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**In The Supreme Court Of The United States**

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ED RAY AND MARK McCAMBRIDGE,

PETITIONERS,

v.

OSU STUDENT ALLIANCE; WILLIAM ROGERS,

RESPONDENTS.

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

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AMICUS BRIEF OF WASHINGTON STATE UNIVERSITY,  
UNIVERSITY OF WASHINGTON, UNIVERSITY OF  
OREGON, PORTLAND STATE UNIVERSITY,  
CALIFORNIA STATE UNIVERSITY, UNIVERSITY OF  
CALIFORNIA, UNIVERSITY OF IDAHO, BOISE STATE  
UNIVERSITY, UNIVERSITY OF MONTANA, MONTANA  
STATE UNIVERSITY, ARIZONA STATE UNIVERSITY,  
AND UNIVERSITY OF ARIZONA, IN SUPPORT OF  
PETITIONERS

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## INTEREST OF AMICI

Amici are large public universities in the Ninth Circuit.<sup>1</sup> Amici are concerned that the Ninth Circuit's incorrect and overly expansive application of individual liability under 42 U.S.C. § 1983 will have a severe and negative impact on the management and functioning of the universities and on the students and public they serve.

The Ninth Circuit's decision also improperly exposes elected state officials and the leaders of large public agencies and municipalities to individual liability without individual culpability. This brief focuses on the particularly acute consequences in the context of public universities such as Amici.

## SUMMARY OF ARGUMENT

Petitioners' brief in support of certiorari describes the flaws in the Ninth Circuit's reasoning and the conflict between the circuit courts in their interpretations of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Amici fully support petitioners' legal arguments. This brief, in contrast, focuses on the public policy implications of the Ninth Circuit's decision, which are serious and far-reaching.

The Ninth Circuit's decision imposes individual liability on university leaders for having mere knowledge of an action alleged to have been a First Amendment free speech violation. By doing so,

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<sup>1</sup> Counsel of Record for all parties have been notified of the intent to file this amicus brief and all parties have consented. No Counsel of Record for any party has authored any portion of this brief, nor paid any amount toward its production.



it discourages the internal communication that is critical to effective university governance and decision making. The decision also punishes university leaders for being accessible and responsive to the university community, to the detriment of students and the public. The disincentives created by the decision are particularly harmful in light of the enormous financial and regulatory burdens currently faced by these institutions, which now more than ever need effective and responsive leadership to continue to thrive and survive, and serve the needs of students, their respective States, and the Nation.

## ARGUMENT

### A. Public Universities Are A Focal Point For Litigation Of Constitutional Rights

The Ninth Circuit's decision has a particular impact on public universities, which have played a pivotal role in the development of First Amendment jurisprudence because of the relative frequency of these types of claims in the university context. See, e.g., *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (First Amendment challenge to statute requiring universities to allow military recruiters access to campus and students as condition for federal funds); *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217 (2000) (First Amendment challenge to mandatory student activity fee); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (First Amendment challenge to public employee union dues); *Univ. of Penn. v. Equal Empl. Opportunity Comm'n*, 493 U.S. 182 (1990) (First Amendment challenge to disclosure of faculty

peer review materials); *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (First Amendment challenge to university's refusal to allow product demonstrations in dormitory rooms). As places of learning and exploration that focus on the free exchange of ideas, conflict and perceived conflict among internal and external groups with differing views is inevitable, as is concern about how university rules, officials, and policies relate to these groups.

Add to this mix the principles of academic freedom and tenure, a diverse and politically active mix of constituents, and the desire of outside groups to have access to students for recruiting and dissemination of their ideas, and it is easy to see why universities are the birthplace of so much constitutional litigation. This Court has recognized that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'" warranting special consideration in constitutional cases. *Healy v. James*, 408 U.S. 169, 180 (1972). In short, First Amendment concerns and claims are simply part of the landscape of a large public university. This context is important for understanding the extent of the impact of the Ninth Circuit's decision here.

**B. The Ninth Circuit's Incorrect Application Of *Iqbal* Greatly Expands Individual Liability Of University Leaders For Constitutional Claims**

In this case, the Ninth Circuit held that knowledge of an alleged First Amendment free speech violation, without more, is sufficient to

impose individual liability on a university leader under 42 U.S.C. § 1983. *OSU Student Alliance v. Ray*, 699 F.3d. 1053, 1073 (9th Cir. 2012) (“[W]e conclude that knowledge suffices for free speech violations under the First and Fourteenth Amendments.”). The President of Oregon State University had no involvement in the alleged constitutional violation. His only participation in the matter was a brief email exchange with the student editor of the newspaper, who complained that the publication’s news bins had been removed. *Id.* at 1059. The President replied briefly to the student’s email, appropriately referring him to the administrators who oversee those areas of the university. *Id.* The Ninth Circuit held that mere knowledge was sufficient to subject the President to individual liability under Section 1983. *Id.* at 1073.

The Ninth Circuit’s imposition of personal liability on the President, based only on his knowledge of the alleged episode, constitutes a significant expansion of individual liability in the university context. It rests on a fundamental misunderstanding of the role and function of a university president.

Amici universities have campuses with tens of thousands of students, many of whom live on campus. Most Amici have multiple campuses and remote facilities. They employ thousands of faculty and staff. They serve and interact with numerous other constituents such as parents, alumni, donors and grantors, athletic fans, vendors, contractors, legislators, community leaders, and outside groups and individuals with various affiliations and interests. Many of these constituents are highly

engaged in university matters and are vocal and communicative with university leadership when issues or perceived issues arise. Students, parents, employees, members of the public, and others regularly contact leaders via email, telephone, online, and in person with concerns, complaints, criticisms, and questions.

Under the Ninth Circuit's decision, any one of these types of daily contacts could now result in a university leader being held individually liable under Section 1983. A plaintiff would need to show only that the president received a communication regarding a concern with First Amendment implications. Merely acknowledging that a communication was received or referring the individual to the appropriate university employee to handle the issue could put the president at risk legally. Indeed, a president need not even respond to the communication—a computer log showing the email was opened could demonstrate knowledge sufficient to support individual liability in the Ninth Circuit.

Knowledge sufficient to establish individual liability could result even from brief informal conversations. The president's role as the face of the university ensures these types of exchanges occur frequently. Individual constituents often approach presidents and other university leaders at public events and other venues to air various issues. "Face time" with constituents, meetings with subordinates, awareness of university issues and events, and responsiveness to communications are critical components of the role of a university leader. The Ninth Circuit's decision indicates that even a single

brief interaction in any of these contexts could be sufficient to impose individual liability on a university president.

For these reasons, the Ninth Circuit's decision greatly expands the potential for individual liability for university leaders. This expansion is not only contrary to this Court's holding in *Iqbal* and the holdings of other circuits, as explained in the petition—it potentially has severe consequences for university governance.

**C. The Ninth Circuit's Expansion Of Supervisory Liability Has Significant Negative Consequences For Amici Universities And The Students And Public They Serve**

The Ninth Circuit's decision presents university leaders with two equally unacceptable options if they are to avoid individual liability: either they must actively direct the minutia of day-to-day university activities and operations to protect against possible First Amendment violations, or they must affirmatively remain ignorant of events unfolding within their institution and unavailable to their constituents to avoid exposure to "mere knowledge" (see *OSU Student Alliance*, 699 F.3d at 1081 (Ikuta, J., dissenting)). As explained below, neither choice is feasible or in the best interests of the universities, their students and other constituents, or the States and Nation that depend on the universities for the education and training of their workforce.

Amici universities are large and geographically diverse, with branch campuses, research

programs, and offices statewide, nationwide, and worldwide. These universities engage in a vast array of activities from the very simple to the very complex. They support research and teaching in many diverse scientific and technical academic areas; instruct students in the full range of human knowledge, culture, experience, and endeavor; operate study-abroad programs in countries across the globe; provide housing and other services to students, such as health care, athletics, career services, and recreation; provide outreach services to the public through county extension programs; operate campus security and police substations; and serve communities with state-of-the-art medical clinics, hospitals, and veterinary clinics.

No university president could successfully micromanage such a large, diverse institution. Senior leaders must be able to rely on subordinates to manage issues within their purview. As in this case, a university president must be able to reasonably assign specific management responsibilities—such as allowing the facilities director to manage an issue involving the location of newspaper bins—without exposure to Section 1983 liability for the individual decision-making of a subordinate.

At the same time, proper governance of the institution requires senior administrators to be aware of university issues and requires them to be accessible to students and other constituents, which exposes them on a daily basis to complaints alleging wrongdoing by the institution or by groups or individuals affiliated with the institution, including claims of potential free speech violations. If, as the

Ninth Circuit's decision requires, a university president must actively manage every matter of which he or she receives mention or else face possible Section 1983 liability if the matter is mismanaged, no president could function. The threat of individual liability for mere knowledge of alleged unconstitutional conduct would grind leadership of the institution to a halt.

The Ninth Circuit appears not to have understood the modern role of the university president. Due in part to declining state support, university presidents, by necessity, spend much of their time on fundraising and external efforts, such as attending events and meeting with donors. They also must spend considerable time meeting with lawmakers to secure state funding, make university priorities known, and ensure that lawmakers understand and take into consideration the critical importance these institutions have to the future of their States. These activities necessitate frequent absences from the campus, which means day-to-day university operations often must be managed by other administrators. A recent white paper summarized the situation as follows:

Now more than ever, finances dominate what college presidents think about on a daily basis, whether their concern is raising more money or managing budgets. In an extensive survey of chief executives of four-year campuses conducted by The Chronicle of Higher Education in January 2013, two items accounted for more than half the time on the presidents' daily agendas: fund raising and budgets.

Chronicle of Higher Education, Jeffrey L. Selingo, *What Presidents Think: A 2013 Survey of Four-Year College Presidents* at 4, available at <http://results.chronicle.com/PresSurveyP1?elid=CLP2013print>. Under these circumstances, it is simply not feasible or in the best interests of the institutions or the public they serve for a president to have the extraordinary level of detailed involvement in daily university matters that the Ninth Circuit's decision would require to avoid Section 1983 liability.

The other alternative is for the university president to be essentially unavailable to individual students, employees, and members of the public. By doing so, the president could avoid inadvertently becoming aware of an issue that subsequently develops into a free speech or other constitutional claim. This approach, of course, is irresponsible. It also runs contrary to the core of the president's role as the face of the university, as well as the expectations of the university community and the public. As discussed above, students, parents, and others demand and deserve responsive leadership, even if the particular issue they raise appropriately is resolved by a lower-level administrator.<sup>2</sup>

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<sup>2</sup> See Bryan J. Cook, *The American College President Study: Key Findings and Takeaways* (2012 Spring Suppl.), <http://www.acenet.edu/the-presidency/columns-and-features/Pages/The-American-College-President-Study.aspx> (last visited May 21, 2013) ("Rapidly ballooning enrollments, escalating fiscal pressures, the change engines of technological advances, a wide array of constituents, and a tumultuous political climate all make it more important than ever for college and university presidents to understand and be responsive to their



Most importantly, to expect senior leadership to actively remain ignorant of developing matters or to avoid contact with constituents would deprive the institution of the leadership skills for which they are employed. If the primary goal of Section 1983 is to prevent constitutional violations, a decision that encourages senior administrators to shield themselves from liability by staying in the dark regarding university matters runs contrary to that goal.

A university president who engages in or approves of conduct that violates someone's First Amendment right to free speech appropriately may be subject to liability under Section 1983. But liability should not attach for mere knowledge—which may be incomplete or inaccurate—of someone else's alleged conduct. The Ninth Circuit's decision creates unreasonable and unwarranted burdens on university administrators at a particularly sensitive time for institutions of higher education, without any meaningful increase in protection for speech under the First Amendment. Institutions are experiencing record growth, declining budgets and state support, and an increased regulatory burden. University presidents should not be faced with the choice of either micromanaging their institutions or staying willfully ignorant of matters within the university.

### CONCLUSION

The Court should grant certiorari. The Ninth Circuit's decision hinders the effective management

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communities and the contexts in which higher education takes place.”).

of Amici universities, creates additional and unreasonable burdens on their leaders, and results in a significant detriment to the students and public they serve. The issues presented by the petition for certiorari are serious and far-reaching, and warrant the Court's attention.

RESPECTFULLY SUBMITTED.

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