NO. 20-1066

IN THE
Supreme Court of the United States

ASHLYN HOGGARD,
Petitioner,

v.

RON RHODES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT SUMMARY

Channelling every public official ever caught violating someone's rights, the Arkansas State officials assure the Court: "Nothing to see here." Meanwhile, their kitchen-sink approach to dissuading the Court from resolving this case's "broad qualified-immunity questions" reveals the opposite. Opp.2.

Leading with the merits, the officials insist they were entitled to qualified immunity. Opp.10–13. But that skips over the mature and substantial circuit splits that Ashlyn's petition describes. Those conflicts must be resolved under a proper qualified-immunity standard before deciding the merits.

And this case is not a "poor vehicle." Contra Opp.19. First, the lower courts assumed without deciding that the officials were personally involved enough for § 1983 liability. Contra Opp.20. That is not an Article III issue. At best, it is one for remand, and the record supports Ashlyn. Second, because they failed to file a cross-petition, the officials cannot challenge the holding that they violated the First Amendment. Opp.21. And third, the "rapidly evolving" nature of police encounters does not justify reserving all qualified-immunity questions for Fourth Amendment cases. Opp.26. Instead, it explains why qualified immunity is "especially difficult" to overcome in those cases. *Morrow* v. *Meachum*, 917 F.3d 870, 876 (5th Cir. 2019). And it supports Ashlyn's position that "specificity" is *less* "important" outside that context. *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015) (per curiam).

This Court should grant certiorari.

ARGUMENT

I. Two circuit splits and the lack of clarity over how much specificity is required to clearly establish law outside the Fourth Amendment context all warrant review.

Ashlyn asks this Court to resolve "a 4-3 circuit split over whether a binding decision's reasoning can 'clearly establish the law' for purposes of qualified immunity." Pet.3, 8–18. She also identifies a 3-1 "split over whether school officials should be held to a higher standard than other state officials," and uncertainty over "how much factual specificity in a prior case is required to overcome qualified immunity in the First Amendment context." Pet.19–24.

Tellingly, the Arkansas State officials skip over all that to defend their qualified immunity on the merits. Opp.10–13. Strategically, it makes sense for them to sidestep "the broad qualified-immunity questions" this case implicates. Opp.2. But logically, it is impossible to decide whether they have qualified immunity without knowing which standards to apply. Ashlyn's claim is that the Eighth Circuit applied the wrong standards. Accordingly, the analysis must begin with the multiple circuit splits this Court should resolve.

A. Four Circuits rely on the *reasoning* in binding precedent to decide if the law is clearly established; three do not.

In *Hope* v. *Pelzer*, this Court indicated that the "reasoning" in a prior decision can give government officials "fair warning" their conduct violates the Constitution—even if the "holding" does not. 536 U.S. 730, 743 (2002). Three courts of appeals apply that rule. *Hernandez* v. *City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018); *Bailey* v. *Wheeler*, 843 F.3d 473, 484 (11th Cir. 2016); *Burchett* v. *Kiefer*, 310 F.3d 937, 945 (6th Cir. 2002). And a fourth takes the same approach applying *Anderson* v. *Creighton*, 483 U.S. 635 (1987). *Hanes* v. *Zurick*, 578 F.3d 491, 496 (7th Cir. 2009).

The officials do not deny these courts properly apply this Court's precedent. Instead, they argue the Fifth, Eighth, and Tenth do, too. Opp.14. But all the officials show is that these circuits consider prior cases' reasoning to *grant* qualified immunity, Opp.14–17, never to deny it. And that's the problem.

The Fifth Circuit has staked out the most aggressive anti-reasoning approach. In *Morrow*, that court declared, "[W]hile officers are charged with knowing the *results* of our cases," they "are not charged with memorizing every jot and tittle we write to *explain* them." 917 F.3d at 875–76 (emphasis added, cleaned up). Those explanations, the court reasoned, are dicta, and "clearly established law comes from holdings, not dicta." *Id.* at 875.

Applying that logic, the court identified three cases holding police officers were "entitled to qualified immunity for using deadly force to end high-speed chases." *Id.* at 877. All three were "distinguishable," as the Fifth Circuit agreed. *Ibid.* ("True."). But none of them "*foreclose[d]* using deadly force to end police chases," and that was "[a]ll that matter[ed]." *Ibid.*

Highlighting a different part of the opinion, the officials counter that the court "held that the law was not clearly established by evaluating the reasoning" in other cases. Opp.16. But that misses the point. It just shows the Fifth Circuit will consider a decision's reasoning if it *supports* a qualified-immunity defense.

That approach allows "public officials [to] duck consequences for bad behavior . . . 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 and dissenting in part). It makes it "immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful." *Ibid.*

That's what happened here. The officials adopted, approved, and enforced speech policies requiring even a single student to seek permission before speaking anywhere on campus. Those policies were unconstitutional. Speech First Br.8–12. So, when officials used their discretion under the policies to create a "tabling policy" and to prevent Ashlyn from speaking outside the student union or anywhere else without seeking permission 24 hours in advance,[1] the Eighth Circuit easily held Ashlyn's First Amendment rights had been violated. App.16a–18a.

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[1] App.16a; Parry Video at 01:35–02:24.

But on qualified immunity, the court said Ashlyn's rights "were not clearly established" because the "case most closely on point, *Bowman* v. *White*, may have given a reasonable impression" the unwritten tabling policy was constitutional. App.18a. The court had "*upheld* several complained-of speech restrictions" in *Bowman*, so the court thought officials "could have reasonably viewed *Bowman* as permitting" the policy, even though such reliance "ignores the critical fact that the *Bowman* plaintiff was a non-student," unlike Ashlyn, and that the "restrictions [in *Bowman*] were justified by compelling safety and administrative concerns," unlike here. *Id.* at 19a (emphasis added).

In other circuits, the result would have been different. *Bowman*'s admonition that prior restraints on college campuses carry a "heavy presumption of unconstitutionality," 444 F.3d 967, 980 (8th Cir. 2006)—set against the backdrop of this Court's caselaw, Speech First Br.2–8—gave officials fair warning that forbidding students from tabling outside the student union while imposing prior restraints to cut off every alternative forum violates the First Amendment. But in the Fifth, Eighth, and Tenth Circuits, that will never be enough.

This Court confronted this very problem earlier this Term. In *Taylor* v. *Riojas*, the Court vacated a Fifth Circuit ruling granting prison officials qualified immunity against an inmate's Eighth Amendment claims. 141 S. Ct. 52, 54 (2020) (per curiam). The Fifth Circuit's mistake? The "case that troubled [it] was too dissimilar . . . to create any doubt about the obviousness of Taylor's right." *Id.* at 54 n.2.

So too here. *Bowman*'s unique facts and narrow ruling make it "too dissimilar . . . to create any doubt about the obviousness of [Ashlyn's] right." *Ibid.* But if courts continue to confine clearly established law to the results—not the reasoning—of prior decisions, injustices like these will keep happening.

B. Courts are split over whether school officials deserve more deference than other public officials.

Ashlyn identifies a "3-1 circuit split over whether school officials should be held to a higher standard than other state officials." Pet.22. The officials do not contest Ashlyn's point that the Fourth, Fifth, and Seventh Circuits all give school officials an "extra measure of deference." Pet.22–23. They just say the Eleventh Circuit *also* places a thumb on the scale for school officials in qualified-immunity cases. Opp.17. That's wrong (and unfair).

In *Holloman*, the Eleventh Circuit did not note only "in passing" that school officials should be able to apply the relevant legal standard. Opp.17. That was part of the *holding*: "We do not find it unreasonable to expect the defendants—who hold[] themselves out as educators—to be able to apply such a standard, notwithstanding the lack of a case with material factual similarities." *Holloman ex rel. Holloman* v. *Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004); accord *id.* at 1279 ("[T]eachers are well equipped to readily determine what conduct falls within [the relevant] standard.") (cleaned up). And it proves nothing that the court applies different parts of *Holloman* "in cases that do not involve school officials." Opp.18.

The Eleventh Circuit has the right approach. School officials should be expected to understand and apply the reasoning in binding decisions. But until this Court says so, that will remain the minority view.

C. It remains unclear how much specificity is required to clearly establish the law outside the Fourth Amendment context.

Finally, the officials say review is unnecessary to "clarify how much factual specificity in a prior case is required for qualified immunity to apply." Opp.18 (cleaned up). But Ashlyn's petition is more limited: it asks the Court to clarify the amount of specificity required outside Fourth Amendment cases where "specificity is especially important." *Mullenix*, 577 U.S. at 12. If specificity is "especially important" there, it cannot be equally important everywhere else. YAL Br.3–10.

The officials never rebut that premise. Instead, they fall back on the merits and claim "petitioner had to resort to citing a variety of 'inapposite' cases" below. Opp.18. But that begs the question: what's "inapposite" for qualified-immunity purposes in a First Amendment case?

"The Constitution is not blind to the fact that police officers are often forced to make split-second judgments." *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600, 612 (2015) (cleaned up). Nor should it be blind to the fact that Arkansas State officials had years to make their campus-speech policies constitutional—and failed. App.16a–18a.

II. This case is an ideal vehicle.

A. The qualified-immunity issue is directly presented.

1. This Court has no need to decide causation.

Though the officials say the Court "[n]eed[s]" to resolve the "threshold" issue of whether the officials caused the deprivation of Ashlyn's rights, they later concede that's a merits issue "independent" of qualified immunity. Opp.19, 21. That's because the "threshold" issue in a qualified immunity case is qualified immunity. *Siegert* v. *Gilley*, 500 U.S. 226, 231 (1991). In contrast, causation is part of the prima facie case under § 1983. *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985). And in this threshold, qualified-immunity case, this Court need not reach causation.

Tellingly, the officials do not argue Article III causation is lacking. They don't dispute that Ashlyn's injuries are "fairly traceable" to their actions. *Vill. of Arlington Heights* v. *Metro. Housing De*v. *Corp.*, 429 U.S. 252, 261 (1977). Nor could they. Section 1983 imposes a tort-like causation requirement. *Martinez* v. *California*, 444 U.S. 277, 285 (1980). And it would be "wrong[] [to] equate[]" Article III's fairly-traceable requirement with § 1983's higher standard of tort causation. *Bennett* v. *Spear*, 520 U.S. 154, 168 (1997). Even an "indirect" cause satisfies Article III. *Vill. of Arlington Heights*, 429 U.S. at 261. And since the record establishes § 1983 causation, it more than adequately shows Article III causation.

What's more, the lower courts left causation unresolved. App.6a–7a n.4 (assuming administrators personally involved), App.43a (assuming "trustees were personally involved"). So this Court should not decide causation in the first instance. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And the record shows the officials *did* cause Ashlyn's injuries. All the trustees had the opportunity to repeal the system policy from which all other policies and restraints flowed. J.A.18, 41–42, 82, 849, 1009. And the officials admit Rhodes was involved in adopting that policy. Opp.8 n.7. He even moved for its approval. J.A.1009, J.A.1024. As to the administrators, Stripling implemented and updated the speech policies, J.A.418–34, and Spack enforced the tabling policy and trained her employees on it. J.A.222, 232, 608, 663–64. The record establishes causation.

2. The constitutionality of the officials' policies is not before the Court.

This Court has long required a cross-petition when respondents seek to enlarge their rights under a judgment. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). The court of appeals held the officials violated Ashlyn's rights. App.16a–18a. Accepting their contrary argument would reverse that ruling. And that would enlarge their rights because constitutionality determinations in qualified-immunity cases are "not mere dicta or statements in opinions." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (cleaned up). They are "rulings that have a significant future effect on the conduct of public officials" and "the policies of [their] government units." *Ibid.* "[B]y overturning the ruling on appeal," the officials (and others) would "gain clearance to engage in the conduct in the future." *Id.* at 703.

Practice and precedent require a cross-petition here. In practice, government officials recognize the need to file cross-petitions when they lose on the constitutional issue. *E.g.*, Conditional Cross-Petition, *Dawson* v. *Brennan*, No. 18-1078 (Feb. 14, 2019); Conditional Cross-Petition, *Swanson* v. *Morgan*, No. 11-941 (Jan. 26, 2012). As for precedent, when the petitioners in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), sought review of the lower court's *grant of immunity* on a due-process claim, this Court had "no occasion" to review the underlying due-process holding because "none of the respondents filed a cross-petition." *Id.* at 396–97. That decision controls here.

The officials' constitutional arguments also rely on undeveloped facts. They claim Ashlyn had other avenues to speak. Opp.23–25. But as the Eighth Circuit held, the tabling policy's vagueness—coupled with ambiguities in the officials' enforcement of the campus speech policies—made the availability of alternatives "unclear" at best. App.14a. Challenging that holding requires further factfinding, which would be inappropriate here. *Upper Skagit Indian Tribe* v. *Lundgren*, 138 S. Ct. 1649, 1654 (2018) (noting "discretion to affirm on any ground supported by the law *and the record*") (emphasis added).

The record also contradicts the officials' claim that Ashlyn's alternative channels did not depend on her speech's offensiveness. Opp.23. Stripling testified that outside the speech zones, students could not engage in speech that other students found offensive. Opp.24 n.15; J.A.470–71. "Alternative" channels are not viable alternatives when subject to a heckler's veto. See *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (collecting cases).

Finally, Ashlyn's alleged opportunity to speak in a "free expression" area proved equally illusory. Contra Opp.23. As the Eighth Circuit recognized, a campus employee told Ashlyn she needed to give 24-hours' advance notice to use one of those areas. App.16a; Parry Video at 01:35–02:24. The employee further informed Ashlyn she could not speak "anywhere" on campus without telling the employee first. Parry Video at 02:15–24. At the very least, the officials identify disputed facts that require a remand.

3. The Eighth Circuit properly held the tabling policy unconstitutional.

The officials rely almost exclusively on *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010), to challenge the constitutionality ruling, but that case is inapposite. First, *CLS* involved a registration requirement, Opp.25, not a speech prohibition, so on-campus groups there had ample alternative channels. *CLS*, 561 U.S. at 691. Here, the record shows Ashlyn could not speak anywhere on campus without seeking prior permission, and she was directly censored.[2] Second, *CLS* held that a policy requiring registered student groups to accept all comers was reasonably related to the school's nondiscrimination goals. *CLS*, 561 U.S. at 688–90. Here, the officials offer no reason why the tabling policy prohibits students like Ashlyn who are not part of registered student groups from talking to fellow students in "the living room of campus." Opp.3; accord App.16a–17a. The Eighth Circuit got it right.

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[2] Likewise, the unavailability here of alternative forums distinguishes *Ball* v. *City of Lincoln*, 870 F.3d 722, 737 (8th Cir. 2017). Contra Opp.11–12.

B. Qualified immunity is an issue of national importance, and this case seeks clarification—not "broad changes" to the doctrine.

The officials downplay the significance of the constitutional injury they inflicted, glossing over what the Eighth Circuit properly recognized as unconstitutional censorship. Opp.19. But this Court recognizes the need for "vigilant protection of constitutional freedoms" on college campuses, an issue of grave national importance, as amici demonstrate. *Healy* v. *James*, 408 U.S. 169, 180 (1972). Accord YAL Br.10–13; FIRE Br.10–21.

The officials' spirited arguments to reverse the constitutionality holding belie their nothing-to-see-here attitude. This Court's decision will not only vindicate Ashlyn's rights but also provide guidance to officials about the First Amendment's parameters.[3] *Camreta*, 563 U.S. at 704. It is unsurprising that the officials disclaim the need for guidance, Opp.27, but intervention is needed to prevent qualified immunity from becoming unqualified impunity.

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[3] The officials claim that Ashlyn "seeks only nominal damages" and "disavowed" compensatory damages. Opp.i, 7. But that's wrong. Ashlyn never withdrew her claim for compensatory damages. J.A.35, 78. So she seeks both. And this is not "a moot case." Opp.1.

The officials' attempt to confine qualified-immunity adjudication to Fourth Amendment cases proves Ashlyn's point. Ashlyn does not dispute that those cases may require more factual specificity to clearly establish the law. Pet.20–21, 25. The "rapidly evolving" nature of Fourth Amendment cases, Opp.27, calls for a more fact-specific inquiry. But here, as in most First Amendment cases, the officials had ample time for reasoned reflection in reviewing and implementing their speech policies. There were no split-second, life-or-death decisions. The unique nature of Fourth Amendment cases shows why Fourth Amendment qualified-immunity cases should not inflexibly govern *all* qualified-immunity cases.

Finally, Ashlyn does not seek "broad changes" to or a "novel and unique" qualified-immunity doctrine. Contra Opp.26–27. She simply asks the Court to resolve circuit splits and clarify the law. This Court has already distinguished the Fourth Amendment context in Fourth Amendment cases; clarification is needed here regarding the degree of factual specificity required in First Amendment cases.

Certiorari is warranted.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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