NO. 24-1608

In the United States Court of Appeals for the Seventh Circuit

E.D., a minor by and through her parents and next friends MICHAEL DUELL and LISA DUELL; NOBLESVILLE STUDENTS FOR LIFE,

Plaintiffs-Appellants,

v.

NOBLESVILLE SCHOOL DISTRICT, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:21-cv-03075-SEB-TAB

BRIEF OF THE UPPER MIDWEST LAW CENTER AND MANHATTAN INSTITUTE AS AMICI CURIAE SUPPORTING APPELLANTS

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Avenue
New York, NY 10017
(212) 599-7000

James V. F. Dickey (MN #393613)
UPPER MIDWEST LAW CENTER
12600 Whitewater Drive
Suite 140
Minnetonka, MN 55343
(612) 428-7000

Attorneys for Amici Curiae

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Appellate Court No: 24-1608

Short Caption: E.D. v. Noblesville School District

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Attorney's Signature: /s/ James V. F. Dickey Date: 6/8/24

Attorney's Printed Name: James V. F. Dickey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 12600 Whitewater Dr., Suite 140

Minnetonka, MN 55343

Phone Number: 612-428-7002 Fax Number: n/a

E-Mail Address: james.dickey@umlc.org

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n/a

Attorney's Signature: /s/ Ilya Shapiro Date: 6/7/24

Attorney's Printed Name: Ilya Shapiro

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 52 Vanderbilt Ave.
New York, NY 10017

Phone Number: (212) 599-7000 Fax Number: n/a

E-Mail Address: ishapiro@manhattan.institute

CORPORATE DISCLOSURE STATEMENT

The Upper Midwest Law Center has no parent corporation, and no publicly held corporation owns 10% or more of its stock. The Center is a nonprofit, tax-exempt public-interest law firm organized under Section 501(c)(3) of the Internal Revenue Code.

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AMICI CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

Amici curiae Upper Midwest Law Center (the "Center") and the Manhattan Institute's ("MI") interest is public.

The Center is a non-partisan, public-interest law firm which litigates for individual liberty and against governmental, special interest, and public union overreach. The Center regularly represents litigants in cases challenging the constitutionality of government action such as in this case.

MI's mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas.

Amici file this brief to emphasize that, regardless of where anyone stands on the larger debate over qualified immunity, this doctrine was never intended to shield government officials who violate clear-cut First Amendment rights. *Amici* contacted counsel for the parties to obtain consent to file. Appellants' counsel consented to the filing of this brief. Appellees' counsel did not respond to our request for consent.

[1] No party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person, other than the *amici curiae*, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

BACKGROUND AND SUMMARY OF ARGUMENT

The district court held that Plaintiffs' First Amendment retaliation claim against some of the individual Defendants below would fail because of the doctrine of qualified immunity:

> Even if Plaintiffs had managed to establish a constitutional violation, Defendants would still be entitled to summary judgment on qualified immunity grounds, given Plaintiffs' failure to cite any analogous case establishing that Plaintiffs' First Amendment right to be free from such social media commentary was clearly established at the time Defendants engaged in the challenged conduct. *See Siddique v. Laliberte*, 972 F.3d 898, 903 (7th Cir. 2020) (holding that the plaintiff bears the burden of establishing that the federal constitutional right alleged to be violated was "clearly established" at the time of the alleged violation to avoid dismissal based on qualified immunity and that "the clearly established law must be 'particularized' to the facts of the case").

RSA-042; Order at 42 n.8.

The district court's statement was *dictum* and did not adjudicate the claims against the current Defendants-Appellees. Nor should it. Principal McCaffrey, Superintendent Niedermeyer, Assistant Principal Mobley, and Dean Luna cannot be entitled to qualified immunity because they violated Appellants' clearly established First Amendment rights to be free from viewpoint discrimination and retaliation.

Regardless of how Appellees frame their response to Appellants' brief, this Court should not apply qualified immunity to Appellees' conduct. First, the doctrine poorly fits circumstances where executive officials, with the benefit of

time to consider their course of action, deliberately choose to violate First Amendment rights. Second, to the extent the Court engages in the qualified-immunity analysis, it should consider whether Appellees had fair notice that their conduct would implicate and potentially violate Appellants' constitutional rights. Third, the Court should, as it may, determine whether Appellants' rights have been violated regardless of whether any right was clearly established. And fourth, given the facts of this case, qualified immunity simply does not protect these Appellees because they violated Appellants' clearly established First Amendment rights.

ARGUMENT

I. The Touchstones of Qualified Immunity Are the Reasonableness of Official Conduct and Fair, but Not Perfect, Notice to Officials of How They May Act.

At common law, school officials acting "within the bounds of reason under all the circumstances" would "not be punished." *Wood v. Strickland*, 420 U.S. 308, 321 (1975). But if a government official acted "with subjective 'malice,'" immunity "would not apply." Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1359 (2021) (quoting *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 123, 129, 130–31 (1849)). At common law, malice could be shown by establishing "any improper or wrongful motive," even if there was no "actual malevolence or corrupt design." *Id.* (quoting Thomas M. Cooley, *A Treatise on the Law of Torts, or the Wrongs Which Arise Independent*

of Contract, 185 & n.6 (Chicago, Callaghan & Co. 1879)); *see also Wood*, 420 U.S. at 321 (providing immunity for "action taken in the good-faith fulfillment of [school officials'] responsibilities").

Thus, the *Harlow* Court declared, "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Qualified immunity, therefore, has its most appropriate[2] application where government officials, such as police officers, are making difficult, split-second decisions. It is most ill-fitting where officials take their time, and even have the benefit of consulting counsel, and then deliberately censor free speech. In the latter situations, the "public interest in deterrence of unlawful conduct" is at its zenith.

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[2] There are good arguments that qualified immunity itself is atextual and an incorrect interpretation of Congress' abrogation of immunity in enacting Section 1983. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) ("our §1983 qualified immunity doctrine appears to stray from the statutory text"); *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor and Ginsburg, JJ., dissenting) (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 82 (2018)); *Green v. Thomas*, No. 3:23-cv-126-CWR-ASH, 2024 U.S. Dist. LEXIS 90805, at *41-60 (S.D. Miss. May 20, 2024) (explaining why qualified immunity is unsound and inconsistent with Section 1983, especially where "[f]or nearly two years, the State of Mississippi falsely accused Desmond Green of capital murder"). But because this Court cannot override existing Supreme Court precedent, we assume it is good law, which guides our discussion.

Too often, courts provide a "one-size-fits-all" qualified immunity test for government defendants facing Section 1983 claims. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., respecting the denial of certiorari). Law enforcement responding in a high-speed car chase, *see Mullenix v. Luna*, 577 U.S. 7 (2015), sometimes inappropriately get the same defense as officials devoting *months* to a constitutional deprivation, under the guidance of legal counsel, *see Villarreal v. City of Laredo*, 94 F.4th 374, 406–07 (5th Cir. 2024) (en banc) (Willet, Elrod, Graves, Higginson, Ho, and Douglas, JJ., dissenting). We write in part to urge the Court not to follow those sirens to a First Amendment shipwreck.

A. There is no common law "reasonableness" justification for providing immunity in slow-moving cases where government actors have time to deliberate and choose to violate First Amendment rights anyway.

Start with common law. To be sure, there are "[c]ertain immunities . . . so well established in 1871," that courts "'presume that Congress would have specifically so provided that it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)). In other words, immunity makes sense if it was "historically accorded the relevant official at common law." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

Under the common law approach, courts did not make a "freewheeling policy choice," of who gets immunity; rather, the common law tradition was the guide. *Malley v. Briggs*, 475 U.S. 335, 342 (1986). That means individual-capacity state legislators get absolute immunity for their legislative acts, *Tenney v. Brandhove*, 341 U.S. 367 (1951), as do judges, *Pierson*, 386 U.S. at 553–55, while private individuals hired to carry out government investigative functions receive qualified immunity, *Filarsky v. Delia*, 566 U.S. 377, 393–94 (2012).

Defendants-Appellees here, however, have a problem. "[T]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018). Instead, the availability of immunity depended on the facts of the case, and the tort at issue. *See id.* at 58–60.

For example, in a case from the early days of the Republic, the Supreme Court held that a ship captain was legally responsible for the unlawful seizure of a ship—even though he relied on the president's interpretation of the underlying statute in carrying out the seizure. *See Little v. Barreme*, 6 U.S. 170, 179 (1804). In other words, the Court was unwilling to "excuse" the mistake or "legalize an act which without those instructions would have been a plain trespass." *Id.* As some scholars have argued, Captain Little's mistake

"was not a *reasonable* one; that the President told Little what to do does not mean it was a reasonable reading of the statute." Aaron L. Nielson & Christoper J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1865 (2018) (emphasis added). In other cases, where a good faith mistake was reasonable, and the *merits* of the cause of action provided for reasonableness as a defense, immunity was available. *See United States v. Riddle*, 9 U.S. 311, 313 (1809) ("A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact.").

The so called good-faith defense for "quasi-judicial" actions—"official acts involving policy discretion"—was never limitless. Keller at 1358 (quoting *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). Instead, it provided "protection" for actions taken "unadvisedly or without reasonable care and diligence," or opinions "formed hastily or without sufficient grounds." *Id.* at 1369 (quoting *Otis v. Walkins*, 13 U.S. (9 Cranch) 339, 355–56 (1815)).

At common law, then, the touchstone of immunity from suit was the objective reasonableness of official actions under the circumstances. What is reasonable for a police officer making a split-second decision is measured differently than a school principal taking a few days and then affirmatively squelching a minor student's free expression.

B. There is no "fair notice" justification for applying qualified immunity when government actors have time to deliberate before violating the First Amendment.

Policy justifications provide no haven for Appellees, either. Qualified immunity has been defended as serving two policy interests: (1) to ensure fair notice; and (2) to protect the public's interest in a functional government. *See, e.g.*, *Campbell v. Kallas*, 936 F.3d 536, 545 (7th Cir. 2019) ("The principle of fair notice pervades the doctrine."); *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) ("These standards ensure the officer has 'fair and clear warning' of what the Constitution requires (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997))); *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."). Neither supports qualified immunity in slow-moving cases like this one.

Fair notice means *fair*—not perfect—foresight. There may be some cases of reasonable disagreement where qualified immunity makes sense. *See* Nielson & Walker (2018) at 1861 n.57 ("[I]magine an officer engages in conduct that has been explicitly blessed by the Supreme Court but nonetheless is sued for it, and in the course of that litigation, the Supreme Court overrules its prior decision. Presumably imposing liability on that officer would offend principles of fair notice."). But in the First Amendment context, government officials

should rarely be surprised. The protection of speech, especially core political speech like E.D.'s, is the rule, not the exception. Indeed, the Supreme Court has consistently refused to declare "new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010). There should rarely be a case where government officials vigorously discriminate and retaliate against the content of an individual's speech, only to later be *surprised* that the individual is entitled to some First Amendment protection.

And when there is time to deliberate, any remaining fair-notice justification falls away. *See Hoggard*, 141 S. Ct. at 2422 (Thomas, J., respecting the denial of certiorari) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"); *Villarreal*, 94 F.4th at 407 n.2 (Willett, J., dissenting) ("Qualified immunity's presumed purpose, to ensure 'fair notice' before imposing liability, seems mislaid in slow-moving First Amendment situations where government officials can obtain legal counsel.").

As discussed in more detail below, E.D.'s First Amendment rights were obvious when her club was suspended. No school official should, or reasonably can, claim surprise at the fact that students cannot be subjected to viewpoint discrimination in a limited public forum. *See Thompson v. Ragland*, 23 F.4th

1252, 1260 (10th Cir. 2022) ("But the law was clear that discipline cannot be imposed on student speech without good reason. And when, as here, that discipline takes the form of a prior restraint on student speech, the law is especially clear: such prospective, content-based restrictions carry a presumption of unconstitutionality." (quotation omitted)); *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 985 (8th Cir. 2021) (holding that it is clearly established that "selective enforcement" of school policies in a limited public forum amounts to a First Amendment violation).

Good governance is not promoted by qualified immunity in this case either. "When public officials are forced to make split-second, life-and-death decisions in a good-faith effort to save innocent lives, they deserve some measure of deference. By contrast, when public officials make the deliberate and considered decision to trample on a citizen's constitutional rights, they deserve to be held accountable." *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc).

There is no chance that heroic police officers will be deterred from running into a firefight because the Defendants in this case were liable for monetary damages. In contrast, the "vital" protection of First Amendment freedoms in "American schools," is served by holding Defendants liable for their deliberate decision to treat E.D. differently because of her speech. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

II. The Court Should Exercise Its Discretion to Evaluate Whether the Government Officials Violated E.D.'s Rights Regardless of Its Decision on Whether the Rights at Issue Are "Clearly Established."

When deciding whether government officials have qualified immunity, courts must answer two questions. First, do the facts show the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, is that right clearly established? *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). In *Pearson*, the Supreme Court overruled its *Saucier* decision, which had required the qualified-immunity questions to be answered in that order. *Id.* at 236. But the Supreme Court noted that the *Saucier* sequence is "often appropriate" and "often beneficial." *Id.*

There is a great benefit to the public in developing constitutional law, and most importantly the benefit of avoiding violations of constitutional rights recurring in the future. On the other hand, failure to engage in the constitutional inquiry causes what commentators have called "constitutional stagnation," and its harm is very real. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 35 (2015). The Court should thus exercise its discretion to answer whether Appellants' rights have been violated, regardless of its final determination on qualified immunity.

The justice of qualified immunity depends on the courts' establishing precedents both to deter unconstitutional conduct and to punish the same

conduct in the future. Needless to say, no other branch of government can establish such precedents. So, if courts decline to identify constitutional violations and thus fail to establish precedent, or if the overwhelming use of *Pearson* discretion leads to the declaration of no constitutional violation by the defendant, constitutional stagnation results, and the purpose behind § 1983—of vindicating citizens' rights—is hampered, if not institutionally undermined. Plaintiffs, like the Appellants here, are then vulnerable to a paradox in which their constitutional harms will never be redressed because no court ever redressed them before. Fifth Circuit Judge Don Willett aptly describes the situation as

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part);[3] *see also Eves v. LePage*, 927 F.3d 575, 591 (1st Cir. 2019) (*en banc*) (Thompson, J., with Torruella and Barron, JJ, concurring).

[3] For an illustration, see Ascending and Descending, Wikipedia, https://en.wikipedia.org/wiki/Ascending_and_Descending.

The post-*Pearson* stagnation in constitutional-law development is real: in only five percent (5%) of post-*Pearson* cases where the law is not clearly established did the lower courts "recognize a new constitutional violation . . . that, because of the court's decision would be [clearly established] in future cases." Nielson & Walker (2015) at 35–36.

An analysis of more than 800 published and unpublished qualified-immunity decisions with 1,400-plus constitutional claims between 2009 and 2012 revealed the following:

- "courts decided the constitutional question first in 'about half of the claims considered (45.5% or 665 claims)'";
- "'[r]oughly a quarter of the time (26.7% or 390 claims) courts did not choose to exercise their discretion, opting instead to just declare that the right was not clearly established'"; and
- of the 1,055 claims on which qualified immunity was granted, courts did not reach the constitutional question more than one-third of the time (36.9% or 390 claims).

Samantha K. Harris, *Have A Little (Good) Faith: Towards A Better Balance In The Qualified Immunity Doctrine*, 93 Temp. L. Rev. 511, 519 (Spring 2021) (quoting Nielson & Walker (2015) at 1–2).

The same analysis concluded that the imbalance of courts exercising their discretion may lead to certain circuits having "an outsized voice regarding the meaning of the Constitution." Nielson & Walker (2015) at 6. More, "the data suggest that judges who hold certain substantive views may be more willing to

decide constitutional questions than judges who hold different substantive views." *Id.* Thus, attending constitutional stagnation is the risk of constitutional disequilibrium. There is even some evidence "that a court's decision to avoid a constitutional determination is a product of its interest in controlling constitutional precedent." Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. Rev. 468, 469 (2011).

Thus, regardless of how the Court decides this important case, to the extent it engages in the qualified-immunity analysis as to the claims on appeal, it should decide whether a constitutional violation has occurred.

III. When Considering Qualified Immunity, Courts Define the Right Violated at a Specificity That Puts the Government Official on Fair Notice of the Constitution's Requirements.

Courts consistently struggle to define what is "clearly established" law for purposes of qualified immunity. The Supreme Court has counseled that the inquiry "does not require a case directly on point for a right to be clearly established." *Kisela*, 584 U.S. at 104 (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)). But "clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. at 79 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This Court has noted that a right is clearly established if "every reasonable official would have understood that *what he is doing* violates that right." *Campbell*, 936 F.3d at 546 (quoting *Taylor v. Barkes*, 575 U.S. 822, 825 (2015)).

Appellants allege violations of the First Amendment in at least three forms: viewpoint discrimination, retaliation motivated by protected First Amendment activity, and prior restraint. The Court should formulate the rights differently based on these separate claims. In context, a "particularized" expression of these rights would be:

(1) E.D.'s right to express her pro-life viewpoint to fellow students via a flyer she created which invited fellow students to join a club;

(2) E.D.'s right to express herself in this way without advance government approval of the content of her flyer; and

(3) E.D.'s right not to endure retaliation for her proposed manner of expression.

Given the Supreme Court's longstanding jurisprudence on forum analysis and student speech rights, there is no universe in which these rights are not "clearly established" for purposes of qualified immunity. The individual Appellees easily had fair notice that their conduct would violate the First Amendment, and they did it anyway.

IV. Appellees Are Not Entitled to Qualified Immunity Here.

As this Court has held, no matter what kind of forum, Appellees are required to apply policies and treat student speakers "in a viewpoint neutral way." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006)

(reversing the denial of a preliminary injunction after a university revoked a Christian students organization's official status).[4]

Further, it is "clear under recent Supreme Court caselaw" that student speech such as "church fliers . . . could not reasonably be perceived as bearing the imprimatur of the school," so there is no basis for suppressing them under the *Tinker* standard, which applies to these circumstances. *N.J. v. Sonnabend*, 37 F.4th 412, 425 (7th Cir. 2022) (citing *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021)[5]).

And finally, related to First Amendment retaliation, court after court has held that "it could hardly be disputed that . . . an individual had a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected expression." *Hyland v. Wonder*, 117 F.3d 405, 410 (9th Cir. 1997) (quoting *Soranno's Gasco, Inc. v. Morgan,* 874 F.2d 1310, 1319 (9th Cir. 1989)); *see also Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010) ("A citizen's right to exercise First Amendment freedoms 'without facing retaliation from government officials is clearly established.'") (quoting *Kilpatrick v. King*, 499 F.3d 759, 767

[4] Notably, in *Business Leaders in Christ*, the Eighth Circuit credited this Court's 2006 *Walker* decision as setting "clearly established" precedent for purposes of the qualified-immunity analysis in that circuit. 991 F.3d at 984.

[5] *Mahanoy* was decided on June 23, 2021, about two months before Appellees discriminated and retaliated against Appellants.

(8th Cir. 2007)); *Modica v. Taylor*, 465 F.3d 174, 183 (5th Cir. 2006) ("[T]he First Amendment's bar against retaliation for protected speech was clearly established federal law.").

Walker has particular similarity to this case. There, the Christian student organization was "the only student group that ha[d] been stripped of its recognized status" on the basis of violating the University's affirmative action policy. 453 F.3d at 866. Other student groups also discriminated in group membership, but the policy was not applied to them. *Id.* That was enough for this Court to conclude that those plaintiffs demonstrated a likelihood of success on the merits. *Id.* at 867. The facts are nearly identical here.

E.D.'s chapter of Students for Life of America was approved on August 3, 2021. Appellant Br. at 7; Doc. 151-2, at 6, 15. On August 27, E.D. met with Assistant Principal Mobley to discuss setting an initial club meeting and posting flyers to advertise that meeting. Appellant Br. at 8; Doc. 158-5, at 5. At that meeting, E.D. was told that "any administrator" could approve a flyer and Dean Luna would have to approve meetings. Appellant Br. at 8; Doc. 152-2, at 44. Dean Luna declined to respond to E.D.'s request for a meeting, and when E.D. finally tracked him down on September 3, she was told the posters were too political, but they could maybe meet later to discuss further. Appellant Br. at 10; Doc. 152-2, at 28, 30, 34–35. Instead, later that day, Principal McCaffrey spoke to Assistant Principal Mobley and Dean Luna and

decided to revoke authorization for the club. Appellant Br. at 11; Doc. 158-3; Doc. 152-2, at 75.

There was no opinion which Appellees were forced to form "hastily or without sufficient grounds." Instead, they took several days to review E.D.'s proposed posters. In fact, they took time to review the posters for their *content*. They had time to consult counsel, if they wanted to. They decided to revoke the club's authorization after deciding that E.D.'s poster's content was *too* political—an obviously "improper or wrongful motive" in the First Amendment context. Nor was revocation of club membership "within the bounds of reason" after Dean Luna advised E.D. that they could meet to discuss the posters in the future and no administrator ever warned E.D. that such a consequence was on the table. Defendants' motive was undoubtedly discriminatory towards the content of E.D.'s message, and therefore would be unprotected at common law. *Cf.* Keller at 1371 (reporting that the use of "racial criteria" would show malice at common law (quoting Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Rsrv. L. Rev. 396, 462 (1987))).

Cementing the viewpoint discrimination here, Defendants had never revoked a student club's recognition until E.D. tried to promote her pro-life club. Appellant Br. at 11; Doc. 158-20, at 20. This is despite the existence of explicitly "political" clubs at Noblesville High, including the Young Democrats and Young Republicans. Appellant Br. at 8, Doc. 158-38 at 1–3. And although

other student groups were free to use pictures to promote their clubs, E.D. was told she could not. Appellant Br. at 10; Doc. 152-2, at 34–35. Treating student groups differently based on the content of their message likely violated the First Amendment in *Walker*, and Defendants should have known—beyond debate—it would violate the First Amendment here.

Moreover, in the qualified-immunity context, other courts have found that the law was clearly established in nearly identical factual scenarios. For example, in *Business Leaders in Christ*, 991 F.3d at 975–77, the University Defendants revoked recognition of a Christian student organization because its requirement that student leaders refrain from same-sex relationships violated University policy. The Eighth Circuit, pulling from its own, Supreme Court, and *this circuit's* precedent, held that the law was clearly established in every respect. *Id.* at 984.

First, it was clearly established that the University had created a limited public forum by opening up communication for certain student groups. *Id.* at 985. Same here: Noblesville schools "created a forum generally open for use by student groups." *Prince v. Jacoby*, 303 F.3d 1074, 1090–91 (9th Cir. 2002).

Second, it was clearly established that students had a right not to be discriminated against on the basis of viewpoint in that limited public forum. *Bus. Leaders in Christ*, 991 F.3d at 985. Again, the same reasoning applies

here—E.D. was treated differently *because of* the message on her proposed posters.

And finally, it was clearly established that applying neutral policies still violates the First Amendment "if not applied in a viewpoint-neutral manner." *Id.* In this case, other political student groups—like the Young Democrats and Young Republicans—continue to operate at Noblesville schools. Only E.D. has been treated differently for her "political" speech. Appellant Br. at 8; Doc. 158-30, at 1–3. There can be no doubt that the treatment of E.D. amounts to a clearly established First Amendment violation.

CONCLUSION

To the extent this Court reaches the issue of qualified immunity, it should find that there is none for Appellees. Qualified immunity does not fit these circumstances, where public school officials, after deliberation, intentionally suppress student speech based purely on content with zero evidence or forecast of disruption based on that speech. The Court should reverse in Appellants' favor.

Dated: June 10, 2024

/s/ James V. F. Dickey

James V. F. Dickey (MN #393613)
UPPER MIDWEST LAW CENTER
8421 Wayzata Blvd., Suite 300
Golden Valley, Minnesota 55426
james.dickey@umlc.org
(612) 428-7000

/s/ Ilya Shapiro

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
ishapiro@manhattan.institute
(212) 599-7000

Attorneys for Amici Curiae

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/s/ James V. F. Dickey

James V. F. Dickey
UPPER MIDWEST LAW CENTER
8421 Wayzata Blvd., Suite 300
Golden Valley, Minnesota 55426
james.dickey@umlc.org
(612) 428-7000

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
ishapiro@manhattan.institute
(212) 599-7000

Attorneys for Amici Curiae

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In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system on June 10, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 10, 2024

/s/ James V. F. Dickey

James V. F. Dickey
UPPER MIDWEST LAW CENTER
8421 Wayzata Blvd., Suite 300
Golden Valley, Minnesota 55426
james.dickey@umlc.org
(612) 428-7000

Ilya Shapiro
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
ishapiro@manhattan.institute
(212) 599-7000

Attorneys for Amici Curiae