No. 23-5293

# In the United States Court of Appeals for the Sixth Circuit

ALLAN M. JOSEPHSON,

*Plaintiff-Appellee*,

v.

TONI M. GANZEL,
IN HER OFFICIAL AND INDIVIDUAL CAPACITY, ET AL.,

*Defendants-Appellants*,

**BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLEE**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION, NO. 3:19-CV-00230-RGH-CHL

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## CORPORATE DISCLOSURE STATEMENT

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*/s/ Shawn Toomey Sheehy*
SHAWN TOOMEY SHEEHY

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Constitutional Provisions**



**Rules**



**Other**

## STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

Cato's interest in this case arises from the lack of legal justification for qualified immunity, the deleterious effect it has on the ability of people to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), counsel for Amicus Curiae contacted counsel for the Parties seeking their consent to submit this brief for this Court's consideration. Counsel for Appellee has consented to the filing of this brief. Counsel for Appellants do not consent to the filing of this brief. No party's counsel authored this brief in whole or in part, and no one besides Amicus Curiae contributed money to fund the brief's preparation or submission.

## INTRODUCTION

Few legal doctrines have received more sustained, more thoughtful, or more well-deserved criticism than qualified immunity. The wellspring of that criticism is the acknowledged fact that qualified immunity cannot plausibly derive from the text of the Civil Rights Act, and that it frustrates not only the congressional aims of that law but the text and spirit of the Seventh Amendment's jury-trial guarantee as well. This case depicts all those shortcomings, and more to boot.

Besides its generic textual and originalist shortcomings, there is a compelling reason to reject the application of qualified immunity here. The very premise underlying the Free Speech Clause is a "mistrust of governmental power." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). This is why the Constitution protects from governmental interference speech about salient issues in the marketplace of ideas, including speech expressing disfavored points of view. *See id*. at 340, 354. But here, the First Amendment's inherent skepticism of governmental power clashes sharply with the qualified immunity's inherent tendency to *encourage* government officials to "vigorous[ly]" exercise the government's mistrusted power without the discipline that robust accountability helps engender. *Harlow*, 457 U.S. at 807, 816. And while this Court is of course bound to apply Supreme Court precedent, it is neither bound to stretch that precedent nor apply it in a way that creates avoidable conflict with core constitutional values of free expression, due process, and accountability. As

explained below, the Cato Institute urges the Court to resolve the unavoidable tension this case presents in favor of the speaker and not the university censors. *See FEC*, 551 U.S. at 474.

## SUMMARY OF THE ARGUMENT

Within the past thirty years, no fewer than four justices—Justice Kennedy, Justice Scalia, Justice Thomas, and Justice Sotomayor—have questioned the foundations of the qualified-immunity doctrine.[2] Circuit judges have also joined the chorus.[3] And the criticism of the Supreme Court's qualified-immunity doctrine is not limited to judges and justices. The legal academy too has expressed concerns that the qualified-immunity doctrine is not grounded in the text of the Civil Rights Act, nor is it grounded in common law. *See, e.g.,* William Baude, *Is Qualified*

[2] *Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in judgment); *Camreta*, 563 U.S. at 729 ((Kennedy, J., dissenting); *Crawford-El v. Britton*, 523 U.S. 574, 611-12 (1998) (Scalia, J., dissenting); *Wyatt v. Cole*, 504 U.S. 158, 170-71 (1992) (Kennedy, J., concurring).

[3] *McKinney*, 49 F.4th at 756-58 (Calabresi, J., dissenting); *Horvath v. City of Leander*, 946 F.3d 787, 800-01 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part); *Echols*, 913 F.3d at 1325; *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Rodriguez*, 899 F.3d at 732 n.40; *See also Reich*, 945 F.3d at 989 n.1 (Moore, J., dissenting) (stating that although accepting the premises of qualified immunity as true, Judge Moore noted the growing number of "jurists and scholars from across the ideological spectrum have questioned whether we should accept all of these premises as true.") *reh'g en banc denied*, No. 18-6296 (6th Cir.), *cert. denied*, 141 S. Ct. 359 (2020).

*Immunity Unlawful,* 106 Calif. L. Rev. 45, 49-51, 55-58 (2018). Notably, this criticism spans the ideological spectrum.[4]

Besides the persuasive arguments advanced by Dr. Josephson, this appeal should be dismissed and qualified immunity denied for three reasons. *First*, the language of the Civil Rights Act is categorical and mandatory, holding every person acting under the color of state law accountable. Multiple interpretive canons of construction establish that Congress did not intend for state officials to defeat liability for plausibly alleged violations of constitutional rights. For example, in Section 1988, Congress expressly authorized Congress to use state common law to fashion remedies, so long as state common law coincides with federal law. If Congress wanted state common-law immunities to shield state officials from liability, then Congress would have expressly provided that those immunities apply.

*Second*, the common law before and contemporaneous with the enactment of the Civil Rights Act consistently held government officials liable for their

[4] *See, e.g.*, Br. of Cross Ideological Groups Dedicated to Ensuring Official Accountability. Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as *Amici Curiae* In Support of Petitioner, *I.B. and Jane Doe v. Woodard*, No. 18-1173 (U.S. April 10, 2019) (amicus brief filed on behalf of fourteen organizations, including the Alliance Defending Freedom, ACLU, Americans for Prosperity, and the NAACP, questioning qualified immunity and noting the doctrine's harmful effects on society); *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (observing that there is a "growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence.").

constitutional violations. Chief Justice Marshall, in opinions involving naval officers' wrongful seizure of ships, upheld the findings of liability against those officers (as well as the damages awards) to the ship owners, despite their purported good faith. Later, the Supreme Court held that Maryland election officials were not immune from liability when they denied African American citizens the ability to register to vote, even though they acted in good faith when enforcing a Maryland law.

When the Supreme Court held that police officers could be immune from civil rights actions for false arrest, the Court's reasoning anchored its holding in the common law of 1871. Because the common law of false arrest permitted a defense of good faith and reasonableness, those defenses were available to government officials. But the current doctrine of qualified immunity is detached from these common-law foundations. This is especially true of qualified immunity for state university officials.

*Third*, and finally, allowing qualified immunity to bar liability as a matter of law here would improperly impair the Seventh Amendment's jury-trial guarantee. Simply put, where there are factual disputes, as in this case, the Constitution's mandate is clear that the plaintiff has a right to trial by jury to resolve those disputes.

It is not the province of these university officials or the judiciary to pretermit the exercise of that right where it has been plainly and properly invoked.

## ARGUMENT

### I. SECTION 1983'S TEXT FORECLOSES QUALIFIED IMMUNITY ACROSS THE BOARD.

In determining the application and scope of qualified immunity in a given case, judges are well advised to start with the relevant legal text. *E.g.*, *Ross*, 578 U.S. at 638. The operative text, in turn, is found in the United States Statutes at Large, the repository that has long been recognized as authoritative, especially when it differs from the text in the U.S. Code. *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 448 (1993); *Stephan v. United States*, 319 U.S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent."); *see also* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 235-38 n.243 (2023). And as set out in the Statutes at Large, Section 1983 provides that: "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall" deprive "any person . . . of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, 42

Cong. Sess. I. Ch. 22, 17 Stat. 13 (1871) (emphasis added); *see* Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. at 207, n.28.

Although the version of Section 1983 reported in the United States Code omits the "notwithstanding" language, the limitation it imposes remains operative. And because qualified immunity has its roots in the common law (i.e., the "law[s]," "custom[s]," and "usage[s]" of the states, *see id.*,[5] the "notwithstanding" clause at the very least limits qualified immunity's reach.

Thus, the plain language of Section 1983 forecloses immunity for at least four reasons, all of which militate in favor of cabining rather than expanding immunity doctrines derived from that statute and attributed to its drafters.

*First*, the Civil Rights Act's language is broad, sweeping, and categorical. The Act vested in the people the right to sue "any person" who acted under color of state law for damages for violating an individual's constitutional rights. *See Baxter*, 140 S. Ct. at 1862 (The Civil Rights Act vested persons with the right "to sue state officers for damages to remedy certain violations of their constitutional rights." (Thomas, J., dissenting from denial of certiorari). The statute's text applies "categorically to [every] deprivation of constitutional rights under color of state

[5] *See W. Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92, 102 (1901) (citing Black's Law Dictionary to note that common law includes a jurisdiction's customs and usages).

law." *Id*. at 1862-63. "Any person" means "any person." and the statute admits no exceptions. *See Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting). And "any person" who under the color of state law violates an individual's constitutional rights, "shall" be liable. "Shall," similarly, means "shall" (i.e., mandatory) and furnishes an entitlement to a plaintiff—i.e., a remedy against the person who violated his constitutional rights. The Act does not provide for any immunities. *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

*Second*, elementary grammar underscores this point. As a superordinating clause, the "notwithstanding" language emphasizes the primacy of the main clause—the one that creates a cause of action for individuals (like Dr. Josephson) whose federal rights have been violated by state officials. In other words, the notwithstanding clause ensures that no state law (including state common-law immunity) constricts a person's ability to seek redress through Section 1983 (like a successful qualified-immunity argument does).[6] Stated more simply, a state official shall be liable for violating constitutional rights, despite *any* state law that may otherwise inoculate a state official.

*Third*, although the notwithstanding clause's extirpative effect on qualified immunity is explicit from Section 1983's plain text, interpreting it to abjure

[6] *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 126 (2012).

common-law-based immunities makes sense when read along with the rest of the Civil Rights Act. Specifically, the expressed intent to omit common-law immunities helps explain how Section 1988(a) operates. *See Reinert*, 111 Calif. L. Rev. at 241 (noting that when reading Section 1988(a)'s authorization to use state common law together with Section 1983's notwithstanding clause, the rule is "state law which imposes a barrier to Section 1983 liability was not meant to apply under the [notwithstanding clause] while state law that makes Section 1983 more effective should be applied under Section 1988."). Section 1988 authorizes federal courts to use state common law to provide a suitable remedy in some cases, so long as the state's common law is not "inconsistent with the Constitution and laws of the United States." *Id*. at 240. Thus, Section 1983 creates a broad cause of action unencumbered by any state law, while Section 1988 narrowly resuscitates the common law, but only if doing so is needed to fashion an appropriate remedy.[7]

Had state common law survived Section 1983's enactment, Section 1988(a) would be superfluous. And in any event, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

[7] *See id* at 240-41; *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 183 ("The most common example of irreconcilable conflict—and the easiest to deal with—involves a general prohibition that is contradicted by a specific permission . . . .").

disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983). This buttresses the notion that Congress had no interest in allowing state common law to frustrate the purposes of the Civil Rights Act, while permitting the state common law if it enhanced the remedial powers of the Act.

*Fourth*, legislative history, whatever its significance in a given setting, bolsters the textual analysis set out above. Indeed, when Congress deliberated the contours of the Civil Rights Act, it seriously considered the immunity question. Reinert, 111 Calif. L. Rev. at 238-39. This makes sense, because the impetus for the Act was to hold accountable those state officials who violated private constitutional rights. President Grant, for instance, encouraged Congress to adopt the Civil Rights Act because there was "a condition then existed in some States which rendered life and property insecure and which was beyond the power of state authorities to control." *Monroe*, 365 U.S. at 230 n.46 (Frankfurter, J., dissenting). And throughout the congressional debates, lawmakers consistently repeated that federal action was needed "to supplant state administration which was failing to provide effective protection for private rights." *Id*. This "state administration" had systematically failed to punish those who violated the constitutional rights of citizens or compensate the victims of those violations, which renders absurd any argument that the Congress enacting the Civil Rights Act would have wanted state common-law immunities to shield those same offenders. *Id*.

Apparently concerned by this, some opponents of the Civil Rights Act objected that it imposed "liability on judges and other state officials for a mere error of judgment." Reinert, 111 Calif. L. Rev at 239 (citation omitted) (internal quotation marks omitted). Others lamented that a state court judge could be liable in federal court no matter how "honest and conscientious" his actions might be. *Id*. at 239 n.248 (quoting Cong. Globe, 42 Cong., 1st Sess. 385 (1871) (statement of Rep. Joseph Lewis). Adhering to the reason passage of the Civil Rights Act was imperative, none of its supporters corrected the opponents' understanding, and none even hinted that common-law immunities might survive enactment. In fact, the Act's supporters responded by emphasizing how state officials had either failed to protect, or were ill-equipped to protect, the constitutional rights of citizens. *Id*. at 239 n.251. As a result, Congress considered, but did not include, state law immunities in the final version of the Civil Rights Act.

Most fundamentally, it makes little sense to suppose that Congress would have wanted to leave intact state common-law immunities when it enacted Section 1983. The Fourteenth Amendment empowered Congress to pass statutes to enforce and bring to fruition the rights enshrined by the Civil War Amendments. U.S. Const. amend. XIV. The Civil Rights Act was enacted "less than a month after President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern States." *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) (citation

omitted). The supporters of the Act "repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States." *Id*. The evil and criminal acts of the Klan often went unpunished. *Id*. Accordingly, the Act's supporters contended that "an independent federal remedy" was needed, "given the ineffectiveness of state law enforcement and the individual's federal right to equal protection of the laws." *Id*. at 338 (citation omitted) (internal quotation marks omitted).[8] The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, was therefore a "part of a suite of "Enforcement Acts" designed to help combat lawlessness and civil rights violations in the southern states." Baude, 106 Calif. L. Rev. at 49.

With such high stakes, it belies all reason to think that Congress would have wanted Section 1983 to apply solely to rights "clearly established" by earlier precedent, of which there were scarcely any. To conclude otherwise is an argument that Congress opted to neuter the otherwise most powerful tool for reigning in state officials hell bent on depriving persons (particularly the recently freed slaves) of

[8] *See also Pierson*, 386 U.S. at 559 (Douglas, J., dissenting) (observing that at the time of the Civil Rights Act's enactment "a condition of lawlessness existed in certain of the States, under which people were being denied their civil rights."); *Monroe*, 365 U.S. at230 n. 46 (Frankfurter, J., dissenting in part) (similarly observing that in 1871, in some states, individual rights were insecure and beyond state authorities to control, therefore requiring "federal action to supplant state administration which was failing to provide effective protection for private rights.").

their newly minted federal rights. This is not only implausible on its face; it also violates the presumption against ineffectiveness cannon, which recognizes that interpretation always depends on context, purpose, and therefore effectiveness. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 63-64 (describing the statutory presumption-against-ineffectiveness interpretive cannon and citing *The The Emily*, 22 U.S. (9 Wheat.) 381 (1824) (Thompson, J.)). Accordingly, the language of the Civil Rights Act does not plausibly provide for any immunities, and this Court may consider that when deciding whether to apply Supreme Court precedent broadly or narrowly.

## II. THE COMMON LAW DID NOT RECOGNIZE QUALIFIED IMMUNITY FOR STATE OFFICIALS VIOLATING CONSTITUTIONAL RIGHTS.

### A. From the Founding through most of the first century of the Civil Rights Act, most government officials did not generally enjoy broad immunity.

From the founding to 1871, the common law did not grant most government officials immunity for their unconstitutional conduct. For instance, in February 1804, during the quasi-war with France, the Supreme Court upheld liability determinations against U.S. Navy Officers for unlawful seizure of Danish ships. *James E. Pfander and Jonathan L. Hunt, Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1877 n.59 (2010).

Congress had empowered the Navy to seize French vessels, *id*. at 1878 n.66, and naval officers were instructed to seize all vessels "bound to or from a French port when the vessel or cargo was apparently as well as really American," *id*. at 1879 (citation omitted) (internal quotation marks omitted). Two naval officers, Little and Murray, seized ships that they honestly believed were American that were sailing away from a French port. *Id*.

Captain Little seized a ship called the Flying Fish and brought it to Boston. *Id*. at 1880. But the Flying Fish was not an American ship, nor was it sailing to a French port. *Id*. Captain Little, therefore, lacked authority to seize the Flying Fish. *Id*. (citing *Little*, 6 U.S. at 172). Ultimately, Captain Little was ordered to pay $8,000. *Id*. at 1881.

Captain Murray suffered a similar fate. He engaged in a two-hour chase of a ship, the Charming Betsy. *Id*. at 1880 (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). After seizing the ship, Captain Murray brought the Charming Betsy to Philadelphia. There, Captain Murray learned that the ship belonged to a Danish man named James Shattuck. *Id*. at 1880. The court imposed a fine of $14,000. *Id*. at 1881.

The Supreme Court upheld the damages awards because Captains Little and Murray could not demonstrate that the seized ships were "American owned at the time of their capture." *Id*. at 1881-82. Despite acting with "correct motives" and

"pure intention" in their seizures, Chief Justice John Marshall upheld the actual damages awards against the captains in both cases. *Id*. at 1882. In other words, good faith and honest mistakes—the principled underpinnings of qualified immunity—were considered and rejected by the great Chief Justice.

Fewer than fifty years after the passage of the Civil Rights Act, the Supreme Court again rejected a good-faith defense to liability under Section 1983. *Myers*, 238 U.S. 368 (1915). In *Myers*, African American voters sued the city of Annapolis over a statute involving the city's municipal elections. *Id*. at 376. The statute at issue contained a grandfather clause that prohibited African American citizens from voting if they could not vote before January 1, 1868. *Id*. at 377. The plaintiffs sued under the Civil Rights Act for violating their rights under the Fifteenth Amendment. *Id*. at 378. The three election-official defendants "seriously pressed" that they were not liable, arguing that they acted in good faith, *id*. at 378-79,[9] and asserting that, without a showing of malice, they could not be held liable. *Id*. at 371. But the Court rejected this good-faith defense, because—critically—it clashed with "the very terms of" the Civil Rights Act. *Id*. at 378-79.

[9] *See* Br. for Pls. in Error at 23-45, *Myers*, 238 U.S. at 368 (Nos. 8-10).

Thus, "[f]or the first century of the law's existence, the Court did not recognize an immunity under §1983 for good-faith official conduct." *Baxter*, 140 S. Ct. at 1863.

### B. The Qualified Immunity Doctrine has drifted from its common-law moorings.

When the Supreme Court recognized qualified immunity for the first time, it anchored its holding in the common law as it existed in 1871. *Pierson*, 386 U.S. at 557. The Court held that because the common-law torts of false arrest and false imprisonment allowed a defense of good faith and probable cause, the defendant police officers there could also assert the same defense to an action under the Civil Rights Act. *See id*.

The Court did not, however, remand with instructions to dismiss the case due to immunity. Instead, the Court found that there were still sufficient factual disputes that warranted a jury trial. The plaintiffs contended that they were arrested solely for standing in a "whites only" waiting room. The police officers contended that the arrest was to preserve the peace. *Id*. The jury needed to resolve the factual dispute. *Id*. The Court concluded that the plaintiffs had a right to use the waiting room, "and their deliberate exercise of that right" did "not disqualify them from seeking damages" under the Civil Rights Act. *Id*. at 558.

But then, as Justice Thomas has since observed, *Baxter*, 140 S. Ct. at 1863, the case law departed from its common-law moorings and sailed into the

unpredictable waters of judicial interest balancing. *See Harlow*, 457 U.S. at 807.[10] Just seven years after *Pierson*, the Court surveyed its precedents and suggested that qualified immunity could protect *all* executive branch officials, including a university president. *Scheuer*, 416 U.S. at 246-47. As Justice Thomas recognized, the *Scheuer* Court arrived at this broad conclusion without analyzing the common law as it existed in 1871. *See Baxter*, 140 S. Ct. at 1863. Instead, the Court extrapolated from *Pierson*'s police-officer-specific holding and observed (again, without any reference to the common law) that, because executive branch officials' range of options is far broader and more subtle than the range of options for police officers, university presidents should receive broad qualified immunity. *Scheuer*, 416 U.S. at 247. In fact, the Court stated that its precedents "suggest[ed]" that qualified immunity is available to all executive branch officials, including a state university president. *Id*. at 247; *See also Crawford-El*, 523 U.S. at 587.

Having unmoored itself from the common law, the Court ventured into open seas.[11] Eight years after *Scheuer*, the Court held that government officials cannot be

[10] *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J.) (plurality op.) (observing that the judicial power is governed by standards). By contrast, balancing competing policy considerations is for Congress. *Ziglar*, 582 U.S. at160 (Thomas, J., concurring in part and concurring in judgment).

[11] *See Crawford-El v. Britton,* 523 U.S. 574, 611 (Scalia, J., dissenting) (stating that the Court's qualified immunity jurisprudence has not remained faithful to the common law immunities that existed in 1871).

held liable for injuring another person's constitutional rights unless the official violates a clearly established right that a reasonable person would have known. *Harlow*, 457 U.S. at 818. This holding contorted the defense of good faith, a defense that was at least somewhat grounded in common law. *Baxter*, 140 S. Ct. at 1863.

What emerges is that the purported common-law origin of immunity for university officials is unclear. Additionally, the proposition that courts should afford qualified immunity to university officials on the grounds that they must be encouraged to vigorously exercise their governmental power is not mandated by Supreme Court precedent. Qualified immunity should not be extended any further than Supreme Court precedent requires. The university is a setting where both academic freedom and freedom of speech should thrive without undue government interference. Buttressing both freedom of speech and academic freedom is the First Amendment's mistrust of governmental power. *See Citizens United*, 558 U.S. at 340. The constitutional right to free speech, in the university, the very quintessential marketplace of ideas, should prevail over an unnecessarily broad qualified-immunity doctrine.

## III. EVEN ASSUMING THAT SECTION 1983 LEFT INTACT STATE COMMON-LAW IMMUNITIES, STATE COMMON LAW DOES NOT SHIELD UNIVERSITY OFFICIALS FROM FEDERAL LIABILITY.

Even if the Civil Rights Act does permit state common law to inoculate state officials from liability—and it does not—the Supreme Court's jurisprudence cannot

be stretched to cover the university officials here. As noted throughout this brief, when the Court recognized qualified immunity for the first time, it did so based on the notion that certain common-law immunities survived Section 1983's enactment. *Pierson*, 386 U.S. at 557. As noted above, the scrivener's error resulting in the difference between the Statutes at Large and U.S. Code versions of Section 1983 likely accounted for this error. But even on *Pierson*'s terms, qualified immunity's umbrella (as originally understood) does not cast a shadow expansive enough to cloak the university officials here.

In *Pierson*, the meat of the Court's opinion turned on whether police officers could be held liable for false arrest when they acted in good faith. 386 U.S. at 555-58. After acknowledging that "[t]he common law has never granted police officers an absolute and unqualified immunity," the Court nonetheless applied what it took to be the Nation's "prevailing view," which established that "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." *Id*. at 555. By the Court's lights, "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id*. Similarly, the Court reasoned that "the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held

unconstitutional, on its face or as applied." *Id*. Thus, the Court held that a police officer, faced with a decision to arrest an individual, should be afforded the opportunity to assert a defense of good faith and reasonableness.

Similar concerns prompted the Supreme Court in *Harlow* to expand common-law immunity beyond the law-enforcement context. In *Harlow*, the Court reasoned that, at common law, "government officials [were] entitled to some form of immunity from suits for damages . . . to shield them from undue interference with their duties and from potentially disabling threats of liability." *Id*. at 457 U.S. at 806. In so doing, though, the Court recognized that "high Federal officials of the Executive Branch . . . require greater protection than those with less complex discretionary responsibilities," because these high officials are "'required to exercise their discretion'" in line with the public's interest "in encouraging the vigorous exercise of official authority." *Id*. at 807 (internal quotations omitted). And for good measure, the Court reiterated that "[d]amages actions" remain "an important means of vindicating constitutional guarantees." *Id*. at 809 (internal quotations omitted).

While the Court has upheld this rationale for police officers, *see Pierson*, 386 U.S. at 557, governors, *see Scheuer*, 416 U.S. at 246-47, university *presidents* faced with decisions about national-guard deployment, *see id*., or White House aides, *see Harlow*, 457 U.S. at 809, these precedents should not be extended to cover the university officials here. This is especially true because the constitutional

infringement here turns on academic and political expression, and the First Amendment exists because the Founders mistrusted expansive government power that could be used to squelch things like academic and political expression. *Citizens United*, 558 U.S. at 340. Qualified immunity is at loggerheads with that First Amendment mistrust, since qualified immunity, by its terms, incentivizes and insulates officials to vigorously exercise governmental power when some exigency or crisis demands it. *Harlow*, 457 U.S. at 807, 816.

Courts should not go out of their way to bestow on university officials a dubious doctrine of qualified immunity in a manner that is contrary to the Civil Rights Act's language, contrary to the purpose of the Act, and not clearly consistent with common law. For that reason, this Court should affirm.

## IV. EVEN IF SECTION 1983 HAD NOT FORECLOSED QUALIFIED IMMUNITY, IT CANNOT BE SQUARED WITH THE SEVENTH AMENDMENT'S JURY GUARANTEE (AT LEAST IN THIS CASE).

Finally, applying qualified immunity to this case at this stage raises profound Seventh Amendment concerns. This is so because the facts here remain in dispute. Or, in the words of the district court, the parties' "competing characterizations of the facts" "could not be further apart." Order, R. 99, Page ID # 5768.

In his briefing, both at the merits stage and through his motion to dismiss, Dr. Josephson convincingly explains why those factual disputes preclude this appeal under the applicable rules of procedure and Circuit precedent. *See* Josephson Br. 2.

He's right, but not just for those reasons. The Seventh Amendment, which provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," further precludes Appellants' case. Because qualified immunity takes from the jury questions that juries should decide, it raises serious constitutional concerns that should not be lightly dismissed. This case, more so than the run-of-the-mine Section 1983 cases, highlights the tension between the Seventh Amendment's jury guarantee and the asserted prerogative of these university officials not to stand trial at all. Even in *Pierson*, the Court remanded to the trial court because a jury needed to determine prevailing factual issues. 386 U.S. at 557-58.

The district court's order was clear: the facts here (many of which turn on the subjective motivations of the defendants) are *not* undisputed. In our system, factual determinations like those at issue here are to be decided by civil juries, not judges. But at every stage of this case, these university officials have insisted that they are immune even from having a factfinder establish whose version of events is more credible, theirs or Dr. Josephson's. That is not what the Constitution provides, nor

what proper application of the Supreme Court's ahistorical, contra-textual, and increasingly dubious qualified-immunity doctrine requires.

## CONCLUSION

For all these reasons, the Court should affirm the district court's order denying qualified immunity.

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Respectfully submitted,

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I HEREBY CERTIFY that, on this 1st day of May, 2024, a true copy of the foregoing Amicus Brief was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by email a notice of docketing activity to the registered Attorney Filer on the attached electronic service list.

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