No. 22-770

IN THE

Supreme Court of the United States

ROSS M. JACKSON,

Petitioner,

v.

GLENN COWAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONER

KEVIN T. SNIDER
Counsel of Record
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, CA 95827
(916) 857-6900
ksnider@pji.org

Counsel for Amicus Curiae
Pacific Justice Institute

319765

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Pacific Justice Institute (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights.

This includes *pro bono* criminal defense of clients standing on traditional public fora who have been arrested or cited while engaging in free speech, press activities, or the free exercise of religion (e.g., prayer, audibly reading religious texts, or preaching). Approximately 90 percent of such cases represented by PJI staff attorneys result in charges dropped, dismissals, acquittals, or cases pled out with no time or fine for the defendants.

Although as a rule there are mostly good outcomes for these criminal defendants, the delivery of the speech itself has been interrupted, and First Amendment rights have been silenced by state actors through uniformed and armed law enforcement. In direct contrast to the successful defense against prosecutions, when criminal defendants become plaintiffs in subsequent lawsuits against arresting officers, they rarely prevail due to courts finding that a patrol officer or sheriff's deputy enjoys qualified immunity.

---

1. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for all parties were notified more than 10 days before the due date of this brief of the intention to file an *amicus curiae* brief.

As such, PJI has a strong interest in the development of the law in this area.

SUMMARY OF ARGUMENT

All of the Petitioner's Questions Presented merit this Court's attention and grant of review. Amicus confines this brief to just one of those questions. Namely, this Court should resolve the circuit split created by the Eleventh Circuit on whether law enforcement holds a duty to protect a speaker in a public forum when the speech is materially impeded by those who object to the message.

This brief is divided into three parts. First, the brief will identify the positions of three other circuits which have found a duty to protect speakers. Second, the brief will discuss why the protection by law enforcement of traditional public fora—and the speakers who utilize those venues—stands as a crucial component to preserve the bundle of liberties enumerated in the First Amendment. Finally, the brief will argue that failure to protect speakers by the government—including officers on the beat—poses a serious risk of the use of a private-party proxy by the government to censor speech that the state does not want heard.

INTRODUCTION

> *One charged with the duty of keeping the peace cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded. He must stand on the side of law and order or be counted among the mob.*
>
> *Downie v. Powers*, 193 F.2d 760, 764 (6th Cir. 1951).

For a street preacher, free speech areas are his church, the public his congregation. Ross Jackson is such a preacher. Standing in a free speech area at the University of Georgia, he sought to draw a crowd of students who formed a circle to listen to him. To that end, he was successful. But a police officer on duty allowed two male students to enter the circle and stand toe to toe with Jackson. As the two male students followed Jackson around and yelled directly into his ear, eventually an incidental and accidental touching occurred. An officer moved in to make an arrest in front of the ecstatic crowd.

In describing the arrest, Sergeant Cowan stated, "Crowd went crazy. I think we hit a home run." App. 103-04. Though the officer may have crossed the plate in front of the howling university students, this Petition should be granted to determine if he struck out with regards to qualified immunity.

ARGUMENT

1. The duty to protect speakers has been clearly established in three circuits.

The Eleventh Circuit has created a split with three other circuits on the duty of law enforcement to protect unpopular speakers. That division is not only solitary, it is dangerous. The Fourth, Sixth, and Eighth Circuits recognize the constitutional peril in failing to protect First Amendment rights. A review of those circuit positions follows.

Fourth Circuit—Jehovah's Witnesses sought to deliver a letter to a mayor and deputy sheriff requesting police protection for religious, proselytizing work. Instead of protecting the religious adherents, the deputy took off his badge to transform himself into a private citizen, and he, along with others, forced the Witnesses to drink large quantities of castor oil. The Witnesses were tied, marched down the town's street, and told to salute the American flag in front of a hostile mob.[2]

The panel sitting for the Fourth Circuit took "judicial notice of the fact that at common law a sheriff was charged with the affirmative duty of preserving the peace and enforcing the law—more specifically, protecting a prospective victim from assault or illegal restraint in the officer's presence." *Catlette v. United States*, 132 F.2d

2. Jehovah's Witnesses deem salute of flags as idol worship. "Flag Salute, Anthems and Voting," JW.org, https://www.jw.org/en/library/books/School-and-Jehovahs-Witnesses/Flag-Salute-Anthems-and-Voting/.

902, 906 (4th Cir. 1943). Law enforcement had the duty to protect the Witnesses "no matter how locally unpalatable . . . [they] may be as a result of their seeming fanaticism. These rights include those of free speech, [and] freedom of religion." *Id*. The failure to protect those exercising their First Amendment rights by not arresting the members of the mob who assaulted them "constituted a violation of [the deputy sheriff's] common law duty." *Id.* at 907.

Sixth Circuit—The Sixth Circuit has well developed case law on law enforcement's duty to protect individuals exercising First Amendment rights, finding that Section 1983 "imposes on the states and their agents certain obligations and responsibilities." *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975). Three cases illustrate this principle.

In an early case, Jehovah's Witnesses rented a high school auditorium for their district convention. Police were warned that there could be trouble. A mob with sticks, rocks, and guns entered the auditorium and broke up the meeting. The court wrote the following:

> a wilful or purposeful failure of [law enforcement] . . . to preserve order, keep the peace, and to make the [religious speakers] . . . secure in their right to peaceably assemble, would undoubtedly constitute acquiescence in, and give color of law to, the actions of the mob.

Downie v. Powers, 193 F.2d 760, 764 (6th Cir. 1951). A police officer thus "cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded." *Id*.

Just over twenty years later, the Sixth Circuit affirmed the principle in a Section 1983 case in which a woman engaged in a protest while President Nixon's motorcade passed through the area. A group of people in support of the President saw her, and the police feared they would become agitated. As such, an officer took away her sign and tore it up. The Court ruled that "state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights." *Glasson*, 518 F.2d at 906.

More recently, Christian preachers went to the Arab International Festival. There they debated with Muslims and stated things insulting to the Islamic faith and were eventually confronted by a group of angry Muslim youth. Instead of protecting the speakers, the police escorted them from the festival grounds. In rejecting the affirmative defense of qualified immunity, the Court wrote that "the officers have a duty to protect speakers . . . from the reactions of hostile audiences." *Bible Believers v. Wayne County*, 805 F.3d 228, 236-37 (6th Cir. 2015).

Eighth Circuit—A panel sitting for the Eighth Circuit upheld Nebraska's Funeral Picketing law challenged by members of the Westborough Baptist Church. In upholding the law, the Eighth Circuit opined that "[a] police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 900 (8th 2017) (cleaned up).

2. First Amendment rights in traditional public fora require proactive engagement by law enforcement to protect speakers.

Citizens of constitutional republics have inherited the right of public access to speech and debate from ancient Greek democracies. But the public assembly is not merely a venue to allow a speaker to get something off of his chest; it is the avenue for potential persuasion for which our system relies.

In line with this understanding, this Court explained that "[t]he vitality of civil and political institutions in our society depends on free discussion . . . it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). There is no greater duty that law enforcement has to American society than to keep open traditional venues where ideas are promulgated and exchanged. This duty stands above the control of crime and public safety. Societies, in all places and at all times, have had laws calculated to protect persons and property through prevention and punishment of crime. Such is neither the sole nor the pinnacle of a police officer's duty.

Few places other than the United States have such liberality in the right to communicate ideas opposed by the State, religious institutions, and the powerful. Throughout history and in most parts of the world, people whisper their anti-establishment thoughts in the recesses of their homes. *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting). Not here. In this country, liberty of expression is protected in the very first

freedom enumerated in the highest law of the land. This is what makes this country unique. "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello*, 337 U.S. at 4. Therefore, a police officer performs no greater duty than the protection of traditional public fora. In contrast, an armed, uniformed police officer does no greater disservice to the country and the Constitution than to arrest a citizen peacefully communicating ideas in a public forum.

Transferring this principle to the current case, the video clips of Jackson preaching on the University lawn display an archetypal fight that those having attended a public high school have encountered. Students formed a wide circle, and the belligerents faced off in the center to do battle. Officers allowed two students—Keaton Law and Lechandt Opperman—to enter the circle and engage in belligerent conduct within the close physical space of Jackson. The preacher had to continually juke, cutback, and spin so that he could have two or three seconds to speak a complete sentence, because Law was "all up in [Jackson's] face" (App. 71) and chest bumping him. This conduct was calculated to interfere with the speaker's message. And it worked.

To understand the adverse impact of the officer's conduct on expressive rights, consider the analogy of a march. Instead of preaching in the park, Jackson decided to communicate his ideas by joining a group of marchers on a public sidewalk, and Law kept interfering by stopping and stepping back and forth in Jackson's path. The notion is absurd that, as long as Law doesn't actually touch Jackson, interference with the movement of the march is

permissible. Unquestionably, such an obstruction strips away the expressive conduct of a march in a public forum. The inaction by the police deprives Jackson of the use of the public forum for the purpose of engaging in the expressive conduct.

Even Justice Jackson, who would limit speech based on what he perceived as the need for ordered liberty to prevent a riot, believed that such order also required police protection of speakers. "[I]f free speech is to be a practical reality, affirmative and immediate protection is required . . . It depends on local police." *Terminiello*, 337 U.S. at 31 (Jackson, J., dissenting). Here, the local police failed in their duty to protect Jackson (the preacher).

This Court recognized that the freedom to speak without risking arrest is "one of the principal characteristics by which we distinguish a free nation." *Houston v. Hill*, 482 U.S. 451, 463 (1987). Confirming the duty of law enforcement to protect speakers using traditional public fora remains a crucial undertaking in the preservation of the bundle of liberties set forth in the First Amendment.

The judiciary's inclination to protect police officers through qualified immunity may be understandable. Nonetheless, protection of freedoms enumerated in the First Amendment must take priority over immunity.

3. Courts have long warned of the danger of law enforcement using private parties as a proxy to suppress unwanted ideas.

This Court has recognized a great underlying danger in giving law enforcement a free hand at breaking up

assemblies and stopping the public communication of ideas. Qualified immunity feeds into that danger. This is not hypothetical. In several of the circuit cases discussed above, law enforcement intentionally allowed government-preferred, private third parties to violate the constitutional rights of citizens who expressed ideas disfavored by officials. *See, Bible Believers v. Wayne Co.*, *Downie v. Powers*, *Catlette v. United States*, *Glasson v. Louisville.*

More than seventy years ago Justice Black dissented from a decision affirming the conviction of a man who gave a speech on racial issues which "inflamed and incited a mixed audience of sympathizers and opponents." *Feiner v. New York*, 340 U.S. 315, 322 (1951). Justice Black found that the affirmance made a "mockery of the free speech guarantees," *id.* at 323, and he rejected the notion that "the police had no obligation to protect the petitioner's constitutional right to talk," *id.* at 326. Justice Black wrote that the end result of the majority's decision provided a template for government censorship of political or other topics of speech via the local police. "I will have no part or parcel in this holding which I view as a long step toward totalitarian authority." *Id.* at 323.

In the Petition before this Court, two students sought to shut down the communication of ideas on their campus. One of the students asked the arresting officer on the day before, "How do we shut this down?" App. 129-30. The officer called the remarks by the preacher "inflammatory." App. 141. It would take little digging on the University's website to find that these two students' views are commonly held among faculty, staff, and administrators.

A reading of many of the cases cited in this brief indicate that police officers have shut down speech not because of an unruly mob, but because of directives from those holding positions of power in government. This echoes Justice Gorsuch's warning:

> History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.

Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part, dissenting in part). By granting qualified immunity to police officers who fail to protect speakers on traditional public fora, the danger that state actors will be able to use private, third-party proxies to censor ideas disfavored by the government stands as acute.

CONCLUSION

The duty of the police to protect citizens exercising First Amendment liberties was well settled in all other circuits. Yet in order to inoculate law enforcement with immunity to prevent legal exposure, the Eleventh Circuit

injected their opinion with a dose of uncertainty. This immunity threatens to spread like a disease that will weaken and potentially kill the availability of access to traditional public fora. For this reason, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

KEVIN T. SNIDER
Counsel of Record
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, CA 95827
(916) 857-6900
ksnider@pji.org

Counsel for Amicus Curiae
Pacific Justice Institute