No. 23-274

In the

Supreme Court of the United States

WILLIAM FELKNER,
Petitioner,

v.

JOHN NAZARIAN, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In his opening brief, Petitioner William Felkner showed how unmoored from both the text of § 1983 and the common law the "clearly established law" standard of qualified immunity is. In their brief in opposition, Respondents (collectively "RIC") do not dispute any of the history or textual analysis advanced by Petitioner. Instead, RIC argues that a) Rhode Island Supreme Court correctly applied this Court's qualified immunity precedents; b) *stare decisis* considerations counsel against reconsideration of this Court's precedents; and c) this case presents a poor vehicle to address any problems with the qualified immunity doctrine.[1] Because the first argument is a *non sequitur*, while the latter two are unsound, the Court should grant *certiorari*.

ARGUMENT

I. THE DOCTRINE OF *STARE DECISIS* DOES NOT JUSTIFY CONTINUED ACCEPTANCE OF THE ATEXTUAL "CLEARLY ESTABLISHED LAW" STANDARD OF QUALIFIED IMMUNITY

Felkner does not dispute that overruling precedent "is not a step that should be taken lightly." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 267 (2022). Nevertheless, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true."

[1] Respondents also attempt to paint Felkner as a "recalcitrant" student, rather than one who was retaliated against for expressing unpopular views. However, because this case was decided on summary judgment, all facts must be viewed in light most favorable to Felkner.

Ramos v. Louisiana, 140 S.Ct. 1390, 1405 (2020) (plurality). Instead, the Court has identified a set of factors that, when present, suggest that a prior decision must be abrogated. *See Janus v. AFSCME*, 138 S.Ct. 2448, 2478–79 (2018). These factors are: "the quality of [prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.*[2]

In this case, each factor favors overruling this Court's erroneous qualified immunity line of cases.

A. *Harlow v. Fitzgerald* Was Ahistorical and Poorly Reasoned

The Court's decision in *Harlow* rested on two pillars, both of which were weak even at the time of the decision. First, *Harlow* sought to ground itself in the supposed availability of the "good faith" defense at common law—a defense which Congress supposedly meant to preserve. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Second, even assuming that such a defense was available, *but see* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 56 (2018), and the Congress meant to preserve it, *but see* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 246

[2] These factors are applicable not only to constitutional decisions but are also utilized in considering whether to overrule prior statutory interpretation cases. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3 (1997), *overruling Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

Additionally, the Court has recognized that *stare decisis* is not as significant when it is deciding whether to change judge-made doctrine. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007).

(2023), the *Harlow* Court equated this defense with the existence of a "clearly established law" standard. *Harlow*, 457 U.S. at 818-19. Both as a matter of history and text, each of the predicates was wrong when *Harlow* was decided and remains wrong today.

First, a good-faith defense was simply unavailable at the time Congress legislated § 1983. As Professor William Baude convincingly shows, "lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic," and the "strict rule of personal official liability, even though its harshness to officials was quite clear, was a fixture of the founding era." Baude, *Unlawful Immunity*, *supra*, at 56 (2018) (internal quotations omitted). Indeed, *Marbury v. Madison* itself held that when an officer "commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law." 5 U.S. (1 Cranch) 137, 170 (1803). *See also id.* at 165 (noting that for officers of the state "the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents ….") (quoting William Blackstone, 2 Commentaries on the Law of England 201 (1765) (Duyckink, *et al.*, eds. 1827)). Thus, Congress could not have intended to preserve immunity that did not exist in the first place. This, in turn, means that the entire foundation of the qualified immunity doctrine is, at best, questionable.

Second, even assuming, *arguendo* (and *dubitante*) that a "good faith" defense was available at common law, Congress enacted § 1983 with the express purpose of providing remedies for violation of rights "any … law,

statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. While the phrase was omitted in the later codification of federal statutes, the omission is of little consequence because a) codification was never meant to substantively change pre-existing law, and b) the phrase merely bolstered the imperative "shall" in § 1983. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 n.29 (1968); *United States v. Bowen*, 100 U.S. 508, 513 (1879) (courts may look to pre-revision statutory language "when necessary to construe doubtful language used in expressing the meaning of Congress.").[3]

Third, leaving to one side the debate regarding the availability of the "good faith" defense in 1871, and Congress's intent to preserve the availability of such a defense, it is beyond peradventure that *Harlow* stretched that defense beyond all bounds that could conceivably have been present at common law. To the extent that such a defense was available at common law, it was an affirmative defense with the burden of proof resting on the *defendant*. *See, e.g.*, *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir. 1982); *Douthit v. Jones*, 619 F.2d 527, 533 (5th Cir. 1980). The *Harlow* Court, relying on little more than its preference for resolution of more

[3] Respondents' reliance on *Maine v. Thiboutot*, 448 U.S. 1, 8 n.5 (1980) is misplaced. Footnote 5 merely reiterates the admonition that "[w]hen the meaning [of a revised text] is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision," *Bowen*, 100 U.S. at 513. But that instruction does not disturb the power, and indeed, the obligation, of the courts to consult the pre-revision text to resolve ambiguities in the statutes as revised. *Id.*

cases via summary judgment, *see* 457 U.S. at 816-17, abrogated that rule. The Court never explained, either in *Harlow* itself, nor in any of the subsequent cases, how easing the burden on the government even further is compelled by either the text or the history of § 1983. Nor could it do so, given the fact that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

In short, *Harlow* was a poorly reasoned, historically inaccurate, and atextual decision.

B. *Harlow* Is Unworkable in Practice

The explicit promise of *Harlow* was quick and easy resolution of "insubstantial claims." 457 U.S. at 816. But reality is the polar opposite. As an initial matter, the rule of *Harlow* precludes the resolution of even substantial claims unless they present an almost identical set of facts to a case previously decided within the same jurisdiction. Respondents themselves point out that under the current regime actions by high school officials may be adjudicated differently than nearly identical actions by college officials, even if both situations present claims of *substantial* violations of civil rights. Opp.Br.15.

The confusion that reigns in lower courts demonstrates the *Harlow* regime's unworkability. *See* John Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010) ("The circuits vary widely in approach …. The instability has been so persistent and so pronounced that qualified immunity … exists in a perpetual state of crisis.") (cleaned up). This confusion has required this Court's repeated interventions to correct lower court

errors. *See White v. Pauly*, 137 S.Ct. 548, 551 (2017).

Relatedly, *Harlow* has "led to the distortion of many important but unrelated legal doctrines." *Dobbs*, 597 U.S. at 220. Though "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 137, the current qualified immunity doctrine permits courts to avoid doing so. This, in turn leaves the law in a variety of areas (*e.g.*, First Amendment, Fourth Amendment, Fourteenth Amendment, etc.) undeveloped, and allows various government officials to continue violating citizens' rights with little fear of ever being called to account.

Consider this very case. If this Court were to deny *certiorari* and permit the judgment below to stand, officials in state colleges will continue to academically punish students for the exercise of their First Amendment rights. Irrespective of how many such violations take place, they would be able to continue to shield themselves from having to answer for their actions.[4] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66 (2017) ("[I]f courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established. This catch-22 may lead to constitutional uncertainty and stagnation … particularly in cases involving new technologies or practices."). These deformations in law are an additional reason to abrogate the doctrine. *See Dobbs*, 597 U.S. at 220.

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[4] Indeed, one of the Respondents explicitly told Felkner that "until there is a *court case* that says we need to" behave in certain manner, they were not going to make any changes.

Nor has the Court's expectation that many lawsuits will be "quickly terminated," 457 U.S. at 814, proven true. To the contrary, the doctrine "is extraordinarily difficult and costly to administer." Alan K. Chen, *The Facts About Qualified Immunity*, 55 Emory L.J. 229, 231 (2006). In the aggregate, the *Harlow* regime increases, or at least does not reduce, litigation costs.

C. *Harlow*'s Approach Is Inconsistent with the Modern Court's Statutory Interpretation Methodologies

The "clearly established" standard for qualified immunity is a doctrine entirely of judicial creation without basis in the statutory text. *See Ziglar v. Abbasi*, 582 U.S. 120, 156-60 (2017) (Thomas, J., concurring-in-part); *Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote."). Yet, in all other areas, the Court has steadily moved towards giving statutes only the effect that is apparent from the text of the statute itself, rather than expanding or contracting the meaning of Congressional enactments via the judicial branch's gloss.

For example, in *Bostock v. Clayton Cnty.*, the Court refused to constrain the reach of statutory text by reading into it "the limits of the drafters' imagination." 140 S.Ct. 1731, 1737 (2020). Instead, the Court held that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Id.* Construing § 1983 by

reference to such "extratextual considerations" is simply inconsistent with the Court's current approach to statutory interpretation.

Conversely, the Court has steadily refused to expand the scope of the *Bivens* action—another judge-made doctrine—because it has concluded that absent Congressional authorization, such actions are not within the cognizance of the federal judiciary. *See Egbert v. Boule*, 596 U.S. 482, 486 (2022) (and cases cited therein). As the Court explained, "prescribing a cause of action is a job for Congress, not the courts." *Id.* The Court noted that it is "long past the heady days in which [it] assumed common-law powers to create causes of action," *id.* at 491 (internal quotation omitted), in large part because it is ill-equipped to evaluate the range of policy choices such as "economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide," *id.* (internal quotation omitted). Instead, such weighing is a job for the legislature. *Id.* The logic of *Egbert* (and the cases preceding it) is equally applicable to the qualified immunity doctrine which rests almost entirely on this Court's evaluation of what is "the best attainable accommodation of competing values," *Harlow*, 457 U.S. at 814—"precisely the sort of freewheeling policy choice that" this Court has left for Congress to make. *Ziglar*, 582 U.S. at 159 (Thomas, J., concurring-in-part) (internal quotation omitted). This Court meticulously adheres to Congressional policy choices *not* to create a cause of action. There is no reason for it to second-guess Congressional policy choices when Congress *does* create such a remedy.

D. No Reliance Interests Are at Stake

Respondents do not actually argue that in taking action either they or anyone else in a similar situation actually relied on the availability of qualified immunity as it currently exists. That is not surprising because "reliance interests arise where advance planning of great precision is most obviously a necessity." *Dobbs*, 597 U.S. at 287 (internal quotations omitted). But a violation of constitutional rights and any suit seeking to vindicate such a violation "is generally 'unplanned activity,'" and various public officials "could take virtually immediate account of any sudden restoration of" the ability of citizens to seek damages for *future* unconstitutional actions. *Id.* Thus, when it comes to qualified immunity, there are no reliance interests "in the conventional sense." *Id.*

Reliance interests are particularly attenuated when it comes to desk-bound officials who, by the very nature of their jobs, consistently seek legal advice before taking any substantial action. Were the qualified immunity doctrine to be either pared back or even altogether abrogated for them, no aspect of such desk-bound officials' duties would undergo any change. Such officials would still seek legal advice, although the advice that they receive would perhaps be more circumspect.

To the extent that there are other types of reliance interests, *e.g.*, budgeting for future legal claims, allocating time dedicated to responding to such claims, etc., these disputes can be resolved by Congress which can choose to legislatively immunize executive officials, in whole or in part, whenever they are subject to suit.

II. FELKNER'S PETITION PRESENTS A WORKABLE ALTERNATIVE TO THE CURRENT DOCTRINE

Respondents suggest that "Felkner fails to adequately identify a replacement standard" to the current regime, Opp.Br. 23, and fails to "explain[] how reverting to a more traditional common-law standard would help him," *id.* at 24. Both assertions are incorrect.

As an initial matter, Felkner suggests several alternatives to the current regime. The Court can hold that qualified immunity does not protect a campus desk officer has ample opportunity to consult legal counsel before engaging in conduct that violates the First Amendment. Better yet, the Court can recognize that *Pierson v. Ray*, 386 U.S. 547 (1967) which established the doctrine in the first place, rested on erroneous historical premises and permit all government officials to be held to account for violating citizens' constitutional rights. But if the Court does not wish to travel that far, it can abrogate (either wholesale or at least for deskbound officials who need not make "split-second" decisions) the "clearly established law" test in favor of the "good faith" standard, putting burden of proof on Respondents.

As explained in the original petition, the current "qualified immunity [doctrine] proves outcome determinative" in this case. Pet.16. Thus, whatever path the Court chooses to take, Felkner would benefit from the decision to reconsider the current doctrine. Felkner would get a trial on the merits of his claims.

III. THE CASE PRESENTS AN IDEAL VEHICLE TO CONSIDER THE QUESTIONS PRESENTED

Respondents argue that the case presents a poor vehicle to consider the questions presented because,

according to them "Respondents would be entitled to qualified immunity on the facts of this case even if the Court altered the inquiry to focus on respondents' good faith or diluted the 'clearly established' standard," and because "any First Amendment violation in this case is borderline at best." Opp.Br.31. Both statements are contradicted by the record below.

First, no court has held that Respondents were acting in "good faith" in their interactions with Felkner. In fact, Felkner's complaint, fairly read, asserts lack of good faith in Respondents' treatment of him. For example, it alleged that one of the Respondents admitted to "revel[ing] in [his] biases," and that the School of Social Work "is not committed to balanced presentations nor should [it] be." Additionally, Felkner alleged that actions taken against him were in response to and in retaliation for his media appearances. App.80a. A reasonable jury, resolving this factual question, *see Meyerson*, 690 F.2d at 830; *Douthit*, 619 F.2d at 533, may view this behavior as indicative of bad, rather than good faith.

Second, the Supreme Court of Rhode Island has already held that Felkner "has made tenable claims that defendants have violated his constitutional rights to free speech and expression," and that such "claims deserve to go to a jury." App.93a. The Court below also held that the question of whether Respondents retaliated against Felkner also deserves to proceed to trial. App.99a. Nothing in the record suggests that the Rhode Island courts viewed these claims as "borderline." No court, including this one, should supplant the function of the jury.

The only thing that stands between Felkner and his ability to have his claims tried to a jury is this Court's

erroneous qualified immunity precedent. The case thus presents an ideal vehicle to reconsider that precedent.

CONCLUSION

This petition for a writ of certiorari should be granted.