NO. ____________

IN THE

SUPREME COURT OF THE UNITED STATES

♦

MICHAEL MARCAVAGE,

Petitioner,

v.

RANGER ALAN SAPERSTEIN ET AL.,

Respondents.

♦

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

♦

PETITION FOR WRIT OF CERTIORARI

♦

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QUESTIONS PRESENTED

On October 6, 2007, park rangers forcibly removed Michael Marcavage from a thoroughfare public sidewalk adjacent to the Liberty Bell Pavilion because of the content of the anti-abortion message he expressed to passersby. The Third Circuit held that the rangers were entitled to qualified immunity because Marcavage's First Amendment right to engage in free speech on the public sidewalk was not clearly established at the time of his arrest. The questions presented are:

I. Do citizens have a clearly established right under the First Amendment to engage in expressive activity on a thoroughfare public sidewalk free from content-based exclusions?

II. Where an appellate court reverses the findings of lower courts that no civil rights violations have occurred, do the lower courts' reversed decisions in favor of law enforcement officers justify granting qualified immunity to the officers?

Parties to the Proceeding

The Petitioner is Michael Marcavage.

The Respondents are Ranger Alan Saperstein and Chief Ranger Ian Crane.

Pursuant to Supreme Court Rule 12(6), Petitioner believes that National Park Service and United States Department of Interior, who were parties to the proceedings below, have no interest in the outcome of the petition. Petitioner's claims against these parties were dismissed by the Federal District Court for the Eastern District of Pennsylvania pursuant to Fed. R. Civ. P. 12(b)(1) by order dated March 9, 2011, which Order is reproduced herein in the Appendix ("App.") at B1. This petition does not seek review of the judgment on the claims against National Park Service and United States Department of the Interior.

Rule 29.6 Notation

No party to this proceeding is a non-governmental corporation.

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CASES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Marcavage respectfully petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit in this case, following the denial of his petition for rehearing *en banc*.

OPINIONS AND ORDERS BELOW

The Circuit Court's opinion below is reported as *Marcavage v. National Park Service*, 666 F.3d 856 (3d Cir. 2012) and is set forth in the Appendix beginning at A1. The order of the United States District Court for the Eastern District of Pennsylvania dismissing Marcavage's claims is set forth in the Appendix at B1. The District Court's opinion is reported as *Marcavage v. National Park Service*, 777 F.Supp.2d 858 (E.D. Pa. 2011), and is set forth in the Appendix beginning at C1. The Order of the United States Court of Appeals for the Third Circuit denying Marcavage's Petition for Rehearing *En Banc* is set forth in the Appendix at G1.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania was entered on February 2, 2012. The court denied Marcavage's Petition for

Rehearing *En Banc* on March 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech…"

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

CONCISE STATEMENT OF THE CASE[1]

A. Factual History

Petitioner Michael Marcavage is a Christian evangelist who frequently travels to various public venues across the country for the purpose of proclaiming the Gospel of Jesus Christ. His public speech sometimes includes expressing his Christian viewpoint in opposition to abortion.

On October 6, 2007, Marcavage and others engaged in free speech activities (characterized by the Third Circuit as an "anti-abortion demonstration") on the public sidewalk of Sixth

[1]For purposes of providing the Court with a concise factual summary, Petitioner adopts the factual findings of the United States Court of Appeals for the Third Circuit (App. A2-5).

Street near the entrance to the Liberty Bell Center at Independence National Historical Park in Philadelphia, Pennsylvania (App. D2). Marcavage and those with him shared this area with tourists, horse-and-carriage operators, and a large number of persons participating in a march for the Susan G. Komen Foundation to raise awareness of breast cancer. Marcavage stood upon a portion of the sidewalk which, like other adjacent sidewalks, was made of Belgian block and bordered by chain-linked metal bollards. The sidewalk at issue was a "thoroughfare" sidewalk, "largely indistinguishable" from other adjacent sidewalks.[2]

As Marcavage was speaking to passersby, Ranger Saperstein approached him and demanded that he vacate the sidewalk, as it was not "designated" as a "First Amendment area" under Park regulations at that time. He issued Marcavage an oral permit to continue his speech on the opposite side of the Liberty Bell Center, which had been designated for First Amendment activity under Park regulations. Chief Ranger Crane also spoke with Marcavage by phone, and insisted that Marcavage vacate his chosen venue.

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[2] The Third Circuit described the sidewalk in question as "a largely unrestricted, common thoroughfare, accessible to pedestrians walking in either direction to destinations other than the Liberty Bell," and distinguished it from special sidewalks such as those at issue in *United States v. Kokinda*, 497 U.S. 720 (1990) and *Greer v. Spock*, 424 U.S. 828 (1976)(App. D20; D16). Throughout this petition, Marcavage will use the phrase "thoroughfare public sidewalk" to refer to those traditional sidewalks that simply provide a thoroughfare for citizens to traverse the community.

Marcavage refused the rangers' repeated demands that he vacate the public sidewalk and relocate his expressive activities. In response to Marcavage's refusal, Ranger Saperstein and other rangers ultimately ushered him off the Sixth Street sidewalk while holding his hands behind his back and issued him a citation for "violating a term or condition of a permit" under 36 C.F.R. § 1.6(g)(2). Marcavage later received a citation through the mail for "interfering with agency functions" under 36 C.F.R. § 2.32.

B. Proceedings Below

1. The Criminal Charges

A United States Magistrate Judge rejected Marcavage's First Amendment arguments and convicted him of both misdemeanors (App. F1). The United States District Court for the Eastern District of Pennsylvania affirmed (App. E1). The district court found that the Sixth Street public sidewalk upon which Marcavage had been exercising his First Amendment rights was a nonpublic forum (App. E18).

In reaching this conclusion, the district court relied on several factors, including: (a) this Court's recognition of instances in which public sidewalks are not traditional public forums in *Greer v. Spock*, 424 U.S. 828 (1976) (sidewalks inside military reservation) and *United States v. Kokinda*, 497 U.S. 720 (1990) (sidewalk adjacent to post office); (b) specific physical features of the sidewalk (such as its proximity to the entrance and exit of the Liberty Bell Center and the presence of bollards and

chains),which the court harmonized with dicta from this Court's decision in *United States v. Grace*, 461 U.S. 171 (1983); (c) the Third Circuit's own holding in *United States v. Goldin*, 311 F.3d 191 (3d Cir. 2002) that the pavilion housing the Liberty Bell was a limited public forum; and (d) the National Park Service's failure to designate the area for protest activity (App. E17-18).

On appeal, the Third Circuit reversed this decision and vacated Marcavage's convictions, finding that the government had impermissibly infringed Marcavage's right to free speech (App. D48-49). Remarkably, the Third Circuit rejected the trial court's factual findings that the rangers had removed Marcavage due to traffic concerns (App. D27). The court found instead that the rangers' actions had been motivated by the content of Marcavage's message and were therefore presumptively invalid (App. D38). The Third Circuit further rejected the district court's conclusion that the Sixth Street sidewalk was a nonpublic forum and held instead that the sidewalk was a traditional public forum. The court remarked that "its historical uses practically cement its public forum status" (App. D18).

2. The Civil Rights Lawsuit

While Marcavage's appeal from his convictions was still pending, he filed a lawsuit against National Park Service, United States Department of the Interior, Ranger Saperstein and Chief Ranger Crane for vindication of his right to free speech under the First Amendment, his right to be free from

unwarranted arrest under the Fourth Amendment, and his right to equal protection under the Fourteenth Amendment. Marcavage invoked the federal court's jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court dismissed the damages claims against the two agencies pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (App. C6). The court also dismissed Marcavage's claims for declaratory and injunctive relief, finding these claims to be moot due to the National Park Service's issuance of new regulations designating the Sixth Street sidewalk as "open for First Amendment activity" (App. C18).

With regard to Marcavage's claims against the individual park rangers, the district court found that although there was no dispute that the rangers had violated Marcavage's First Amendment rights, the rangers were entitled to qualified immunity because "Marcavage's claim under the First Amendment was not clearly established at the time of his arrest" (App C14). This holding turned on the court's conclusion that it was not clearly established that the Sixth Street sidewalk was a public forum at the time of the arrest (App. C12).

The district court noted that although the Third Circuit had ultimately concluded that the sidewalk was a traditional public forum, the decisions of the magistrate judge and the district court judge in the criminal case, as well as the Park regulations themselves, "supported the notion that the place in question was a nonpublic forum" (App. C12-13). The court ruled that the rangers should not be subjected to damages based on their "'picking the

losing side of the controversy' regarding the status of the forum" (App. C13 (*citing Wilson v. Layne*, 526 U.S. 603, 618 (1999)).

Marcavage appealed these rulings to the United States Court of Appeals for the Third Circuit, invoking its appellate jurisdiction under 28 U.S.C. §1291. The Third Circuit affirmed, specifically rejecting Marcavage's contention that his "rights to engage in fundamental speech activities on a public sidewalk were clearly established" (App. A6). The court did not engage in any independent analysis as to whether a reasonable park ranger should have known that Marcavage had a right to engage in free speech on the public sidewalk in question without being subjected to content-based discrimination. Rather, the court rested its finding of qualified immunity for the rangers entirely upon the idea that "[t]he question whether a particular sidewalk is a public or a non-public forum is highly fact-specific and no one factor is dispositive," combined with the fact that the two lower court judges in the criminal case had sided with the rangers (App. A6-7).

Reasons for Granting the Petition

A. The decision below significantly undermines this Court's public forum doctrine because it holds that a citizen's right to engage in expression on a public sidewalk free from content-based exclusions is not clearly established.

The ruling below—that content-based restrictions of Marcavage's speech on a public sidewalk did not interfere with any clearly established rights—seriously erodes two separate bulwarks of this Court's public forum jurisprudence. First, the decision undermines this Court's longstanding recognition that a public sidewalk is a traditional public forum. The holding legitimizes a particularized inquiry into forum status that has heretofore been rejected for thoroughfare public sidewalks such as the one at issue here.

That public streets and sidewalks are the quintessential public forums is surely one of the most clearly established principles of constitutional law.[3]*See United States v. Kokinda*, 497 U.S. 720, 726-28 (1990); *United States v. Grace*, 461 U.S. 171, 177 (1983);*Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 45 (1983); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Hague v. CIO*, 307 U.S. 496, 515 (1939). In *United States v. Grace*, s*upra*, this Court identified this principle as a type of presumption inherent in public forum analysis, stating, "Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally *without further inquiry*, to be public forum property." 461 U.S. at 179

[3] Indeed, the Third Circuit itself noted this principle as being "well established" in its decision vacating Marcavage's criminal convictions (See App. D15).

(emphasis added).[4]

The Third Circuit has effectively precluded citizens from benefitting from this presumption by announcing that "[t]he question whether a particular sidewalk is a public or a non-public forum is highly fact-specific and no one factor is dispositive" (App. A6). This reasoningeviscerates the analytical framework constructed by the Court to guide lower tribunals, law enforcement, administrative authorities and citizens, leaving the question of whether each particular public sidewalk is, in fact, a traditional public forum, open for speculation and case-by-case analysis. It also flies in the face of this Court's pronouncements in*Grace*, *supra*, and in*Frisby v. Schultz*, 487 U.S. 474, 481, that "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora."[5]

Precedents such as *Kokinda* and *Greer* recognize very narrow, specific exceptions to the well-established principle that public sidewalks are traditional public forums.[6] But the Third Circuit's decision below seizes upon these narrow exceptions

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[4]*See also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998)("[T]raditional public fora are open for expressive activity regardless of the government's intent.").

[5] Although *Frisby* dealt with public streets rather than public sidewalks, Marcavage submits that the operation of the presumption that such places are traditional public forums is the same for both types of public property.

[6] Note that the contexts in which the Court has recognized such exceptions involve sidewalks that are not thoroughfare sidewalks.*See Kokinda*, *supra*; *Greer*, *supra*.

to foreclose a citizen's vindication of First Amendment rights by using them to find a thoroughfare public sidewalk's forum status not to be "clearly established."

It is important to note that the searching, fact-intensive analysis of the public sidewalk to determine its forum status did not originate in the qualified immunity determination, but in the courts' respective inquiries of whether the rangers violated Marcavage's First Amendment rights in the first instance (App. D15-21).Again, this methodology is in direct contradiction of this Court's pronouncements in *Grace* and*Frisby*.

Whilethe "particularized inquiry" produced the correct result in Marcavage's criminal appeal, this Court must recognize that this fact-intensive analysis of particular streets, parks and sidewalks may not always end in favor of First Amendment values. And the very fact that it is undertaken chills the citizen from taking his views to the public square. For these reasons, this probing analysis is unsuited to the determination of so fundamental a question as whether or not an ordinary public sidewalk is a traditional public forum where citizens may freely engage in First Amendment activity.

As the four dissenting Justices warned in *Kokinda*, the transferring of complicated analytical frameworks (which may be appropriate where First Amendment claims center on unique types of government-owned property) to traditional public forums such as streets, sidewalks and parks "dilutes the very core of public forum doctrine." 497 U.S. at 745-47 (Brennan, J., dissenting). Under such an

analytical framework, citizens will be left to wonder at which public sidewalks they will be permitted to speak and which ones not. *Id.* at 745 (Brennan, J., dissenting) (*quoting Kokinda*, 866 F.2d 699, 702 (4th Cir. 1989)). The application of this fact-intensive analysis—at least with regard to ordinary thoroughfare sidewalks like the Sixth Street sidewalk—creates a chilling effect on protected free speech in the very public places in which it was heretofore thought to have been most freely permitted.

This Court should correct the considerable mischief caused by the Third Circuit's mistakenconclusion that the public forum status of thoroughfare public sidewalks is too murky an issue to be considered clearly established. The decision below opens the floodgates for other courts to question the forum status of every public park, street and sidewalk and to immunize law enforcement officials who ignore the special status these venues occupy in the Court's First Amendment jurisprudence.[7]

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[7]The Third Circuit's improperly narrow framing of the issue (discussed *infra*) precludes Counsel from claiming that this case creates a true Circuit split over whether it is clearly established that public sidewalks, generally, are traditional public forums. However, Circuits have varied in their treatment of the issue of "clear establishment" of First Amendment rights on public sidewalks, generally. *See*, *e.g.*,*Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012) (not clearly established that law enforcement could not proscribe display of large, graphic photographs in a traditional public forum while allowing protest to continue);*Childs v. DeKalb County*, 286 F3d. Appx. 687, 693 (11th Cir. 2008) (finding that this Court's precedents have put law enforcement "on notice for decades that protestors present

Second, the decision below erodes the Court's public forum doctrine by lending a modicum of legitimacy to content-based speech restrictions by denying that the right to be free from such restrictions is clearly established.

The Third Circuit considered it so obvious that the rangers had interfered with Marcavage's expression for content-based reasons that it took the extreme measure of rejecting the trial court's factual findings on this point (App. D26-37). The court also recognized the clear import of decades of First Amendment jurisprudence: that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (App. D29) (*quoting Texas v. Johnson*, 491 U.S. 397, 414 (1989)).[8] The Third Circuit further noted that "[T]he Supreme Court and the courts of appeals have *consistently* held unconstitutional regulations based on the reaction of the speaker's audience to the content of expressive activity" (App. D30) (emphasis added).

It is remarkable, then, that the Third Circuit held, in its decision below, that the rangers were

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on public property have a First Amendment right to peacefully express their views…"); *Cannon v. City and County of Denver*, 998 F.2d 867, 873 (10th Cir. 1993) (right of protestors to picket with signs on public sidewalk in front of clinic was clearly established).

[8]*See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992);*Boos v. Barry*, 485 U.S. 312, 322 (1988) (plurality opinion); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

entitled to qualified immunity because they had not interfered with any clearly established First Amendment rights (App. A6). This is inexplicable. The rangers might have plausibly believed that there was nothing unlawful in prohibiting all assemblies or demonstrations within a given proximity to the Liberty Bell entrance and exit, as such an action might have been justified by an interest in regulating traffic. However, there was surely no reasonable basis for the rangers to believe that they could lawfully require only Marcavage to leave the public sidewalk while permitting the otherdemonstrators to continue marching and larger assemblies to continue gathering in even closer proximity to the entrance/exit than where Marcavage stood (See App. D36). Surely a reasonable law enforcement official can—and indeed must—be required to know that content-based interference with speech on a public sidewalk is forbidden by the First Amendment.

Marcavage prays that the Court will intervene in this case to preclude confusion among other appellate courts, lower courts, and law enforcement as to the proper expectations of competence for law enforcement officers in applying First Amendment principles on public streets and sidewalks. If, on the other hand, the Third Circuit's decision is left standing, it will ever remain a chink in the armor of First Amendment jurisprudence that does, in fact, clearly establish citizens' rights to be generally free from content-based speech restrictions in these places.

B. The Third Circuit's ruling departs

from this Court's qualified immunity framework in a way that upsets the proper balance between legitimate law enforcement interests and vindication of citizens' civil rights.

This Court's qualified immunity doctrine represents an effort to balance two competing interests: ensuring that competent government officials can work effectively without undue fears of incurring personal liability on the one hand, and providing a means by which citizens might vindicate constitutional rights on the other. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The decision below upsets this balance, ignoring altogether the importance of the citizen's interest and providing law enforcement with a virtual *carte blanche* to interfere with core First Amendment rights in all but the narrowest of circumstances. The ruling effectively eliminates any incentive for law enforcement to have a rudimentary working knowledge of core First Amendment principles which their duties will frequently and inevitably intersect.

1. The Third Circuit's ruling below gave insufficient weight to the citizen's interest in vindicating the violation of First Amendment rights.

This Court has specifically recognized that "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Anderson*, 483 U.S. at 638 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). In apparent disregard of this fact, the Third Circuit below found that "Marcavage's First Amendment rights were

already vindicated when we vacated his previous conviction" (App. A7). Surely it cannot be so.

The outrages Marcavage endured as a result of the rangers' unconstitutional actions included:

- Being forced to surrender his First Amendment right to engage in peaceful free speech in a public place;
- Suffering the humiliation of being escorted from a public sidewalk with his hands held behind his back as passersby watched;
- Being subjected to monthly home "visits" by a probation officer;
- Being prohibited from engaging in free speech at the Park without first notifying National Park Service and obtaining a permit (and even then, only allowed in the "free speech zone");
- Facing intense media attention and scrutiny;
- Being forced to devote considerable time, energy and resources to defendingillegal criminal charges and appealing convictions over the course of four years.

In light of this reality, it is of little consolation to Marcavage that the unjust, unlawful convictions were ultimately vacated. This simply does not suffice as vindication for the government's forceful interference with rights so precious and so venerated as those enshrined by the First Amendment. The Third Circuit's lack of consideration for Marcavage's

interest—and society's—in vindicating core civil liberties thus upsets the balance achieved through proper application of this Court's qualified immunity doctrine.

2. The Third Circuit framed the legal issue which must be "clearly established" too narrowly, thus improperly broadening the scope of qualified immunity.

As this Court explained in *Anderson*, the operation of the qualified immunity standard to achieve the proper balance between government interests and citizen's interests "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. In other words, in determining whether or not a given right is "clearly established" for purposes of qualified immunity analysis, the framing of the "right" in question at the proper level of generality is all-important. Where the right is framed too generally (i.e., Marcavage had a First Amendment right to engage in free speech), officials will too frequently be liable because the right will usually be found to have been "clearly established"; where it is framed too specifically (i.e., Marcavage had a First Amendment right to engage in free speech on the precise block of the Sixth Street sidewalk upon which he was standing), officials will seldom be liable because there will always be room for doubt.

The Third Circuit took the latter course, framing the issue as focusing on the "particular" sidewalk involved (App. A6-7). By the Third Circuit's reasoning, so long as *Kokinda* and *Greer* remain standing there can never be absolute

certainty of a given sidewalk's forum status absent a court ruling as to a specific stretch of sidewalk. Yet, this Court has stated that qualified immunity does not provide so broad a shield as to protect all official actions except those previously held unlawful. *Anderson*, s*upra*, at 640. It follows that the Third Circuit's analysis has contorted this Court's qualified immunity framework for public forum cases by identifying the "legal rule" at so specific a level as to preempt clear establishment except where the particular location has been adjudicated to be a traditional public forum. This, then, will preclude the citizen's vindication of core First Amendment rights in cases such as this one, where the personal liability of the officers is the only available means of recourse.

Obviously, if this Court's mere recognition (in *Kokinda* and *Greer v. Spock*, 424 U.S. 828 (1976))of specific, limited exceptions to the general rule that public sidewalks are traditional public forums is sufficient to trigger qualified immunity for an officer who interferes with expression on a sidewalk that *is* a traditional public forum, then officers will almost always be immune from liability for interfering with speech on public sidewalks. Such a scheme is not only in direct conflict with this Court's instruction in *Anderson*, it creates a jurisprudence in which the qualified immunity "tail" wags the "dog" of the First Amendment.

3. The Third Circuit misused dicta from *Wilson v. Layne*, 526 U.S. 603 (1999) to improperly broaden the scope of qualified immunity.

In reaching its conclusion that the rangers

were entitled to qualified immunity, the Third Circuit did not follow this Court's analytical framework, which focuses on whether the unlawfulness of a particular official act is "apparent in light of existing law." *Anderson*, *supra*, at 640. Rather, it summarily concluded that qualified immunity applied based on this Court's statement in *Wilson* that "[i]f judges … disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S. at 618.Resting on this dictum, the Third Circuit reasoned that the reversed findings of the lower courts in the same case indicated a legal issue sufficiently unsettled to trigger qualified immunity.

This reasoning ignores the context of the *Wilson* dictum and wrongly applies it. The ambiguity surrounding the constitutional question involved in *Wilson*—whether police may bring the press into a home during execution of an arrest warrant—was of a dramatically different nature than that the Third Circuit identified in this case.

In *Wilson* this Court pointed out that there were "no judicial opinions holding that [inviting the press to witness warrant executions] became unlawful when it entered a home." *Id.* at 615. This dearth of guiding precedent on the issue is certainly not the background against which the question of First Amendment rights on a thoroughfare public sidewalk arose. To the contrary, the status of public sidewalks as quintessential public forums is a veritable beacon of First Amendment jurisprudence.

In *Wilson*, qualified immunity serves its purpose, as it may be unreasonable to expect law enforcement to know that a behavior violates civil rights when not a single court has yet ruled so. On the other hand, nothing is more eminently reasonable than expecting law enforcement to predict that removing a protestor from a public sidewalk because of the content of his message violates the First Amendment.[9]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague, *supra*, 307 U.S. 496, 515 (1939) (Roberts, J.).

It is a travesty of justice to allow an unduly complicated judicial analysis—later established to have been erroneous—to preclude a citizen from vindicating his First Amendment rights. Again, the Third Circuit's ruling has upset the proper balance of interests achieved by this Court's qualified immunity doctrine.

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[9]*A fortiori*, government officials should know that they are transgressing First Amendment values when they remove a protestor from a public sidewalk because of the disturbing content of his message, while allowing others to engage in expressive activity in the same place at the same time (See App. A2-3).

4. The decision below holds disastrous public policy ramifications.

The pernicious public policy ramifications of the Third Circuit's mode of qualified immunity analysis in the public forum context are apparent. This scheme does nothing to foster in law enforcement an attitude of respect for foundational civil rights principles. Rather, it will embolden them to interfere with citizens' expression of controversial viewpoints in public places because the benefit of doing so (preserving a tranquil environment) will not be offset by the cost that has heretofore existed in the form of potential liability. If the Third Circuit's decision is left standing, then law enforcement officials will no longer have any incentive to hesitate before interfering with the core First Amendment expression that is the bedrock of any free society. *See Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("Where an official could be expected to know that his conduct would violate statutory or constitutional rights he *should* be made to hesitate…" (*quoting Harlow*, *supra*, 457 U.S. at 819) (emphasis in original).

Because First Amendment rights need breathing room to survive[10], this Court must not countenance the creation of a qualified immunity doctrine that looks only to law enforcement's "good faith" while ignoring the importance of competence in basic First Amendment principles.Where the actions of government officials transgress

[10]*See NAACP v. Button*, 371 U.S. 415, 433 (1963).

foundational, firmly established First Amendment rights, the scales of the doctrine must tip in favor of the citizen's right to vindicate his civil liberties.

C. This Court should ensure that appellate courts do not premise findings of qualified immunity solely on judicial decisions in the same case that have been found erroneous and reversed.

The Third Circuit below conducted plenary review of the district court's finding of qualified immunity (App. A5). Nonetheless, rather than engaging in an independent analysis of whether or not Marcavage's First Amendment rights were clearly established by judicial precedent, the Third Circuit relied upon the reversed findings of lower courts on the criminal charges against Marcavage in ruling that the rangers' actions were reasonable: "While we ultimately held otherwise, the fact that two judges found no First Amendment violation indicates that Marcavage's constitutional right to demonstrate on the Sixth Street sidewalk was not clearly established" (App. A6).

Again, the Third Circuit's reasoning hinged on this Court's statement in *Wilson v. Layne*, 526 U.S. 603, 618 (1999) that "[i]f judges … disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy" (App. A6). The Third Circuit has misapplied this dictum not only by wrongly analogizing the uncertainty level of the two constitutional questions at issue, as discussed s*upra*, but also by taking the word "judges" out of context.

This Court applied the stated principle in the context of examining the totality of the jurisprudential landscape, searching for judicial decisions from various courts on the legal issue in question.[11] It did not limit the analysis to decisions of lower courts in the same matter, as the Third Circuit has done here.

Certainly, it may be useful for appellate courts to examine the treatment of a legal issue inprior cases and other jurisdictions in determining whether existing precedents provided sufficient guidance for the actions of law enforcement. However, the availability of recourse for the citizen's vindication of constitutional rights depends upon the denial of qualified immunity where the only shadow of a doubt as to the clear establishment of a right is cast by the lower courts in the same matter.

If qualified immunity is deemed to be triggered—without regard for the clear establishment of a right generally—whenever a lower court has affirmed the actions of law enforcement, citizens will be denied the opportunity to vindicate their civil rightsin cases where they have been forced to appeal erroneous judgments. Marcavage suggests that it is in those very cases that the opportunity to vindicate civil rights is most

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[11] This Court noted in *Wilson* that at the time of the officers' actions there were no judicial opinions holding that the practice was unlawful. On the other hand, it identified one decision from another jurisdiction upholding the practice and pointed out that a Circuit split had developed while the case had been pending. 526 U.S. at 616-18.

important. For in such cases, the citizen has been forced to endure more protracted litigation and greater associated expenses, greater damage to his personal reputation, and greater mental anguish than in cases where criminal charges are immediately dismissed.

The decision below only serves to aggravate the grievous injury suffered by Marcavage, first at the hands of law enforcement officials, and then at the hands of judges. Marcavage prays that this Court will not countenance such an injustice both to him and to the steadfast principles of the First Amendment. Instead, he prays that this Court will act to put law enforcement officials on notice, once and for all, that where they interfere with peaceful expression in those areas that have long been considered sanctuaries for First Amendment activities, they do so at their peril. Such a pronouncement from this Court is necessary to counteract the chilling effect that will inevitably result from the uncertainty legitimized below as to whether basic public sidewalks are traditional public forums.

CONCLUSION

The Third Circuit's ruling below holds far-reaching implications for the future of First Amendment litigation that must not be ignored. The decision produces an obvious chilling effect on free speech in the very venues where it has always been most protected because the ruling legitimizes a finding of uncertainty as to whether a traditional thoroughfare sidewalk is a public forum—an

uncertainty premised upon a contortion of this Court's precedents.

This ruling creates ambiguity for citizens, law enforcement officials and judges as to whether and when expression on public sidewalks is protected from content-based censorship. The existence of such ambiguity will both chill the free expression of the timid citizen and leave the bold citizen without an important means of recourse when his expression is unlawfully censored. Marcavage prays that this Court will intervene to vindicate the First Amendment.

Respectfully submitted,

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