No. 23-35288

United States Court of Appeals
for the
Ninth Circuit

RACHEL G. DAMIANO; KATIE S. MEDART,

Plaintiffs-Appellants,

v.

GRANTS PASS SCHOOL DISTRICT NO. 7, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon (Medford)
Case No. 1:21-cv-00859-CL • Honorable Mark D. Clarke, Presiding

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

ABIGAIL E. SMITH
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
Telephone: (215) 717-3473
abby.smith@thefire.org

RONALD G. LONDON*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE
Suite 340
Washington, DC 20003
Telephone: (215) 717-3473
ronnie.london@thefire.org

**Counsel of Record*

Attorneys for Amicus Curiae *Foundation for Individual Rights and Expression*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *Pickering* Establishes a High Bar to Prove Disruption Caused by Political Speech on Matters of Public Concern. 4

A. Because speech on matters of public concern is entitled to the highest protection, it requires the most "vigorous" showing to prove disruption. 5

B. Viewing the facts in the light most favorable to Plaintiffs, there is insufficient evidence to prove "vigorous" disruption at summary judgment 9

II. The District Court Erred in Granting Qualified Immunity. 12

A. *Settlegoode* clearly established that Grants Pass violated Plaintiffs' First Amendment rights. 13

B. Qualified immunity should apply only to split-second decisions in the field, not considered disciplinary responses to protected speech. 16

1. Qualified immunity should not be governed by a one-size-fits-all standard. 18

2. Limiting qualified immunity to acts made under exigent circumstances meets Section 1983's purpose.............................21

3. Traditional reasons for qualified immunity weaken beyond exigent circumstances...24

4. Reining in qualified immunity for considered decisions will protect First Amendment liberties. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page(s)**

Allen v. Scribner,
812 F.2d 426 (9th Cir. 1987) 5

Bates v. Clark,
95 U.S. 204 (1877) 22

Berger v. Battaglia,
779 F.2d 992 (4th Cir. 1985) 8, 11

Butz v. Economou,
438 U.S. 478 (1978) 26

Connick v. Myers,
461 U.S. 138 (1983) 2, 14

Craig v. Rich Twp. High Sch. Dist. 227,
736 F.3d 1110 (7th Cir. 2013) 6

Damiano v. Grants Pass Sch. Dist. No. 7,
No. 1:21-cv-00859-CL, 2023 WL 2687259
(D. Or. March 29, 2023) 10, 11, 15, 20, 21

Dodge v. Evergreen Sch. Dist. #114,
56 F.4th 767 (9th Cir. 2022) 5, 6, 7, 8, 10, 11, 12

Eng v. Cooley,
552 F.3d 1062 (9th Cir. 2009) 15, 16

Flanagan v. Munger,
890 F.2d 1557 (10th Cir. 1989) 8, 9

Gonzalez v. Trevino,
42 F.4th 487 (5th Cir. 2022) 19

Graham v. Connor,
490 U.S. 386 (1989) 24

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 13, 24, 25, 26

Heien v. North Carolina,
574 U.S. 54 (2014) 27

Hoggard v. Rhodes,
141 S. Ct. 2421 (2021) 17, 18

Hope v. Pelzer,
536 U.S. 730 (2002) 12, 13, 15, 27

Hufford v. McEnaney,
249 F.3d 1142 (9th Cir. 2001) 5

Hyland v. Wonder,
972 F.2d 1129 (9th Cir. 1992) 5

Intervarsity Christian Fellowship/USA v. Univ. of Iowa,
5 F.4th 855 (8th Cir. 2021)...................................... 17, 18, 29

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804).. 22

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803).. 21

Moser v. Las Vegas Metro. Police Dep't,
984 F.3d 900 (9th Cir. 2021) 8, 9, 11

Mullenix v. Luna,
577 U.S. 7 (2015) 27

Munroe v. Cent. Bucks Sch. Dist.,
805 F.3d 454 (3d Cir. 2015)... 6

Myers v. Anderson,
238 U.S. 368 (1915) 23

N. S., only child of decedent, Stokes v. Kansas City Bd. of Police Comm'rs, 143 S. Ct. 2422 (2023)... 3

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 6

Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968) 5, 14

Pierson v. Ray,
386 U.S. 547 (1967) 19, 24, 25

Poindexter v. Greenhow,
114 U.S. 270 (1885) 23

Porter v. Bowen,
496 F.3d 1009 (9th Cir. 2007) 16

Riley's Am. Heritage Farms v. Elsasser,
32 F.4th 707 (9th Cir. 2022) 7

Robinson v. York,
566 F.3d 817 (9th Cir. 2009) 6

Scheuer v. Rhodes,
416 U.S. 232 (1974) 26

Settlegoode v. Portland Pub. Schs.,
371 F.3d 503 (9th Cir. 2004) 2, 7, 12, 13, 14, 16

Spalding v. Vilas,
161 U.S. 483 (1896) 22

Taylor v. Riojas,
141 S. Ct. 52 (2020) 13

Tracy v. Swartwout,
35 U.S. (10 Pet.) 80 (1836) 22

Wearry v. Foster,
52 F.4th 258 (5th Cir. 2022) 29

Zadeh v. Robinson,
928 F.3d 457 (5th Cir. 2019) 19

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) 17

Statutes

42 U.S.C. § 1983.. 13, 18, 21, 23

Other Authorities

4 Annals of Cong. (1794) 29

Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*,
111 Cal. L. Rev. 201 (2023) 16

Cong. Globe, 42d Cong., 1st Sess. 376 (1871).. 23

David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 Cardozo L. Rev. 90 (2022) 22, 23

Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation, the Collapse of Constitutional Remedies by Aziz Z. Huq*, 131 Yale L.J. 2126 (2022) 23

F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*,
56 Wake Forest L. Rev. 501 (2021).................................... 18, 19, 20, 26

James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010) 22

Joanna C. Schwartz, *The Case Against Qualified Immunity,*
93 Notre Dame L. Rev. 1797 (2018).. 19

Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*,
34 Colum. Hum. Rts. L. Rev. 261 (2003) 27

Richard M. Re, *Clarity Doctrines*,
86 U. Chi. L. Rev. 1497 (2019). 20

Scott Keller, *Qualified and Absolute Immunity at Common Law*,
73 Stan. L. Rev. 1337 (2021) 19

Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*,
87 N.Y.U. L. Rev. 132 (2012).. 21

William Baude, *Is Qualified Immunity Unlawful?*,
106 Calif. L. Rev. 45 (2018) 19

William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115 (2022).......................... 19, 25

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Supp. of Petitioner, *Novak v. Parma*, No. 22-293 (Oct. 28, 2022); Brief of FIRE as *Amicus Curiae* in Supp. of Pls.-Appellants and Reversal, *TGP Comms., LLC v. Sellers*, No. 22-16826 (9th Cir. Dec. 16, 2022). After defending core civil liberties at our nation's colleges and universities for more than two decades, *amicus* FIRE recently expanded its mission to protect free expression beyond campus as well.

FIRE has a direct interest in this case because FIRE frequently advocates on behalf of individuals who were retaliated against by

---

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

government officials for exercising their First Amendment rights. Many of those officials try to avoid liability by invoking qualified immunity. But qualified immunity provides no shield to cases like this one, where existing law provides officials fair warning that their actions violate the First Amendment. Furthermore, qualified immunity should not apply to considered, deliberated decisions to violate constitutional rights. FIRE files this brief in support of Petitioners to clarify the high bar this Circuit established for *Pickering* disruption, and to explain why qualified immunity is inappropriate here.

SUMMARY OF ARGUMENT

Almost twenty years ago, this Court held "it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters." *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 516 (9th Cir. 2004) (citing *Connick v. Myers*, 461 U.S. 138, 162 (1983)). Yet the district court here held that, under *Pickering*, Grants Pass School District could do exactly that. The court incorrectly concluded that the district did not violate the First Amendment by firing an assistant principal (Rachel Sager, née Damiano) and teacher (Katie Medart) for speaking out against the District's gender identity policy,

because their actions—namely, publishing an alternative model gender-identity education policy and accompanying video called "I Resolve"—allegedly caused significant community disruption.

That ruling gets *Pickering* all wrong, particularly in the K-12 context. The Ninth Circuit has established a high bar to show *Pickering* disruption when political speech is involved, particularly in the K-12 context. In this Circuit, there are precise considerations to evaluate school disruption under *Pickering*: The disruption must be of the *classroom*, not the teacher's lounge or the local community; the complaints must come from *students and parents*, not teachers and outside community members; and the disruption must be caused by *the speaking employees themselves*, not outraged community members who cause a ruckus.

But the district court ignored some of those considerations, conflated others, and disregarded key disputes of material fact to grant summary judgment to Grants Pass. "It is the jury's role to decide factual disputes over what happened and draw factual inferences from the evidence presented." *N. S., only child of decedent, Stokes v. Kansas City Bd. of Police Comm'rs*, 143 S. Ct. 2422, 2422 (2023) (Sotomayor, J,

dissenting from denial of cert). The district court should have let a jury resolve the disputed facts that comprise this Circuit's *Pickering* considerations. This Court should reverse that error on appeal.

The district court further erred in holding Grants Pass would be protected by qualified immunity. In light of *Settlegoode*, any reasonable school board official in 2021 should have had fair warning that it violated the First Amendment to punish employees for speaking out on school matters. Regardless, the very justifications for qualified immunity make clear that it should not apply to this case, where school board officials decided to violate Plaintiffs' constitutional rights after measured, months-long deliberations. Holding otherwise merely encourages government officials of all stripes to violate the Constitution and hope that qualified immunity will grant them "one free bite." This Court should reverse and allow a jury to decide Grants Pass's fate, not allow a judge to shield them from liability.

ARGUMENT

I. *Pickering* Establishes a High Bar to Prove Disruption Caused by Political Speech on Matters of Public Concern.

To win on summary judgment, Grants Pass needed to show there is no genuine dispute of material fact that it had a "legitimate

administrative interest in preventing [Plaintiffs'] speech that outweighed [their] First Amendment rights." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 781 (9th Cir. 2022) (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968)). The most commonly cited government interest, and the one raised by Grants Pass in this case, is "promoting workplace efficiency and avoiding workplace disruption." *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001). This Circuit establishes a very high bar to show disruption, including in the K-12 school context. Between the undisputed facts in Plaintiffs' favor and the disputed facts in the record, Grants Pass failed to meet that bar.

A. Because speech on matters of public concern is entitled to the highest protection, it requires the most "vigorous" showing to prove disruption.

Workplace disruption is very difficult to prove in the Ninth Circuit, particularly when it involves speech on a matter of public concern. "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992). Speech on matters of public concern "occupies the 'highest rung of the hierarchy of first amendment values.'" *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987) (quoting *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886, 913 (1982)). "Thus, employers must make a 'stronger showing of disruption when the speech deal[s] . . . directly with issues of public concern.'" *Dodge*, 56 F.4th at 782 (quoting *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009)).

The Ninth Circuit and courts across the country have found substantial disruption sufficient to outweigh a public employee's First Amendment rights only in extreme examples that directly touched on the employee's work. In the school context, courts have typically required that some level of inappropriate interaction with students occur. For example, the Third Circuit held a school district could fire a schoolteacher for directly criticizing her students by name on her blog, which caused student and parental outrage after it was publicly reported. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 473–74 (3d Cir. 2015). And the Seventh Circuit has held that a school counselor could be fired for dedicating his book—which largely consisted of sex advice—to his high school students. *Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110 (7th Cir. 2013). By contrast, this Circuit has recently held that a school district could *not* retaliate against a teacher for wearing a MAGA hat to a teacher training, even though it upset several of his colleagues, because

the training sessions were able to proceed without interference and, since he did not wear the MAGA hat in the classroom, it did not "cause any disruption *to school*." *Dodge*, 56 F.4th at 783 (emphasis in original).

Dodge provides significant guidance on what constitutes disruption in the K-12 school context. This Court held: "Speech that outrages or upsets co-workers without evidence of 'any actual injury' to school operations does not constitute a disruption." *Id.* at 782 (quoting *Settlegoode*, 371 F.3d at 514). "Other relevant considerations in the school context are whether 'students and parents have expressed concern that the plaintiff's conduct has disrupted the school's normal operations, or has eroded the public trust between the school and members of its community.'" *Id.* (quoting *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 725 (9th Cir. 2022)). Causing fellow teachers or other coworkers to be "outraged or offended" does not suffice—a school employee's speech must actually disrupt the *classroom* environment. *Id.* at 783. Perhaps most importantly, this Court held that the disruption caused must be more than merely "the disruption that necessarily accompanies controversial speech." *Id.* at 782. "That some may not like the political message being conveyed is par for the course and cannot

itself be a basis for finding disruption of a kind that outweighs the speaker's First Amendment rights." *Id.* at 783.

This Court also recently acknowledged that *Pickering* balance does not permit threatened disruption by *others outside government* to suffice for a compelling government interest—the disruption must be caused by the speaker himself or by members of the school. In *Moser v. Las Vegas Metropolitan Police Department*, 984 F.3d 900 (9th Cir. 2021), the Court cites *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985), for the proposition that "threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech." *See Moser*, 984 F.3d at 909. *Berger* held that a police officer could not be punished for performing in blackface under *Pickering* because the outrage and disruption that resulted came from the local black community, not the officer himself or other officers within the department. *See Berger*, 779 F.2d at 1001. Otherwise, *Pickering* would effectuate a "heckler's veto" and would be used "as a justification for curtailing 'offensive' speech in order to prevent public disorder." *Flanagan v. Munger*, 890 F.2d 1557,

1566 (10th Cir. 1989) (citing *Berger* and collecting Supreme Court cases that reject a heckler's veto).

B. Viewing the facts in the light most favorable to Plaintiffs, there is insufficient evidence to prove "vigorous" disruption at summary judgment.

Far too many key facts remain disputed for the district court to have resolved them and found disruption on summary judgment. In considering the appeal of a grant of summary judgment, the court must review the evidence "in the light most favorable to the nonmoving party" (here, Plaintiffs) and "determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Riley's Am. Heritage Farms*, 32 F.4th at 719 (cleaned up). In light of this Court's holdings in *Dodge* and *Moser*, the undisputed facts (and the disputed ones, viewed in Plaintiffs' favor) make this, at best, an edge case that should be evaluated by a jury, not by a judge at summary judgment.

A key issue that should have precluded summary judgment is the lack of certainty regarding the number and source of complaints Grants Pass received against Plaintiffs for their involvement in "I Resolve." The district court noted that the parties disputed how many complaints were

filed with the school, and it was unclear how many of those complaints came from staff and the broader community versus students and parents. *Damiano v. Grants Pass Sch. Dist. No. 7*, No. 1:21-cv-00859-CL, 2023 WL 2687259, at *7 (D. Or. March 29, 2023). Yet the court opined that "regardless of whether the complaints numbered in the range of 10-20 or closer to 100, the fact that Plaintiffs' speech caused a disturbance on campus between staff, students, and community members is undisputed and well documented." *Id.*

That sweeping conclusion is completely at odds with this Court's decision in *Dodge*. There, for example, even when five of sixty attendees of the teacher training complained about being "outraged or offended," that volume of complaints did not suffice to outweigh the teacher's First Amendment right to freedom of expression because it did not "interfere[] with his ability to perform his job or the regular operation of the school." *Dodge*, 56 F.4th at 782. The volume of complaints matters.

It also matters whether those complaints came from students and parents (which weighs more in favor of classroom disruption under *Pickering*), or whether those complaints came from staff and community members outside the school (which have little to no impact on classroom

disruption). For example, *Dodge* held that to pass *Pickering* balancing in the K-12 context, any disruption to school operations must disrupt the learning environment for *students*; "[s]peech that outrages or upsets co-workers" without actually damaging classroom operations "does not constitute a disruption." *Id.* But the district court conflated classroom disruption with outside concerns when it lumped together complaints from "staff, students, and community members." *Damiano*, 2023 WL 2687259, at *7.

The district court further erred when it held that "whether the disturbance was 'caused' by Plaintiffs' speech or by the staff, student, and community reaction to the speech is a distinction without a difference." *Damiano*, 2023 WL 2687259, at *7. This approach disregards this Court's embrace of *Berger* in *Moser* and effectively endorses a heckler's veto by holding Plaintiffs responsible for the "community backlash," rather than any disruptive behavior from Plaintiffs. *Id.*; *see also Moser*, 984 F.3d at 909 (citing *Berger*, 779 F.2d at 1001, for the proposition that "threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech").

The district court's reasoning also runs afoul of this Court's holding in *Dodge* that to satisfy *Pickering* balancing, the disruption caused by an employee's speech must be "beyond the disruption that necessarily accompanies controversial speech." 56 F.4th at 782 (cleaned up). The district court never identified any undisputed evidence of disruption beyond complaints about Plaintiffs' controversial speech. While there may be disputed evidence of that in the record, it is the jury's place to weigh it against other evidence to reach a verdict, not the district court's place to disregard it to decide summary judgment. In light of these disputed facts, and particularly in light of the fact-intensive nature of *Pickering* balancing, summary judgment was inappropriate.

II. The District Court Erred in Granting Qualified Immunity.

Qualified immunity is inappropriate here for two reasons. First, existing precedent with very similar facts clearly established that Grants Pass violated Plaintiffs' constitutional rights. *Settlegoode* provides "fair warning" that the District's conduct here was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Second, regardless of *Settlegoode*, qualified immunity should not apply at all to considered, deliberative decisions to violate First Amendment rights, like the decision of Grants Pass officials

in this case. The history and purpose of both qualified immunity and Section 1983 confirm that.

A. *Settlegoode* clearly established that Grants Pass violated Plaintiffs' First Amendment rights.

Qualified immunity does not shield government officials who violate "clearly established statutory constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the U.S. Supreme Court has reiterated, "clearly established" does not require precedent with exactly matching facts, so long as the law gave "fair warning" to an official that their conduct was unlawful. *Hope*, 536 U.S. 740–71; *see also Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam) (reversing qualified immunity under *Hope*, despite novel fact pattern).

The Ninth Circuit's ruling in *Settlegoode*, a case with similar facts and legal issues that arose seventeen years before the events here, provided exactly that "fair warning" to Grants Pass. In *Settlegoode*, the Portland Public Schools school board chose not to renew the contract of a physical education teacher for disabled students, after that teacher complained about the school district's treatment of disabled students. 371 F.3d at 507–09. When the teacher sued, a jury ruled in her favor, but the

magistrate judge granted defendants' motion for judgment as a matter of law on all issues and held that two school officials were entitled to qualified immunity because under *Pickering*, "the balancing of interests . . . did not weigh clearly in [the teacher's] favor." *Id.* at 513.

The Ninth Circuit reversed. It noted that the jury's verdict for the teacher "necessarily reflected a finding that any disruption her comments might have aroused was outweighed by [the teacher's] interest in free expression." *Id.* This Court held that it has "long recognized 'the importance of allowing teachers to speak out on school matters,' because 'teachers are, as a class, the members of a community most likely to have informed and definite opinions' on such matters." *Id.* at 514 (quoting *Connick*, 461 U.S. at 162, and *Pickering*, 391 U.S. at 572). "Whether or not [the teacher's] assertions were accurate, or were communicated in the best manner possible, it is clear that the subject matter of her expression was of public importance." *Id.* The court further noted that "it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters." *Id.* at 516 (citing *Connick*, 461 U.S. at 162).

Plaintiffs Damiano (Sager) and Medart faced a very similar situation here. In publishing the "I Resolve" video and proposed policies, they were openly critical of school district policies on how to treat gender identity and spoke based on their personal experiences with gender identity in schools. *Damiano*, 2023 WL 2687259, at *1. The district court ruled that they "arguably spoke on a matter of public concern," and assumed for the purpose of its ruling that they spoke as private citizens. *Id.* at *6. Like the teacher in *Settlegoode*, Damiano (Sager) and Medart were punished for speaking out on a school issue that they were uniquely qualified to discuss based on personal experiences in their workplace.

While there are some factual differences—for example, there were no student complaints in *Settlegoode*, and there are a disputed number of complaints at issue in this case—*Settlegoode* certainly provided Grants Pass officials "fair warning" that their conduct violated the First Amendment. *Hope*, 536 U.S. at 741. A case does not need to be "directly on point" in order to clearly establish a First Amendment violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Rather, "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope*, 536 U.S. at 741, *accord Eng v. Cooley*, 552

F.3d 1062, 1076 (9th Cir. 2009) (same), if the case involves "mere application of settled law to a new factual permutation." *Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007).

Viewing the facts in the light most favorable to Plaintiffs, as is required at summary judgment, that is exactly what this case involved. A reasonable official reading this Court's holding in *Settlegoode* would have had fair warning that firing Plaintiffs for "speaking out on school matters" constituted unlawful First Amendment retaliation. *Settlegoode*, 371 F.3d at 516. Qualified immunity was inappropriate.

B. Qualified immunity should apply only to split-second decisions in the field, not considered disciplinary responses to protected speech.

Even if the law were not clearly established, a growing chorus of justices, judges, and academics have opined or held that qualified immunity does not apply to First Amendment violations by school officials because it violates the very rationale underpinning the doctrine of qualified immunity.[2] As noted by Justice Thomas in his statement

---

[2] It is worth noting that the entire doctrine of qualified immunity may be living on borrowed time. Recent scholarship has revealed historical evidence that the original text of Section 1983 explicitly sought to displace common-law defenses, including qualified immunity, but the text was omitted from the current codified version due to scrivener's

respecting the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021):

> 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?
>
> . . .
>
> This approach is even more concerning because "our analysis is [not] grounded in the common-law backdrop against which Congress enacted [§ 1983]." *[Ziglar v. Abbasi*, 137 S. Ct. 1843 1871–72 (2017) (opinion concurring in part and concurring in judgment)]. It may be that the police officer would receive more protection than a university official at common law.

Id. at 2422.

The Eighth Circuit took up this issue in *Intervarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021). There, after a religious student organization sued the university for deregistering it because the group's faith requirement allegedly violated school anti-discrimination policy, the university conducted a comprehensive review of *all* religious student groups and deregistered

---

error. *See generally* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023).

several for their faith requirements—despite allowing many non-religious groups to violate its non-discrimination policy. *Id.* at 861. The court held that university officials were not entitled to qualified immunity when they deliberately, and after a lengthy review process, "targeted religious groups for differential treatment." *Id.* at 867 (citing *Hoggard*, 141 S. Ct. at 2422).

This Court should follow the Eighth Circuit's example and reconsider whether the rigid application of qualified immunity to "calculated choices" made by school officials is appropriate. Properly considered in light of the history and purpose of qualified immunity, Section 1983, and common-law immunities, the answer is no.

1. Qualified immunity should not be governed by a one-size-fits-all standard.

Too often lower courts wrongly reduce qualified immunity to a rigid test: Is there a case on all fours? The result is that "the same qualified immunity standard applies regardless of the circumstances under which the [official] acted. Qualified immunity thus creates a least common denominator that favors government officials. It operates on the assumption that officers make all decisions under the worst-case

scenario."[3] The "all fours" approach also lets "public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). Nothing justifies this inflexible approach. Even the "good-faith" common law immunity for police officers was limited to certain discretionary police duties, like making arrests. *Pierson v. Ray,* 386 U.S. 547, 555 (1967). Arguably, that historical immunity was even more limited, covering only quasi-judicial acts.[4] And there remains a question of why the same qualified immunity inquiry applies regardless of the constitutional right at hand.[5] By any measure, there is scant support for the one-size-fits-all standard courts often use.[6]

---

[3] F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 Wake Forest L. Rev. 501, 529 (2021).

[4] William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 116 (2022).

[5] *E.g., Gonzalez v. Trevino,* 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting).

[6] Against this backdrop, many have questioned the qualified immunity doctrine. *E.g.,* William Baude, *Is Qualified Immunity Unlawful?,* 106 Calif. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 Notre Dame L. Rev. 1797 (2018);

A flexible approach to qualified immunity is more sensible. After all, different officials exercise different duties in different situations. "Qualified immunity might be particularly forgiving when the relevant actor is, say, a police officer making a split-second decision, as opposed to an executive branch policymaker with access to an expert legal staff."[7] Thus, "immunity is less warranted in situations where officers have more opportunity to ensure that their decisions comply with the law."[8]

That is particularly true with regard to deliberative decisions made by governing school bodies, which are typically made after hours or days of discussion, often with input from general counsel or other legal advisors. For example, in this case, Plaintiffs published "I Resolve" in late March 2021. 2-ER-173. They were placed on administrative leave a week later, on April 5, 2021, 3-ER-384, 386; investigated for their speech by both Grants Pass staff and an outside investigator over several months, *Damiano*, 2023 WL 2687259, at *2–3; subject to public hearings before

---

Hessick, supra note 3*; but see* Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1354 (2021).

[7] Richard M. Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1497, 1545 (2019).

[8] Hessick, *supra* note 3 at 529.

the school board in July 2021, *id.* at *4; and eventually fired for their speech on July 15, 2021, *id.*; *see also* 2-ER-185, 202. Grants Pass officials deliberated for days over whether to place Plaintiffs on administrative leave, then for months over whether to fire them. These deliberations were a far cry from the thought process of a police officer in the field deciding whether to shoot.

2. Limiting qualified immunity to acts made under exigent circumstances meets Section 1983's purpose.

"The original system of constitutional remedies worked as follows: If an officer violated one of your constitutional rights, you could sue him as an individual, and you would win because he would have no defense for his wrongful act."[9] Early decisions from the U.S. Supreme Court confirm a history of strict liability for government officials. *E.g.*, *Little v.*

---

[9] Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. Rev. 132, 138, 145–48 (2012); *see generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Barreme, 6 U.S. (2 Cranch) 170 (1804); *Bates v. Clark*, 95 U.S. 204, 209 (1877); *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1836).

At the same time, Congress maintained the power to immunize or indemnify an official.[10] Sometimes it granted petitions for indemnification.[11] And when Congress believed immunity was the right policy, it said so through statute.[12] Only when an official acted within the plain scope of his legal duties would the courts consider granting an official immunity. *See, e.g.*, *Spalding v. Vilas*, 161 U.S. 483, 493 (1896).

In short, "the legal backdrop to Section 1983 promised official accountability, not immunity."[13] With that in mind, Congress included no express immunity in the Ku Klux Klan Act of 1871, the forerunner to

---

[10] James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1871–75, 1924–26 (2010).

[11] *Id.* at 1897.

[12] *Id.* at 1924–25.

[13] David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 Cardozo L. Rev. 90, 103 (2022).

Section 1983.[14] That was no accident. Crafted to remedy post-Civil War constitutional violations, Section 1983 was to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired, affording an injured party redress in the United States courts against any person violating his rights as a citizen under claim or color of State authority."[15] So in the decades after the Act's passage, the Court kept treating claims against officials as it had historically done—applying strict liability.[16]

This historical framework and Section 1983's text support cutting off qualified immunity's "worst excesses" that shelter officials at the expense of vindicating constitutional rights.[17] If anything, courts should uphold Section 1983's guarantee of constitutional remedies, at most

---

[14] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

[15] Gans, *supra* note 13 at 97–98 (quoting Cong. Globe, 42d Cong., 1st Sess. 376, app. 313 (1871) (internal quotation marks omitted).

[16] *Myers v. Anderson*, 238 U.S. 368, 377–78 (1915); *see also Poindexter v. Greenhow*, 114 U.S. 270, 297 (1885).

[17] Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation, the Collapse of Constitutional Remedies by Aziz Z. Huq*, 131 Yale L.J. 2126, 2193 n.355 (2022).

shielding officials from damages only when difficult circumstances set a high bar for fair warning of a constitutional violation.

3. Traditional reasons for qualified immunity weaken beyond exigent circumstances.

In its cases establishing the bounds of qualified immunity, the U.S. Supreme Court has given various reasons for maintaining it. These include the availability of common law immunities;[18] "objective reasonableness" striking a balance between remedy and immunity;[19] and giving police breathing space when making split-second decisions.[20] But none of these reasons justify immunity for school officials who violate the Constitution despite having time to recognize the established constitutional principles forbidding their acts.

In *Pierson,* the Court found common law immunities like probable cause and good faith befitted immunity for police officers sued after they arrested a group of ministers on-the-spot for peacefully sitting in a "White Only" area at a Mississippi bus station. 386 U.S. at 557. On its

---

[18] *Pierson,* 386 U.S. at 555.

[19] *Harlow*, 457 U.S. 800.

[20] *Graham v. Connor*, 490 U.S. 386, 396 (1989).

facts, *Pierson* established a limited qualified immunity: One for the unique position of police officers making *immediate* decisions about whether a statute authorizes an act. *Id.* at 555–57. Yet *Pierson* did not identify any common law immunity for officials who made less immediate decisions, including those outside their authorized duties.

If anything, it defies good faith for an official to act unlawfully despite having time to recognize clear constitutional principles limiting the scope of his authority. Thus, any common law immunities *Pierson* relied on do not validate an "across the board" immunity doctrine that shields school officials for obvious constitutional violations, regardless of "the precise nature of their duties."[21]

Nor does the current standard from *Harlow*—"objective reasonableness . . . measured by reference to clearly established law"[22]—validate an immunity doctrine that treats constitutional violations under exigent circumstances the same as more calculated ones. In a forerunner to *Harlow*, the Court explained reasonableness turns on "the scope of discretion and responsibilities of the office and all the circumstances as

---

[21] *See* Baude, *supra* note 4 at 116 n.12 (citations omitted).

[22] *Harlow*, 457 U.S. at 818.

they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). So if an official's duties involve no danger and allow time to recognize the constitutional limits to his authority, there is little reason to grant that official qualified immunity when he violates the Constitution, even without on-point precedent.[23]

This outcome aligns with *Harlow*'s balancing "the importance of a damages remedy to protect the rights of citizens" against "'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" 457 U.S. at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). Shielding officials who defy clear constitutional principles does not encourage vigorous exercise of official authority. Rather, it encourages vigorous abuse of that authority. On the other hand, discouraging deliberative abuse of official authority vindicates a damages remedy critical to protecting rights. *Id.*

---

[23] Hessick, *supra* note 3 at 543.

Finally, limiting qualified immunity to exigent or extraordinary circumstances harmonizes with the "fair warning" standard established in *Hope v. Pelzer*, which denies qualified immunity where "a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." 536 U.S. at 740–41. The more time an official has to reflect on his actions, the more likely he will have fair warning of a constitutional violation.

So at most, "qualified immunity makes more sense in situations where decisions are made under circumstances that increase the likelihood that they will be erroneous," like police making split-second decisions about use-of-force.[24] In those exigent situations, "clearly established law" may require more factual specificity. *E.g.*, *Heien v. North Carolina*, 574 U.S. 54, 66 (2014); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). But courts often twist this into giving any official decision the same deference as a split-second one.[25]

---

[24] Hessick, *supra* note 3 at 543.

[25] *See, e.g.*, Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum.

Of course, most decisions police officers and other officials make are not "split-second." Thus, while exigent circumstances may support some deference to police officers on the "clearly established" question, there is no basis to extend that deference to school officials acting in less urgent situations.

4. Reining in qualified immunity for considered decisions will protect First Amendment liberties.

Decades of decisions from the U.S. Supreme Court, this Court, and other federal circuits have recognized clear First Amendment principles about protections for speech, including in the K-12 school context. Rarely do government officials lack time to consider those First Amendment principles. For instance, unlike police facing imminent danger on the street, school board officials evaluating whether to fire two employees through a lengthy process that included two public hearings and an outside investigator have ample time to recognize the First Amendment rights at stake.

Hum. Rts. L. Rev. 261, 322 (2003) ("Many of the lower federal courts have become mesmerized by the concept that police officers are forced to make decisions about the use of force in split seconds.")

So if officials "make the deliberate and considered decision to trample on a citizen's constitutional rights, they deserve to be held accountable." *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc). And it does not matter if school officials "turned a blind eye to decades of First Amendment jurisprudence" instead of knowingly violating the First Amendment; a court still should deny those school officials qualified immunity. *Intervarsity*, 5 F.4th at 867.

In sum, qualified immunity should be an exception for First Amendment violations, not the norm. As James Madison rightly put it: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Cong., p. 934 (1794). But if the people have scarce remedy to hold government officials accountable when they flout clear First Amendment principles, the government wields censorial power over the people. This Court should take this opportunity to clarify, as various academics have begged and at least the Eighth Circuit has held, that qualified immunity provides no shelter for school

officials who take considered action to defy established First Amendment principles.

CONCLUSION

For all these reasons, the ruling of the district court should be reversed.

Dated: September 13, 2023

/s/Ronald G. London

RONALD G. LONDON
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003
(215) 717-3473
ronnie.london@thefire.org

**Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-35288

I am the attorney or self-represented party.

This brief contains 5,772 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ______.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Ronald G. London **Date** 9/13/2023

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

The undersigned certifies that on September 13, 2023, an electronic copy of the Foundation for Individual Rights and Expression Brief of *Amicus Curiae* was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: September 13, 2023

/s/ Ronald G. London

RONALD G. LONDON*
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
(215) 717-3473
ronnie.london@thefire.org

**Counsel of Record*