

No. 25-1389

**In The
Supreme Court of the United States**

RICHARD HERSHEY,

Petitioner,

v.

CITY OF BOSSIER CITY; BOBBY GILBERT,
individually and in his capacity as Deputy
Marshal; DANIEL STOLL; DAVID SMITH; TYSHON
HARVEY; EUGENE TUCKER,

Respondents.

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

**BRIEF OF *AMICI CURIAE*
FOUNDATION FOR INDIVIDUAL RIGHTS AND
EXPRESSION, GOLDWATER INSTITUTE, CENTER
FOR INDIVIDUAL RIGHTS, AND THE
RUTHERFORD INSTITUTE
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the principles of *Hope v. Pelzer* are limited to Eighth Amendment claims or extend to Free Speech and Free Exercise claims such that petitioner's constitutional claims should not be barred by qualified immunity.

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INTEREST OF *AMICI CURIAE*¹

The **Foundation for Individual Rights and Expression** (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended freedom of expression without regard to speakers’ political orientation through public advocacy, strategic litigation, and participation as *amicus curiae* in free speech cases. *See, e.g., Fellowship of Christian Univ. Students at the Univ. of Tex. at Dall. v. Eltife*, No. 1:25-cv-01411, 806 F. Supp. 3d 662 (W.D. Tex. 2025), *appeal docketed*, No. 25-50914 (5th Cir. Nov. 5, 2025); *Rosado v. Bondi*, 1:26-cv-01532, 2026 WL 1291731 (N.D. Ill. May 5, 2026); *Reges v. Cauce*, 175 F.4th 1014 (9th Cir. 2026).

FIRE regularly seeks damages and confronts qualified immunity on claims against government officials who have violated First Amendment protections for free expression, and appears as *amicus curiae* in similar cases. *See, e.g., Diei v. Boyd*, 116 F.4th 637 (6th Cir. 2024); *Villarreal v. City of Laredo*, 134 F.4th 273 (5th Cir. 2025), *cert. denied sub nom. Villarreal v. Alaniz*, 146 S. Ct. 939 (2026); Brief for FIRE as *Amicus Curiae* Supporting Petitioner, *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (No. 20-1066), 2021 WL 916341; Brief of FIRE as *Amici*

1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel contributed money intended to fund preparing or submitting this brief. *Amici* provided timely notice to counsel for all parties under Rule 37.2.

Curiae Supporting Petitioner, *Nat'l Rifle Ass'n of Am. v. Vullo*, 146 S. Ct. 1628 (2026) (No. 25-479), 2025 WL 3271633. Given FIRE's decades of experience combating censorship, it is well acquainted with how free speech suffers when courts broadly apply qualified immunity.

The **Goldwater Institute** is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the constitutional principles of free speech and freedom of association. For example, Institute litigators represented an attorney challenging a mandatory association in *Fleck v. Wetch*, 139 S. Ct. 590 (2018), in which the Court vacated the Eighth Circuit's decision rejecting a First Amendment challenge to mandatory bar membership and fees and remanded the case for reconsideration in light of *Janus v. AFSCME*, 585 U.S. 878 (2018). The Institute has also litigated and won important victories for other aspects of free speech, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing

different campaign contribution limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as an *amicus curiae* in this Court and other courts in free-speech cases. *See, e.g., Janus, supra; Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), cert. denied, 136 S. Ct. 480 (2015).

The **Center for Individual Rights** is a national public interest law firm dedicated to defending individual rights essential to a free and flourishing society. Founded in 1989, CIR has a record of court victories, including in the Supreme Court of the United States, establishing landmark precedents that protect fundamental rights against government overreach.

Most relevant here, CIR represented the student editors of a Christian magazine in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995)—a Section 1983 suit in which this Court held that the University of Virginia engaged in unconstitutional viewpoint discrimination when it refused to fund the publication on the same terms it funded every other student journal. Now cited by courts more than 1,600 times, *Rosenberger* supplies the very rule the parties dispute here. CIR therefore brings a distinctive perspective: it helped establish the precedent the decision below deemed too general to give fair notice.

CIR has a direct and continuing interest in the question presented. The constitutional rules that public-interest litigants secure—often over many years and at great cost—mean little if courts decline

to enforce them in damages precisely where they apply with the greatest clarity. CIR submits this brief, from the vantage of the firm that litigated *Rosenberger*, to explain why the viewpoint-discrimination principle it helped establish should be enforceable here. *See infra* Parts I.A–B.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Few constitutional principles are as familiar to the public and government officials alike as the First Amendment’s bedrock protection of free expression. Police know they cannot arrest someone for criticizing the government, whether in a public park or on Facebook. Nor can a school principal feign First Amendment ignorance after he forces a student to salute the Stars and Stripes on a field trip over the student’s religious objection. And here, every official sworn to protect the Constitution would understand

that threatening to arrest Richard Hershey for passing out religious leaflets on a public sidewalk, all while allowing non-religious leafleteers to remain, violates long-settled law.

When officials violate those and other undoubted First Amendment freedoms, Section 1983 is there to provide a remedy for which qualified immunity provides no shield. At least that's what *should* follow from the Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). *Hope*'s core premise is a commonsense one: While a plaintiff must overcome qualified immunity by showing an official violated "clearly established law," pointing to factually similar precedent is not the only way to make that showing. Rather, *Hope* justly reasons, a constitutional principle can apply with "obvious clarity to the specific conduct in question" to give "fair warning" of a constitutional violation, even in "novel factual circumstances." *Id.* at 740–41.

Given the score of undoubted First Amendment freedoms entrenched in our law, one would imagine *Hope* to make quick work of qualified immunity when officials violate core principles. Yet lower courts keep granting those officials qualified immunity. That recurring problem begs for this Court's intervention.

To start, the Court should grant certiorari to undo the Fifth Circuit's refusal to apply *Hope*'s principles to anything but obvious Eighth Amendment violations. Nothing in *Hope* so limits its reach. The Court should reverse the Fifth Circuit's standard that treats First Amendment safeguards (and other vital constitutional protections) as "second class rights."

Villarreal v. City of Laredo, 94 F.4th 374, 413 (5th Cir. 2024) (en banc) (Ho, J., dissenting).

Though other circuits have not followed the Fifth Circuit’s path, they continue to struggle with deciding what “clearly established” means in the First Amendment context, especially with violations of fundamental free speech protections. Rather than faithfully apply *Hope*’s standard, lower courts too often demand near-identical precedent, elevating immaterial factual differences over familiar First Amendment principles. Small wonder that in recent years, this Court has repeatedly seen some form of the question that Hershey’s petition presents, from decisions across several circuits. The Court should grant certiorari to resolve that confusion and provide the lower courts with much-needed guidance.

Doing so now is imperative for freedom of speech. The past few years have seen state and local officials nationwide place core First Amendment rights in the crosshairs. From arresting dissenters to ransacking a newsroom in retaliation for unfavorable coverage, state- and local-level attacks on free expression are as brazen as ever. And if victims of obvious First Amendment violations have no way to hold those officials answerable, the speech-chilling consequences will be dire.

Whatever purposes qualified immunity may serve, purging officials of accountability when they trample undoubted First Amendment rights must not be one of them. *Amici* urge the Court to make that clear by granting certiorari and instructing lower courts to

faithfully apply *Hope v. Pelzer*'s principles when long-settled First Amendment rights are at stake.

ARGUMENT

I. *Hope v. Pelzer*'s "Obvious Clarity" Standard Should Apply When Officials Violate Fundamental Protections for Free Expression.

Hope's principles are tailormade for the First Amendment. Many protections for freedom of speech, from the right to criticize the government free of arrest to the unflinching bar against viewpoint discrimination, apply with "obvious clarity" to establish a First Amendment violation in almost any conceivable set of facts. Any other standard, allowing lower courts to subvert fundamental First Amendment freedoms to immaterial factual differences, will only erode those freedoms and the crucial remedy Section 1983 promises when officials violate them.

A. Under bedrock first principles and this Court's precedents, many First Amendment rights are obvious to all.

Of all our principles protecting liberty, few are so entrenched as those fundamental to securing the freedom of speech. Early Americans so revered the freedom to criticize public officials that they revolted against the Sedition Act of 1798, which criminalized dissent against the federal government. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964) (describing heavy opposition to the Act). As James

Madison explained in opposing the Act, that freedom “has ever been justly deemed the only effectual guardian of every other right.” 4 Elliot’s Debates on the Federal Constitution, 553–54 (J. Elliot ed. 1876). And in “A Bill for Establishing Religious Freedom,” Thomas Jefferson sought not only to secure liberty for religious speakers, but also explained the dangers of officials “being themselves fallible and uninspired,” and forcing “their own opinions and modes of thinking” upon others.² Jefferson was planting the seeds of American hostility both to viewpoint discrimination and to the government compelling speech.

The Court’s First Amendment precedents have long cemented these and other fundamental protections for free expression. Time and again, the Court has upheld the constitutional right to dissent, free of arrest or other punishment, whether in the form of criticizing court proceedings in a newspaper, *Bridges v. California*, 314 U.S. 252 (1941), wearing a jacket displaying “Fuck the Draft,” *Cohen v. California*, 403 U.S. 15 (1971), or burning a flag in protest, *Texas v. Johnson*, 491 U.S. 397 (1989).

So too has the Court repeatedly made clear that viewpoint discrimination in all forms—and in all forums, public and nonpublic—violates the First Amendment. *E.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing decades of precedent establishing the First Amendment bar

2. *A Bill for Establishing Religious Freedom* (Jun. 18, 1779), available at <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082>.

against viewpoint discrimination); *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026). The Court has been resolute applying that principle to religious and other expression officials may find offensive. *E.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023); *Matal v. Tam*, 582 U.S. 218, 244 (2017). And of course, the Court long ago left no doubt that “no official, high or petty,” can “force citizens” to speak the government’s preferred views on “politics, nationalism, religion, or other matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also 303 Creative*, 600 U.S. at 603.

These examples are not exhaustive. Nor is providing a complete list the point. Rather, these examples highlight how certain First Amendment freedoms are so obvious that government officials and the public alike readily understand them.

In granting qualified immunity to officials who violate these freedoms, lower courts send the wrong message to officials: You are “free to plead (or feign) ignorance of bedrock constitutional guarantees.” *Villarreal*, 94 F.4th at 407 (Willett, J., dissenting). First Amendment protections indispensable to our American traditions, this Court’s time-honored precedents upholding those protections, and the promises of Section 1983, all deserve better.

B. Applying *Hope* to First Amendment claims will better preserve bedrock protections for free expression and avoid absurd outcomes under the Constitution and Section 1983.

When officials trample an undoubted First Amendment right, like those detailed above, courts should not shield them from a lawsuit by granting qualified immunity. Rather, they should permit speakers to pursue the remedy Section 1983 guarantees. After all, without that remedy, those First Amendment rights mean little. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also Uzuegbunam v. Preczewski*, 592 U.S. 279, 288–89 (2021) (explaining the common law view that violations of noneconomic rights warrant remedies, in reversing the dismissal of a religious speaker’s First Amendment claim for nominal damages).

Qualified immunity does not shield government officials from Section 1983 lawsuits if they violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). True, one way to meet the clearly established test is by identifying binding precedent establishing a violation under similar circumstances, particularly in the Fourth Amendment realm, where police often must make decisions in challenging situations. *See, e.g., City of Tahlequah v. Bond*, 595 U.S. 9, 12–13 (2021) (per curiam). But this Court made clear that is not the only way to overcome qualified immunity.

In *Hope*, the Court reasoned that if an official had “fair warning” their conduct was unlawful, a denial of qualified immunity should follow. *Hope*, 536 U.S. at 740–41. To that end, *Hope* tailors the “clearly established” standard for obvious constitutional violations. It holds that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.” *Id.* at 741 (internal quotation marks omitted) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)); see also *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (noting, in a lawsuit involving a Fourth Amendment claim, that the Court does “not require a case directly on point” to show a right was clearly established so as to overcome qualified immunity).

While *Hope* centered on an obvious Eighth Amendment violation, its commonsense standard aligns just as well with obvious First Amendment violations. Well-known First Amendment principles, like those this Court has cemented through decades of precedent, provide more than “fair warning” to a reasonable official that he will violate the Constitution. For instance, a reasonable official knows he cannot arrest an American for political dissent, even if he finds it repugnant. *E.g.*, *Johnson*, 491 U.S. at 414–15; *Bridges*, 314 U.S. at 274–75; *Cohen*, 403 U.S. at 25–26. So too does he understand the First Amendment prohibits forcing someone to express the government’s favored view. *Barnette*, 319 U.S. at 642; *303 Creative*, 600 U.S. at 603. Likewise, he has fair warning that strongarming a religious speaker like Hershey out of a public park under the

threat of arrest, while allowing non-religious speakers to remain, violates the unequivocal First Amendment bar on viewpoint discrimination. *Rosenberger*, 515 U.S. at 829; *Chiles*, 146 S. Ct. at 1021; *see also Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam).

Under *Hope*, officials would rightfully not deserve qualified immunity for obvious First Amendment violations “even in novel factual circumstances.” *Hope*, 536 U.S. at 741. That makes sense. As then-Judge Gorsuch wrote for the Tenth Circuit: “After all, some things are so obviously unlawful that they don’t require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

And that rule makes even more sense given that officials usually violate bedrock First Amendment freedoms without facing exigent circumstances. Officials engaging in viewpoint discrimination or arresting their critics typically are not doing so under danger. Perhaps “clearly established law” entails more factual specificity for police making rapid use-of-force decisions.³ But it makes little sense to demand the same for law enforcement officers, like those here, who force a peaceful religious pamphleteer off a public sidewalk under threat of arrest while allowing non-religious speakers to

3. *E.g., Mullenix v. Luna*, 577 U.S. 7, 12 (2015); *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

remain.⁴ *See* Pet. 6–7. Every reasonable official would know that violates the First Amendment’s absolute protection against viewpoint discrimination, even if no official had acted in such brazen defiance of the Constitution before.

At bottom, *Hope*’s principles ensure speakers like Hershey have a remedy when officials violate their undoubted First Amendment rights. Any more rigid standard would undermine the undoubted protections for free expression this Court has affirmed time and again.

Imagine a public school suspends a student who refused to wave a rainbow flag during a Pride week school parade, over his religious objections. *Barnette* would leave every reasonable school official with no doubt that suspending the student would violate the First Amendment. *See* 319 U.S. at 642. Without this Court’s instruction that *Hope* controls, would a lower court hold qualified immunity shields the school official, just because *Barnette* involved the Pledge of

4. As Justice Thomas aptly asked, why should administrators “who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as,” for example, “a police officer who makes a split-second decision to use force in a dangerous setting?” *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J., respecting the denial of certiorari). When officials have a chance to reflect before violating bedrock First Amendment rights, any justification for qualified immunity is, at best, quite weak. But the converse is not true. As Hershey’s case shows, on-the-spot decisions can often violate the First Amendment in obvious ways. Officials should not be able to avoid liability by simply choosing to make a quick decision when there is no threat of imminent physical danger.

Allegiance instead of a parade? It very well might, absent firm guidance on the standard to apply for “clearly established law” when assessing First Amendment claims. *See infra* Section II.

Or suppose a police chief orders a peaceful protester’s arrest under a city’s harassment ordinance because she called a group of police officers “fat tyrants.” Of course, this Court’s holding in *City of Houston v. Hill* would have provided fair warning that arrest was unconstitutional, as it broadly affirmed First Amendment protection for “verbal criticism and challenge directed at police officers.” 482 U.S. 451, 461 (1987). But if unbound to *Hope*’s principles, a lower court might grant qualified immunity because, for example, *Hill* did not involve an arrest for harassment.

These examples are far from fanciful. *E.g.*, *Barboza v. D’Agata*, 676 Fed. App’x 9, 15 (2d Cir. 2017) (granting qualified immunity for police officer who arrested a man for harassment after he colorfully criticized police on a traffic-citation form, because no case clearly established First Amendment protection for such a message on a government form); *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 348 (5th Cir. 2017) (granting qualified immunity to a teacher who required students to stand and recite the Mexican pledge of allegiance). Even more, they illustrate a perilous folly: Providing “unqualified impunity” for officials to violate the Constitution in obvious ways, “as long as they were the *first* to behave badly.” *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). That is no way to ensure officials respect our

fundamental expressive freedoms. Instructing lower courts to apply *Hope*’s sound principles to First Amendment violations is a vital step toward making sure they do.

II. Without This Court’s Intervention, Lower Courts Will Continue Denying Americans a Critical Remedy for Obvious First Amendment Violations.

Until this Court affirms that *Hope* applies to obvious First Amendment violations, lower courts will continue granting qualified immunity to officials who violate bedrock protections for free speech. Whether the Fifth Circuit’s refusal to apply *Hope* beyond the Eighth Amendment, or other courts’ insistence on demanding on-point precedent even where First Amendment principles “apply with obvious clarity,” *Hope*, 536 U.S. at 740–41, the outcome is the same: Free expression is in danger. This Court should grant certiorari to thwart that danger and correct the lower courts’ course.⁵

5. A recent study of circuit court cases involving qualified immunity found 18 percent involved First Amendment claims—the largest category after excessive force and false arrest. Jason Tiezzi et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, 4, 18, INSTITUTE FOR JUSTICE (Feb. 2024), <https://ij.org/wp-content/uploads/2023/11/Unaccountable-qualified-immunity-web.pdf>. That only underscores the need for the Court to take up the question presented and clarify that *Hope* applies to First Amendment claims. Any other rule will continue perpetuating a “one-sided approach to qualified immunity that transforms the doctrine into an absolute shield for law enforcement officers,

Start with the Fifth Circuit’s rule limiting *Hope* to Eighth Amendment violations. *See* Pet. 25–28 (describing the Fifth Circuit’s “miserly approach to *Hope*”). For one thing, it clashes both with Section 1983 and this Court’s lasting precedent. Nothing in Section 1983 limits its remedies to the Eighth Amendment. Nor does anything in *Hope*, or its progeny like *Taylor v. Riojas*, 592 U.S. 7 (2020), limit the “obvious violation” standard to the Eighth Amendment.

Not only does the Fifth Circuit’s cramped reading of *Hope* ignore those truths, it also ignores how the Court implied in *Sause v. Bauer* that *Hope*’s principles apply to obvious First Amendment violations. 585 U.S. 957 (2018) (per curiam). In *Sause*, the Court reversed a grant of qualified immunity against police officers who ordered a woman to stop praying. While the decision does not expressly cite *Hope*, it centered on the Court affirming “[t]here can be no doubt that the First Amendment protects the right to pray.” *Id.* at 959. To that end, this case provides the Court an opportunity to make explicit what it signaled in *Sause*: Courts should not grant officials qualified immunity when they violate undoubted expressive freedoms.

But until the Court does so, speakers in the Fifth Circuit have no remedy when officials commit even the most basic First Amendment violations. Four times over the Fifth Circuit has refused to apply *Hope*

gutting the deterrent effect of the [First] Amendment.” *Zorn v. Linton*, 146 S. Ct. 926, 936 (2026) (Sotomayor, J., dissenting) (cleaned up).

to violations of fundamental expressive freedoms. It has done so twice when granting qualified immunity to officials who targeted speakers for sharing messages rooted in their faith. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011); *Hershey v. City of Bossier City*, 156 F.4th 555 (5th Cir. 2025). And it twice did so when granting qualified immunity to law enforcement officials who arrested Priscilla Villarreal for politely asking the police questions as part of her routine journalism. *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024), *vacated and remanded sub nom. Villarreal v. Alaniz*, 145 S. Ct. 368 (2024); *Villarreal v. City of Laredo*, 134 F.4th 273 (5th Cir. 2025), *cert. denied sub nom. Villarreal v. Alaniz*, 146 S. Ct. 939 (2026). Under our Constitution and Section 1983, that is four times too many.

Other circuits have not joined the Fifth Circuit’s refusal to apply *Hope*’s principles beyond the Eighth Amendment. *See* Pet. 29–32. That conflict warrants granting certiorari, as Hershey explains. *Id.*

And even those courts need definite guidance from the Court, underscoring the need to grant certiorari. They continue struggling to assess qualified immunity against obvious First Amendment violations, wrestling with what constitutes a “clearly established right” and minor factual distinctions, instead of looking to *Hope*’s clear principles.

Take the Second Circuit in *National Rifle Association of America v. Vullo*, 144 F. 4th 376 (2d Cir. 2025), *cert. denied*, 146 S. Ct. 1628 (2026) (Mem.). In that case, New York officials coerced financial services companies to stop doing business with the

NRA, because they disfavored the NRA’s views. *Id.* at 380–83. After the Second Circuit held those officials did not violate the First Amendment, this Court unanimously vacated and remanded, “reaffirm[ing] what it said” six decades prior: “Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.” *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 180 (2024) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

Given the Court’s unambiguous holding that a 60-year-old case squarely controlled the First Amendment question, *Hope*’s “obvious clarity” standard should have applied with ease. Yet on remand, the Second Circuit granted the New York officials qualified immunity. Paying mere lip service to *Hope*’s standard, the Second Circuit reasoned that “no case (or set of cases) had clearly established, by the time of Vullo’s conduct, that exercising regulatory power to pressure third-party regulated entities into refraining from nonexpressive activity and disassociating from a plaintiff crossed the line from persuasion into impermissible coercion and retaliation.” *Vullo*, 144 F.4th at 391.

Consider, too, the case of Paul Hunt, a former medical student at the University of New Mexico. Hunt sued university officials after they punished him for speaking out on his personal Facebook page about political issues like abortion, accusing some of “supporting the genocide against the unborn.” *Hunt v. Bd. of Regents of the Univ. of N.M.*, 792 Fed. App’x 595, 597–98 (10th Cir. 2019). The Tenth Circuit recognized the core First Amendment principles

forbidding Hunt’s punishment: “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* at 602–03 (quoting *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973)). Yet the court did not uphold the obvious clarity of those principles and deny qualified immunity. Instead, it affirmed qualified immunity because no precedent “sent sufficiently clear signals to reasonable medical school administrators that sanctioning a student’s off-campus, online speech for the purpose of instilling professional norms is unconstitutional.” *Id.* at 605.

Sometimes lower courts get it right, faithfully applying *Hope* to obvious First Amendment violations instead of demanding factually similar precedent. For example, in 2023, a Kansas police chief manufactured probable cause to raid a local newspaper’s office after the newspaper began investigating the chief for misconduct, seizing computers, cellphones and more. *Meyer v. City of Marion*, 776 F. Supp. 3d 991, 1108–13 (D. Kan. 2025). In the ensuing Section 1983 lawsuit, the district court had little trouble applying the “obvious clarity” standard and denying qualified immunity, even though the plaintiffs could not provide specific precedent “that raiding and shutting down a newspaper—without probable cause—constitutes a First Amendment violation.” *Id.* at 1039.

The disparate outcomes between *Vullo* and *Hunt*, on the one hand, and *Meyer* on the other, illustrate the unpredictability of how lower courts assess qualified immunity for even the most straightforward First Amendment violations. Section 1983 plaintiffs

who sue over obvious First Amendment violations should not be at the mercy of what qualified immunity standard a court chooses to apply. Not only does that weaken fundamental protections for free expression, it is simply unjust.

The Court should take this opportunity to clear the air by confirming that *Hope*’s “obvious clarity” and “fair warning” standards apply to First Amendment violations, even in the absence of on-point precedent.

III. Ongoing Attacks on Undoubted First Amendment Rights Underscore Why the Court Should Grant Certiorari.

Several recent petitions—along with *Hershey*’s—reveal a recurring question begging for this Court’s consideration. In *Villarreal*, the petitioner asked, “whether it obviously violates the First Amendment to arrest someone for asking government officials questions and publishing the information they volunteer.” Petition for Writ of Certiorari at i, *Villarreal*, 146 S. Ct. 939 (No. 25-29). Likewise, in *Vullo*, the petitioner questioned, “[w]hen it is obvious that a government official’s conduct violates the Constitution under longstanding Supreme Court precedent, is the violation clearly established for purposes of qualified immunity despite some factual distinctions that are irrelevant under the governing constitutional rule?” Petition for Writ of Certiorari at i, *Vullo*, 146 S. Ct. 1628 (No. 25-479). Other recent petitions posed similar questions presented. *E.g.*, Petition for Writ of Certiorari at i, *Novak v. City of Parma*, 143 S. Ct. 773 (2023) (Mem.) (No. 22-293);

Petition for Writ of Certiorari at i, *Hoggard*, 141 S. Ct. 2421 (No. 20-1066).

It is time for the Court to take up this question, and affirm qualified immunity does not shield officials who violate the First Amendment in obvious ways. That need is only more pronounced as local and state officials increasingly wage attacks on basic expressive freedoms.

Just consider Larry Bushart's plight. In 2025, the retired Tennessee police officer found himself jailed for 37 days under a \$2,000,000 bond.⁶ His supposed crime? Posting a widely-circulated political meme in the aftermath of Charlie Kirk's murder. Authorities charged Bushart with threatening a school—even as the sheriff orchestrating Bushart's arrest admitted the meme was not threatening.⁷

Other examples illustrate this worrying trend of First Amendment abuses:

6. Phil Williams, *Jailed for 37 days for posting a meme of Pres. Trump, Tenn. man reaches settlement for civil rights violation*, NEWS CHANNEL 5 NASHVILLE (May 20, 2026), <https://www.newschannel5.com/news/newschannel-5-investigates/jailed-for-37-days-for-posting-a-meme-of-pres-trump-tenn-man-reaches-settlement-for-civil-rights-violation>.

7. *Id.* Even though Larry received an ample settlement after suing (and before the court considered the official's qualified immunity defense), many similar plaintiffs are not so fortunate, as revealed in the examples *amici* provide of courts granting qualified immunity in the face of obvious First Amendment violations.

- In 2023, police in Pennsylvania arrested and charged a man for disorderly conduct, after he peacefully quoted Bible verses on a public sidewalk across from a Pride Month event at city hall. The arresting officer claimed the man was making “derogatory” comments.⁸
- An Arizona woman attended a 2024 city council meeting and peacefully criticized the city attorney’s pay raise. So the mayor ordered her arrest and had her dragged out of the meeting in front of her ten-year-old daughter, with the police charging her with trespass.⁹ The local state court quickly dismissed the charge as clearly unconstitutional, stressing that “[n]o branch of any federal, state, or local government in this country should ever attempt to control the content of political speech.”¹⁰

8. Michelle Lynch, *Reading Police Department Suffering Fallout from Arrest of Preacher at Pride Event*, READING EAGLE (June 13, 2023), <https://www.readingeagle.com/2023/06/13/reading-police-department-suffering-fallout-from-arrest-of-preacher-at-pride-event>.

9. Praveena Somasundaram, *She Was Arrested after Speaking at a City Meeting. Now She’s Suing*, WASH. POST (Sept. 4, 2024), <https://www.washingtonpost.com/nation/2024/09/04/arizona-city-council-meeting-arrest>.

10. Ruling on Motion to Dismiss, *State v. Massie*, No. JC2024-141028, (Maricopa County Justice Courts, State of Ariz. Oct. 23, 2024) (citing *Rankin v. McPherson*, 483 U.S. 1056 (1987)), available at <https://www.fire.org/research->

- Last year, the student newspaper at Indiana University published a story critical of how the school treated free speech. The public university’s response? Shutting down the newspaper and firing its student media director.¹¹

Upholding Section 1983’s promise of a damages remedy against these abuses is essential to preserving freedom of speech. In fact, for most of the speakers in these examples, a damages claim is their only remedy. An injunction cannot undo an arrest for political speech, no more than it can fix the harm a religious pamphleteer like Hershey suffers when police eject him from a park for his speech while allowing commercial pamphleteers to remain.

And even if equitable remedies are an option, that does not weaken the case for damages claims against individual officials who violate First Amendment rights in obvious ways. Rather, while injunctions may create little personal stake for individual officials, holding them accountable in the way damages do provides both a remedy for past harms and a powerful deterrent against future violations. *See Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 488 (1980) (recognizing “two of the principal policies embodied in § 1983 as deterrence and compensation”).

learn/arizona-v-massie-ruling-motion-dismiss-maricopa-county-justice-courts.

11. Sean Stevens, *What the hell is going on at Indiana University*, FIRE (Oct. 23, 2025), <https://www.fire.org/news/what-hell-going-indiana-university>.

Granting certiorari and affirming that *Hope's* principles apply to Section 1983 claims for First Amendment violations is an essential step toward meeting those twin goals.

CONCLUSION

“No right was deemed by the fathers of the Government more sacred than the right of speech. It was in their eyes, as in the eyes of all thoughtful men, the great moral renovator of society and government.”¹² But that sacred right will wither if Americans lack a meaningful remedy to hold government officials accountable when they defy fundamental constitutional principles protecting free expression. This case provides a vehicle to finally affirm that courts should not shelter those officials, even in novel circumstances.

Amici urge the Court to grant certiorari.

12. Frederick Douglass, *A Plea for Free Speech in Boston*, Address Delivered in Boston, Massachusetts (Dec. 9, 1860), in THE FREDERICK DOUGLASS PAPERS, <https://frederickdouglasspapersproject.com/s/digitaledition/item/9060>.

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