

Case No. 23-5293

---

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

ALLAN M. JOSEPHSON,  
*Plaintiff-Appellee,*

v.

TONI M. GANZEL, in her official and individual capacities; KIMBERLY A. BOLAND, in her official and individual capacities; CHARLES R. WOODS, in his official and individual capacities; JENNIFER F. LE, in her official and individual capacities; BRYAN D. CARTER, in his official and individual capacities; WILLIAM D. LOHR, in his official and individual capacities,

*Defendants-Appellants.*

On Appeal from the United States District Court  
for the Western District of Kentucky  
Case No. 3:19-cv-00230-RGJ-CHL  
The Honorable Rebecca Grady Jennings

---

**BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL  
FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE AND  
AFFIRMANCE**

---

*Attorneys for Amicus Curiae  
Mountain States Legal Foundation*

William E. Trachman  
James Kerwin  
MOUNTAIN STATES  
LEGAL FOUNDATION  
2596 South Lewis Way  
Lakewood, CO 80227  
Phone: (303) 292-2021  
wtrachman@mslegal.org  
jkerwin@mslegal.org

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, *Amicus Curiae* certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation. *Amicus Curiae* further certifies that no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome.

## TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
IDENTITY AND INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
I. Qualified Immunity Should Not Shield Constitutional Infringement in Slow-Moving First Amendment Cases.	3
A. As a Foundational Matter, Qualified Immunity is on Tenuous Footing.....	4
B. The Right to Free Speech Is So Well-Known that Time Pressure Has Significantly Less Relevance. ....	9
II. Claims of Free Speech Infringement on Campus are So Common That Qualified Immunity Should Almost Never Apply. .	12
CONCLUSION.....	14
RULE 29(a)(5) & 32(a)(7) CERTIFICATE OF COMPLIANCE	16
CERTIFICATE OF SERVICE.....	17

## TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE(S)</u>
<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023) .....	1, 12
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995) .....	1
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) .....	3
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	10
<i>Hoggard v. Rhodes</i> , 141 S. Ct. 2421 (2021) .....	14
<i>Illinois v. Krull</i> , 480 U.S. 340 (1987) .....	8
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976) .....	9
<i>Jordan v. Jenkins</i> , 73 F.4th 1162 (10th Cir. 2023).....	10
<i>Kennedy v. Bremerton Sch. Dist.</i> , 142 S. Ct. 2407 (2022) .....	9
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589 (1967) .....	10
<i>Little v. Barreme</i> , 6 U.S. 170 (1804) .....	7
<i>Mahanoy Area Sch. Dist. v. B. L.</i> , 141 S. Ct. 2038 (2021) .....	9
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803) .....	3, 15

<i>Matal v. Tam</i> , 582 U.S. 218 (2017) .....	13
<i>Mullenix v. Luna</i> , 577 U.S. 7 (2015) .....	4
<i>National Institute of Family &amp; Life Advocates v. Becerra</i> , 585 U.S. 755 (2018) .....	11
<i>Procunier v. Navarette</i> , 434 U.S. 555 (1978) .....	9
<i>Rosenberger v. Rector &amp; Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995) .....	11
<i>Tinker v Des Moines Independent Community School District</i> , 393 U.S. 503 (1969) .....	10
<i>United States v. Stevens</i> , 559 U.S. 460 (2010) .....	5
<i>Uzuegbunam v. Preczewski</i> , 141 S. Ct. 792 (2021) .....	9
<i>W. Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	10
<b><u>Rules</u></b>	
FED. R. APP. P. 26.1 .....	i
FED. R. APP. P. 29(a)(2) .....	1
FED. R. APP. P. 29(a)(3) .....	1
FED. R. APP. P. 29(a)(4)(E) .....	1
FED. R. APP. P. 29(a)(5) .....	16
FED. R. APP. P. 32(a)(5) .....	16
FED. R. APP. P. 32(a)(6) .....	16

FED. R. APP. P. 32 (f) .....	16
Sixth Circuit Rule 26.1.....	i

**Other Authorities**

1 Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 326 (John Lewis ed., 3d ed. 1906).....	4
A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853 (2018).....	7
The Death of A Maxim: Ignorance of Law Is No Excuse, 13 Jrnl. of Civ. Rts. & Ec. Dev. 635 (1999) .....	6

## IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Mountain States Legal Foundation (“MSLF”) is a nonprofit public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues that are vital to the defense and preservation of individual liberties: the right to speak freely, the right to own and use property, and the need for limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (*amicus curiae* in support of petitioners); *Tennessee v. United States Dep’t of Ed.*, 6th Cir. No. 22-5807 (2023) (*amicus curiae* in support of appellees).

---

<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amicus curiae* attempted to obtain the parties’ consent to the filing of this brief. Plaintiff-Appellee consents to the filing but Defendants-Appellants do not. Accordingly, *amicus curiae* is filing a motion for leave to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3).

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party or party’s counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission and no other person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

To secure these interests, MSLF files this *amicus curiae* brief urging this Court to affirm the Western District of Kentucky's ruling.

### **SUMMARY OF THE ARGUMENT**

Two policy considerations have traditionally been asserted as the rationalization for qualified immunity: to ensure fair notice before imposing monetary liability against state officials; and to provide breathing room for split-second decisions in dangerous situations that may arise in the course of law enforcement. Outside of these contexts, qualified immunity as a shield for constitutional infringement has no place. It is especially problematic when it protects officials who have plenty of time to consider, reflect, and even seek legal advice before engaging in their unconstitutional conduct.

Defendants-Appellants are just such officials. Their campaign of retaliation against Plaintiff-Appellee unfolded over more than a year. Even if they had reasonable grounds at the outset to be uncertain whether Plaintiff's speech was protected by the First Amendment (which they did not), they could have, at any point, stopped and reconsidered over the ensuing months and years, and could have sought competent legal counsel. That they did not shows exactly why the

doctrine of qualified immunity has become a serious impediment to justice—it incentivizes government actors to get as close to the line as possible and to experiment with the free speech rights of Americans, knowing they have one free bite at the apple. This Court should hold that qualified immunity does not apply to cases such as this one involving slow-moving First Amendment violations.

## ARGUMENT

### I. **Qualified Immunity Should Not Shield Constitutional Infringement in Slow-Moving First Amendment Cases.**

In cases of alleged infringement of First Amendment rights, particularly where, as here, a slow-moving chain of events unfurls over a substantial period of time, qualified immunity should not apply. This is because, “[t]he crucial question . . . is whether ‘a reasonable official would understand that what he is doing violates [a constitutional] right.’” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In cases silencing or punishing bedrock First Amendment activity, a legal doctrine that excuses ignorance is a poor fit. *Cf. Marbury v. Madison*, 1 Cranch 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

**A. As a Foundational Matter, Qualified Immunity is on Tenuous Footing**

It can be argued that qualified immunity serves two policy interests: (1) to ensure fair notice for a government employee before liability can be imposed (which, properly understood, is co-extensive with the constitutional due process requirement of fair notice for anyone, government official or not); and (2) to promote official action necessary to society. *See* 1 Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 326 (John Lewis ed., 3d ed. 1906) (citation omitted) (explaining historical basis for qualified immunity). The Supreme Court has therefore applied qualified immunity in cases involving danger and time-sensitive decision-making for law enforcement officers. *See, e.g., Mullenix v. Luna*, 577 U.S. 7 (2015) (applying qualified immunity where law enforcement chose among dangerous alternatives in regard to a high-speed car chase).

Even crediting this tradition, of course, the law enforcement justification for qualified immunity breaks down entirely in cases like Dr. Josephson's, where there is no allegation of lawbreaking, much less danger to officers. In such cases, there is no reason for society, the law,

or the courts, to create a safe harbor for public officials who aggressively punish speech. Nor would such an approach be consistent with the First Amendment, in which protection of speech is the default rule, and criminalization of speech is the exception. It is thus hard to imagine a situation in which public officials ought to be encouraged to engage in vigorous law enforcement with respect to speech. Indeed, the Supreme Court has steadfastly held the line against declaring “new categories of speech outside the scope of the First Amendment.” *United States v. Stevens*, 559 U.S. 460, 472 (2010). Thus, invoking the societal benefit from vigorous law enforcement in any but the most extraordinary circumstances—and especially in this context, where all speech is protected unless and until it is deemed unprotected—makes little constitutional sense. *Id.*

The fair-notice rationale for qualified immunity also breaks down in cases like Dr. Josephson’s. The contours of fair notice implicate due process, the availability or ambiguity of positive law, the chronology and factual similarity of clarifying court opinions, and the amount of time that the state actor has available to evaluate the constitutionality of the proposed course of action—with the latter being also or even more

relevant to the “reasonableness” of the official’s actions under the circumstances.

At a fundamental level, the mere fact that a government official (or anyone else for that matter) claims to have been unaware that his or her conduct was unlawful is insufficient to show a lack of fair notice. This is reflected in the age-old maxim that ignorance of the law is no excuse.<sup>2</sup> That said, certain narrow exceptions have evolved over time, based on situational features that show a lack of fair notice. Put another way, there is a distinction between unclear or erroneous laws for which a government actor could not reasonably be deemed to have fair notice, on one hand, and acts that a government actor should be expected to know are unlawful, even if they profess personal ignorance, on the other.

---

<sup>2</sup> See Mark D. Yochum, *The Death of A Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT, St. John’s University School of Law (Spring 1999) (“Ignorance of the law is no excuse” is taken from the latin phrases *ignorantia legis neminem excusat* or *ignorantia juris non excusat.*”), at <https://scholarship.law.stjohns.edu/jcred/vol13/iss3/7/> (last visited Apr. 29, 2024).

As an example of the first category, “imagine 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.” Aaron L. Neilson & Christopher J. Walker, A QUALIFIED DEFENSE OF QUALIFIED IMMUNITY, 93 Notre Dame L. Rev. 1853, n.57 (2018) (cleaned up). In that case, it would be unreasonable to hold the officer to a higher standard of knowledge than the Court itself.

On the other hand, absent the kind of reasonable misunderstanding outlined above, a public official is always bound by the law. This can be true even in the face of contrary commands from a superior. 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 another ship, even though he relied on the President’s interpretation of the underlying statutory authority. *See Little v. Barreme*, 6 U.S. 170, 170 (1804). It was not enough in *Little* that the error in law could be traced directly to the President’s order; rather, the captain of the ship was responsible for complying with the

law, as written. In essence, the mismatch between the President’s command and the underlying law could not effect a change in the law that would excuse the unlawful seizure. *See Id.* at 179 (holding that “instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass”). The rationale in *Little*—which rejects the ability of officials to shield themselves from liability by relying on a patently invalid law—has stood the test of time. *See, e.g., Illinois v. Krull*, 480 U.S. 340, 355 (1987) (“A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.”).

And, in the vast majority of cases where a government actor is faced with neither (1) the “gotcha” of an intervening Supreme Court reversal of its prior holdings nor (2) an erroneous instruction from a superior, the default maxim that “ignorance of the law is no excuse,” ought to provide the rule of decision. Like everyone else, state actors

cannot say that they lacked fair notice of what the law requires, merely because they are purportedly ignorant of that law, and decided to risk violating the Constitution anyway.

**B. The Right to Free Speech Is So Well-Known that Time Pressure Has Significantly Less Relevance.**

Whether qualified immunity is interpreted under the original understanding of § 1983, such that immunity is granted according to analogous common law, *see Imbler v. Pachtman*, 424 U.S. 409, 421 (1976), or under the “clearly established” standard, where government officials are immune unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known, *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978), fair notice that speech is protected is readily satisfied, because claims of First Amendment infringement are among the most frequently discussed and hotly asserted constitutional rights. Indeed, the Supreme Court has heard First Amendment speech cases on a consistent basis for years, often arising from educational settings. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). This is to say nothing of various iconic rulings that every

high-level education official ought to be aware of, such as *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); and *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

It is thus quite reasonable to expect public officials with even the most rudimentary understanding of our constitutional system to be well aware that government attempts to suppress speech should be met with a jaundiced eye and—at a minimum—that they ought to seek legal guidance if the lawful course of action is unclear. As the Court held in *Harlow v. Fitzgerald*, “[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate.” 457 U.S. 800, 815–19 (1982).

Speech rights are so well-established that even short time horizons should suffice to allow public officials to recognize when they are infringing the First Amendment. For example, in *Jordan v. Jenkins*, the Tenth Circuit rejected a qualified immunity defense for law enforcement officers who arrested a man for orally challenging their treatment of his nephew at the site of a car accident, because it is well known that the First Amendment protects citizens observing and

speaking to police. *Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023).

For example, the prohibition on viewpoint discrimination is so well-established that any government efforts in that area should immediately raise red flags. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding when the government targets “particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”). The government’s burden to justify viewpoint discrimination stands in stark contrast to the presumption that qualified immunity applies, unless there is ample precedent that squarely prohibits the government’s action, because “[t]his Court’s precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect.” *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755, 767 (2018) (cleaned up) (“*NIFLA*”). The significant gap between what state actors owe to citizens, and what state actors may be liable for in court, defies sound legal reasoning, particularly in cases where state officials have a luxurious amount of time for basic research into whether an actor’s questionable conduct may be unlawful.

In cases like this one, in which over a year elapsed during which Defendants rolled out their slow-moving campaign of retaliation against Dr. Josephson, fair notice was easily satisfied. Any lingering doubt regarding the lawfulness of defendants-appellants' conduct could have been analyzed many times over.

**II. Claims of Free Speech Infringement on Campus are So Common That Qualified Immunity Should Almost Never Apply.**

Free speech infringement claims on college campuses are so prevalent that a constant stream of lawsuits flows through the federal courts. One might think this torrent would eventually lead to settled law protecting the speech rights of members of campus communities. But that does not appear to be the case, in large part due to the invocation of qualified immunity.<sup>3</sup> A handful of these cases make it to the Supreme Court, which routinely decides in favor of protecting speech. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570, 595 (2023) (“Nor, in any event, do the First Amendment’s protections belong only

---

<sup>3</sup> A search of the federal courts database in Westlaw for First Amendment cases involving a university or college reported since the beginning of 2013 returns more than 300 cases that include the term “qualified immunity.”

to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive.”); *Kennedy v. Bremerton*, 597 U.S. 507, 531 (2022) (applying *Tinker* to teacher’s religious speech); *Mahanoy Area School District v. B. L.*, 594 U.S. 180, 193 (2021) (“The alleged disturbance here does not meet *Tinker*’s demanding standard.”); *Matal v. Tam*, 582 U.S. 218, 244 (2017) (“We have said time and again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”) (internal quotation marks omitted). Nevertheless, free speech cases keep coming, not just to the Supreme Court, but across all the federal courts.

In addition to essentially nonstop litigation, many universities have their own law schools, as well as their own legal counsel. Why then do colleges seem so unwilling to learn the lessons of past conflicts? It seems reasonable to presume that qualified immunity itself now plays a role in suppressing speech, encouraging universities to make minor changes to their practices, evade adjudication, and live on to impose viewpoint conformity another day.

But denying a rudimentary understanding of the basic contours of

First Amendment law is willful blindness that should not be encouraged via expansive application of judge-made doctrine. The fair-notice element in cases of viewpoint discrimination and retaliation simply does not fit. Neither does the vigorous law enforcement justification, where bona fide criminal activity via professor speech is uncommon if non-existent, and therefore inadequate to justify state censorship.

As Justice Thomas put it, “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?” *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of cert.)). Why indeed? Given that these protections incentivize university officers to get as close to the constitutional line as possible (indeed, to go over the line, just not “too far”), the doctrine of qualified immunity does more harm than good in this context. *Amicus* hopes that this Court considers this issue when issuing its opinion.

## CONCLUSION

This Court should affirm. More broadly, this Court should consider whether to offer broader commentary in its ultimate opinion on

the applicability of the doctrine of qualified immunity in this context. *Cf. Marbury*, 1 Cranch at 163 (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

Respectfully submitted,

*/s/ William E. Trachman*

William E. Trachman

James L. Kerwin

MOUNTAIN STATES LEGAL FOUNDATION

2596 South Lewis Way

Lakewood, CO 80227

Phone: (303) 292-2021

wtrachman@mslegal.org

jkerwin@mslegal.org

**RULE 29(a)(5) & 32(a)(7) CERTIFICATE OF COMPLIANCE**

1. This document complies with the page and type-volume limits of FED. R. APP. P. 29(a)(5) because, excluding the parts of the document exempted by FED. R. APP. P. 32 (f), this document contains 3,122 words according to the word count function of Microsoft Word 365, and because this document does not exceed fifteen pages.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

*/s/ William E. Trachman*

---

William E. Trachman

*Attorney for Amicus Curiae*

## CERTIFICATE OF SERVICE

Under 6th Cir. R. 25, I hereby certify that on May 1, 2024, a digital copy of the foregoing document was filed electronically with the Court using its electronic filing system, which automatically sends an electronic notification to all attorneys of record.

On this the 1st day of May, 2024.

/s/ William E. Trachman  
William E. Trachman  
*Attorney for Amicus Curiae*