allows for basic research into whether an actor's questionable conduct may be unlawful.

In cases like this one, in which over three years elapsed during which Mr. Felkner raised an assortment of claims, and multiple hearings and appeals were held, purportedly to address those claims, fair notice of the allegations was not only met, but acknowledged. Any lingering doubt regarding the lawfulness of the school's policy and application to Mr. Felkner could have been analyzed many times over to determine whether the College met the high standard acknowledged in *NIFLA*.

II. Claims of Free Speech Infringement on Campus are So Common That Qualified Immunity Should Almost Never Apply.

Free speech infringement claims on college campuses are so prevalent that a constant stream of lawsuits flows through the federal courts. One might

think this torrent would eventually lead to settled law protecting the speech rights of members of campus communities. But that does not appear to be the case, in large part due to the invocation of qualified immunity.[3] A handful of these cases make it to this Court, which routinely decides in favor of protecting speech. *Supra* at 10 (providing example cases). Nevertheless, free speech cases keep coming, not just to this Court, but across all the federal courts.

In addition to essentially nonstop litigation, many universities have their own law schools, as well as their own legal counsel. Why then do colleges seem so unwilling to learn the lessons of past conflicts? It seems reasonable to presume that qualified immunity plays a role, encouraging universities to make minor changes to their practices, evade adjudication, and live to impose viewpoint conformity another day. Here, such ideological conformity was the acknowledged purpose of RIC's practices. *E.g.*, *Felkner v. Rhode Island College*, 291 A.3d 1001, 1004 (2023) ("According to Felkner, Professor Ryczek told him that RIC was a 'perspective school' and that if Felkner was to lobby on SB 525, it would need to be 'in [RIC's] perspective.'").

But denying a rudimentary understanding of the basic contours of First Amendment law is willful blindness that should not be encouraged via expansive application of judge-made doctrine. The fair-notice element in cases of compelled speech and viewpoint discrimination simply does not fit. Neither

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[3] A search of the federal courts database in *Westlaw* for First Amendment cases involving a university or college reported since the beginning of 2013 returns more than 300 cases that include the term "qualified immunity".

does the vigorous law enforcement justification, where criminal activity via student speech is uncommon and therefore inadequate to justify state censorship.

Moreover, the exact-match precedent requirement drives university speech policies into a speech death spiral, which could easily be avoided by holding officials to an understanding of the law commensurate with their position and access to legal advice. Justice Thomas acknowledged the issue in the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of cert.) ("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?"). And, because qualified immunity is immunity from suit—not just a defense to liability—then the lack of precedent becomes self-fulfilling. The anti-precedent trap was summarized thus by Judge Willett in his dissent in *Zadeh v. Robinson*:

> To rebut the officials' qualified-immunity defense and get to trial, [plaintiff] must plead facts showing that the alleged misconduct violated clearly established law.
>
> * * *
>
> Controlling authority must explicitly adopt the principle; or else there must be a robust consensus of cases of persuasive authority. Mere implication from precedent doesn't suffice.
>
> * * *

> But owing to a legal *deus ex machina*—the clearly established prong of qualified-immunity analysis—the violation eludes vindication.
>
> * * *
>
> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

928 F.3d 457, 474, 477, 478–80 (5th Cir. 2019).

In short, where university lawyers can make strategic decisions about which cases to settle, moot, or let go to judgment, qualified immunity distorts the legal playing field, allowing future violations of the First Amendment to be likewise shielded because past violations never resulted in a final judgment. This precedential death spiral should not be allowed to stand, and the status quo merits review and reform.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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