No. 23-3196

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JASON J. KILBORN,
Plaintiff-Appellant

v.

MICHAEL AMIRIDIS, CARYN A. BILLS, JULIE M. SPANBAUER, DONALD KAMM, and ASHLEY DAVIDSON,
Defendants-Appellees

On Appeal From the United States District Court
for the Northern District of Illinois (Eastern)
Case No. 1:22-cv-00475
Honorable Sara L. Ellis, Judge Presiding

DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

John F. Kennedy (jkennedy@taftlaw.com)
Elizabeth E. Babbitt (ebabbitt@taftlaw.com)
Paul J. Coogan (pcoogan@taftlaw.com)
Andrew S. Murphy (amurphy@taftlaw.com)
Elizabeth A. Winkowski (ewinkowski@taftlaw.com)
Taft Stettinius & Hollister LLP
111 East Wacker Dr., Suite 2600
Chicago, IL 60601
Telephone: (312) 527-4000

Attorneys for Defendants-Appellees

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3196

Short Caption: Jason Kilborn v. Michael Amiridis, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Michael Amiridis, Caryn A. Bills, Julie M. Spanbauer, Donald Kamm, and Ashley Davidson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: John F. Kennedy Date: March 27, 2025

Attorney's Printed Name: John F. Kennedy

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

Address: Taft Stettinius & Hollister, LLP, 111 E. Wacker Drive, Suite 2600, Chicago, Illinois 60601

Phone Number: (312) 527-4000 Fax Number: (312) 527-4011

E-Mail Address: jkennedy@taftlaw.com

rev. 12/19 AK

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3196

Short Caption: Jason Kilborn v. Michael Amiridis, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Michael Amiridis, Caryn A. Bills, Julie M. Spanbauer, Donald Kamm, and Ashley Davidson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Andrew S. Muprhy Date: March 27, 2025

Attorney's Printed Name: Andrew S. Muprhy

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

Address: Taft Stettinius & Hollister, LLP, 111 E. Wacker Drive, Suite 2600, Chicago, Illinois 60601

Phone Number: (312) 527-4000 Fax Number: (312) 527-4011

E-Mail Address: amurphy@taftlaw.com

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3196

Short Caption: Jason Kilborn v. Michael Amiridis, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Michael Amiridis, Caryn A. Bills, Julie M. Spanbauer, Donald Kamm, and Ashley Davidson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Elizabeth A. Winkowski Date: March 27, 2025

Attorney's Printed Name: Elizabeth A. Winkowski

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

Address: Taft Stettinius & Hollister, LLP, 111 E. Wacker Drive, Suite 2600, Chicago, Illinois 60601

Phone Number: (312) 527-4000 Fax Number: (312) 527-4011

E-Mail Address: ewinkowski@taftlaw.com

rev. 12/19 AK

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3196

Short Caption: Jason Kilborn v. Michael Amiridis, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Michael Amiridis, Caryn A. Bills, Julie M. Spanbauer, Donald Kamm, and Ashley Davidson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Paul J. Coogan Date: March 27, 2025

Attorney's Printed Name: Paul J. Coogan

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

Address: Taft Stettinius & Hollister, LLP, 111 E. Wacker Drive, Suite 2600, Chicago, Illinois 60601

Phone Number: (312) 527-4000 Fax Number: (312) 527-4011

E-Mail Address: pcoogan@taftlaw.com

rev. 12/19 AK

Save As Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3196

Short Caption: Jason Kilborn v. Michael Amiridis, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Michael Amiridis, Caryn A. Bills, Julie M. Spanbauer, Donald Kamm, and Ashley Davidson

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister, LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Elizabeth E. Babbitt Date: March 27, 2025

Attorney's Printed Name: Elizabeth E. Babbitt

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

Address: Taft Stettinius & Hollister, LLP, 111 E. Wacker Drive, Suite 2600, Chicago, Illinois 60601

Phone Number: (312) 527-4000 Fax Number: (312) 527-4011

E-Mail Address: ebabbitt@taftlaw.com

rev. 12/19 AK

TABLE OF CONTENTS

Page

RULE 40 STATEMENT IN SUPPORT OF REHEARING EN BANC 1

BACKGROUND 4

I. Kilborn's Exam Question 4

II. Kilborn's Emails with Former Student 5

III. Kilborn's Meeting with BLSA Student 5

IV. University Response to Kilborn's Behavior and Threats 6

V. The Litigation 8

ARGUMENT 9

I. The panel's holding and analysis denying qualified immunity on Kilborn's retaliation claim conflict with the precedents of this Court and the Supreme Court 9

II. The Opinion raises, but does not answer, questions of exceptional importance regarding the limits of public university professors' First Amendment rights 18

CONCLUSION 22

TABLE OF AUTHORITIES

City of Tahlequah v. Bond, 595 U.S. 9 (2021) 1

Demers v. Austin, 746 F.3d 402 (9th Cir. 2014) 14

Doe v. Purdue Univ., 928 F3d 652 (7th Cir. 2019) 16

Felton v. Brown, 129 F.4th 999 (7th Cir. 2025) 16

Garcetti v. Ceballos, 547 U.S. 410 (2006) 2, 9, 14, 15, 16

Keen v. Penson, 970 F.2d 252 (7th Cir. 1992) 13

Kisela v. Hughes, 584 U.S. 100 (2018) 10, 11

Kilborn v. Amridis, et al., No. 23-3196, ___ F.4th __,
2025 WL 783357 (7th Cir. Mar. 12, 2025) ..... *passim*

Omosegbon v. Wells, 335 F.3d 668 (7th Cir. 2003) 13

Piggee v. Carl Sanburg Coll., 464 F.3d 667 (7th Cir. 2006) 12, 13

Plumhoff v. Rickard, 572 U.S. 765 (2014) 12

Sabo v. Erickson, 128 F.4t 836 (7th Cir. 2025) 1, 10, 12, 14, 17

Zigler v. Abassi, 582 U.S. 120 (2017) 11

Wozniak v. Adesida, 932 F.3d 1008 (7th Cir. 2019) 17

Hatcher v. Bd. of Trs. of S. Ill. Univ., 829 F.3d 531 (7th Cir. 2016) 17

RULE 40 STATEMENT IN SUPPORT OF REHEARING EN BANC

On March 12, 2025, a panel of this Court held that Plaintiff-Appellant Jason Kilborn ("Kilborn") plausibly stated a claim for First Amendment retaliation, and that Defendants-Appellees ("Defendants") were not entitled to qualified immunity on that claim. *Kilborn v. Amiridis, et al.*, No. 23-3196, -- F.4th-- , 2025 WL 783357, at *4-5 (7th Cir. Mar. 12, 2025) (hereinafter, the "Opinion"). Defendants respectfully request that this Court rehear this case en banc for two reasons.

First, the panel's holding that Defendants are not entitled to qualified immunity conflicts with this Court's recent en banc decision in *Sabo v. Erickson*, 128 F.4th 836 (7th Cir. 2025), which reaffirmed that clearly established law must be particularized to the facts of each case. Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions. In *Sabo*, this Court reiterated the Supreme Court's oft-repeated instruction "not to define clearly established law at too high a level of generality." 128 F.4th at 844 (quoting *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021)). Here, however, the panel relied

exclusively on cases that recognize only a generalized right to "academic freedom." It did not cite any cases "specific to the relevant factual context" presented by Kilborn's allegations, especially those involving Kilborn's out-of-classroom speech, that would have put "every reasonable official" on notice that Defendants' actions in this case were unconstitutional. *See id.* at 843-44. Significantly, the Opinion represents the *first time* this Court has ever held that the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), does not apply to public university professors. *Kilborn*, 2025 WL 783357 at *4. The novelty of that holding itself demonstrates that the specific rights at issue were not clearly established at the relevant time.

Second, this Court should hear the case en banc because the Opinion raises, without answering, questions of exceptional importance that will have sweeping implications for university officials. For example, what are the limits of First Amendment protection on a professor's out-of-classroom speech? Relatedly, are all statements by professors, in or out of the classroom, automatically protected if they are arguably related to a "public discussion?" If so, can qualified immunity ever shield University officials

from suit when they regulate harassing speech? Or, as the Opinion suggests, is the *Pickering* balancing test always required?

In its discussion of Kilborn's retaliation claim, the panel failed to analyze much of Kilborn's out-of-classroom speech, most notably his comment to a student that he might become "homicidal" and his thinly veiled threats to a former student during a private email exchange. Nonetheless, the panel held that all of Kilborn's speech, in or out of the classroom, "falls comfortably within the core of what constitutes university teaching and scholarship." *Id.* at *5. The Opinion offers no limiting principles on this exceedingly broad interpretation of what constitutes protected academic speech. The Opinion leaves open issues of exceptional importance to public university officials who seek to maintain a safe workplace for their employees and a safe learning environment for their students. Rehearing en banc is necessary to answer these open questions.

BACKGROUND

I. Kilborn's Exam Question

In December 2020, Kilborn's Civil Procedure II final exam contained a hypothetical question (the "Exam Question") regarding a woman suing her employer for race and gender discrimination. (R.47 ¶¶ 7, 15.)[1] The Exam Question stated that the employee "quit her job at Employer after she attended a meeting in which other managers expressed their anger at Plaintiff, calling her a 'n_____' and 'b____' (profane expressions for African Americans and women) and vowed to get rid of her." (*Id.* ¶ 15.) Following the exam, the law school dean informed Kilborn that multiple students were upset by the racial epithet in the Exam Question. Kilborn told the dean that he had used the Exam Question before and that the epithets were expurgated. (*Id.* ¶ 17.) On December 24, 2020, the UIC Black Law Students Association ("BLSA") circulated the BLSA Letter, signed by various students, objecting to the exam question. (R.47-1 at 421.)

[1] References to the District Court Docket are abbreviated "R." Page numbers are the "PageID" numbers applied by the District Court.

II. Kilborn's Emails with Former Student

On January 4, 2021, Kilborn emailed a student to criticize her support for the BLSA Letter. (*Id.* at 428.) Kilborn wrote,"[c]an't tell you how painful it was to see your name on BLSA's attack letter against me." (*Id*.) Kilborn castigated this student for signing that "horrible, horrible letter," remarking it was "[s]uch a shame to see all of my efforts to comfort and encouragement, as you acknowledge below, only to be now vilified in the most vicious, cruel, and uncompassionate way. I feel like my extended hand of help has been bitten off." (*Id*.) Kilborn later complained to the same student that he was being made "into a villain." (*Id*. at 427.)

III. Kilborn's Meeting with BLSA Student

On January 7, 2021, Kilborn arranged to speak with a BLSA student about the Exam Question over Zoom. (R.47 ¶ 19.) During that meeting, the BLSA student asked why the dean had not shown Kilborn the BLSA Letter. (*Id.* ¶ 20.) Kilborn responded by speculating that the dean did not show Kilborn the BLSA Letter because she was afraid Kilborn would "become homicidal" if he saw the letter. (*Id*.) Kilborn also referred to students who

objected to his Exam Question as "enemies," twice accused the BLSA student of calling Kilborn a "liar," and expressed his "desire to go after people who 'come at [him].'" (R.471-1 at 422.) Kilborn did not dispute his "homicidal" remark, claiming it was a "joke." (R.47 ¶ 20.)

IV. University Response to Kilborn's Behavior and Threats

Kilborn's threats were reported to the University on January 10, 2021. The next day, the University initiated a behavioral threat assessment of Kilborn as required by its Violence Prevention Plan and Illinois law. (*Id*. ¶ 22.) Kilborn was advised that he was being assessed because of "additional complaints and concerns brought forth by students regarding possible violations of University policies, including the nondiscrimination statement." (*Id.* ¶ 25.) Per established protocol, Kilborn was examined by University health officials and submitted to drug testing. (*Id.* ¶ 28.) While Kilborn was evaluated, his contact with students and colleagues was temporarily restricted, and, as a result, his classes (scheduled to commence the next day), were reassigned. (*Id.* ¶ 23.) Kilborn was released to unrestricted duty a few days later. (*Id*. ¶ 28.)

Six students and a faculty member subsequently complained to the University of Kilborn's race-based harassment of students between January 2020 and January 2021. (R.47-1 at 420.) The University thoroughly investigated those complaints, and on May 28, 2021, the University issued its "Findings Letter." (*Id*. at 421-23.) The Findings Letter concluded that Kilborn's conduct "*considered cumulatively and particularly with respect to the manner of [his] responses to criticism of the [Exam Question]*, was sufficiently substantial and repeated that it interfered with Black students' participation in the University's academic program and therefore constituted harassing conduct that violates the Policy." (*Id*. at 421-22 (emphasis added).)

The Findings Letter explained that Kilborn had responded to criticism of the Exam Question by expressing "anger and displeasure with students' objections." (R.47-1 at 421-22.) In addition to the interactions described in Sections II and III above, the Findings Letter also identified "multiple, inappropriate, racially-charged comments" Kilborn made during a January 2020 class, including Kilborn's making references to "cockroaches" and "lynching," "using an African American Vernacular English ('AAVE')

accent while referencing a Black artist's lyrics," and a confrontation with a Black student about his "overgeneralizing references to minorities." (*Id*. at 421-22.)

Based on the Findings Letter, Kilborn was directed to report any future complaints of racial or ethnic harassment to the Dean, and to have his classes audio-recorded and reviewed by the law school. (R.47-1 at 429.) Kilborn was also directed to participate in a training course before returning to the classroom. (R.47 ¶ 45.) Kilborn returned to teaching in the Fall of 2022. (R.47 ¶¶ 50-51; R.30-2 at 227.) At all times, Kilborn maintained his full salary and benefits. (R.56-1 at 503.)

V. The Litigation

Kilborn sued Defendants in both their official and individual capacities. He asserted claims for First Amendment retaliation, unlawful compelled speech, and violation of his procedural due process rights, and a claim that the University's Nondiscrimination Policy is unconstitutionally vague. (R.47.) Kilborn also asserted state law claims for defamation and false light. (*Id.*) Defendants filed a Rule 12(b)(6) motion. (R.56.) The District Court

dismissed Kilborn's federal claims with prejudice and relinquished jurisdiction over the state law claims. Kilborn appealed.

On March 12, 2025, a panel of this Court affirmed the dismissal of Kilborn's compelled speech, due process, and vagueness claims. *Kilborn*, 2025 WL 783357 at *1. However, it reversed and remanded Kilborn's retaliation claim, finding that Kilborn had plausibly stated a claim and that Defendants are not entitled to qualified immunity. *Id.* at *4-7.

ARGUMENT

I. The panel's holding and analysis denying qualified immunity on Kilborn's retaliation claim conflict with the precedents of this Court and the Supreme Court.

The Opinion held that Defendants are not entitled to qualified immunity on Kilborn's claim that Defendants improperly retaliated against him for engaging in speech protected by the First Amendment. *Kilborn*, 2025 WL 783357 at *4-5. The panel reached this conclusion by reasoning that this Court's pre-*Garcetti* cases clearly established a generalized right to "academic freedom" that covers all of Kilborn's speech, including his antagonistic comments made in private conversations outside the classroom.

That holding and reasoning conflict with well-established qualified immunity principles prescribed by this Court and the Supreme Court, as recently set forth in this Court's en banc decision in *Sabo*.

To overcome qualified immunity, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Sabo*, 128 F.4th at 843 (cleaned up). A constitutional right is "'clearly established' when the law is sufficiently clear that every reasonable official would understand what he is doing is unlawful." *Id.* at 843-44 (cleaned up). "In other words, to clearly establish a right, existing precedent must place the constitutional or statutory question 'beyond debate.'" *Id.* at 844 (quoting *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)). Most importantly, *Sabo* emphasized that "[l]itigants and courts formulate rules of law too generally if the unlawfulness of the [state official's] conduct does not follow immediately from the conclusion that the rule was firmly established." *Id.* (cleaned up). While it is true that "existing precedent need not be directly on point to clearly establish a right," the "Supreme Court has explained that qualified immunity's 'clearly

established' requirement protects officials accused of violating extremely abstract rights." *Id.* at 844-45 (quoting *Ziglar v. Abassi*, 582 U.S. 120, 151 (2017)).

The Opinion conflicts with these well-established principles to the extent the panel held that Kilborn had a "clearly established" constitutional right to engage in all of the speech at issue, including the speech that occurred outside the classroom. More specifically, the Opinion conflicts with the qualified immunity precedents of this Court and the Supreme Court because it did not demonstrate, or even analyze whether, existing precedent placed the relevant constitutional question "beyond debate." *See id.* at 844; *see also Kisela*, 584 U.S. at 104.

According to the Opinion, qualified immunity could not apply because "it was clearly established that the *Connick-Pickering* test offered qualified protection to public employees, including professors at public universities." *Kilborn*, 2025 WL 783357, at *4. The panel explained that Kilborn's rights were clearly established "in this context" because this Court has previously "recognized that a college or university 'instructor's freedom

to express [his] views on [an] assigned course is protected.'" *Id.* (quoting *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006)). But none of the cases cited in the Opinion (or by Kilborn) would have put Defendants on notice that their actions were unlawful "in the particular circumstances that [they] faced." *See Sabo*, 128 F.4th at 844 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). The Opinion's holding that Kilborn had a clearly established right to "academic freedom in this context," without any explanation of what "this context" is, or how his out-of-classroom speech falls within the bounds of "academic freedom," conflicts directly with the Supreme Court's admonition "not to define clearly established law at too high a level of generality." *Bond*, 595 U.S. at 12.

Notably, the panel correctly applied this principle in affirming that Defendants were entitled to qualified immunity on Kilborn's compelled speech claim, carefully distinguishing the factual contours of various cases Kilborn cited. *Kilborn*, 2025 WL 783357, at *9. In contrast, as to the retaliation claim, the panel rejected qualified immunity by pointing to three cases that do not present analogous facts and that discuss the right to "academic

freedom" only in high-level generalities. *Kilborn*, 2025 WL 7833357 at *4 (citing *Keen v. Penson*, 970 F.2d 252, 257-58 (7th Cir. 1992); *Omosegbon v. Wells*, 335 F.3d 668, 676-77 (7th Cir. 2003); and *Piggee*, 464 F.3d at 671). Moreover, in all three cases, this Court *rejected* the First Amendment claims advanced by the professor plaintiffs. *See Keen*, 970 F.2d at 257-58 (noting that "[a]cademic freedom prohibits state actions that cast a pall of orthodoxy over the classroom," but holding that plaintiff's speech was unprotected because he "abused his power as a professor in his dealings with his former student"); *Omosegbon*, 335 F.3d at 676-77 (finding that plaintiff's academic freedom claim failed "because he did not allege that he was ever restricted from or sanctioned for speaking publicly about an issue"); *Piggee*, 464 F.3d at 671-72 (acknowledging that "instructor's freedom to express her views on the assigned course is protected," but concluding speech at issue was unprotected because it "was not related to her job of instructing students"). The particular facts of those cases did not clearly establish Kilborn's First Amendment right to engage in all of the speech at issue here, and they

certainly did not put the unconstitutionality of Defendants' responses to Kilborn's harassing speech "beyond debate."

The Opinion recognizes that "[i]n some cases, there may be genuine uncertainty about whether the speech at issue falls within *Garcetti*'s exception for university teaching or scholarship." *Kilborn*, 2025 WL 783357 at *5 (citing *Demers v. Austin*, 746 F.3d 402, 406-10, 417 (9th Cir. 2014)). But, the panel did not even attempt to explain how Kilborn's threats to students fall within the realm of "university teaching and scholarship," much less how Defendants could have been on notice that such a determination was "beyond debate." *See Sabo*, 128 F.4th at 844.

The panel also failed to acknowledge the dispositive importance of the fact that this Court had *never* held—until the Opinion—that *Garcetti* does not apply to public university professors. *Kilborn*, 2025 WL 783357 at *4; *see also* App. Dkt. 18 at 34 (Kilborn's opening brief, conceding that "[t]his Court has not expressly decided whether *Garcetti* applies to a public university professor's speech related to scholarship or teaching"). In *Demers*, one of the out-of-circuit decisions cited by Kilborn for the proposition that *Garcetti* does

not extend to teaching or academic speech, the Ninth Circuit granted qualified immunity to university officials for this precise reason. As the Ninth Circuit correctly held in granting the officials qualified immunity, "because there is no Ninth Circuit law on point to inform defendants about whether or how *Garcetti* might apply to a professor's academic speech, we cannot say that the contours of the right in this circuit were 'sufficiently clear that every reasonable official would have understood' that this conduct violated that right." 746 F.3d at 417. The same is true here.

There is an irreconcilable contradiction between the panel concluding, for the first time in this Circuit, that *Garcetti* does not apply in this context, and the panel simultaneously holding that Kilborn's right to engage in the speech at issue was already clearly established. This Court's previous recognition of a professor's generalized right to "academic freedom" did not sufficiently define the contours of that right such that Defendants could know that Kilborn's out-of-classroom harassing speech was protected academic speech. Kilborn's allegations, especially those related to his out-of-classroom speech, do not present "the type of 'obvious' First Amendment

violation that would preclude qualified immunity." *Felton v. Brown*, 129 F.4th 999, 1013 (7th Cir. 2025). The Opinion's brand new pronouncement that *Garcetti*'s holding does not apply to university professors only underscores that conclusion. *See, e.g.*, *Doe v. Purdue Univ.*, 928 F.3d 652, 665-66 (7th Cir. 2019) (affirming grant of qualified immunity where Seventh Circuit had never previously applied its "well-settled" "general stigma-plus test" for alleging due process claims "specifically in the university setting").

Even in *Piggee*, one of the cases the panel cited to support its "clearly established" finding, this Court acknowledged professors' rights "to engage in academic debates, pursuits, and inquiries," while also noting that *Garcetti* "signal[ed] the [Supreme] Court's concern that courts give appropriate weight to the employer's interests." 464 F.3d at 672. That discussion makes clear that, even after *Garcetti*, there remained open questions in this Circuit about *Garcetti*'s applicability and the boundaries of what constitutes an "academic debate." This lack of clarity in this Court's law is further confirmed by more recent cases in which this Court applied *Garcetti* to hold that a university professor's job-related speech was not protected. *See*

Wozniak v. Adesida, 932 F.3d 1008, 1010 (7th Cir. 2019); *Hatcher v. Bd. of Trs. of S. Ill. Univ.*, 829 F.3d 531, 539-40 (7th Cir. 2016).

As the en banc Court in *Sabo* firmly reiterated, "qualified immunity's 'clearly established' requirement protects officials accused of violating extremely abstract rights." *Sabo*, 128 F. 4th at 845 (cleaned up). Contrary to *Sabo*, the Opinion's "clearly established" analysis is rooted in an abstract right to "academic freedom" that reaches far beyond the classroom. The Opinion does not rely on, and Kilborn did not cite, any precedent, either from this Court or the Supreme Court, that places the unconstitutionality of Defendants' actions in response to Kilborn's out-of-classroom harassing speech "beyond debate." To the contrary, by holding that Kilborn's harassing speech made during private conversations with students "falls comfortably within the core of what constitutes teaching and scholarship," the panel has further confused the ongoing debate regarding how far a public university professor's abstract right to "academic freedom" may extend beyond the classroom.

The purpose of qualified immunity is to "safeguard government and the public at large" by shielding officials from the "fear of liability or insubstantial lawsuits." *Sabo*, 128 F.4th at 843 (cleaned up). Rather than furthering that goal, the Opinion's treatment of qualified immunity will ensure that public university officials who are charged with enforcing anti-harassment policies to maintain a harassment-free learning environment are subjected to suit. Respectfully, the panel's holding that Kilborn had a clearly established right to engage in all of the speech at issue, based on its generalized characterization of an abstract right to "academic freedom," conflicts with the qualified immunity precedents of this Court and the Supreme Court. Defendants therefore request that this Court rehear this case en banc to resolve that conflict.

II. The Opinion raises, but does not answer, questions of exceptional importance regarding the limits of public university professors' First Amendment rights.

Throughout its analysis of Kilborn's retaliation claim, the panel treated all of the speech at issue in the same way. The Opinion offers no distinction between Kilborn's in-class speech and his private expression of his own

personal feelings to students that occurred outside the classroom. Indeed, the Opinion does not even mention Kilborn's out-of-classroom speech in holding that Kilborn's First Amendment rights were clearly established. It does not attempt to draw any lines or provide any guidance as to how a public university official should determine whether a professor's speech is protected by the First Amendment, particularly when it occurs outside the classroom. As such, the Opinion creates questions of exceptional importance to public university officials regarding their ability to regulate their employees' speech in order to maintain a harassment-free workplace and learning environment.[2]

For example, what are the limits of First Amendment protection on a professor's out-of-classroom speech? In its analysis of Defendants' qualified immunity defense, the panel concluded, without explanation, that all of Kilborn's speech "falls comfortably within the core of what constitutes university teaching and scholarship." *Kilborn*, 2025 WL 783357 at *5. According to Kilborn's own allegations, Defendants' actions in this case

[2] The importance of these questions is illustrated by the attention of the amici who filed briefs in this appeal. (App. Dkts. 16, 25, 27.)

were premised in part on Kilborn's statements to students, during private conversations, that he might "become homicidal" or "go after" students he considered his "enemies" because they had criticized him. (R.47 ¶ 20; R.47-1 at 422, 428.) If such speech fits "comfortably within the core of what constitutes university teaching and scholarship," then there is effectively no limit on what statements a professor might make to a student that will receive First Amendment protection.

Further, do all statements by professors, in or out of the classroom, automatically receive First Amendment protection if they fall within the broad and nebulous category of a "public discussion"? Even if, as the Opinion found, Kilborn made those statements "in the context of a public discussion that was occurring at the University," *Kilborn*, 2025 WL 783357 at *7, the Opinion offers no limiting principle as to what can be considered "academic speech" in such a context. The Opinion, taken at face value, suggests that whenever a professor speaks within the "context of a public discussion," his speech enjoys First Amendment protection, no matter what he says. Such a broad rule of automatic constitutional protection is not only

inconsistent with the law, it also ensures that public university officials will not be able to regulate a professor's harassing speech without subjecting themselves to federal litigation over whether the professor's speech is somehow related to a "public discussion occurring at the [u]niversity."

Finally, can qualified immunity ever shield University officials from suit when they enforce an anti-harassment policy against a professor speaking in an academic setting? Or, as the Opinion suggests, is the *Pickering* balancing test always required? *See Kilborn*, 2025 WL 783357, at *4 (rejecting qualified immunity defense because "*Connick-Pickering* test offered qualified protection to public employees"). The answer to this question is critical, particularly in light of the panel's holding that the University's anti-harassment policy is not unconstitutional.

As a result of the Opinion, public officials in a university setting will now be left to wonder whether they can or should investigate allegations of harassment made against a professor, notwithstanding the applicability of a valid anti-harassment policy. That is because the Opinion provides no discernible boundary for speech uttered by a professor that would not enjoy

First Amendment protection under the guise of "academic freedom." The panel has determined that a professor's speech can still be related to "scholarship and teaching," and thus entitled to First Amendment protection, even if that speech is found by university administrators to have violated a clear anti-harassment policy. Without further clarification, the Opinion will significantly and negatively impact public universities' ability to investigate and remedy harassing and even violent speech when it is uttered by a professor.

The Opinion's analysis of Kilborn's retaliation claim creates unanswered questions of exceptional importance and will have far-reaching and unintended consequences for universities and students.

CONCLUSION

Defendants therefore respectfully request that this Court rehear this case en banc to address the panel's unprecedented rationale on qualified immunity and academic freedom.

Dated: March 26, 2025

Respectfully submitted,

MICHAEL AMIRIDIS, CARYN A. BILLS, JULIE M. SPANBAUER, DONALD KAMM, and ASHLEY DAVIDSON

By: */s/ John F. Kennedy*
One of their attorneys

John F. Kennedy
Elizabeth E. Babbitt
Paul J. Coogan
Andrew S. Murphy
Elizabeth Winkowski
Taft Stettinius & Hollister LLP
111 East Wacker Drive, Suite 2600
Chicago, IL 60601

jkennedy@taftlaw.com
ebabbitt@taftlaw.com
pcoogan@taftlaw.com
amurphy@taftlaw.com
ewinkowski@taftlaw.com

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE WITH APPLICABLE RULES

I, John F. Kennedy, attorney for Defendants-Appellees, certify that this brief 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), as modified by Circuit Rule 32(b), because it has been prepared in 14-point Palatino Linotype, a proportionally spaced typeface, using Microsoft Word 2016.

This brief also complies with the type-volume limitation of Fed. R. App. P. 40(d)(3(A) because it contains 3,892 words, including footnotes and excluding the parts of the brief exempted from the limitation by Fed. R. App. P. 32(f).

/s/ John F. Kennedy
John F. Kennedy

Attorney for Defendants-Appellees

171883483v8