No. _____

In the Supreme Court of the United States

DR. RALPH CLAIBORNE WALSH, JR.
Petitioner

v.

LISA HODGE; JOHN SCHETZ; LISA KILLAM-WORRALL; JESSICA HARTOS; EMILY SPENCE-ALMAGUER; SUMIHIRO SUZUKI; VICTOR KOSMOPOULOS; MICHAEL R. WILLIAMS; PATRICIA GWIRTZ; DAMON SCHRANZ
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Justice Thomas and Justice Sotomayor have criticized the "clearly established" prong of the qualified-immunity test and would revisit the Court's precedent as to what is required for the law to be "clearly established." *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting).

The District Court in this case concluded that the relevant precedent was "clearly established," so it rejected qualified immunity for university officials who denied the Petitioner Dr. Walsh the procedural-due-process right to confront and cross-examine his accuser in a Title IX disciplinary proceeding. The Fifth Circuit reversed.

It concluded that the law was "not clearly established" unless the relevant precedent is at a "high degree of specificity" that is "beyond debate" and that the existence of a "split among the Federal Circuits" makes the law "not clearly established." App.18a, App.22a, *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (cleaned up); *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

The courts of appeals are split 4-7 on how to apply *Wilson*/*Wesby*. And they are split 3-1 on the level of specificity required for deliberative as opposed to split-second decisions. Petitioner thus presents two questions:

1. Does the mere presence of a circuit split necessarily foreclose a finding that the law is "clearly established" for qualified immunity purposes?

2. If not, does *Wilson*/*Wesby*'s "clearly established" standard apply, or does a lower standard apply, when officials have sufficient time to obtain and act on legal advice before their rights-violating conduct occurs?

DETAILS REQUIRED BY RULE 14.1(b)

Parties

All parties are listed on the cover page.

Petitioner Dr. Ralph Claiborne Walsh, Jr. was the Plaintiff in the U.S. District Court for the Northern District of Texas, and the Appellee in the U.S. Court of Appeals for the Fifth Circuit.

Respondents were Defendants in the district court and Appellants in the Fifth Circuit.

Rule 29.6 Statement

None of the parties is a corporation.

Related Proceedings

Proceedings directly related to the case are as follows:

- *Walsh v. Hodge*, No. 4:17-CV-323, U.S. District Court for the Northern District of Texas. Order partially granting and partially denying Defendants' Motion for Summary Judgment entered on June 20, 2019.

- *Walsh v. Hodge*, No. 4:17-CV-323, U.S. District Court for the Northern District of Texas. Order staying and closing case pending interlocutory appeal entered on August 9, 2019.

- *Walsh v. Hodge*, No. 19-10785, U.S. Court of Appeals for the Fifth Circuit. Panel's Opinion and Judgment issued on September 15, 2020.

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The Fifth Circuit opinion is reported at 975 F.3d 475. App.1a–23a. The district court opinion is not reported but reproduced at App.24a–44a.

JURISDICTION

The Fifth Circuit's opinion issued on September 15, 2020. App.1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is filed within 150 days of the Fifth Circuit's decision.

RELEVANT PROVISIONS

"No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V (Due Process Clause).

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1 (Due Process Clause).

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress … ." 42 U.S.C. § 1983.

INTRODUCTION

The decision below has taken the doctrine of qualified immunity far past its stated goals. It blessed systematic and deliberate violations of the law even when pertinent authority plainly alerted government actors to the illegality of their conduct. When, as here, government actors design a policy that systematically violates constitutional rights, qualified immunity becomes unmoored from its foundation where it bars relief unless it is beyond debate that the law of *the specific circuit* forbids the course of conduct.

The Courts of Appeals are split on how to interpret this Court's holding in *Wilson v. Layne*, 526 U.S. 603 (1999). Here, the Fifth Circuit decided it means that a split in circuit authority necessarily precludes a finding that the law is clearly established. In so concluding, the Fifth Circuit cast aside multiple decisions demonstrating the illegality of the University's conduct, reasoning that a split in authority negates any notion that the law was clear. Particularly when the government actors may reflect on such authority before *creating* an unlawful program, a circuit split should make it clear that the illegal acts cannot be undertaken in *good faith*. *Wilson* only held that a *subsequent* split in circuit authority shows that the law was not clearly established when the conduct occurred. There is no such *post-conduct* split in this case. Rather, every court of appeals to consider the question since this case's 2015 Title IX hearing has held that defendants have a right to confront and cross-examine their accuser.

The Court should take this case to resolve the circuit split over the widespread misapprehension of *Wilson* and reaffirm that a *pre-conduct* circuit split in legal authority does not preclude finding that a civil right was "clearly established" so that qualified immunity does not obtain.

The Court should also grant certiorari to decide that qualified immunity does not attach to government officers who have the opportunity to deliberate, discuss, debate, and obtain and act on legal advice before a constitutional right could be violated. Or, at least, the level of specificity required for a law to be clearly established in making deliberative decisions should be far lower than the level required in making split-second decisions.

Previously, Justices Thomas and Sotomayor have invited this Court to revisit and clarify the "clearly established" prong of the qualified-immunity test. The two historical justifications—"fair warning" to government officials and the common-law good-faith defense—do not justify qualified immunity given to officials' conduct that is the product of deliberative decisionmaking.

Whatever may be the justifications for qualified immunity given to government officials making split-second decisions, those justifications do not support giving qualified immunity to official actions taken with sufficient time and opportunity to deliberate.

Additionally, there are serious due process concerns in the way lower courts have expanded the already-high bar to recovery of damages in Section 1983 cases. The Court should take the case to resolve the entrenched circuit split and lower the level of specificity necessary for law to be considered "clearly established" when officials take deliberative decisions.

This case provides an attractive vehicle by which to return to a more textually grounded qualified-immunity doctrine, at least for officials' conduct that is the product of deliberation, discussion, debate, or legal advice.

STATEMENT OF THE CASE

A. Title IX Proceedings at the University

Ralph Claiborne Walsh, Jr., a doctor of osteopathic medicine, was employed as a professor at the University of North Texas Health Science Center ("University") between 2011 and 2015. App.24a, App.2a. His employment contract with the University stated he could be terminated only for good cause. *Id.*

In October 2014, Dr. Walsh, two other faculty members, and two medical students attended a medical conference in Seattle, Washington. App25a. A week after the conference, one of the student attendees filed a Title IX "sexual harassment" complaint against Dr. Walsh with the University. *Id.*

The University hired an outside investigator to investigate the student's complaint, and after conducting interviews but without a formal hearing, the investigator suggested that the complaint was founded. In December 2014, Dr. Walsh received a letter from the University department head stating that based on the outside investigator's findings, the department was proposing a sanction of termination. *Id.*

Dr. Walsh appealed that decision to the dean, who upheld it. *Id.*

In January 2015, Dr. Walsh requested a hearing before the Faculty and Grievance Committee ("Committee") challenging the findings of the investigation and the proposed termination. *Id.*

In February 2015, the University permitted Dr. Walsh to review the outside investigator's report. App.27a. Dr. Walsh noted that the report omitted many of the statements he had made during the investigative interview. *Id.*

The University held a hearing in March 2015. *Id.* The student was not required to testify. App.28a. Instead, the outside investigator testified regarding the allegations made by the student. *Id.* Dr. Walsh attempted to introduce contemporaneous photos taken at the conference showing the student with her arms around Dr. Walsh and otherwise smiling and exhibiting no discomfort or distress. *Id.* The Committee refused to admit those photos into evidence. *Id.* Thus, the University officials designed a process to assess credibility of witnesses in Title IX hearings without any means of actually assessing it.

After the hearing, the Committee concluded that Dr. Walsh violated the University's sexual-harassment policy. *Id.* Dr. Walsh was ultimately terminated, five months before the end of his year-long contract. App.7a, 28a-29a.

B. District Court Proceedings

Dr. Walsh filed suit under 42 U.S.C. § 1983 against the relevant University officials, each sued in their individual capacities. *Id.* The University officials moved for summary judgment on grounds that they did not violate Dr. Walsh's procedural due process rights and were entitled to qualified immunity. *Id.*

The Northern District of Texas, as relevant, denied the motion, concluding that the defendants were not entitled to qualified immunity. *Id.* The court held that the Due Process Clause required Dr. Walsh be given the right to cross-examine his accuser to allow the Committee to evaluate her credibility; cross-examining the outside investigator was not a reasonable substitute. App.12a, 37a–39a.

The district court then held that Dr. Walsh's right to cross-examine the student who accused him was clearly established at the time of the violation (*i.e.*, at the time of the 2015 Committee hearing). App.13a. The court noted that Fifth Circuit case law from 1986 required that "when an administrative termination hearing is required for a public-school employee, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity." App.43a (cleaned up) (quoting *Wells v. Dallas Independent School District*, 793 F.2d 679, 683 (5th Cir. 1986)).

C. Fifth Circuit Proceedings

University officials appealed the district court's ruling on qualified immunity to the Fifth Circuit. The Fifth Circuit performed *Saucier*'s two-step inquiry[1] in order, as it has the option to do under *Pearson v. Callahan* and Fifth Circuit precedent. App.8a–9a; *see Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011).

At *Saucier* Step One, the court concluded that Dr. Walsh "suffered a violation of his procedural due process rights[.]" App.17a.

To arrive at that conclusion, the Fifth Circuit performed a *de novo* analysis of the *Mathews v. Eldridge*

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[1] The two-part inquiry into government officials' qualified-immunity claims is: (1) "whether the facts that a plaintiff has alleged … or shown … make out a violation of a constitutional right"; and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (quoting *Saucier*).

three factors as to Dr. Walsh's procedural-due-process right to confront one's accuser in a university proceeding. 424 U.S. 319 (1976). App.13a–17a.

The procedural-due-process violation, the court said, turned on the second *Mathews* factor because both Dr. Walsh's and the University's interests are significant, App.13a–14a: "the risk of erroneously depriving [Dr.] Walsh of an important interest and whether additional or substitute safeguards could be implemented to mitigate the concern about having a student being confronted by her professor in front of a committee of his peers." App.15a. In the Fifth Circuit's view, the "entire hearing boiled down to an issue of credibility": "It was [Dr.] Walsh's word (mutual flirtation) versus Student #1's (unwanted harassment)." App.15a. "[W]here credibility was critical and the sanction imposed would result in loss of employment and likely future opportunities in academia, it was important for the Committee to hear from Student #1 and [Dr.] Walsh should have had an opportunity to test Student #1's credibility," the court concluded. App.16a. The court was persuaded that "the substitute to cross-examination the University provided [Dr.] Walsh—snippets of quotes from Student #1, relayed by the University's investigator—was too filtered to allow [Dr.] Walsh to test the testimony of his accuser and to allow the Committee to evaluate her credibility, particularly here where the Committee did not observe Student #1's testimony." *Id.*

The Fifth Circuit agreed with the First Circuit's established law "that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if through a hearing panel.'" App.17a (quoting *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019)).

Despite finding a constitutional violation in the Title IX hearing's *design*, the court determined that the constitutional right was not clearly established. It held the officials were entitled to qualified immunity. App.23a.

The court found the district court's reliance on the Fifth Circuit's *Wells* decision misplaced. App.20a. The language from *Wells* that the district court had relied on, App.43a, was "dicta," the Fifth Circuit said. App.20a.[2]

Discussing other relevant Fifth Circuit precedent, App.18a–21a, the court said that precedent "makes clear" that "before today we have not explicitly held that, in university disciplinary hearings where the outcome depends on credibility, the Due Process Clause demands the opportunity to confront witnesses or some reasonable alternative." App.21a.

The court noted an open and acknowledged split among the circuits on the right-to-confrontation question, including authority that predated the hearing Dr. Walsh faced, App.21a n.54:

- It is clearly established in the First, Sixth, Tenth, and now the Fifth, Circuits that due process demands an opportunity to confront witnesses or some reasonable alternative in university disciplinary hearings. *Haidak*, 933 F.3d at 59 (1st Cir.); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 517–18 (10th Cir. 1998).[3]

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[2] The *Wells* rule is not dicta. It was necessary to resolve the issue. The court applied the rule to the facts and reached a conclusion in a typical issue-rule-application-conclusion format. *See Wells*, 793 F.2d at 683.

[3] In its opinion, the court left out the Seventh Circuit. *Doe v. Purdue Univ.*, 928 F.3d 652, 663–64 (7th Cir. 2019) (concluding that in university disciplinary hearings where the

- It is not clearly established in the Second, Eighth, and Eleventh Circuits that due process generally includes the opportunity to cross-examine in university proceedings. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Riggins v. Bd. of Regents of Univ. of Nebraska*, 790 F.2d 707, 712 (8th Cir. 1986); *Winnik v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972).

Noting this circuit split, the court decided against Dr. Walsh under the "clearly established" prong for two interrelated reasons:

First, relying on the Fifth Circuit's *Morgan v. Swanson*, which in turn relies on this Court's *Wilson v. Layne* decision, the court held, "when the federal circuit courts are split on the issue, the law cannot be said to be clearly established." App.21a n.54 (quoting *Morgan v. Swanson*, 659 F.3d at 372); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (noting that post-conduct split in the circuits is the basis for giving qualified immunity to officials).

Second, noting that the "clearly established" prong "requires a high 'degree of specificity,'" and that "existing precedent must have placed the … constitutional question beyond debate," the Fifth Circuit disagreed with the district court's degree-of-specificity analysis. App.18a, App.22a. The Fifth Circuit instead held that it was not clearly established before its decision in Dr. Walsh's case that "the University's use of an investigator to interview the … student and face cross-examination at the hearing violated [Dr.] Walsh's due process rights."

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outcome depends on credibility, due process requires at least the deciding committee to evaluate the accuser's credibility) (Barrett, J., writing for the three-judge panel). That non-inclusion only sharpens the circuit split.

App.22a (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)); App.18a (cleaned up).

REASONS FOR GRANTING THE PETITION

Justice Thomas and Justice Sotomayor have both called on the Court to revisit its precedent as to what is required for the law to be "clearly established" for the purpose of giving qualified immunity to an official's rights-violating conduct. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting). This case presents an attractive opportunity for the Court to accept Justices Thomas and Sotomayor's invitation to cure one of the defects of the "clearly established" prong of the qualified-immunity test. As relevant here, *Wilson* and *Wesby* should not foreclose relief when government actors have ample notice that their conduct is unlawful, yet still design a program that violates constitutional rights. The Court should take this case to clarify what level of specificity is required for the law to be clearly established when officials civilly sued for damages under 42 U.S.C. § 1983 have sufficient time to obtain and act on legal advice before their rights-violating conduct occurs.

Separately, this Court should answer a question that is dividing the circuits in *Wilson*'s wake. When a circuit split exists *before* the challenged conduct, particularly when the government actor has time and opportunity for reflection, must that split necessarily foreclose relief to an injured person? The Fifth Circuit's extension of *Wilson* into such territory serves no valid purpose. Instead, it undermines respect for the law, and should be rejected.

I. CIRCUITS ARE SPLIT 4-7 ON WHETHER MERE JUDICIAL DISAGREEMENT ROBS OFFICIALS OF FAIR WARNING

Federal courts are split[4] 4-7 on whether existence of judicial disagreement at the time of the offending official conduct robs officials of fair warning such that they are entitled to qualified immunity because the law cannot be said to be clearly established:

- Four circuits (First, Third, Eighth, Ninth) do not extend *Wilson* to the existence of any circuit split, no matter the timing, that would prevent the law from being clearly established such that the official should get qualified immunity.[5]
- Seven circuits (Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, D.C.) have erroneously extended

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[4] The Federal Circuit has no on-point cases and is not expected to rule on very many qualified-immunity cases, given the nature of its subject-matter jurisdiction. Cases in the Second Circuit are inconclusive. *See Sloley v. VanBramer*, 945 F.3d 30, 40 (2d Cir. 2019) (stating the *Wilson* rule, but the rule likely was not outcome determinative); *see also id.* at 52 (Jacobs, J., dissenting) (criticizing the *Wilson* circuit split fair-warning rationale).

[5] *Irish v. Fowler*, 979 F.3d 65, 78 (1st Cir. 2020) ("[A]s a proposition of law this is wrong. A circuit split does not foreclose a holding that the law was clearly established[.]"); *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) ("[T]he split between the Courts of Appeals … at the time of [official's] actions does not preclude our deciding that [plaintiff's] right … was clearly established."); *Irving v. Dormire*, 519 F.3d 441, 451 (8th Cir. 2008) (no qualified immunity when "split of authority exists" and there is a "lack of a decision squarely on point within our circuit" "given the clear weight of authority in the circuits that have ruled on the question"); *Morgan v. Morgensen*, 465 F.3d 1041, 1046 n.2 (9th Cir. 2006), *opinion amended on reh'g*, No. 04-35608, 2006 WL 3437344 (9th Cir. Nov. 30, 2006) ("potential circuit split … does not preclude our holding that the law was clearly established for the purposes of the § 1983 inquiry").

> *Wilson* to mean that *any* circuit disagreement automatically grants qualified immunity.[6]

In light of the well-developed split resulting from this Court's atextual excursion into the fair-warning rationale, the Court should take this opportune case to clarify that circuit splits do not automatically amount to the law not being "clearly established." At least, this is true when the government actors may consider the adverse authority well in advance of their conduct.

Also, very little further percolation can occur. Each circuit has weighed in on the question. Nothing would change even if the Federal and Second Circuits were to stake a position in this debate. The numbers would

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[6] *Rogers v. Pendleton*, 249 F.3d 279, 288 (4th Cir. 2001) ("[I]f other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established for qualified immunity purposes."); *Morgan v. Swanson*, 659 F.3d at 372 (5th Cir.); *Citizens In Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016) ("the existence of a circuit split" is sufficient for qualified immunity to attach); *Nader v. Blackwell*, 545 F.3d 459, 477 (6th Cir. 2008) (same); *Denius v. Dunlap*, 209 F.3d 944, 951 (7th Cir. 2000) ("A split among courts regarding the constitutionality of conduct analogous to the conduct in question is an indication that the right was not clearly established at the time of the alleged violation."); *Mocek v. City of Albuquerque*, 813 F.3d 912, 930 n.9 (10th Cir. 2015) ("A circuit split will not satisfy the clearly established prong of qualified immunity."); *Lincoln v. Maketa*, 880 F.3d 533, 539 (10th Cir. 2018) (same); *Marsh v. Butler County*, 268 F.3d 1014, 1033 (11th Cir. 2001) ("We do not understand *Wilson* … to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly."); *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) (same); *Dukore v. Dist. of Columbia*, 799 F.3d 1137, 1144–45 (D.C. Cir. 2015) (concluding that law was not "clearly established" "at the time of the [alleged violation]" because "precedent in this and other circuits was either inconclusive or actively in conflict").

change slightly (the split would be 4-9, 5-8, or 6-7 in place of 4-7), but the nature of the split would not change. The split here is as deep, entrenched and as well-developed as circuit splits can get.

When officials like those sued here have ample time and opportunity to understand the nature of the circuit split (how much confrontation and cross-examination is required in Title IX university proceedings), it cannot be said they lack fair warning. There was no circuit split on the point of law that *some* confrontation and cross-examination is necessary in Title IX proceedings. And precedential authority from outside the Fifth Circuit had held that a complete denial of confrontation was unlawful. But due to the Fifth Circuit's extension of *Wilson* and adherence to *Wesby*—saying the lack of a "high degree of specificity" that is "beyond debate" makes the law "not clearly established"—the court below felt compelled to conclude that the law was not clearly established. Clarification from this Court is sorely needed to prevent such repeated miscarriages of justice in the courts of appeals.

Even though the Fifth Circuit recognized Dr. Walsh suffered a constitutional violation, and even though no fewer than five precedential decisions in that circuit[7] had established the right to due process in faculty disciplinary proceedings, and numerous other circuits had specifically required cross-examination in such hearings, it determined the University lacked a "fair warning" of its constitutional obligations. App.18a. The

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[7] *Levitt v. Univ. of Texas at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985); *Plummer v. Univ. of Houston*, 860 F.3d 767, 775 (5th Cir. 2017), *as revised* (Jun 26, 2017); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Woodbury v. McKinnon*, 447 F.2d 839, 844 (5th Cir. 1971); *Wells*, 793 F.3d at 683.

Fifth Circuit took the concept of "good faith" beyond all meaning and extended this Court's precedents far beyond any conceivable justification, leaving Dr. Walsh without a remedy for the clear violation of his civil rights.

The two historical reasons for qualified immunity (fair warning and good-faith defense) do not justify the Fifth Circuit's application of *Wesby*'s "beyond debate" language. Nor do they require the extension of *Wilson's* post-conduct circuit split degree-of-specificity criterion for the "clearly established" prong of the qualified-immunity test. Certainly not when government actors have designed a disciplinary scheme that several courts of appeals have explicitly said violates the constitutional rights of accused defendants. To be sure, there is a circuit split as the court below recognized. But every circuit to rule on the question after the 2015 conduct of Respondent officials here has ruled in favor of people in Dr. Walsh's situation. *See Wilson*, 526 U.S. at 618 (*post-conduct* circuit split matters). Rather than immunizing good-faith mistakes, qualified immunity in these fraught circumstances rewards deliberate and systematic violations of constitutional rights.

A. The Fair-Warning Rationale Does Not Justify *Wesby* or the Extension of *Wilson* in this Context

1. The Fair-Warning Rationale Departs from Section 1983's Text

Because the Constitution does not "partake of the prolixity of a legal code," simply reading the Constitution does not always tell an official much about what conduct the law forbids. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). The "fair warning" rationale for qualified immunity can be traced to *United States v. Screws*, 325

U.S. 91, 104 (1945), which interpreted the criminal sibling to Section 1983 that is now codified at 18 U.S.C. § 242: "Whoever, under color of any law … willfully subjects any person … to the deprivation of any rights … shall be fined under this title or imprisoned[.]"

Screws's rationale is described as "three related manifestations of the fair warning requirement": (1) the rule of lenity favoring narrow construction of criminal statutes, (2) broad constructions of the criminal law cannot be applied retroactively, (3) vague criminal statutes are unconstitutional, which the statute should be construed not to be. *United States v. Lanier*, 520 U.S. 259, 266 (1997). Without grounding the *Screws* fair-warning rationale in the text of 42 U.S.C. § 1983, *Lanier* and then *Hope v. Pelzer* simply stated that "[o]fficers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242." 536 U.S. 730, 739 (2002); *Lanier*, 520 U.S. at 270–71.

Under the fair-warning rationale, qualified immunity thus seems to rest on the notion that officials are not to blame for reasonable, even negligent, or reckless mistakes. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Whatever may be the efficacy of that rationale in other contexts (*e.g.*, *Bivens* actions against federal officials, or when applied to officials making split-second decisions), it is inapposite to a vast majority of official decisions (like the Title IX university proceedings at issue here) that are the product of deliberation, discussion, debate, and legal advice.

The fair-warning rationale for qualified immunity ignores its *Screws* and Section 242 origins that made

officials *criminally* liable for "willfully subject[ing]" "any person" "under color of any law … to the deprivation of any rights." This Court has not articulated any text-based reason to assimilate that rationale in the context of *civil* or *tortious* liability for government officials. While *Lanier* and *Hope* restate that the fair-warning rationale is co-opted for Section 1983, those cases never explained why that is so.

The fair-warning rationale also ignores the important textual difference between 18 U.S.C. § 242 and 42 U.S.C. § 1983: "willfully subjects" versus "subjects." That is a relevant distinction under "ordinary rules of statutory construction." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992). In *Monroe v. Pape*, 365 U.S. 167, 187 (1961),[8] the Court explained:

> The word 'willfully' does not appear in [Section 1983]. Moreover, [Section 1983] provides a civil remedy, while the *Screws* case dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

The fair-warning rationale came to a head in *Wilson v. Layne* when the Court said "it is *unfair* to subject police to money damages" in light of a "split among the Federal Circuits" that "developed on the question" "[b]etween the time of the events of this case and today's decision." 526 U.S. 603, 618 (1999) (emphasis added).

In *Wilson* a split developed *after* the allegedly violative official conduct occurred. *Wilson*, therefore,

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[8] *Monell* does not disturb this portion of *Monroe*. *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978).

untethered the fair-warning rationale from the assumption that *at the time* the rights-violating official conduct occurred, the right was not clearly established. *Pearson* extended the circuit-split fair-warning reasoning to a split "created by the decision of the Court of Appeals in this case." 555 U.S. at 245. To date, the Court has not provided a text- or context-based justification for qualified immunity based on the fair-warning rationale.[9]

Wilson's circuit-split explanation was not imperative for its central holding. After all, *Wilson*'s holding also rests on the alternative explanation that the law was "undeveloped" at the time of the complained-of official conduct. 526 U.S. at 617. But lower courts, have elevated that dicta to binding law. The court below certainly used *Wilson*'s circuit-split explanation as black letter law, but it did not take into account *when* the circuit split developed—and that affected the outcome of the case.

The fair-warning rationale is a two-fer: while *Wilson* uses the existence of a circuit split to say the law could not have been viewed as "clearly established," *Wesby* translates the fair-warning rationale into "high degree of specificity" that is "beyond debate." 138 S. Ct. at 590. The "high degree of specificity" formulation appears for the first time in *Wesby*. The cases it relies on do not mention it; they only mention "clearly established." *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mullenix v. Luna*, 577 U.S. 7 (2015). "Beyond debate," *Wesby* says comes from *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

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[9] Assuming *Wilson* is correct, the fact that every circuit to look at the specific procedural-due-process right Dr. Walsh asserts has ruled in favor of people like Dr. Walsh suggests that the law *was* "clearly established" at the time of the 2015 conduct of the Respondents here—there is no post-conduct circuit split here and *Wilson* speaks only to later-developing circuit splits. That only goes to show the extent of the lower court's misapplication of *Wilson*.

But *al-Kidd* says "beyond debate" supposedly comes from *Anderson* and *Malley*, 475 U.S. 335, when neither case requires a "beyond debate" degree of specificity.

If Section 1983 is to "be read against the background of tort liability," *Monroe*, 365 U.S. at 187, the degree of specificity should conform to the ordinary level of specificity required to prove torts—preponderance of the evidence. *Clearly* established or *beyond debate* formulations that come dangerously close to a criminal-style beyond-reasonable-doubt level of specificity would be constitutionally defective under the Due Process Clause if applied in a civil suit for damages predicated on a tort. *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (this Court "engaged in a straight-forward consideration of the factors identified in [*Mathews v.*] *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process").

Neither *Wilson*'s nor *Wesby*'s version of the fair-warning rationale is moored to Section 1983's text. And neither holding makes sense in the context of a University's designing a disciplinary process that has been found unlawful in multiple courts. The Court should grant certiorari to clarify the level of specificity required under the "clearly established" prong of the qualified-immunity analysis in circumstances like those presented here. *Santosky* suggests one way to tackle the question, if the Court is reluctant to return to Section 1983's text and scrap the "clearly established" prong altogether: the Court should perform a *Mathews* analysis to define the degree of specificity required for the qualified-immunity test. Thus, when government actors act with forethought and planning, a lower level of specificity may be appropriate than when they are forced to react in a split second. The *Mathews* analysis would likely point to a level of specificity akin to a more-likely-than-not standard: would a reasonable official at the

time of the conduct conclude that the conduct would, more likely than not, be viewed as violating the rights of a person?

2. The Fair-Warning Rationale Raises Serious Due Process Concerns

If one assumes (as this Court has over the decades) that the *Screws* fair-warning rationale, which developed in the criminal context, supports the qualified-immunity doctrine under Section 1983, then it raises serious constitutional concerns under the Due Process Clause.

At the outset, the contours of a *civil* rule of lenity are unclear. *Thompson/Center Arms* applied the rule of lenity "in a civil setting" because the statute also had "criminal applications." 504 U.S. at 517–18 (plurality opinion). And *Leocal v. Ashcroft* applied the rule of lenity because the statute "has both criminal and noncriminal applications." 543 U.S. 1, 11 n.8 (2004). But Section 1983 does not have criminal applications. Yet the fair-warning rationale rests on the "rule of lenity" drawn from the criminal context. *Lanier*, 520 U.S. at 266.

In Section 1983 cases, per *Wilson*/*Wesby*, a circuit split is considered a strong point in favor of the official. This Court has granted qualified immunity based on judicial disagreement as the basis for lack of fair warning in *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 378–79 (2009); *Reichle v. Howards*, 566 U.S. 658, 669–70 (2012); *Lane v. Franks*, 573 U.S. 228, 246 (2014) (relying on the *al-Kidd* "beyond debate" formulation); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017).

But when nongovernmental litigants, especially criminal defendants, point to such circuit splits, the Court gives them the opposite treatment; circuit splits do

not resolve the lenity inquiry. *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity."); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("[T]he existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable."). In other words, nongovernmental litigants in criminal cases cannot point to a circuit split to excuse their wrongful conduct, but governmental defendants in qualified-immunity civil-liability cases can—and are thereby excused according to the circuits that misread or misapply *Wilson*/*Wesby*'s circuit-split-based/beyond-debate fair-warning rationale. *See also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 585 (1998).

On the other hand, if Section 1983 is truly read against a backdrop of tort liability, *Monroe*, 365 U.S. at 187, the "clearly established" analysis still treats governmental litigants and nongovernmental litigants differently. Intentional torts require the complainant to prove the defendant knew or *should have known* the natural consequences of action or inaction. Negligent torts occur when the defendant's actions are unreasonably unsafe. Foreseeable plaintiff, foreseeable harm, standard of care, and preponderance of the evidence are all tort-law staples passed down through the centuries of common law. A nongovernmental defendant must overcome these standards to mitigate or overcome any damages sought by the plaintiff.

However, a governmental defendant in a Section 1983 suit is not answerable to these recognized and established standards of tort law. Instead, the official defending the Section 1983 suit only must assert that the plaintiff failed to show that the right at issue was "clearly

established" at the time of the defendant's alleged misconduct, or did not demonstrate that the precise right was established at a "high degree of specificity" that is "beyond debate" and not a subject of a "circuit split." This biased and lopsided treatment of nongovernmental and governmental litigants in civil suits for recovery of tort damages undermines due process. The Court should take this case to correct course in the seven circuits that misread *Wilson*, for not doing so would levy constitutionally impermissible due-process costs on nongovernmental litigants like Dr. Walsh.

B. The Good-Faith Defense Cannot Justify *Wilson* or *Wesby* as Applied Here

Sitting alongside *Screws*'s criminal-law based "fair warning" justification for qualified immunity from a civil suit for money damages is the notion that Section 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions'"; that "[p]art of the background of tort liability … is the defense of good faith and probable cause." *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (quoting *Monroe v. Pape*, 365 U.S. at 187). More recently, the Court invoked the common-law background as an important grounding for the legitimacy of the qualified-immunity doctrine. *Filarsky v. Delia*, 566 U.S. 377, 389 (2012)

"The text of § 1983 makes no mention of defenses or immunities. Instead, it applies categorically to the deprivation of constitutional rights under color of state law." *Baxter*, 140 S. Ct. at 1862–63 (2020) (Thomas, J., dissenting from denial of certiorari) (cleaned up). While nineteenth-century officials "sometimes avoided liability because they exercised their discretion in good faith," "officials were not *always* immune from liability for their

good-faith conduct." *Id.* at 1864 (emphasis in original; collecting relevant authoritative references). In other words, in tort law, a successful defense can mitigate or eliminate an award of damages; the fact that tortious conduct can be defensible does not grant immunity from suit. *See also Kisela*, 138 S. Ct. at 1159–60 (Sotomayor, J., dissenting) (criticizing, and offering an alternative to, the "beyond debate" level of specificity).

Tracing the historical maldevelopment of the qualified-immunity doctrine, Justice Thomas stated, "[i]n several different respects, it appears that our analysis is no longer grounded in the common-law backdrop against which Congress enacted [Section 1983]." *Baxter*, at 1864 (cleaned up). At most, the good-faith defense "appears to have been limited to authorized actions within the officer's jurisdiction." *Id.* "An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense." *Id.*

The good-faith rationale cannot justify the extension of the "circuit split" test (*Wilson*) or the "high degree of specificity" that is "beyond debate" test (*Wesby*) under the "clearly established" prong where, as here, officials had time to deliberate, discuss, debate, and seek and act on legal advice. The Court should take the case to delimit the "clearly established" prong or else to clarify that a lower degree of specificity is required for the law to be clearly established when officials civilly sued for damages under 42 U.S.C. § 1983 have sufficient time to obtain and act on legal advice before their rights-violating conduct occurs.

II. THE COURT SHOULD RESOLVE A 3-1 SPLIT OVER THE LEVEL OF SPECIFICITY REQUIRED FOR DELIBERATIVE DECISIONMAKERS TO OBTAIN QUALIFIED IMMUNITY

This Court also should resolve a distinct circuit split concerning qualified immunity in deliberative-decisionmaking contexts and adopt a more flexible standard for the deliberate choices that officials make. Indeed, because of the need for flexible concepts of qualified immunity, the circuits are divided over whether courts should treat deliberative decisionmakers differently than other governmental defendants for purposes of qualified immunity.

Holloman v. Harland rejected qualified immunity for a high school teacher and principal, concluding that both violated the student's clearly established First Amendment rights. 370 F.3d 1252, 1269–70, 1278–79 (11th Cir. 2004). The Court did "not find it unreasonable to expect the defendants—who hol[d] themselves out as educators—to be able to apply" the relevant legal standard "notwithstanding the lack of a case with material factual similarities." *Id.*

In contrast, three circuits (Fourth, Fifth, Seventh) have concluded otherwise in qualified-immunity cases arising in the deliberative-decisionmaking context.[10] The extra measure of deference afforded to officials with sufficient time to formulate a course of conduct, especially in contexts where they are not making split-second decisions (unlike, say, police officers deciding whether to draw a weapon) is troubling. In deliberative decisionmaking, there is sufficient time to obtain and act

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[10] *Abbott v. Pastides*, 900 F.3d 160, 174 (4th Cir. 2018); *Morgan v. Swanson*, 755 F.3d at 760 (5th Cir.); *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005).

on legal advice—time and opportunity that may not be available to officers making split-second decisions. Given the broader "range of the professional competence" and time available to make an informed decision, university officials, like Respondents here, should be held accountable when applying even some mental effort to the relevant caselaw would have given them "fair warning" that their decision withholding from Dr. Walsh *some* opportunity to confront or cross-examine Student #1 would be unconstitutional. *Malley*, 475 U.S. at 346 n.7.

III. THIS CASE PRESENTS AN ATTRACTIVE VEHICLE TO CLARIFY THE LEVEL OF SPECIFICITY REQUIRED FOR THE LAW TO BE CLEARLY ESTABLISHED

This case is attractive because it can be decided by clarifying but not revisiting *Wilson* and/or *Wesby*. That is so because the Fifth Circuit dramatically extended both of those cases. On one hand, the Fifth Circuit rejected at least five of its own precedential decisions that had already found a right to due process in faculty disciplinary proceedings. App.18a–22a. But because due process itself can "vary depending upon the circumstances of the particular case," App.13a, in essence, the Fifth Circuit concluded that no due process rights can ever really be clearly established under its view of *Wesby*. The Court can take this opportunity to rectify that overly restrictive view of its precedents.

On the other hand, the Fifth Circuit extended *Wilson* to find the presence of *any* circuit split, even a pre-existing one, to defeat the fair notice requirement of qualified immunity. App.21a. Chief Justice Rehnquist's majority opinion in *Wilson* highlights the internal inconsistency of this Court's circuit-split formulation

that the court below exacerbated. At one point, *Wilson* states that the degree of specificity for the law to be clearly established is "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. at 617. Turn the page, and the opinion concludes that "[g]iven … an undeveloped state of the law," and given that a circuit split developed *after* the complained-of official conduct occurred, it was "unfair to subject police to money damages." *Id.* at 618. An *undeveloped* state of the law is one thing, a preexisting circuit split which still shows a "consensus of cases of persuasive authority" is quite another. Therefore, one way to resolve this case would be to clarify that the mere existence of a circuit split does not defeat a "consensus of cases." Indeed, that would resolve the 4-7 split that has developed in the wake of *Wilson*.

Dr. Walsh's case, therefore, provides a clean vehicle for this Court to clarify the level-of-specificity analysis, and that clarification need not involve overturning *Wilson* or *Wesby*.

CONCLUSION

The writ should issue.

Respectfully submitted, on February 12, 2021.

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