No. 20-40359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Priscilla Villarreal,

Plaintiff-Appellant,

v.

The City of Laredo, Texas; Webb County, Texas; Isidro R. Alaniz; Marisela Jacaman; Claudio Trevino, Jr.; Juan L. Ruiz; Deyanria Villarreal; Enedina Martinez; Alfredo Guerrero; Laura Montemayor; Does 1-2,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Laredo Division, No. 5:19-CV-48,
Hon. John A. Kazan, Presiding

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PLAINTIFF–APPELLANT AND REVERSAL ON REHEARING EN BANC

Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
571.329.2227
ccrawford@afphq.org

December 12, 2022

Attorney for Amicus Curiae
Americans for Prosperity Foundation

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amicus curiae* Americans for Prosperity Foundation certifies that the following listed persons and entities, in addition to those listed persons and entities in the parties' and amici's briefs, as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

Americans for Prosperity Foundation ***Amicus Curiae***	Cynthia Fleming Crawford **Counsel for *Amicus Curiae* AFPF**

Undersigned counsel further certifies that *amicus curiae* Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Cynthia Fleming Crawford

Dated: December 12, 2022 Cynthia Fleming Crawford

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include ensuring the freedom of expression guaranteed by the First Amendment. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because it is concerned about the use of the doctrine of qualified immunity to chill speech. More broadly, AFPF has a similar interest in this case as in *Uzuegbunam v. Preczewski*, No. 19-968 (U.S., filed March 3, 2020), which concerned the use of qualified immunity to shield university administrations from responsibility for infringing student speech rights based on the lack of precedent with an exact-fit fact pattern. The anti-precedent trap, under which the clearly established prong of qualified-immunity analysis allows a violation to elude vindication creates the problem it purports to solve by stymying development of precedent that would protect speech from future violations.

[1] This brief is accompanied by an opposed motion for leave to file. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The application of qualified immunity to shield patently unconstitutional conduct would run contrary to the limited purposes of qualified immunity: to ensure fair notice before imposing liability; and to promote government activity beneficial to society.[2] For violations of the First Amendment, for which bedrock principles are well established and ubiquitous, the timeframe over which infringing activity takes place should inform whether the government official's understanding of the law was reasonable. This is so because a longer timeframe would allow for the elimination of any lingering doubt, regardless whether the doubt was reasonable in the first place.

The panel decision's holding that "[i]t should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment" satisfied the fair notice requirement of qualified immunity even if no factually-similar case has previously been decided. To hold otherwise would shield egregious constitutional violations that have not previously merited adjudication and feed the anti-precedent trap in which state actors can game the system by eluding final decisions on First Amendment claims to shelter later violations.

While the panel decision focused largely on the First Amendment rights of the press, the constitutional rights implicated by the application of qualified immunity in this case are not limited to the Press Clause. Indeed, they may be of

[2] This brief focuses on Villarreal's First Amendment claim.

greater force due to broader applicability of the Speech Clause to situations where split-second decisions are rare, but premeditated policy-based discrimination is all too common. Such policy-based infringement is particularly acute on college campuses where school policies may facially infringe speech rights but evade remediation through litigation because qualified immunity is used to dismiss lawsuits and eliminate development of the very precedent needed to prevent future violations. Not only does this anti-precedent trap leave students without a remedy for obvious infringement because an exact-fit fact pattern is required before speech prohibitions can be recognized as unconstitutional, it teaches students that government can curb or eliminate rights by cultivating ignorance to leave them without recourse.

ARGUMENT

I. Qualified Immunity Should Not Be Applied to 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 multi-month period, qualified immunity should be applied rarely, if at all. This is because, as the panel opinion correctly stated, "[t]he crucial question . . . is whether 'a reasonable official would understand that what he is doing violates [a constitutional] right.'" *Villarreal v. City of Laredo*, 44 F.4th 363, 369 (5th Cir. 2022), *reh'g granted and vacated*, 52 F.4th 265 (5th Cir. Oct. 28, 2022) (quoting *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.

Qualified immunity serves two essential purposes: to ensure fair notice for the government employee before liability can be imposed—consistent with the constitutional due process requirement of fair notice; and to promote official action recognized under the common law as necessary to society. The societal justification for promoting action was explained by Cooley's *Treatise on Torts*:

> It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime[.]

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).

Certain types of official action have long received essentially plenary immunity. For example, the Supreme Court has concluded "legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J. concurring in part and concurring in the judgment) (citing *Tenney v. Brandhove*, 341 U.S. 367, 372–76 (1951) (legislators);

Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (judges)). Whereas the availability or degree of immunity for other categories of official action has varied across time and type of activity, attempting to accommodate vigorous official action within a reasonable standard of care. In the area of policing, the Court long ago "concluded that police officers could assert 'the defense of good faith and probable cause' against the claim for an unconstitutional arrest because that defense was available against the analogous torts of 'false arrest and imprisonment' at common law." *Id*. at 1871 (Thomas, J. concurring in part and concurring in the judgment) (citing *Pierson*, 386 U.S. at 557).[3] Thus, the Court has recognized police "under § 1983 [have] a 'good faith and probable cause' defense coextensive with their defense to false arrest actions at common law." *Imbler v. Pachtman*, 424 U.S. 409, 418–19 (1976). While the Court has largely abandoned this approach in favor of the *Harlow* "objective," "clearly established" test, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (applying the objective test in *Bivens* action); *Ziglar*, 137 S. Ct. at 1866–67 (applying the objective test in § 1983 cases), it is instructive to understand the goals qualified immunity has traditionally served.

[3] *See also Pierson*, 386 U.S. at 555 ("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 . . . the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid.").

With the near elimination of the good faith test, fair notice has become largely dispositive. But the contours of fair notice have long roots, implicating due process, and turning on 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 to evaluate the constitutionality of the proposed course of action.

Regarding due process and the need for clarity in settled law, there is a distinction between unclear or erroneous laws for which a government actor could not reasonably be deemed to have fair notice and acts that are so clearly unconstitutional or otherwise unlawful that a government actor should be expected to know better. On the one hand, "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, when the law is clear, the government actor is bound by it and may be liable even in the face of contrary commands from a superior. For example, in a case from the early days of the Republic, the Court held a ship captain

responsible for the unlawful seizure of another ship even though he relied on the President's interpretation of the underlying statutory authority. *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"). This approach, refusing to shield reliance 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.").

Whether interpreted under the original understanding of § 1983, such that immunity is available if it was historically accorded in an analogous situation at common law, *see Imbler*, 424 U.S. at 421, 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 and the press are protected is readily satisfied because claims of First Amendment infringement are among the most frequently discussed and hotly asserted constitutional rights. It is thus reasonable to expect that a public official with even the most rudimentary understanding of our constitutional system would be well aware that government attempts to control speech and the press should be met with a jaundiced eye and—at a minimum—pause and seek guidance if the lawful course of action is unclear. As the Court held in *Harlow*, "[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. at 815–19. The alternative to this approach would be to promote ignorance of the constitution as a shield against liability.

Moreover, in cases like this one, in which six months elapsed between a journalist's open questioning of the police officer and issuance of the warrants for her arrest, fair notice in slow moving decisions would be easy to meet. Any questions regarding the lawfulness of a policy, regulation, or proposed course of action, could be analyzed before action is taken. This holds particularly true where, as here, the action taken was extreme: "It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment," *Villarreal*, 44 F.4th at 373. Six months would be more than enough time to satisfy

any lingering doubt that arresting her may be unconstitutional. But even in more subtle, policy-setting cases, the slow-moving nature of many First Amendment conflicts raises doubt whether qualified immunity should ever apply. If so, it should be the rarity not the rule.

This issue has relevance well beyond the policing situation and is particularly acute in settings where an unconstitutional policy can be readily changed to moot a plaintiff's case either through narrow policy modifications that elude the plaintiff's specific fact pattern or through flip-flopping policies to wriggle past plaintiffs whose standing is based on a temporary status. This type of gamesmanship is familiar on university campuses where college administrators set policies that infringe the speech rights of students and faculty despite involving a slow-moving policy-making process that is amenable to legal consultation. 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?").

Accordingly, application of qualified immunity in First Amendment cases should be rare, and, if applied at all, should be informed by the amount of time

available to the state actor to ensure that the proposed course of action is constitutional before acting to chill speech.

II. College Campuses Present an Acute Example of Qualified Immunity Run Amok to Minimize Speech Rights.

Despite frequent litigation challenging violations of the First Amendment, universities continue to retain unconstitutional policies. According to the Foundation for Individual Rights and Expression, 83.5% of public universities continue to maintain policies that either clearly violate the First Amendment or, on their face, would permit application in ways that violate the First Amendment rights of students or faculty.[4] There is little legal reason for universities to be more proactive. In spite of frequent challenges to these policies, few campus free speech cases actually reach the merits because of qualified immunity and the potential mootness of the case once the student graduates or when a university revises its policy during litigation. Because universities can almost always play one or more of these cards at any time in a typical case, they can avoid a judgment. Where constitutional violations can always be remedied later, without significant cost to the defendants and without

[4] *See* Foundation for Individual Rights and Expression, Spotlight on Speech Codes 2022, *available at* https://bit.ly/3uzXaXa (18.5% of institutions earned a "Red" rating, meaning the institution has "maintained at least one severely restrictive policy," and 68% of institutions earned a "Yellow" rating, meaning the institution maintained at least one policy that applied "either clear restrictions on a narrower range of expression or policies that, by virtue of vague wording, could too easily be applied to restrict protected expression").

risking an actual decision that would bind the defendants, the incentive is lacking to proactively correct unconstitutional policies.

A. Universities Do Not Have a Special Dispensation from the Government's Burden to Justify and Tailor Infringement of Constitutional Rights.

Contrary to the routine university practice of placing the burden on students to pre-clear speech ahead of time, the burden is squarely on the government to justify speech limitations by ensuring they comport with the First Amendment—that bar is particularly high against prior restraints such as those imposed by campus free speech zones or speech reservation policies. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Time, place, and manner restrictions must be "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

Against this background of broad protection for First Amendment rights, it is inexplicable that qualified immunity can be used to repeatedly evade constitutional review and provide an "out" against adhering to the Constitution.

B. Schools are Normalizing Prior Restraints.

The risk to free speech from offending policies is particularly acute in educational settings as anti-speech pressures and the ability of governing bodies to creatively impose restrictions on speech and to modify policies with an alacrity unavailable to legislatures minimize the risk or effect of litigation. But the risk to speakers who dare to challenge those policies pales in comparison to the danger of educating future generations in the belief that the government not only must, but rightfully should, be asked for permission before speaking.

Government speech rules that are inconsistent with the First Amendment thus not only infringe the rights of individual students, but also educate students in a misunderstanding of the American system that is anathema to the rights secured by the Constitution. Written policies that tell students they may only speak in certain small areas of the campus, only with a government permit, and on topics that have been pre-screened by the administration, educate the next generation that this is the kind of relationship citizens should expect with their government.[5] Compelling students to sign student codes that censor their speech, thereby inuring them to being stopped from speaking and threatened with expulsion—even if they have a permit—

[5] The inclination toward a converse-Lotus principle, where everything that is not allowed is forbidden, is contrary to the American and English traditions and should be avoided. *See generally Everything which is not forbidden is allowed*, Wikipedia, http://bit.ly/2TgF5vB (last visited Dec. 2, 2022).

simply because someone else doesn't like what they have to say, teaches them that their "rights" exist at the pleasure of government. Beyond the application of such policies to individual students in violation of their rights, these kinds of policies affect not only those on campus, but our civic culture. These students will leave the university after four years. Will they carry with them the understanding that government must respect constitutional freedoms, or instead—trained by the policies they have grown accustomed to living under—believe that much of our normal discourse is too dangerous to permit?

C. Application of Qualified Immunity Exacerbates the Problem of Challenging Unconstitutional Campus Speech Policies.

Because qualified immunity is immunity from suit, not just a defense to liability, *Pearson*, 555 U.S. at 231, it should not be applied when "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Hope v. Pelzer*,536 U.S. 730, 740 (2002) (alteration in original). This approach can be the critical difference in the university between vindicating First Amendment rights and a pernicious cycle in which repeated dismissal of First Amendment cases results in losing potential precedential value of those cases.

The anti-precedent trap was well summarized 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 (2019) (Willett, J., concurring in part, dissenting in part).

So too where the god in the machine is helped along by university administrators who may elude review by simply changing their policies just enough to avoid a perfect match with existing precedent, thus ensuring that future violators may be preserved from "knowing" that their actions violate free speech rights.

This Court should not allow expansive application of the qualified immunity doctrine to shield these state officials from accountability for clear constitutional violations in this way.

CONCLUSION

For these reasons, this Court should reverse the district court's dismissal and judgment on Ms. Villarreal's Section 1983 claim for violation of the First Amendment.

Respectfully submitted,

/s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
571.329.2227
ccrawford@afphq.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 3,500 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford

Dated: December 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Plaintiff-Appellant and reversal on rehearing *en banc* with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Cynthia Fleming Crawford
Cynthia Fleming Crawford

Dated: December 12, 2022