NO. _____

In the Supreme Court of the United States

DENISE A. CANZONERI,

Petitioner,

v.

PRESCOTT UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Cheri L. McCracken
111 E. Dunlap Avenue
Suite 1-484
Phoenix, AZ 85020
(602) 231-0595

Michael J. Pérez
Counsel of Record
Evan C. Flores
Marissa S. Denison
PEREZ VAUGHN & FEASBY INC.
600 B. St., Suite 2100
San Diego, CA 92108
(619) 784-1442
perez@pvflaw.com

May 29, 2025 *Counsel for Petitioner*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. At the motion to dismiss stage, all factual allegations in the complaint must be viewed as true and resolved in a light most favorable for the plaintiff. When assessing qualified immunity at the motion to dismiss stage, can a court disregard this "light most favorable" standard and require the plaintiff to prove her rights were "clearly established" based on unfavorably-interpreted facts?

2. When analyzing First Amendment employment retaliation cases, courts generally utilize a four/five-step test to determine if an employee suffered adverse employment actions due to protected speech. In the instant case, the Ninth Circuit ruled against Petitioner on qualified immunity, seemingly because Petitioner did not provide analogous caselaw to each and every prong of the five-step test. In analyzing qualified immunity's second prong, should courts look for cases with generally analogous facts, viewing the case as a whole? Or should courts analyze, separately for each prong of qualified immunity, whether factually similar case law exists?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Denise A. Canzoneri

Respondents and Defendants-Appellees below

- Prescott Unified School District
- Joe Howard, as Superintendent of Prescott Unified School District, and in his individual capacity
- Mardi Read, as Vice Superintendent, and in her individual capacity
- Mark Goligoski, as Principal of the High School of Prescott Unified School District, and in his individual capacity

LIST OF PROCEEDINGS

United States District Court, District of Arizona

Canzoneri v. Prescott Unified Sch. Dist., No. CV-20-08033-PCT-SMB, 2021 WL 3931269 (D. Ariz. Sept. 2, 2021) (order granting motion to dismiss)

United States Court of Appeals for the Ninth Circuit

Canzoneri v. Prescott Unified Sch. Dist., No. 21-16615, 2024 WL 4834240 (9th Cir. Nov. 20, 2024) (affirming in part, reversing in part and remanding), rehearing denied (January 3, 2025)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Denise A. Canzoneri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is unreported but is available at 2024 WL 4834240 (9th Cir. Nov. 20, 2024). App.1a. The opinion of the United States District Court for the District of Arizona is unreported but is available at 2021 WL 3931269 (D. Ariz. Sept. 2, 2021). App.7a. The order of the court of appeals denying rehearing en banc (App.21a) is unreported.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on November 20, 2024. App.1a. The Court of Appeals denied a timely petition for rehearing en banc on January 3, 2025. App.21a. This Court granted an extension of time to file this petition for a writ of certiorari until May 29, 2025. No. 24A952. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents a complex and ongoing question over which the courts of appeals across the country are deeply divided: how to resolve the "clearly established" prong of qualified immunity. More specifically, two procedural mechanisms in analyzing qualified immunity's second prong have never been addressed by this Court. First, this case requests intervention as to whether the plaintiff-favored factual assumptions required at the motion to dismiss stage should have any effect on the framing of "clearly established" rights, and if so, a clear ruling on how. Second, this case seeks confirmation that when addressing the multiple-factor test required in First Amendment employment retaliation cases, courts should look for generally factually analogous cases, as opposed to searching for cases with similar facts individually for each prong of the test.

A. Basic Qualified Immunity Background

Qualified immunity is no stranger to this Court. As this Court has established, a governmental officer is immune to civil suit for violating a constitutional right unless they exceed the bounds of what a reasonable officer should know. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). A plaintiff who alleges a violation of their constitutional rights can only overcome qualified immunity by establishing that (1) the officer violated a federal statutory or constitutional right, and (2) the right at issue was "clearly established." *Id.* at 62-3. While the resolution of qualified immunity's first prong requires a straightforward application of

facts to the law, the second prong is a different matter. "[T]here is great confusion in the lower courts as to whether and when cases on point are needed to overcome qualified immunity." *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1027, fn. 3 (9th Cir. 2020) (Hurwtiz, J., concurring in part, dissenting in part) (citing Erwin Chemerinsky, FEDERAL JURISDICTION § 8.6, at 580 (6th ed. 2012)).

While qualified immunity's second prong raises a host of questions over jurisprudence, practicality, and equity, there are two important procedural questions that have not been specifically addressed by this Court. Each is discussed in more detail below, and the resolution of each issue will have far-reaching effects across the courts of this country.

B. Factual and Procedural Background

In 1996, Denise A. Canzoneri ("Petitioner") was hired as a Librarian Specialist by Prescott Unified School District ("PUSD"). App.26a. She provided valuable public service through her job at the library for over twenty years until 2019, when the events relevant to this matter took place. App.25a-27a.

In late March 2019, Petitioner was informed that budget cuts would lead to changes to the library program and potentially lead to the elimination of her job at Prescott High School ("School"). App.27a. Confused about the decision to de-staff and close two libraries within the District, Petitioner attempted to set a follow-up meeting with the principal of the school, Respondent Mark Goligoski, but to no avail. App.27a. Petitioner contacted a PUSD board member to inquire about two

areas of concern that directly affected the library's funds, including unaccounted-for monies. App.27a, 32a-33a.

On April 2, 2019, Petitioner attended a public PUSD School Board ("Board") meeting on the proposed 2019-2020 budget. App.27a-28a. The hearing was open to the public and after working hours. App.27a-28a. Petitioner appeared in her personal capacity rather than as a public employee. App.28a, 39a-40a. During the Board meeting, she voiced her concerns about the changes to the library, particularly in light of the unaccounted-for monies that were still missing without explanation. App.27a-28a. Her speech was motivated by possible misuse of public funds, wastefulness, inefficiency and the poor management practices in PUSD. App.27a-28a, 44a.

One day after speaking at the public PUSD Board meeting, Petitioner received a letter from PUSD notifying her that she was being placed on administrative leave. App.28a. The claimed basis for the leave was "unprofessional conduct" in violation of a PUSD Board policy. App.28a, 30a. The letter forbade her from entering "any [PUSD] properties" without permission from specific PUSD individuals. App.49a. It also prohibited her from having "any contact, whether in person, by telephone, by letter or otherwise, with any employee of [PUSD], or any student or parent of [PUSD]" without permission from PUSD. App.49a. The letter did not attempt to curtail the restriction of Petitioner's speech to make exceptions for family members or friends, or for speech unrelated to PUSD. App.31a, 49a. Then, her employment contract was not renewed for the first time in twenty-two years. App.44a.

Petitioner brought suit against PUSD and several individuals, including the School's principal and super-

intendent ("Respondents") in the United States District Court of Arizona. App.23a. One of Petitioner's claims was brought under section 1983 of the United States Code for employment retaliation in violation of her First Amendment rights. App.32a. Respondents brought a motion to dismiss, which resulted in Petitioner amending the complaint. App.8a. In her first amended complaint ("FAC"), Petitioner specifically alleged:

> Defendants violated 42 U.S.C. § 1983 when they retaliated against Plaintiff including by suspending and terminating her employment because Plaintiff complained of conduct she reasonably believed was possible misuse of public funds, wastefulness, inefficiency and the failure of best practices in managing PUSD.

App.34a, ¶ 44. Nowhere in the FAC did Petitioner claim she was terminated for a reason other than her First Amendment-protected speech. App.23a-29a. Petitioner actively contested and discredited any alternative explanations for her termination. *See*, *e.g.*, App.30a, ¶ 27.

Thereafter, Respondents brought a motion to dismiss the FAC, alleging, among other things, that qualified immunity protected the individual Respondents from suit. App.7a, 16a. The district court granted Respondents' motion, finding the FAC did not provide authority "showing why the constitutional violations alleged were clearly established." App.18a. The district court dismissed the complaint with prejudice. App.20a. Petitioner timely appealed. App.2a.

On review, the Ninth Circuit reversed as to issues not before this Court but affirmed the district court's finding of qualified immunity. App.4a. Before turning

to qualified immunity, the appellate court ruled that the reason for Respondents' disciplinary actions was "a disputed question of fact inappropriately resolved at the pleadings stage." App.4a. The Ninth Circuit then addressed qualified immunity, holding that "the law regarding public employee free speech claims will rarely, if ever, be sufficiently clearly established to preclude qualified immunity." App.4a (citing *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 784 (9th Cir. 2022)). The reason for this rule, the Ninth Circuit reasoned, was that "*Pickering* analysis 'requires a fact-sensitive, context-specific balancing of competing interests[.]" App.4a (*Id.*), footnote omitted.

The Ninth Circuit then held that Petitioner had not "demonstrated that her right to be free from retaliation was clearly established." App.5a. In framing the issue, the Ninth Circuit reasoned certain facts alleged in the FAC could provide an "alternative justification" for the disciplinary actions. App.5a. The Ninth Circuit arrived at this conclusion despite Petitioner's claim that the disciplinary actions were a direct response to her decision to draw attention to the misuse of public funds at the Board meeting. App.34a, ¶ 44. The Ninth Circuit thereby held that qualified immunity applied because Petitioner had not shown a case that "clearly establishes that government employees must disregard a valid motive for disciplinary action given the presence of outside protected speech." App.5a.

The Ninth Circuit's approach is emblematic of the much larger, widespread confusion over the "clearly established" prong of qualified immunity, particularly at the motion to dismiss stage.

REASONS FOR GRANTING THE PETITION

This Court's intervention is needed to bring clarity and consistency across the circuits on these issues. Courts have used their wide discretion to attempt to resolve these qualified immunity issues, but without this Court's guidance have created wildly inconsistent procedures and rulings. Given qualified immunity's impact on whether parties are removed from cases entirely, the importance of this issue cannot be overstated. Procedures governing the "clearly established" prong of qualified immunity should be uniform and understood by the lower courts. As such, Petitioner seeks this Court's guidance on the "Questions Presented," as explored in more detail below.

I. The Application of Qualified Immunity at the Motion to Dismiss Stage is Applied Inconsistently Across the Circuits

This Court has affirmed that when courts decide motions to dismiss, the factual allegations in the complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011). District and circuit courts have clear directions from this Court to adhere to this rule when analyzing the first prong of qualified immunity. But when assessing the second prong, there are significant discrepancies across the circuits in applying this rule, if it is applied at all. In some cases, courts fail to apply this "accept as true" factual standard to the second prong. Other courts hold it is premature to fairly analyze the second prong of qualified immunity at the pleadings stage. Some of those courts do not

attempt to define the scope of the clearly established rights because it is impossible to determine whether analogous case law exists without further factual development. Others rule that, so long as the relevant facts are pled, the standard allows them to define the "clearly established" right in broad, generalized terms. And some courts simply do not attempt to address the second prong given the lack of developed factual information. The following cases, all decided within the last five years, demonstrate the varied and inconsistent approaches courts take in addressing the second prong of qualified immunity in light of ordinary motion to dismiss standards.

A. Defining the Right Broadly to Account for Plaintiff's Version of Facts

In *Cooperrider v. Woods*, 127 F.4th 1019 (6th Cir. 2025), the Sixth Circuit emphasized that it had "repeatedly cautioned" courts that "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. *Id.* at 1036 (6th Cir. 2025) (citing *Wesley v. Campell*, 779 F.3d 421, 433–34 (6th Cir. 2015)). The appellate court explained that:

> [a]bsent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is "obvious" or "squarely governed" by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not for purposes of determining whether a right is clearly established.

Id. at 1036 (citing *Guertin v. State*, 912 F.3d 907, 917 (6th Cir. 2019)). The Sixth Circuit nevertheless attempted

to define the "clearly established" right. In so doing, however, the Sixth Circuit broadly framed the "clearly established" right as one to be free from retaliation for the exercise of First Amendment rights:

> The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional. [Citations]. And we have clearly stated that private citizens have a First Amendment right to criticize public officials and to be free from retaliation for doing so. [Citations]. We therefore conclude that the complaint plausibly alleges that [the defendants] violated [the plaintiff's] clearly established right to criticize the state government without retaliation.

Id. at 1040 (internal citations omitted). In other words, the Sixth Circuit framed the "clearly established" right in a broad fashion to offset its stated inability to fairly analyze analogous case law.

The Third Circuit has sometimes approached this issue in a similar fashion. In *Williams v. City of Allentown*, 804 F. App'x 164, 169 (3d Cir. 2020), the Third Circuit reviewed a district court's denial of a motion to dismiss based on qualified immunity. *Id.* In assessing the First Amendment employment retaliation claim, the Third Circuit expressed its rule that it was required to "afford [the plaintiff] the benefit of all reasonable inferences" when reviewing "qualified immunity based on the pleadings[.]" *Id.* at 167. The court was silent, however, as to the effect this rule had on the second prong of qualified immunity. Instead, the Third Circuit interpreted the "clearly established" right broadly. It held that "[t]he Supreme Court has clearly established that a government employer cannot

retaliate against an employee when he speaks as a private citizen or associates with a political candidate." *Id.* (citing *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 270 (2016)). The court reasoned that "no officer could reasonably believe that they could lawfully retaliate against [the plaintiff] because of his political affiliation or support of the co-worker." *Id.* As such, the Third Circuit affirmed the denial.

B. Using Plaintiff's Version of Facts to Show Obvious Violations

Somewhat similarly, in *Blackwell v. Nocerini*, 123 F.4th 479 (6th Cir. 2024), the Sixth Circuit reviewed a district court's denial of a motion to dismiss that asserted qualified immunity. In assessing the "clearly established" prong of qualified immunity, the Sixth Circuit wrestled with the proper scope of the second prong: "What is the appropriate level of generality in [the plaintiff's] case? We see room for debate on this question." *Id.* at 491. After considering two potential levels of specificity, the court ruled that "[i]n the end, though, we need not resolve this debate at this stage given that we must accept the complaint's allegations. If those allegations are true, the City Officials could not seek qualified immunity even under the more defendant-friendly test." *Id.* at 492. Consequently, the court held that the plaintiff's version of the facts created an "obvious" violation and that the plaintiff "did not need to identify analogous probable-cause caselaw to get past the pleading stage." *Id.*

C. Disregarding Plaintiff-Friendly View of the Facts

In contrast, the Fifth Circuit in *Bevill v. Fletcher*, 26 F.4th 270 (5th Cir. 2022) denied qualified immunity without any discussion or application of motion to dismiss standards to qualified immunity's second prong. *Id*. The appellate court reviewed the first prong of defendants' qualified immunity claims while viewing facts in the light most favorable to the plaintiff. *Id*. at 274. But after ruling that the first prong was satisfied, the Fifth Circuit conducted a lengthy, fact-intensive analysis of applicable case law for the second prong, complete with a series of diagrams to compare potential binding precedents. *Id*. at 279–83. In so doing, the Fifth Circuit construed the scope of the "clearly established" right narrowly ("whether a government official, not a supervisor/coworker of the plaintiff, can be held liable for First Amendment retaliation under § 1983 for influencing the plaintiff's employer to terminate the plaintiff's employment"). *Id*. at 280. The Fifth Circuit did not give any weight to the lack of discovery and the plaintiff-friendly construction of facts required during the motion to dismiss stage. *Id*. at 279–83. Instead, it provided a thorough analysis of cases that could be analogous in order to affirm the district court's finding that the plaintiff's right was clearly established. *Id*. at 284.

D. Determining Pleading Stage Prevents Meaningful Discussion of Clearly Established Law

The Ninth Circuit used a different approach as it ruled on a First Amendment school-employment retaliation case in *Jensen v. Brown*, 131 F.4th 677 (9th Cir.

2025). The Ninth Circuit reviewed a district court's grant of the defendants' motion to dismiss which had been based on qualified immunity (among other issues). *Id.* at 686–87. The Ninth Circuit assessed the "clearly established" prong and acknowledged that "[d]etermining claims of qualified immunity at the motion-to-dismiss stage raises special problems for legal decision making," *Id.* at 695 (citing *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018)). The Ninth Circuit held that one such problem was the fact that in First Amendment employment retaliation cases, "the boundaries of the right at issue are delineated by a balancing test in which the defendant bears the burden of substantiating its interest." *Id.* at 695. Ruling that without further evidentiary development it was "unable to determine . . . whether any act [the state] committed in defense of [its interests] constituted a violation of clearly established rights," the Ninth Circuit reversed the district court's finding of qualified immunity. *Id.* at 696. In so doing, the Ninth Circuit concluded that "it is not possible to determine at this stage as a matter of law that [the plaintiff] has not alleged a violation of clearly established law," and that the defendants were thus not entitled to qualified immunity at the pleading stage. *Id.* at 695–96.

E. Declining to Define Scope of Right and Avoiding Discussion

Other courts take the standard one step further and simply do not attempt to define the scope of the second prong at the motion to dismiss stage. For example, in *Brown v. City of Tulsa*, 124 F.4th 1251, 1271 (10th Cir. 2025), a police officer was fired after members of the public complained that the officer's social media posts were offensive. The police officer

sued, alleging in his complaint that he had been subjected to a retaliatory termination in violation of his First Amendment rights. *Id*. The Tenth Circuit reversed the district court's finding of qualified immunity because "conducting *Pickering* balancing is usually inappropriate – if not impossible – at the motion to dismiss stage." *Id*. at 1269. To reinforce its position, the Tenth Circuit observed that "[s]everal of our sister Circuits have echoed this point." *Id*. The court then held that during the motion to dismiss stage, it is "impossible" for a plaintiff to plead facts and identify clearly established law without complete knowledge of "what interest the government will assert, how it will assert it, or what disruption the government claims the speech caused." *Id*. at 1270. Consequently, the court affirmed the Tenth Circuit's rule that a complaint, on its own, cannot be expected to "(1) allege facts sufficient to show that the defendant 'plausibly violated their constitutional rights,' and (2) identify a materially similar case where the employee prevailed to demonstrate that their First Amendment right was clearly established." *Id.* at 1270 (citing *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008)). The Tenth Circuit concluded that qualified immunity could not be fairly evaluated until the parties had an opportunity to conduct discovery and reversed the district court's dismissal.

F. Postponing Any Discussion of the Clearly Established Prong

In *Beathard v. Lyons*, 129 F.4th 1027 (7th Cir. 2025), a former assistant football coach filed a retaliation action against a state university's head football coach and athletic director alleging that he was terminated from his position in retaliation for his viewpoint on a

matter of public concern. *Id.* at 1028. Similar to Petitioner's case, the complaint alleged that the plaintiff was told by the defendants that he was being fired for reasons other than his speech. *Beathard v. Lyons*, 620 F. Supp. 3d 775, 782 (C.D. Ill. 2022). The defendants moved to dismiss on qualified immunity grounds. *Id.* at 783. The district court denied the motion without resolving qualified immunity, as it felt it lacked information to meaningfully resolve the *Pickering* balance. *Id.* at 783–84. The Seventh Circuit reviewed the decision and found that in some cases "the fact-intensive nature of the claim means that resolution of a qualified immunity defense must await factual development" and that "[t]he district court reasonably understood this to be such a case." *Beathard v. Lyons*, 129 F.4th 1027, 1036 (7th Cir. 2025). The appellate court found the district court "'d[id] not settle or even tentatively decide anything' about the merits of the defendants' qualified-immunity arguments." *Id.* at 1034 (citing *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)). The Seventh Circuit upheld the district court's decision and ability to "reserve" the qualified arguments "for a later date," and in so doing held it did not have appellate jurisdiction over the appeal. *Id.* at 1034, 1036.

* * * * *

In the instant case, had Petitioners' case been resolved in a different circuit or by a different panel, both the procedural approach and outcome of the case would have been different. There is no clear standard for evaluating "clearly established" rights at the motion to dismiss stage. While each case presents different factual and procedural backgrounds, the diversity of approaches in accounting for motion to dismiss stan-

dards when assessing the second prong of qualified immunity is rooted in a more fundamental confusion over procedure. Both across and within circuits, courts continue to utilize varying solutions to resolve the lack of clear guidance. Until this Court provides clarity and uniformity, the rights of plaintiffs and defendants will continue to be deeply affected by circumstance and chance.

II. CIRCUITS INCONSISTENTLY ANALYZE "CLEARLY ESTABLISHED" RIGHTS IN FIRST AMENDMENT EMPLOYMENT RETALIATION CASES

This Court has delivered a series of cases that, when taken together, provide precedent on the requirements for cases in which public employees are retaliated against with adverse employment actions in violation of their First Amendment Rights. Generally, courts apply a five-step (sometimes four-step) test ("Employment Retaliation Test") to determine whether such a violation has occurred. *See Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009); *Kilborn v. Amiridis*, 131 F.4th 550 (7th Cir. 2025). This test is uniformly applied in resolving qualified immunity's first prong – determining whether a violation has occurred. But in deciding the second prong of qualified immunity, courts have adopted different procedures. Some attempt to determine whether a plaintiff's rights were established by looking for generally analogous cases. But others, as the Ninth Circuit did here, attempt to find factually similar precedent for all five steps of the test. This results in five different searches for factually analogous cases in five different contexts.

In *Kilborn v. Amiridis*, 131 F.4th 550 (7th Cir. 2025), a law school professor brought claims against state university officials, alleging that his discipline

for including a racial slur in a law school exam question violated his constitutional rights to free speech. *Id*. The defendants moved to dismiss the complaint for failure to state a claim, and the district court granted the motion on the basis of qualified immunity. *Id*. at 556. The Seventh Circuit laid out the Employment Retaliation Test, analyzing the applicability of *Garcetti* first. *Id*. at 557. The court found that the "official duties" test was not applicable because "[b]efore *Garcetti*, it was clearly established that the *Connick-Pickering* test offered qualified protection to public employees, including professors at public universities." *Id*. at 558. The court further explained that "our pre-*Garcetti* cases clearly establish a right to academic freedom in this context, and neither *Garcetti* nor our more recent case law undermines that right[.]" *Id*.

The Seventh Circuit next ruled that the plaintiff's speech had involved a matter of public concern. *Id*. at 559. It is unclear whether the court intended its discussion of case law on matters of public concern to fulfill both prongs of the qualified immunity test, but the Seventh Circuit neither stated nor assessed the level of clarity or "legal reasonableness" of the public concern step. *See id*. at 559–61. Instead, the court turned to the *Pickering* balancing step. *Id*. at 561. In addressing qualified immunity's first prong, the Seventh Circuit found that it was too early to engage in *Pickering* balancing on the basis of pleadings alone. *Id*. at 562. Finding it could reasonably infer from the complaint the defendant had punished the plaintiff for his controversial exam question and had used the investigation to establish a pretext for their actions, the court held that dismissal was inappropriate. *Id*. The Seventh Circuit reversed the district court's

dismissal, and did not engage in any clearly established law analysis for the *Pickering* step or the remaining steps of the Employment Retaliation Test. *See generally id*. at 557–62.[1]

In *Barton v. Neeley*, 114 F.4th 581 (6th Cir. 2024), a discharged city fire chief brought a § 1983 action against a city and its mayor, alleging that he was retaliated against, in violation of the First Amendment, for refusing the mayor's directives to cover up other firefighters' malfeasance. *Id*. The district court denied the defendants' motion to dismiss, which had argued qualified immunity. *Id*. at 587. After ruling that the plaintiff had fulfilled qualified immunity's first prong as to certain portions of the plaintiff's speech, the Sixth Circuit held "that it is clearly established that public employees cannot be compelled to make false statements on matters of public concern in response to threats of retaliation." *Id*. at 591. Rather than addressing whether each prong of the Employment Retaliation Test was clearly established by law, the court addressed the fact pattern holistically. The Sixth Circuit held that "it is well-established that a public official's retaliation against an individual exercising his or her First Amendment rights is a violation of § 1983." *Id*. at 591 (citing *Barrett v. Harrington*, 130 F.3d 246, 264 (6th Cir. 1997)). The court then affirmed that "the First Amendment protects 'both the right to speak freely and the right to refrain from speaking at all.'" *Id*. at 592 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Taken together, the court held that

[1] This case also implicates the issue surrounding the proper approach to analyzing the clearly established prong of qualified immunity at the motion to dismiss stage, as discussed earlier in this application.

plaintiff's rights were clearly established because "[s]peech by citizens on matters of public concern lies at the heart of the First Amendment," and "public employees cannot be compelled to speak, and in turn, they cannot be retaliated against when they choose not to speak on matters of public concern." *Id.* at 592 (citing *Lane v. Franks*, 573 U.S. 228, 235 (2014)). After citing these broad First Amendment principles, the Sixth Circuit drew an analogy to a factually similar case, *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), before concluding that the "right not to speak on a matter of public concern in response to threats of retaliation was clearly established[.]" *Barton*, 114 F.4th at 593.

In *Ashford v. Univ. of Michigan*, 89 F.4th 960 (6th Cir. 2024), a university police officer brought a retaliation action after he was suspended for speaking with the media on the police department's mishandling of a case. *Id.* The district court denied summary judgment for individual defendants who had claimed qualified immunity. *Id.* at 964. The Sixth Circuit addressed the first prong of qualified immunity by assessing each step of the Employment Retaliation Test. *Id.* at 970–74. As to the second prong of qualified immunity, the Sixth Circuit held that the defendants had not properly disputed the "clearly established" nature of the violation, but that they would have been unsuccessful even if they had. *Id.* at 975. The court explained that "there is no doubt that there is a clearly established constitutional right to speak, even as a government employee, on a matter of public concern regarding issues outside of one's day-to-day job responsibilities, absent a showing that *Pickering* balancing favors the government[.]" *Id.* at 975 (citing *Buddenberg v. Weisdack*, 939 F.3d 732, 739 (6th Cir. 2019)). The

court further held that "it is well settled in our circuit that retaliating against an employee for exercising this free speech right violates the Constitution." *Id*. at 975 (citing *See v. City of Elyria*, 502 F.3d 484, 495 (6th Cir. 2007)). As such, the Sixth Circuit found that the plaintiff's rights were clearly established and affirmed the district court's denial of summary judgment. *Id*. at 976.

* * * * *

Had Petitioner's case been decided using the Sixth Circuit's methodology, the case would have been resolved in her favor. The court would have looked for analogous case law that clearly establishes a governmental employee's right to publicly voice criticism and raise awareness, as a private citizen, over the misuse of public monies by her employer without fear of retaliation. Since similar caselaw exists, qualified immunity would have been denied.

III. Resolution of the Questions Presented Is Necessary and Warrant Review in this Case.

1. As courts struggle to consistently apply qualified immunity analysis, differences in holdings and rule of law have arisen and will continue to arise. The importance of uniform application rule of law needs no explanation to this Court. But in addition to usual dangers of inequity and instability, inconsistent decision-making in qualified immunity creates a different problem: the slow expansion of the judicially-created doctrine of qualified immunity. Confusion and lack of clarity over qualified immunity creates inconsistent holdings. Those precedential discrepancies ensure that the law is not "clearly established" and thus expand qualified immunity. Qualified immunity's dependence

on "clearly established" precedent necessarily means that its scope is subject to any inconsistencies in court interpretations, arguably more than any other doctrine in law.

Indeed, this Court's own precedent highlights the issue. In *Lane v. Franks*, 573 U.S. 228 (2014), discussed *supra*, this Court discussed three Eleventh Circuit cases in assessing qualified immunity's second prong. *Id*. at 243–6. This Court observed that the debate over which of the cases applied "only highlight[ed] the dispositive point: at the time of [the] termination, Eleventh Circuit precedent did not provide clear notice" and that the different holdings could "demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity." *Id*. at 246.

Courts must grant qualified immunity if the plaintiff's right was not clearly established by law. Courts routinely hold that law is not "clearly established" if cases regarding similar fact patterns are decided differently. This creates a self-generating cycle: as circuit courts apply their analysis inconsistently, similar cases can be decided on different criteria and create ruling discrepancies on whether the law is clearly established or not. The rulings in turn expound the confusion and progressively more issues become "not clearly established." The judicially-created doctrine consequently grows, pushing the role of the courts further into the role of the legislative branch. The decisions of courts expand and shrink the boundaries of qualified immunity; thus, this Court's intervention will help curtail the judicial expansion of qualified immunity.

The courts' role as a quasi-legislator and quasi-fact finder has only been reinforced by this Court's

decisions that have granted courts more freedom and autonomy in addressing qualified immunity. For example, in *Elder v. Holloway*, 510 U.S. 510 (1994), this Court ruled that the Ninth Circuit had erred in ignoring relevant case law in analyzing the "clearly established" prong of qualified immunity because the parties had failed to identify the case in their briefing. *Id.* This Court's holding – which Petitioner does not seek to challenge in any way – ensured that reviewing courts should use their "full knowledge of [their] own and [other relevant precedents.]" *Id.* at 516. And in *Pearson v. Callahan*, 555 U.S. 223 (2009), this Court eliminated the *Saucier* procedure that required a sequential resolution of qualified immunity's prongs. *Id.* As this Court observed in its *Pearson* opinion, while "the two-step procedure promotes the development of constitutional precedent" (*id.* at 236), the removal of the mandated first-into-second sequence gave federal district courts and appellate courts room "to exercise discretion to decide whether that procedure is worthwhile in particular cases." *Id.* at 242.

Courts now have more autonomy than ever before in evaluating qualified immunity, allowing for convenience and efficiency but creating more inconsistency and judicially created law. As such, clarity and guidance by this Court is needed.

2. In addition to widespread confusion surrounding qualified immunity, the application of its second prong has increasingly drawn criticism in recent years. *See e.g.*, *Wells v. Fuentes*, 126 F.4th 882, 889 (2025) ("Though qualified immunity is controversial, we are bound to apply it in full measure"); *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (citing secondary sources and case law to show "there is a growing, cross-ideological

chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence" [footnotes omitted]) (Willett, J., concurring). Some courts have expressed frustration towards "the Supreme Court's impossibly high bar" as to "clearly established" rights. *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1024 (9th Cir. 2020); *see also Cope v. Cogdill*, 3 F.4th 198, 229 (5th Cir. 2021) (criticizing improper use of qualified immunity as "the judicial equivalent of the Armor of Achilles") (Dennis, J., dissenting). Others have criticized the consequences of qualified immunity's second prong in its current form. *Villarreal v. City of Laredo, Texas*, 134 F.4th 273, 283 (5th Cir. 2025) (opining that "[i]t is not immediately obvious what purpose qualified immunity should serve" in cases that do not involve split-second decision making) (Oldham, J., concurring); *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020) ("Unfortunately, the Supreme Court's exceedingly narrow interpretation of what constitutes a "clearly established" right precludes us from holding what is otherwise obvious to us").

Indeed, even sitting members of this Court have expressed a desire to bring reform to qualified immunity, or reconsider it entirely. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422, 210 L. Ed. 2d 996 (2021) ("we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally") (Thomas, J., respecting denial of certiorari); *Lombardo v. City of St. Louis, Missouri*, 143 S. Ct. 2419, 2421, 216 L. Ed. 2d 1266 (2023) ("If this Court is going to endorse this 'Escherian Stairwell', then it should instead

reexamine the doctrine of qualified immunity and the assumptions underlying it" [citations omitted]) (Sotomayor, J., dissenting from denial of certiorari); *Ziglar v. Abbasi*, 582 U.S. 120, 160 (2017) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence") (Thomas, J., concurring); *Kisela v. Hughes*, 584 U.S. 100, 121, 138 S. Ct. 1148, 1162, 200 L. Ed. 2d 449 (2018) (expressing concerns over the Supreme Court's trend of taking a "one-sided approach to qualified immunity") (Sotomayor, J., dissenting).

3. As to Petitioner's case, the Ninth Circuit's decision has created several conflicts that warrant review. The decision centers on (1) the proper framing of the "clearly established" prong at the motion to dismiss stage, and (2) the analysis of "clearly established" rights in the employment retaliation context.

The Ninth Circuit's decision is seemingly at odds with this Court's prior decisions. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011). Furthermore, the Ninth's Circuit decision to disregard the motion to dismiss standard of accepting facts as true and in the best light possible for the Petitioner is in direct conflict with the decisions of several other circuit court decisions, as discussed above. The same is true of the Ninth Circuit's approach to analyzing Petitioner's First Amendment employment retaliation claim. The decision is also such a far departure from the accepted and usual course of judicial proceedings that it warrants an exercise of this Court's supervisory power.

Alternatively, since this Court has not explicitly addressed either issue, review of this case is still warranted as the Ninth Circuit has decided an important question of federal law that has not, but should be, settled by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael J. Pérez
Counsel of Record
Evan C. Flores
Marissa S. Denison
PEREZ VAUGHN & FEASBY INC.
600 B. St., Suite 2100
San Diego, CA 92108
(619) 784-1442
perez@pvflaw.com

Cheri L. McCracken
111 E. Dunlap Avenue,
Suite 1-484
Phoenix, AZ 85020
(602) 231-0595

Counsel for Petitioner

May 29, 2025