No. _____

In the
Supreme Court of the United States

ROSS M. JACKSON,

Petitioner,

v.

SGT. GLENN COWAN, SPK K DORSEY, and OFC HUTCHINS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is the rare decision that presents multiple conflicts with other circuits. The Eleventh Circuit's decision in this case presents four §1983 conflicts, plus blatant misuses of summary judgment to foreclose equal protection and 1985(3) conspiracy claims founded on *prima facie* evidence indicating racial and religious bias. The questions presented are as follows:

1. Whether the Supreme Court's recent decisions in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), and *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018), apply retroactively. The Panel said not, but this Court applied its rulings retroactively in those cases, and other circuits have applied them retroactively as well.

2. Whether it is clearly established by this Court's precedent that police officers, when assessing whether there exists probable cause for arrest, must consider a legal defense established by what the officers observed at that time. The Panel affirmed the district court, which said not; other circuits disagree.

3. Whether it is clearly established that officers have a duty to protect a speaker in a public forum when his speech is being materially impeded by those who object to the message. The Panel said not, while acknowledging that other circuits have held this to be clearly established by this Court's precedent.

4. Whether it is clearly established that the court must consider internal police policies when

determining whether officers had fair warning of their constitutional violations. The Panel refused to consider such policies as a matter of law, despite this Court's contrary precedent, as confirmed by other circuits.

5. Whether this case presents a particularly egregious example of the lower courts neglecting their duty to view the facts in the plaintiff's favor when determining whether the plaintiff has made a *prima facie* showing of racial discrimination violating the Equal Protection Clause and a conspiracy to deprive civil rights, taking the issues out of the jury's hands in plain contravention of this Court's precedent.

PARTIES TO THE PROCEEDINGS

The parties to this action are the plaintiff/petitioner, Ross M. Jackson, and the defendants Glenn Cowan, Kevin Dorsey, and Oksana Kay Hutchins ("Police Defendants"), who at the time of the relevant events were all officers in the University of Georgia Police Department. Also defendants below are Keaton Law and Lechandt Opperman. The State of Georgia is defending the Police Defendants, as they are covered by the state's indemnity agreement.

STATEMENT OF RELATED CASES

The cases related to this petition are the following:

Jackson v. Cowan, No. 19-13181 (11th Cir.) (judgment entered Sept. 1, 2022).

Jackson v. Cowan, No. 3:17-cv-00145-CDL (M.D. Ga.) (judgment entered June, 17, 2019).

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PETITION FOR WRIT OF CERTIORARI

Mr. Jackson, a black, open-air preacher, was heckled and hounded mercilessly by two white students while he tried to address a crowd in the public forum area of the University of Georgia campus. The situation degenerated into assaults and disorderly conduct by the hecklers against Mr. Jackson, but this was ignored by the three white campus police officers, despite Mr. Jackson's plea to them for help, despite the same officers having repeatedly moved non-white objectors back from white preachers in the same forum the day before, and despite their own policies requiring them to do so. When Mr. Jackson was approached from the side and raised his arms, slightly brushing against one of the hecklers, the officers immediately moved in and arrested him. The State declined to prosecute, because, it stated, if anything, he was only acting in self-defense. In response to Mr. Jackson's §1983 action, the district court and the circuit court, with a partial dissent, found the officers were protected by qualified immunity and that Mr. Jackson had not established a *prima facie* violation of equal protection or a conspiracy to deprive civil rights due to race and religion.

OPINIONS BELOW

The district court opinion is unreported and begins in the Appendix at App39. The *per curiam* and dissenting opinions of the Eleventh Circuit are unreported and begin at App1.

JURISDICTION

The court of appeals denied petitioner's timely petition for rehearing *en banc* on November 7, 2022. (App58.) This Court has jurisdiction under 28 U.S.C. §1254(1); the Eleventh Circuit, under §1291; and the district court, under §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourth Amendment provides in part as follows:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . .

Section 1 of the Ku Klux Act, 42 U.S.C. §1983, provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., 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 . . . .

Official Code of Georgia Annotated ("O.C.G.A.") §16-5-23 (2010) provides in relevant part as follows:

> (a) A person commits the offense of simple battery when he or she . . .:
>
> (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another . . . .

O.C.G.A. §16-3-20 provides in relevant part as follows:

> The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed: (1) When the person's conduct is justified under Code Section 16-3-21 [self-defense], 16-3-23 [stand-your-ground] . . . .

O.C.G.A. §16-3-21(a) provides in relevant part as follows:

> (a) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself . . . against such other's imminent use of unlawful force . . . .

O.C.G.A. §16-3-23.1 provides in relevant part as follows:

> A person who uses threats or force in accordance with Code Section 16-3-21, relating to the use of force in defense of self or others, . . . has no duty to retreat and has the right to stand his or her ground and use force as provided in said Code sections, including deadly force.

STATEMENT OF THE CASE

Day 1: The Day Before the Central Events

In the presence of the three University of Georgia Police Defendants (Cowan, Dorsey, and Hutchins), on October 10, 2016, the day before Mr. Jackson's harassment and subsequent arrest, two white preachers in the public free speech area on campus iteratively spoke to a crowd which had encircled them at a respectful distance to listen. Several members of the crowd objected to the content of their speech and moved inside the circle and approached them, but never so close as to be face-to-face. (App131-App137.) The principal objectors who entered the circle that day were of Middle Eastern, Asian, and African-American descent, and the officers repeatedly moved them a respectful distance away from the white preachers, allowing the preachers to continue proclaiming their message unobstructed. (Hutchins Clip 4; Hutchins Clip 7; Preacher Clip 2; Dorsey Clip 7; Dorsey Clip 8, Dorsey Clip 10; Dorsey Clip 11; Dorsey Clip 12; App84-App95; App105-App109; App125 (transcriptions).)[1] This was fully in harmony with the officers'

[1] All referenced video clips (which are excerpts taken from the full videos) can be accessed by clicking on the link in the electronic text or by going to https://www.claybrooklaw.com/cases/jackson/clips/index.html. Transcripts of

training policies that were, in turn, stated to be modeled on established, First Amendment law requiring protection of the speaker even when some listeners find the speech objectionable. (App143-App149.)

Associate Dean of Students Jan Barham, who is responsible for the university's Free Speech Policy, was present and reminded Dorsey on this first day to continue to keep onlookers a good distance away from the white preachers, because, when people get closer, it makes "the people more hostile." (Dorsey Clip 14; App96; App126.) Barham observed a student, Keaton Law, among the onlookers the first day, and Law asked, "How do we shut this down?" (App127-App128.) Cowan answered Law's question on that first day. (App129-App130.)

Day 2: The Day of the Central Events

On the next day, Mr. Jackson was at the same location and preached a similar message to that of the white preachers the day before. Cowan in his incident report recounted several of these topics Mr. Jackson addressed, describing them as "inflammatory remarks." (App141.)

Mr. Jackson's listeners formed a circle around him. Some of them interacted with him on occasion. He was first observed by only Sgt. Cowan among the

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referenced clips were stipulated as accurate by counsel for the Police Defendants and are collected in the Appendix at App63-App125. The full police videos, also part of the record below, were taken from "FlexCam" camera attached to their heads. The Jackson clips were taken from a "GoPro" camera hanging on his chest.

Police Defendants. Barham preceded Cowan on the scene and approached Cowan shortly after he arrived with, "Did we not get enough of this yesterday?" She also pointed out that Law, who (unlike the day before) had moved inside the circle close to Mr. Jackson and was following him around, had christened himself as "Defender of Students" and "keeps talking over" Jackson. She did not ask Cowan to move Law away from Mr. Jackson. (Cowan Clip 1; App63-App68; App126-App128.)

After several minutes, another student, Lechandt Opperman, joined Law inside the circle, with both of them upbraiding and insulting Mr. Jackson in loud voices and in close proximity to him. Mr. Jackson repeatedly requested that they move away from him and let him address others in the crowd who were at a respectful distance. Cowan observed all this, but, contrary to the day before, he took no action to intervene or to allow Mr. Jackson to continue his religious speech unobstructed. (Jackson Clip 1; Jackson Clip 3; App115-App117.)

The crowd of listeners increased, and Cowan called for support from Dorsey and Hutchins. Dorsey arrived first. Observing the situation but not first checking in with Cowan, Dorsey immediately went inside the circle and began moving Law and Opperman away from Mr. Jackson "because it looked like [Law] was all up in [Jackson's] face." (App71.) Cowan immediately moved into the circle and called Dorsey off, telling him he had already talked with Law and Opperman (when he had only talked with Law), who were "really good about countering" whatever Mr. Jackson had to say. He told Dorsey to say nothing to anybody and, "If anybody asks a question refer them

to me." (Cowan Clip 4; App71-App72.) Officer Hutchins subsequently arrived and checked in with Dorsey, who repeated Cowan's admonitions to her. Dorsey observed to her that Law and Opperman were "doing a good job of covering him up" but knew not to touch him. (Dorsey Clip 18; App97.)

After Cowan called off Dorsey, Law and Opperman intensified their obstruction of Mr. Jackson. Mr. Jackson asked the audience to remind Law and Opperman that he had asked them to move away from him. They ignored his requests and continued to follow and hector him, with it escalating after a short period to Law shouting in Mr. Jackson's ear. He felt Law's spittle. (App6.) Mr. Jackson then walked over to the Police Defendants and requested their help, asking if it was legal for Law "to get right up in my ear and yell?" Law and Opperman also approached the officers and asked if they could get close to Mr. Jackson as long as they didn't touch him. While Dorsey and Hutchins stood mute, Cowan told Law and Opperman, "Yeah," and then turned to Mr. Jackson and gave him the brush-off by a dismissive wave of the back of his hand. (Jackson Clip 4; Hutchins Clip 12; App110; App119.)

Further emboldened by this action of the officers, Law and Opperman then got right in Mr. Jackson's face, with Law getting nose-to-nose with him. Mr. Jackson shouted, "Back up, pervert," and "Get out of my face!" repeatedly. Law shouted back that he wouldn't back off, and Opperman, right next to Law, yelled that Mr. Jackson was "nothing but a bigot." Law chest bumped Mr. Jackson, Mr. Jackson said Law was "a sissy going straight to hell" and "You're soft," and Law asked Mr. Jackson whether he wanted a kiss.

Law then continued that "I'm not soft," but, rather, "I'm hard from looking at that fine ass." Opperman yelled in Mr. Jackson's face, "You are nothing but garbage." The Police Defendants watched all this from close range with their arms crossed, saying and doing nothing. (Jackson Clip 5; Dorsey Clip 19; App122; App98-99.)

Mr. Jackson then pivoted away from Law and Opperman, being careful to avoid touching them with his outstretched arms, and tried to continue preaching, often with his arms raised and his Bible in one hand. Law and Opperman repeatedly ducked under and moved around Mr. Jackson's outstretched arms. (Dorsey Clip 19.) Law and Opperman followed Mr. Jackson around for a couple minutes while he tried to preach to others, but, then, they again stepped directly in front of him and got right in his face, with Law going nose-to-nose. Law shouted about "your ass" and, when Mr. Jackson remonstrated, Law rejoined, "I will yell at you." Mr. Jackson responded, "You need a breath mint," to which Law yelled, "I do, and I hope it smells terrible." Mr. Jackson pleaded, "Out of my face, please! Out of my face," to no avail. (Dorsey Clip 19; Jackson Clip 5; App98-App99; App122)

Mr. Jackson backpedaled, avoiding contact with Law, but Law moved back with him step for step, staying right in his face. Mr. Jackson pivoted to his right, and Law approached him toward his left side, potentially to scream in his ear like he had said he would keep doing or to kiss him as he had just threatened to do. Mr. Jackson put up his left arm as he had repeatedly done before, in a controlled manner. Instead of simply avoiding the arm, as he had done

previously, Law this time leaned in toward Mr. Jackson and allowed it to brush against him. He then feigned a comically exaggerated reaction of being knocked back. It was obvious that Law was the aggressor and manufactured the contact and that Mr. Jackson, at most, was reacting in self-defense to Law's aggression. (Cowan Clip 6; Dorsey Clip 19; Jackson Clip 5.)

Ignoring Law's assaults and batteries against Mr. Jackson and the fact that Law was the aggressor, the officers immediately moved in after this slight contact. Mr. Jackson offered no resistance, but they handcuffed him and told him he was being arrested for "simple battery" because he had touched Law intentionally (reciting part of the Georgia law for the offense). Law cavorted around inside the circle of onlookers and did fist pumps and gave hugs. Mr. Jackson protested to the officers that he had not intentionally touched Law or committed a battery. (Cowan Clip 6; Jackson Clip 5; App81; App124.) Hutchins admitted that they had not followed their policies to protect speakers and that she was unsure she would have arrested Mr. Jackson if she had been alone. (App135-App138.)

Dorsey called in the arrest, and investigating officers came to the scene within minutes. Dorsey while waiting for them asked Law, "I just wanted to verify. He did actually touch you, right?" (Dorsey Clip 20; App102.) When other officers arrived, Cowan admitted to one of them that Mr. Jackson had only "brushed against" Law and had "pushed him away." (Cowan Clip 9; App82-App83.) Cowan bragged to the investigating officers that they had "hit a home run" when they "took him down." (Dorsey Clip 22; App103-

App104.) Law, for his part, immediately afterwards boasted to the student newspaper, *Red and Black*, that he had succeeded in his "mission" to "drown [the preachers] out," "talk over them," and "remove [them] from campus" because they were "preaching hate." (App150-App151.)

The Police Defendants when talking to onlookers prior to the arrest derided Mr. Jackson as a "problem." They stated that what he preached was not "real" religion and repeatedly remarked that Mr. Jackson's actual intent was to inflame someone to touch him so he could sue that person or the university. (E.g., Cowan Clip 2, Cowan Clip 4, Cowan Clip 5; App69, App74-App75.)

***Nolle Prosequi* by the Prosecutor**

Mr. Jackson was incarcerated in the county jail. He made bail several hours later and was then released. Several months later, the prosecutor filed a *nolle prosequi*. He stated that viewing the police videos "has led to the conclusion that Mr. Jackson was justified in using the amount of force that he did in order to move the named victim away from his personal space pursuant to O.C.G.A. § 16-3-20."[2] (App60-App62.)

Proceedings Below

After written discovery was exchanged and several depositions were taken, the Police Defendants moved for summary judgment, claiming that they

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[2] O.C.G.A. §16-3-20 is quoted above in relevant part.

were entitled to qualified immunity. The district court granted the Police Defendants' motion and, thereafter, issued judgment on their behalf. The district court stayed the action against Student Defendants Law and Opperman pending appeal.

The Eleventh Circuit Panel in a *per curiam* opinion, issued over two years after oral argument, affirmed the district court. Judge Lagoa dissented on two grounds: (a) no reasonable officer would have had probable cause to believe that Mr. Jackson intentionally made contact with Law in an insulting or provoking manner, as required by Georgia law; and (b) the officers' disparate conduct toward Jackson and his hecklers made a *prima facie* case that the officers acted in retaliation for Jackson's speech. (App32-App38.)

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Ruled Inconsistently with This Court and Other Circuits When It Refused to Apply *Nieves* and *Lozman* Retroactively

This Court ruled in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), and *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018), that, as a matter of statutory construction of §1983, while probable cause normally provides an absolute defense to a retaliatory arrest (as it provides an adequate, independent cause for the arrest), there are exceptions. Those exceptions are applicable in this case, but the Panel held as a matter of law that, because the *Nieves* and *Lozman* exceptions were "not clearly established law in this circuit at the time of

Mr. Jackson's arrest," they did not have to be considered. (App18-App19; App35.)

That ruling put the Panel in conflict with every other authoritative opinion on this issue. The Ninth Circuit applied the new causation rule of *Nieves* retroactively. *See, e.g.*, *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1056-58 (9th Cir. 2019). The Seventh Circuit did the same in *Lund v. City of Rockford*, 956 F.3d 938, 944-45 (7th Cir. 2020), as did the Fifth in *Roy v. City of Monroe*, 950 F.3d 245, 255 & n.4 (5th Cir. 2020), and the Tenth in *Hinkle v. Beckham County Board of Commissioners*, 962 F.3d 1204. 1227 (10th Cir. 2020). *See also Higginbotham v. Brauer*, 2020 WL 4569520 (D. Md. Aug. 7, 2020) (applying the *Nieves* exception to prior conduct by defendant officers due to their inconsistent conduct in the very situation in which they were alleged to have acted improperly); *State v. Cox*, No. 20-0227 (W. Va. 2021) (noting the *Nieves* exception in ruling on pre-*Nieves* conduct). The courts in *Robinson v. Ash,* 374 F. Supp. 3d 1171, 1182-83 (M.D. Ala. 2019), and *Mayfield v. Butler Snow LLP,* 341 F. Supp. 3d 664, 674 (S.D. Miss. 2018), treated *Lozman* as retroactive.

These courts properly followed this Court's lead in *Nieves* and *Lozman*. In *Nieves*, this Court ruled that probable cause did not bar a §1983 retaliation claim if the complainant could show that the officers had not arrested others for similar offenses in similar situations. 139 S. Ct. at 1727. It then applied that rule to the case at hand. *Id.* at 1927-28. Here, Law yelled in Jackson's face and ear, leaving spittle on Jackson's face, and then chest bumped Mr. Jackson. (App6; App37 (dissent noting that Law's actions qualified as assault and disorderly conduct).) This clearly

establishes the *Nieves* exception, as the officers did not arrest the white heckler for the same type of offenses as they did Mr. Jackson in exactly the same circumstances.[3]

Similarly, in *Lozman* this Court remanded with instructions to apply its newly minted exception to the case at hand, despite the arrest occurring prior to its decision. 138 S. Ct. at 1955. It ruled that, when there is a showing of a premeditated plan to silence objectionable speech, probable cause for the arrest does not defeat a §1983 claim. *Id.* at 1952-54. Here, there was ample evidence of a predetermined plan to silence Mr. Jackson, *e.g.,* (a) Law meeting with Cowan and Dean Barnham about his "mission" to "drive [Jackson] out" (App150-App151); (b) Barnham telling Cowan before the arrest, "Didn't we get enough of this yesterday?" (App63); and (c) Cowan insisting that the other two officers not act independently and restraining Dorsey

[3] The Panel attempted to explain away this Court's retroactive application of its ruling in *Nieves* by noting that, prior to *Nieves*, the Ninth Circuit did not regard probable cause as an absolute defense to a retaliation claim. (App19.) But if the ruling were not to be applied retroactively, this Court would have remanded for the Ninth Circuit to apply its prior interpretation of §1983 or affirmed. Instead, this Court applied its newly announced rules to the case, which varied from the prior reading of the statute by the Ninth Circuit, even though those new rules obviously were not "clearly established" when the offense occurred. *See* 139 S. Ct. at 1721 (discussing the Ninth Circuit's prior law), 1727-28 (applying its new exception).

when Dorsey began to move Law away from Mr. Jackson when he first arrived on the scene (App37).[4]

Those lower courts applying *Lozman* and *Nieves* retroactively not only followed this Court's lead, but they also properly applied the law. Section 1983 is a *remedial* statute; it does not supply the substance of the offense. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Granted, when there is a change or clarification of *substantive* law, that new law is not applied retroactively to defeat qualified immunity in the particular case. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975). However, when law defining the requirements to obtain a §1983 remedy is modified, it is a matter of §1983's "statutory construction," *id.* at 316, and it is applied retroactively, as it does not involve the substance of the underlying offense to be remedied, but the proper application of §1983 itself. For example, the substantive laws involved in *Lozman* and *Nieves* (and here) are those of assault and battery and disorderly conduct and the constitutional rights not to be arrested without probable cause or in retaliation for exercising First Amendment rights.[5] The statutory law issue peculiar to §1983 involved in those cases was whether probable cause was an absolute

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[4] The Panel also erred in holding that the *Lozman* exception turned on the fact that the defendant was a city. (App19.) The *Lozman* passage quoted by the Panel in support of its interpretation only noted the extra proof requirement *because* the defendant was a city. The *Lozman* Court did not limit its holding to cities, and *Nieves* relied on *Lozman* in a police case. 139 S. Ct. at 1727.

[5] Ironically, in *Nieves* the plaintiff was arrested for disorderly conduct when he shouted in an officer's face and was pushed away by the officer. 139 S. Ct. 1720-21. Probable cause for that arrest was conceded. *Id.* at 1721.

defense to allegations of a retaliatory arrest. This Court's rulings on that issue in *Nieves* and *Lozman* did not interpret an element of the *substantive* offenses to be remedied, but were statutory constructions of §1983 *remedial* law.

The Eleventh Circuit improperly refused to apply *Nieves* and *Lozman* retroactively and, in so doing, created a circuit split. This court should grant the petition to remedy this split and to provide guidance on an issue likely to recur repeatedly.

II. The Panel Ruled in Conflict with Other Circuits and This Court's Precedent by Holding That Arresting Officers Need Not Consider Personally Observed Facts Negating the Alleged Crime

Georgia statutory law provides that self-defense is a full justification to what might otherwise be a battery and that a person may stand his ground and use force when someone advances in a threatening manner.[6] As the videos and the Panel's factual recitation show, that is exactly the situation here. Under Georgia law in effect prior to Mr. Jackson's arrest, if a person acts in self-defense and stands his ground, even if (unlike here) he does bodily harm to the other person, he has committed "no crime at all." *State v. Green*, 289 Ga. 802, 804, 716 S.E.2d 194, 196 (2011). Of course, as stated in *Beck v. Ohio*, 379 U.S. 89, 91 (1964), probable cause is the determination of the likelihood of a *crime* being committed. Indeed, the State

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[6] *See* O.C.G.A. §§16-3-23.1, 16-3-23.1, quoted above in relevant part.

did not argue below that the officers would have had probable cause for the arrest if they had considered Jackson's stand-your-ground defense; the State only argued that the officers did not have to consider it. Thus, this presents a pure issue of law.

The district court erred when it found these Georgia statutes irrelevant on the ground that it was not clearly established under this Court's precedent that officers had to consider such defenses when making an arrest (App50-App51), but the Panel affirmed.[7] Other circuits disagree, holding that it *is* clearly established under this Court's precedent that officers must consider facts they personally observe that conclusively establish a statutory defense that negates the crime. As the Sixth Circuit said in just such a situation in *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), "[t]he law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132, 162 (1925), that probable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest*." *Id*. at 1012 (emphasis in original). And no information can be more relevant than that which relates to a statutory defense that eliminates the offense entirely.

In *Fridley v. Horrighs*, 291 F.3d 867 (6th Cir. 2002), the Sixth Circuit elaborated that it is clearly established that officers must consider "facts and circumstances establishing statutorily legitimated affirmative justification for the suspected criminal act"

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[7] The parties fully briefed this issue before the Eleventh Circuit, but the Panel affirmed without discussing the issue.

when making a probable cause determination, if those facts and circumstances are reasonably known. *Id.* at 873 (quoting *Painter v. Robertson*, 185 F.3d 557, 570 (6th Cir. 1999)). Similarly, the Seventh Circuit in *Hodgkins ex rel. Hodgkins v. Peterson,* 355 F.3d 1048, 1061 (7th Cir. 2004), ruled, while there is no duty of investigation, "A police officer may not ignore conclusively established evidence of the existence of an affirmative defense . . ." (internal citation omitted)). The Second Circuit is in accord. *In Jocks v. Tavernier,* 316 F.3d 128, 135-36 (2d Cir. 2003), it held that an arresting officer may not "deliberately disregard" the existence of facts establishing an affirmative defense and, in *Garcia v. Does,* 779 F.3d 84, 93 (2d Cir. 2015), that officers must accept a suspect's defense if "the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs."

Because all the elements of the absolute defense to the battery for which Mr. Jackson was arrested were played out right before the officers, they were required to consider them. It was plain error for the Panel to affirm the district court by ignoring this clearly established rule of law. In doing so, it ruled contrary to longstanding precedent of this Court, as confirmed by other circuits, that facts that conclusively establish a defense to the alleged crime are among the set of "*all* facts and circumstances" officers must consider when making an arrest based on probable cause. *See Carroll,* 267 U.S. at 162. This Court should grant the petition to confirm the law as stated

by the Second, Sixth, and Seventh Circuits and to cure the circuit split.[8]

III. The Panel Ruled in Conflict with Other Circuits and This Court's Precedent by Holding That Officers in No Circumstance Have a Clearly Established Duty to Protect a Speaker from Hostile Listeners

The Panel acknowledged that it created a circuit split when it ruled that the officers did not have a clearly established duty to intervene to allow Mr. Jackson's unpopular speech to continue unhindered. The Panel admitted that the Second and Sixth Circuits have found such a duty to be clearly established in appropriate circumstances and cited no contrary precedent, but implied that this Court has never so held. (App20-App21.)

The Panel was in error. It has long been settled by this Court that "[t]he right of free speech . . . does not embrace a right to snuff out the free speech of others." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). Moreover, in *Edwards v. South Carolina*, 372 U.S. 229 (1963), this Court held that the expression of views disagreeable to listeners may at times "necessitate police protection," 372 U.S. at 237, and in *Hague v. CIO,* 307 U.S. 496, 516 (1939), that "uncontrolled official suppression of the privilege [of

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[8] A recent commentator has called for this issue to be resolved by this Court. Ryan Sullivan, *Revitalizing Fourth Amend. Protections: A True Totality of the Circumstances Test in § 1983 Probable Cause Determinations*, 105 Iowa L. Rev. 687, 692 (2020).

free speech] cannot be made a substitute for the duty to maintain order in connection with the exercise of th[at] right." *See also Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (plurality opinion) (holding that the right of free speech requires the opportunity to win the attention of willing listeners). Yet, when the student hecklers here consistently restricted Mr. Jackson's speech, the officers did not intervene. Instead, they actively encouraged and aided its suppression.

Law and Opperman didn't just engage in a counter-debate; they physically obstructed Mr. Jackson, they openly rejected his repeated requests that they quit impeding him, they shouted in his ear, and they chest-bumped him. And although they sometimes shouted substantive remarks in reaction to Mr. Jackson's preaching, they also repeatedly hurled invective at him, which has no First Amendment protection. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2301-02 (2019). Law immediately afterwards boasted to the student newspaper, *Red and Black*, that he had succeeded in his "mission" to "drown [the preachers] out," "talk over them," and "remove [them] from campus" because they were "preaching hate." (App150-App151.)

This case is materially indistinguishable from the police conduct this Court condemned in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In *Adickes*, like here, a police officer observed, but refused to intervene, when a private party was violating the plaintiff's civil rights. *Id.* at 149-50. The actions of the officers here demonstrate much more active participation than those for which the Court held the officer in *Adickes* potentially liable under §1983. *Id.* at 157-58.

The ruling also puts the Eleventh Circuit in conflict with the Sixth and Eighth Circuits, as the Panel admitted. In *Bible Believers v. Wayne County*, 805 F.3d 228, 252–53 (6th Cir. 2015), the Sixth Circuit found that it was clearly established by this Court's precedents that officers had to protect speakers in a public forum from those who objected to the speech; officers are not allowed to "sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule . . . ." And in *Phelps-Roper v. Ricketts*, 867 F.3d 883, 900–01 (8th Cir. 2017), the Eighth Circuit concurred that officers have an obligation "to protect [the speaker]'s right to the *opportunity* to reach *willing* listeners . . . ." (Emphasis in original.)

This Court should grant the petition and confirm, as the Sixth and Eighth Circuits have, that the law is clearly established that, in appropriate circumstances, police officers have a duty to intervene to allow peaceful speech to continue in a public forum.

IV. The Panel Ruled in Conflict with Other Circuits and This Court's Precedent by Holding That Internal Police Procedures Are Irrelevant to Determining Whether Officers Were on Fair Notice of Their Constitutional Violations

In *Hope v. Pelzer*, 536 U.S. 740 (2002), this Court confirmed that the purpose of qualified immunity is to make sure that officers are on "fair warning" of their violations. *Id.* at 739-40; *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("the focus is on whether the officer had fair notice that her conduct was unlawful"). *Hope* further instructed that, when the officers failed to observe their own policies, it

provided "strong support for the conclusion that they were fully aware of the wrongful character of their conduct." *Id.* at 744. Similarly, this Court in *Lombardo v. St. Louis*, 141 S. Ct. 2239, 2241 (2021), relied on police guidance to show that officers were on fair notice that their actions violated constitutional requirements.

The Eleventh Circuit refused to consider the on-point, internal policies involved here, brushing them aside on the rationale that a violation of internal policies does not state a cause of action. (App21.) Of course, under that rationale, internal policies would *never* be considered when assessing qualified immunity. But Mr. Jackson did not base a cause of action on the officers' violation of their internal policies, instead using them only in the way that *Hope* prescribed—to show the officers were on fair notice of their duty to protect Mr. Jackson's right to speak.

The UGA Police Department's Standard Operating Procedures for managing disputes incorporated the university's "Free Speech Policy." (App143.) That policy, in turn, set up free expression areas for student and public speakers and provided, "In the event that other persons react negatively to this expression, University personnel (including University Police) shall take all necessary steps to ensure public safety while allowing the expressive activity to continue." (App143-App144.)

Further implementing this policy, the Police Department's training bulletin entitled, "Police Response to Free Speech Issues," expressly stated it was setting out the constitutional requirements under the First Amendment and that the "U.S. Supreme Court

has made it quite clear that it firmly supports an individual or group's right to exercise free speech." (App145-App149, citing *Snyder v. Phelps*, 562 U.S. 443 (2011).) It continued,

> As the police, we have a dual legal duty to preserve all individuals' right to freedom of speech and to protect the welfare and safety of all those involved in an expression of free speech. This extends to the safety of the speaker as well as the safety of those listening to the message. . . . Touching, impeding a person's free movement through an area . . ., and getting in a person's face (in a manner that leads you to believe a breach of peace is imminent) are not acceptable and probably require our intervention. . . . Remember, the First Amendment guarantees freedom of expression, not freedom to infringe upon another person's rights.

(App146-App147.)

These policies show that reasonable officers would have known full well that they were violating the law by not protecting Mr. Jackson's opportunity to speak. Yet, the Eleventh Circuit did not even consider them, based on a rationale that would never allow internal policies to be considered.

This puts the Eleventh Circuit in direct conflict not only with this Court but also with other circuits. For instance, in *Nelson v. Correctional Medical Services*, 583 F.3d 522, 532-34 (8th Cir. 2009), the Eighth Circuit relied on internal prison regulations

concerning shackling of inmates needing medical attention when finding that officials clearly violated the constitutional rights of an inmate in labor. And in *Hardwick v. County of Orange*, 844 F. 3d 1112, 1117, 1120 (9th Cir. 2017), the Ninth Circuit recognized that, after *Hope*, internal regulations can be evidence of constitutional requirements being clearly established and providing fair warning to a reasonable officer, applying that principle to a state statute. *See also Cooper v. Brown*, 156 F. Supp. 3d 818, 824-25 (N.D. Miss. 2016) (applying *Hope* to find failure to follow internal police policy was evidence that officer's action obviously violated constitutional norms).

This Court should grant the petition to affirm that courts must consider such policies when they are relevant to whether officers were on fair notice that their behavior violated constitutional norms, curing the split among other circuits.

V. The Panel Blatantly Violated Judicial Procedures by Prejudging Significant Claims of Racial and Religious Bias, Taking Them away from the Jury

In its seminal *Adickes* decision involving asserted civil rights violations, this Court made it exceedingly clear that factual inferences must be afforded the plaintiffs when determining whether they have made a *prima facie* case for the jury. *See* 398 U.S. at 157-58. Defendants must show that no reasonable jury could consider the alleged circumstances to have an improper motivation and, otherwise, summary judgment is improper. *See id.* at 158-59.

The Panel egregiously violated these important principles when it held that summary judgment was appropriate on Mr. Jackson's claim that he was discriminated against due to his race and on his claim that the defendants conspired to violate his civil rights due to class-based animus of race and religion. It "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ." S.Ct.R.10.

A. The Panel Violated *Adickes* by Taking the Equal Protection Claim away from the Jury

The Panel reviewed the evidence and concluded that the circumstances were not sufficiently similar on Days 1 and 2 to establish an equal protection claim. (App22-App23.) That conclusion could only be reached by giving every presumption to the officers, rather than, as required, to Mr. Jackson. That the officers protected the white preachers from hostile listeners on Day 1 but refused to protect Mr. Jackson on Day 2 provides a sufficient foundation for a claim standing alone, but there is much more. The preachers were on the same campus, at the identical location, in front of the same officers and dean. Both the white preachers on Day 1 and Mr. Jackson on Day 2 were delivering similar messages. Both the white preachers and Mr. Jackson attracted a significant number of listeners who formed a circle around them, and, on both days, a few of those listeners entered the circle to approach the preachers and to voice their objections to the message being preached.

Indeed, Defendant Dorsey certainly thought Day 1 and Day 2 were substantially similar. When

called to the scene by Sgt. Cowan because the crowd Mr. Jackson was attracting on Day 2 was becoming substantial, before checking in with Cowan but seeing the situation as he approached, Dorsey immediately worked his way through the encircling audience and began to move the student hecklers near Mr. Jackson away from him, whereupon he was called off by Cowan. (App37.) Moreover, (a) the individuals whom the officers moved away from the white preachers were principally non-whites, while the two students molesting Mr. Jackson were both white; (b) Dean Barham instructed Dorsey to keep people away from the white preachers on Day 1, because, if they got too close, things could get hostile (Dorsey Clip 14; App96), but she showed no such solicitude when Law stalked and screamed at Mr. Jackson from close range; and (c) when both Jackson and the student hecklers approached the officers after Law had shouted in Mr. Jackson's ear, Cowan responded politely to the white students but gave Mr. Jackson the back of his hand, insulting instead of helping him. (App37-App38.)

The Panel's assertion that two differences were "particularly compelling" (App22-App23) only demonstrates that it improperly viewed the evidence in the officers' favor, rather than Jackson's. The first alleged "compelling" difference—that the officers had better visibility on Day 2—does not negate either (a) the fact (validated by videos) that they achieved adequate visibility (including at times being inside the circle of onlookers) on Day 1 to move objectors away from the white preachers when those hecklers were further away than Jackson's hecklers were to him the next day; or (b) Officer Hutchins' testimony that there was no imminent danger of altercation on Day 1, but there

was when Mr. Jackson was preaching. (App131-App138.)

The Panel's second "particularly compelling" fact was that Cowan had spoken with Law about "counter-speech" and "not touching" and the officers had allowed a black woman on Day 1 to continue debating a white preacher after speaking with her. But (a) the woman on Day 1 stayed well away from the preacher after the officers had moved her back; (b) there were two hecklers on Day 2, and Cowan never talked to Opperman; and (c) Cowan's conversation with Law cannot be assumed to have been innocent just because he claims so. *See Adickes*, 398 U.S. at 157-59.

The Panel's weighing of the evidence of racial discrimination mimics that struck down by this Court in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). In considering a *Batson* challenge to the makeup of the jury, this Court rejected the sifting of evidence to look for an innocent explanation and inferred from the disparate questioning of blacks and whites that the elimination of blacks in the venire was motivated in substantial part by discriminatory intent. *Id.* at 2237-51. The *Flowers* majority repeatedly inferred racial bias from similarly situated whites and blacks being treated differently. In contradistinction here, the district court and Panel went out of their way to excuse the Police Defendants' disparate treatment of people of different races, even though it was required as a matter of law to view all facts in Mr. Jackson's favor in the summary judgment posture and to send the case to the jury. *See* Fed.R.Civ.Pro. 56.

In dissent, Judge Lagoa stated, "Viewed in the light most favorable to Jackson, as is proper at this stage," the officers treated the white students' aggression towards Mr. Jackson differently than they did his toward them. (App37-App38.) She attributed that bias to the animosity they voiced toward the religious content of Mr. Jackson's speech, but it could just as well be explained, in whole or in part, by a racial bias.

B. The Panel Violated *Adickes* by Taking the Civil Rights Conspiracy Claim away from the Jury

The Panel repeated its clear error when it resolved contested issues by finding there to be no evidence that the officers and the private defendants conspired to deprive Mr. Jackson of his civil rights. (App23-App26.) The Panel ruled as if, to prove a conspiracy, a plaintiff must show a formal agreement, when the law only requires proof of an implied agreement by circumstantial evidence. *See Griffin v. Breckenridge*, 403 U.S. 88, 90 (1971); *Parker v. Landry*, 935 F. 3d 9, 18 (1st Cir. 2019).

As this Court stated in a Sherman Act context in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), it is not necessary to show a formal agreement to prove a conspiracy, and the evidence of actions taken in concert is often stronger evidence of conspiracy than "an exchange of words." *Id.* at 809-10; *see also United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). Indeed, in *Adickes*, this Court ruled that, due to the plaintiff's allegation that a policeman and a lunchroom manager were seen together and in light of later events, summary judgment could

not be properly be based on their deposition and affidavit testimony that there was no collusion, as the jury could infer from what happened that they had indeed colluded to violate the plaintiff's rights due to her race. 398 U.S. at 157-59; *see also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99-100 (2003) (holding that discriminatory motivation may be shown by circumstantial evidence).

Here, it is uncontroverted that Law spoke with both Barham and Cowan about "shutting down" Jackson, but the Panel simply took Barham's and Cowan's denials of any agreement to assist Law's self-described "mission" at face value, contrary to the express teaching of *Adickes*. Even without the admitted prior conversations, which a jury could obviously find were not innocent but part of a joint purpose to disrupt the preacher's speech, standing and watching the private parties hector Mr. Jackson was, by itself, enough to show a meeting of the minds to deprive Mr. Jackson of his constitutional rights. "[I]t is not necessary to show an *express* agreement to prove a conspiracy." *Earle v. Benoit*, 850 F.2d 836, 845 (1st Cir. 1988) (emphasis in original).

With due respect, the Panel's startling finding that there was "simply no evidence that the officers reached an agreement with their co-defendants to deprive Mr. Jackson of his rights" (App25-App26) can be accounted for only by egregious oversights or by a basic misunderstanding of the legal standard. "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not

'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2004) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986), and citing *Brosseau,* 543 U.S. at 195, n.2; *Saucier v. Katz,* 533 U.S. 194, 201 (2001); *Hope,* 536 U.S. at 733 n.1). At a minimum, the Panel committed clear error by failing to view evidence in the non-movant's favor, as Rule 56 requires. *See id.; Adickes*, 398 U.S. at 157-59.

The Panel manifestly failed to apply the teaching of *Adickes* that facts must be viewed in the complainant's favor and summary judgment may not be used to take from the jury *prima facie* cases of racial discrimination and conspiracy to deprive of civil rights. Unfortunately, this case confirms that it is important for this Court to reconfirm those teachings of *Adickes* even today.

VI. This Case Presents a Unique Opportunity to Eliminate Conflicting §1983 Precedent on Several Issues

One of the most strident complaints about §1983 case law in recent years has been that different results obtain in different circuits for substantially similar situations. Another is that, while allowing lower courts to avoid constitutional issues by addressing first whether violations have been clearly established has undoubtedly lessened a judicial burden, it has also meant that constitutional violations can continue repeatedly and indefinitely within a single circuit unless this Court steps in. *See Sims v. Madisonville,* 894 F.3d 632, 638 (5th Cir. 2018) (noting that

the constitutional issue had repeatedly been presented to the court before and that "[c]ontinuing to resolve the question at the clearly established step means the law will never get established"); *see generally* John C. Jeffries, *What's Wrong with Qualified Immunity*, 62 Fla. L. Rev. 851 (2010); Chaim Saiman, *Interpreting Immunity*, 7 U. Pa. J. Const. L. 1155, 1155 (2005); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445 (2000).

This appeal presents a unique opportunity to address multiple constitutional issues that have split the circuits and to provide uniformity. That the officers here committed multiple constitutional violations of the type frequently encountered around the country is not seriously contested. But whether those violations were "clearly established" by this Court's precedent has split the circuits. A decision by this Court addressing these multiple splits will provide uniformity that is sorely needed.

CONCLUSION

For each of the above reasons, this Court should grant the petition.

Respectfully submitted, in
this this 6th day of February 2023,

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