No. 12-1296

IN THE

Supreme Court of the United States

ED RAY and MARK McCAMBRIDGE,

Petitioners,

v.

OSU STUDENT ALLIANCE and WILLIAM ROGERS,

Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND FIVE OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are a non-profit organization, the American Council on Education, whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States, and five other organizations representing numerous additional higher education institutions and individuals engaged in higher education, including campus chief executive officers and other senior-level administrators. A list of *amici* and summary of their members is included in the addendum to this brief. *Amici* and their members have a substantial interest in this case because the Ninth Circuit's decision imposing *respondeat superior* liability under Section 1983 on public officials, based solely on their purported knowledge of actions by subordinate employees, threatens to subject public university presidents and senior campus administrators to costly and burdensome litigation arising out of routine student affairs, employment, and other disputes on campuses across the country.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs, in support of either party or of neither party, have been filed with the Clerk of the Court. Pursuant to Rule 37.2, *amici* timely provided notice of intention to file this brief to counsel of record for all parties.

SUMMARY OF ARGUMENT

I. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this Court squarely rejected the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution." *Id.* at 677. The Court dismissed the concept of "supervisory liability" as a "misnomer," holding that in a case under 42 U.S.C. § 1983, a government official named in his or her individual capacity "is only liable for his or her own misconduct." *Id.* The Ninth Circuit's divided ruling conflicts with that holding. The panel majority adopted the very standard that this Court rejected in *Iqbal*, holding that a supervisor may be held personally liable in damages under Section 1983 based on mere knowledge of a subordinate's misconduct. That ruling is inconsistent with this Court's repeated recognition that a defendant may not be held liable under Section 1983 on the basis of *respondeat superior*. It confuses the distinction between culpable conduct by a supervisor and the state of mind necessary to prove an underlying constitutional tort. It also ignores the need to establish proximate cause as an essential element of any such violation. Finally, by equating "knowledge" with "notice" and "acquiescence" with "inaction," it creates an unworkable and unrealistic standard. Review by this Court is necessary to resolve the existing uncertainty and conflict among the courts of appeals regarding the scope and application of this Court's decision in *Iqbal*.

II. The Ninth Circuit's decision threatens public universities with significant harm. State universities generally are entitled to Eleventh Amendment immunity from suits for damages in federal courts. Plaintiffs therefore frequently name senior university administrators in their personal capacities as defendants in § 1983 suits seeking damages for alleged constitutional violations. Such claims are asserted against university officials in a wide variety of cases, ranging from student discipline and sexual harassment claims to campus free speech disputes to faculty employment and tenure disputes. The Ninth Circuit's decision conflicts with lower court decisions recognizing that such claims often are an improper attempt to base § 1983 liability on *respondeat superior*. If allowed to stand, the Ninth Circuit's ruling will only encourage plaintiffs to bring suit for damages against senior university administrators who had no personal involvement in the underlying events giving rise to their claims. Such an outcome will subject university presidents and senior officials to unrealistic expectations, and will unnecessarily burden public universities and their leaders by forcing them to incur the financial, reputational, and other costs of defending litigation claims against their senior administrators. That burden is particularly unfortunate at a time of severe budgetary constraints on public institutions of higher education.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *IQBAL*.

In *Iqbal*, the Court held that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 556 U.S. at 676. Rather, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* The Court explicitly rejected respondent's argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution." *Id.* at 677. As the Court recognized,

> In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.

Id. at 677. The dissenting Justices in *Iqbal* equally recognized that the Court's decision "does away with supervisory liability under *Bivens*." *Id.* at 687-88 (Souter, J., dissenting).

Iqbal broke no new ground in this regard. The Court has long recognized that a defendant "cannot be held liable under § 1983 on a *respondeat superior* theory," in which an employer is subject to vicarious liability "solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691-92 (1978); *see also Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) ("under § 1983, local governments are responsible only for 'their *own* illegal acts.' They are not vicariously liable under § 1983 for their employees' actions") (citations omitted); *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*") (citations omitted).

While *Monell* and its progeny involved municipal liability, the rule against *respondeat superior* liability is not limited to that context. It also applies to individual state officials, who are not subject to § 1983 liability merely because of their authority to control subordinate employees. *Rizzo v. Goode*, 423 U.S. 362 (1976). In rejecting *respondeat superior* as a basis for Section 1983 liability, the Court has relied primarily on the plain language of the statute:

> The plain words of the statute impose liability . . . only for conduct which 'subjects, or causes to be subjected' the complainant to a

> deprivation of a right secured by the Constitution and laws.

Id. at 370-71; *see also Los Angeles County v. Humphries*, 131 S. Ct. 447, 453 (2010) ("the Court's rejection of *respondeat superior* liability [in *Monell*] primarily rested . . . on the fact that liability in such a case does not arise out of the municipality's own wrongful conduct").

Thus, in *Rizzo*, plaintiffs brought an action arising out of an alleged pattern of illegal and unconstitutional treatment of minority citizens by police officers in the city of Philadelphia. Plaintiffs charged defendants, who included the mayor, the city managing director, and the police commissioner, with conduct "ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future." 423 U.S. at 367. The Court reversed an injunction entered by the district court, rejecting the argument that "even without a showing of direct responsibility for the actions of a small percentage of the police force," individual defendants' *failure to act* to eliminate misconduct by subordinate employees could serve as a basis for relief under § 1983. *Id.* at 376. That argument, the Court said, "blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983." *Id.* In short, an individual state official who does not personally "subject, or cause to be subjected" the plaintiff to a

deprivation of federally protected rights cannot be held liable in damages for actions by his or her subordinate employees merely because the official learned of those actions after the fact and did not countermand them.

Despite this Court's unmistakable holding in *Iqbal*, the Ninth Circuit majority below adopted the very standard that this Court rejected in that case. The majority sought to limit *Iqbal*'s holding to invidious racial discrimination claims, which contain a specific intent requirement that is not satisfied by pleading that a supervisor "knowingly acquiesced in discrimination by subordinates." 699 F.3d at 1071. Emphasizing the Court's observation that "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue," (556 U.S. at 678), it concluded that "constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged." 699 F.3d at 1071. Reasoning that "[f]ree speech claims do not require specific intent," (*id.* at 1074),[2] it concluded that "allegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments." *Id.* at 1075.

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[2] The court reached the same conclusion as to Respondents' speech-based equal protection claims. *Id.* at 1075 n.18.

The court acknowledged that neither of the Petitioners—Oregon State University's President and Vice President of Finance and Administration—had authorized the confiscation of Respondents' news bins or the resulting loss of newspapers; indeed, it noted, when the President learned about those events after they had occurred, he responded that they were "news to him." *Id.* at 1059, 1078. It also recognized that after learning of Respondents' complaint, the President delegated responsibility for dealing with the dispute to his subordinates, and that neither he nor Vice President McCambridge "actually made the decision to deny plaintiffs permission to place their newsbins throughout campus." *Id.* at 1059, 1070. Finally, it did not suggest that Petitioners had developed or approved the university's unwritten policy regarding the placement of newsbins on campus. To the contrary, it acknowledged that the complaint portrayed Martorello, the Director of Facilities Services, as "the University official responsible for enforcing the unwritten newsbin policy," and that Petitioners "are not alleged to have run the department that enforced the policy or to have had any familiarity with the policy's requirements before the confiscation." *Id.* at 1075, 1076. Nevertheless, it held that allegations that after the dispute arose, Petitioners were kept informed about it and about Martorello's actions in enforcing the policy, and "did nothing to stop him," were sufficient to state claims against them under

Section 1983 for violation of Respondents' free speech and equal protection rights. *Id.* at 1071-75.

In dissent, Judge Ikuta observed that under *Iqbal*, "an official is not liable under § 1983 for simply knowing about a lower ranking employee's misconduct and failing to act." *Id.* at 1079-80 (Ikuta, J., dissenting in part). "In holding otherwise," the dissent observed, "the majority resurrects the very kind of supervisory liability that *Iqbal* interred." *Id.* at 1080. The dissent pointed out that in light of *Iqbal*'s principle that a supervisor "is only liable for his or her own misconduct," (556 U.S. at 677), an official may not be held liable for "inaction in the face of someone else's wrongdoing" unless the official had a legal duty to act, which was not alleged here. *Id.* at 1080. The majority's contrary determination, the dissent concluded, "smuggles respondeat superior back into our § 1983 jurisprudence" by substituting "mere knowledge of a lower-ranking employee's misconduct" for personal misconduct and causation. *Id.* "By adopting this standard, the majority returns us to pre-*Iqbal* jurisprudence and revives vicarious liability, at least for First Amendment claims." *Id.*

The "knowledge and acquiescence" standard adopted by the panel majority below is inconsistent with this Court's holding in *Iqbal* and with other lower courts' decisions, in at least two respects.

First, the ruling below conflates two distinct concepts: the state of mind necessary to prove the

underlying constitutional tort, and unconstitutional conduct by a supervisory official. Even if the panel majority is correct that no specific intent need be shown to prove a First Amendment violation, a supervisory official's mere knowledge of a subordinate's actions plainly is an insufficient basis for imposing liability. Otherwise, the principle recognized in *Iqbal* that a supervisor "is only liable for his or her own misconduct" would be rendered meaningless, and supervisors would be exposed to nearly limitless liability.

Second, the majority's holding is inconsistent with an essential element of any constitutional tort: a close causal connection between the plaintiff's injury and the defendant's conduct. To show that a defendant is liable under Section 1983, a plaintiff must show that the defendant's actions *caused* the deprivation of its constitutional rights. *See, e.g., Los Angeles County v. Humphries*, 131 S. Ct. 447, 452 (2010) (referring to "the causation requirement" of § 1983); *Martinez v. California*, 444 U.S. 277, 285 (1980) (parole board members were not subject to § 1983 liability for death of plaintiff's decedent, who was murdered by a parolee whom the parole board had released on parole five months earlier, where decedent's death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law"). That fundamental requirement is embedded in the plain language of Section 1983 itself: "Indeed, the fact that Congress did specifically provide that A's tort

became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Monell*, 436 U.S. at 692 (footnote omitted).

The panel majority gave lip service to this principle, acknowledging in a footnote that "like common law torts, constitutional torts require proximate cause. Even if the defendant breached a duty to the injured party, the defendant is only liable if his conduct foreseeably caused the injury." 699 F.3d at 1072 n.12. Yet its decision effectively read the causation requirement out of Section 1983 by allowing a supervisor to be held liable for mere knowledge of a subordinate's misconduct, without any requirement that the supervisor's own conduct caused the loss of rights of which the plaintiff complains.

The Ninth Circuit's "knowledge and acquiescence" standard is not only inconsistent with prior authority, it is amorphous and unworkable. The majority made the unreaslistic assumption that a supervisory official who is merely copied on a single email regarding a subordinate's actions should be deemed to "know" of any arguable constitutional violation, even if the facts giving rise to the claim are disputed or unclear. Moreover, the court made no attempt to define when a supervisory official who learns of arguably improper conduct by a subordinate employee has "acquiesced" in such conduct. In asserting that Petitioners could be

subject to personal liability under Section 1983 because they had some knowledge of subordinate employees' allegedly unconstitutional actions and "did nothing," the Ninth Circuit effectively equated acquiescence with inaction, as the dissent pointed out. 699 F.3d at 1081 ("But of course, 'acquiescence' is merely a way to describe knowledge and inaction").

Notably, the Ninth Circuit itself has rejected the very standard adopted by the panel majority here, holding in the context of municipal liability that a policymaker's knowledge of an allegedly unconstitutional act or mere failure to overrule a subordinate's completed act does *not* constitute ratification actionable under Section 1983. For example, in *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997), which involved a claim by a medical director that he was demoted in retaliation for protected speech, the court held that the plaintiff's claim against the members of the county board of supervisors was properly dismissed because he did not allege any personal participation by them in violating his constitutional rights. *Id.* at 781. The court rejected plaintiff's argument that the supervisors engaged in personal conduct when they "found out he had been removed from his position and refused to overrule the chief of his department and reinstate him." *Id.* That argument, it said, "would always permit an 'end run' around" the rule against *respondeat superior* liability: "To hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of

subordinates would simply smuggle *respondeat superior* liability into section 1983." *Id.* (citation and internal quotation omitted); *see also Gillette v. Delmore*, 979 F.2d 1342, 1347-48 (9th Cir. 1992) (per curiam) (city manager did not make city policy by declining to overrule subordinate's discretionary decision to fire plaintiff). Precisely the same rationale applies when a plaintiff seeks to impose liability on a senior state official for failing to overrule completed acts by his or her subordinate employees.

The Ninth Circuit's sharply divided decision provides only the latest illustration of the need for further guidance from this Court highlighted by other lower courts, many of which have "expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal*." *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 n.8 (3d Cir. 2010).[3] Indeed, at least one court has highlighted

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[3] *See also, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1194 (10th Cir. 2010) (noting the "important questions about the continuing vitality of supervisory liability under § 1983 after the Supreme Court's recent decision" in *Iqbal*); *see also id.* at 1208 (observing that "the standard for demonstrating that a supervisory official has caused a violation [of constitutional rights] is far from clear") (Tymkovich, J., concurring); *id.* at 1209 (suggesting that *Iqbal* "muddied further these already cloudy waters"); *Lewis v. Tripp*, 604 F.3d 1221, 1227 n.3 (10th Cir. 2010) (noting the "significant debate about the continuing vitality and scope of supervisory liability, not only in *Bivens* actions, but also in § 1983 suits"); *Maldonado v. Fontanes*, 568 F.3d 263, 274-75 n.7 (1st Cir. 2009) (noting that *Iqbal* "may call

the very issue presented here, noting that in light of *Iqbal*, "it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding [defendant] liable with respect to plaintiffs' Fourteenth Amendment claims." *Bayer v. Monroe*, 577 F.3d 186, 190 n.5 (3d Cir. 2009).

Even within the Ninth Circuit itself, *Iqbal* has given rise to conflicting rulings and prompted vigorous disagreement. *See Starr v. Baca*, 659 F.3d 850 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101 (2012), in which eight judges dissented from the denial of rehearing en banc, arguing that the majority opinion "conflicts with *Iqbal* in . . . its far-reaching conclusions regarding supervisory liability" and "resurrects a theory of supervisory liability for constitutional torts that the Supreme Court has foreclosed." *Starr v. County of Los Angeles*, 659 F.3d 850, 851, 855 (9th Cir. 2011) (O'Scannlain, J., dissenting); *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1141 (9th Cir. 2010) (asserting that the majority permits "[plaintiff] to seek damages from [the Attorney General] for his subordinates' alleged misconduct, a result indisputably at odds with *Iqbal*") (O'Scannlain, J., joined by seven circuit judges, dissenting from denial of rehearing en banc), *rev'd on other grounds*, *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011).

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into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability").

Review by this Court therefore is necessary both to resolve the conflict between the Ninth Circuit's ruling below and *Iqbal*, and to address the continuing conflict and uncertainty among the courts of appeals regarding the meaning and scope of the Court's decision in that case.[4]

II. THE NINTH CIRCUIT'S DECISION IMPOSING *RESPONDEAT SUPERIOR* LIABILITY UNDER SECTION 1983 ON STATE OFFICIALS WILL ADVERSELY AFFECT PUBLIC UNIVERSITIES.

A public university generally is considered an arm of the state entitled to Eleventh Amendment immunity from suits for damages in federal court. *See, e.g., Irizarry-Mora v. University of Puerto Rico*, 647 F.3d 9, 14 (1st Cir. 2011) ("The distinctive, public-oriented role that a state university typically

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[4] Commentators have expressed the view that the Ninth Circuit's decision in this case may give this Court an "opportunity to clarify the law on supervisory liability." Karen Blum, Celeste Koeleveld, Joel B. Rudin & Martin A. Schwartz, *Municipal Liability and Liability of Supervisors: Litigation Significance of Recent Trends and Developments*, 29 Touro L. Rev. 93, 116 & n.167 (2013); *see also* Comment, *Supervisory Liability after Iqbal: Decoupling* Bivens *from Section 1983*, 77 U. Chi. L. Rev. 1401, 1403, 1411, 1418 (2010) (arguing that since *Iqbal*, "a three-way circuit split" has developed over supervisory liability and that the Ninth Circuit has incorrectly construed *Iqbal*'s discussion of the issue as dicta).

plays in its state's higher education landscape undoubtedly accounts for the fact that the vast majority of state universities . . . have been found to be 'arms' of the State.") (citation and internal quotations omitted); *see also* 13 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, *Federal Practice and Procedure* § 3524.2, at 325-32 & n.42 (2008) (noting that "state universities usually are considered arms of the state").

Plaintiffs in disputes with public universities who wish to avoid state sovereign immunity, therefore, may choose to sue university officials directly, in their personal capacities, seeking damages.[5] For example, in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), survivors of student demonstrators killed by members of the Ohio national guard at Kent State University sued under Section 1983 for damages for deprivation of constitutional rights under color of state law. They named as individual defendants in the suit a number of state officials, including the president of the University. The district court dismissed the cases on the ground that they were effectively against the State of Ohio, and therefore barred by the Eleventh Amendment. The Court reversed, holding that "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that

[5] Suits against state officials in their official capacities are also barred by sovereign immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

they hold public office," and that such claims against state officials in their personal capacities are not barred on their face by the Eleventh Amendment. *Id.* at 238.[6]

Section 1983 claims are frequently brought against institutions of higher education and their leaders. Plaintiffs have asserted Section 1983 claims against university presidents and senior administrators in a wide variety of cases, including student discipline and sexual harassment claims, First Amendment disputes over speech on campus, faculty tenure and employment disputes, and claims of excessive force by campus police. What far too many of these cases have in common is that in each of them, private plaintiffs chose to bring damages claims under Section 1983 against individual university administrators who had no personal involvement in the alleged constitutional violations that gave rise to their claims.

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[6] Following a 15-week trial that resulted in a jury verdict for all defendants, the Sixth Circuit held that the plaintiffs were entitled to a new trial because at least one of the jurors had been threatened during the trial by a person interested in its outcome. *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977). However, the court found that because the university president's decision to ban the assembly did not violate plaintiffs' First Amendment rights, and the president had no control over the actions of the National Guard, all claims against him should be dismissed upon remand. *Id.* at 572.

For example, in *Hayut v. State Univ. of New York*, 352 F.3d 733 (2d Cir. 2003), a student alleged that her political science professor had made sexually charged comments to her in class that created a hostile educational environment, and brought Section 1983 equal protection claims against the professor and university officials, including the department chair and the dean and associate dean of the college. The court affirmed summary judgment in favor of the individual defendants other than the professor, noting that *respondeat superior* does not impose liability for damages under Section 1983 on a defendant acting in a supervisory capacity, and that there was no evidence that the university officials had directly participated in the harassment, or were grossly negligent in monitoring the professor's conduct. *Id.* at 753-54.

Similarly, in *Salehpour v. Univ. of Tenn.*, 159 F.3d 199 (6th Cir. 1998), a former dental student brought ethnic and disability discrimination and other claims against twenty university faculty members and administrators based on a dentistry college's enforcement of a rule against him barring first-year dental students from sitting in the last row of their classrooms. The court affirmed summary judgment for the university president and chancellor, observing that there was no evidence that either official had any personal involvement in the alleged constitutional violations. *Id.* at 206. Under the circumstances, the court emphasized, plaintiff's claims against the president and chancellor violated

the rule against *respondeat superior* liability under Section 1983. *Id.* at 206-07.

Other courts have reached similar conclusions in a wide variety of cases, including suits, like the ruling below, that involved First Amendment claims. *See, e.g., Jennings v. Univ. of No. Carolina at Chapel Hill*, 482 F.3d 686, 702 (4th Cir. 2007) (en banc) (affirming summary judgment for former chancellor and athletics directors on claim by female student athlete that she was sexually harassed by male coach of women's soccer team, where there was no evidence that university officials knew of coach's behavior or supported any official policy that enabled the harassment); *Galdikas v. Fagan*, 342 F.3d 684, 693-97 & n.8 (7th Cir. 2003) (affirming summary judgment for university president and trustees on former graduate students' First Amendment and retaliation claims arising out of protest at alumni events due to lack of evidence that individual defendants had any involvement in underlying events); *Alton v. Texas A&M Univ.*, 168 F.3d 196, 200-01 (5th Cir. 1999) (substantive due process claim arising out of hazing of student cadet against university officials including commandant of cadet corps and vice-president for student affairs; court found no evidence that officials were deliberately indifferent to plaintiff's rights); *Dube v. State Univ. of New York*, 900 F.2d 587, 599-600 (2d Cir. 1990) (acting chancellor's alleged "ratification and enforcement" of decision on former faculty member's appeal from denial of tenure in alleged violation of

First Amendment rights insufficient to give rise to Section 1983 liability); *Kline v. North Texas State Univ.*, 782 F.2d 1229, 1233-35 (5th Cir. 1986) (reversing $200,000 jury verdict in favor of former faculty member of medical school who alleged that defendants had forced him to quit his job in retaliation for exercise of his First Amendment rights, holding that plaintiff failed to prove that defendants, university president, academic and associate deans, and chief fiscal officer, had deprived him of any constitutional right).

The Ninth Circuit's ruling, which exposes senior state officials to liability under Section 1983 based on mere knowledge of alleged misconduct by subordinate employees, is irreconcilable with these decisions, which recognize that such a standard effectively equates to *respondeat superior* liability. Moreover, it can be expected to embolden plaintiffs routinely to name senior supervisory officials in their private capacities as defendants in § 1983 suits. Such a result threatens to have significant adverse effects on public universities and their leadership, for several reasons.

First, the decision below imposes an unrealistic standard on university administrators. University presidents and senior administrators, like senior government officials, preside over large institutions that often have tens of thousands of students, thousands of faculty members and employees, multiple campuses, and large numbers of

administrators.[7] Such officials receive myriad emails, telephone calls, and other communications from administrators, faculty members, students, legislators, alumni, and countless others. Such senior officials cannot possibly be expected to familiarize themselves with the minutiae of the numerous matters they necessarily delegate to their subordinates to handle. Yet under the Ninth Circuit's standard, if they fail to do so, they can be held personally responsible for their subordinates' alleged misconduct. Senior university administrators should not be forced to navigate between the Scylla of micromanaging their institutions and the Charybdis of personal liability for every misstep by an employee.

Second, forcing university administrators to defend Section 1983 lawsuits imposes very real costs, financial, reputational and otherwise, on them and their institutions. Even if a university administrator

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[7] Oregon State University, the institution involved in this case, has 12 colleges, 15 agricultural experiment stations, 35 county extension offices, over 26,000 students, and nearly 3,500 faculty. About OSU, *http://oregonstate.edu/main/about*. Other public universities are even larger. For example, the University of Texas at Austin, the Respondent in *Fisher v. University of Texas at Austin*, No. 11-345, includes 17 different colleges and schools, more than 50,000 students, and 24,000 faculty and staff. It is one of 15 institutions (nine universities and six health institutions) comprising the University of Texas System, which has a total enrollment of over 214,000 students. The University of Texas System Fast Facts 2012, *http://www.utsystem.edu/fastfacts*.

has no personal involvement in the events giving rise to a lawsuit, once named as a defendant, the administrator will be forced to retain counsel, to expend time and attention preparing for deposition, drafting affidavits, moving to dismiss or for summary judgment, etc. Particularly in an era of drastically declining state support for public education, in which public institutions and their administrators are increasingly expected to accomplish more with less, they should not be subjected to such unnecessary and costly burdens, which interfere with their ability to carry out their important public functions. As this Court recognized in *Iqbal*,

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counter-productive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

556 U.S. at 685.

This Court's jurisprudence, culminating in *Iqbal*, makes it crystal-clear that senior supervisors "are accountable for what they do, but they are not

vicariously liable for what their subordinates do." *Vance v. Rumsfeld*, 701 F.3d 193, 203 (7th Cir. 2012) (en banc), *pet. for cert. filed*, No. 12-976 (Feb. 5, 2013). While in "an ideal world" a senior official should achieve full compliance with federal law, "a public official's inability to ensure that all subordinate . . . employees follow the law has never justified personal liability." *Id.* "[H]eads of organizations have never been held liable on the theory that they did not do enough to combat subordinates' misconduct, and the Supreme Court made clear in *Iqbal* that such theories of liability are unavailing." *Id.* at 205. The Ninth Circuit's ruling, by subjecting supervisors to personal liability in damages on the sole basis of their knowledge of subordinates' alleged misconduct, threatens to embroil public university presidents and senior administrators in litigation over disputes for which they have no personal responsibility.

To be sure, *amici* acknowledge that government officials may be entitled to qualified immunity from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Wilson v. Layne*, 526 U.S. 603, 609, 614 (1999). However, the potential availability of a qualified immunity defense (and of an interlocutory appeal from the denial of such a defense) may be cold comfort indeed to a university president or senior administrator who

has been named as a party to a lawsuit concerning events in which he or she had no personal involvement. University administrators should not be forced to seek dismissal from a lawsuit to which they should not have been joined in the first place because they did not personally engage in conduct that deprived the plaintiff of constitutional rights, or caused such deprivation.

CONCLUSION

For the foregoing reasons, and those in the petition for a writ of certiorari, certiorari should be granted.

Respectfully submitted,

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May 29, 2013

ADDENDUM: *AMICI* ON THIS BRIEF

The American Council on Education (ACE) is a non-profit organization that was founded in 1918, whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. ACE represents all sectors of American higher education— public and private, large and small, and denominational and nondenominational. ACE strives to enhance the vitality and well-being of the nation's higher education institutions through advocacy, research, leadership, and program initiatives. ACE regularly submits amicus briefs in cases that raise legal issues important to higher education.

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.

The American Association of State Colleges and Universities (AASCU) is a higher education association of more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

The Association of American Universities (AAU) is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.

The Association of Governing Boards of Universities and Colleges (AGB) is the only national association that serves the interests of academic governing boards, boards of institutionally related foundations, and campus chief executive officers and other senior-level governance and leadership. AGB includes 1,900 institutions of higher learning and serves nearly 1,300 boards, both publicly supported and independent. The Association also serves more than 36,000 individuals, including trustees and regents, campus and public college and university foundation chief executive officers, board professionals and staff members and senior level administrators. AGB's mission is to strengthen, protect and advocate on behalf of citizen trusteeship in ways that support and advance higher education.

The Association of Public and Land-grant Universities (APLU) is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with

member campuses in all 50 states, U.S. territories, and the District of Columbia.