No. 22-293

In The
Supreme Court of the United States

ANTHONY NOVAK,

Petitioner,

v.

CITY OF PARMA, OHIO, ET AL.,

Respondents.

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

REPLY IN SUPPORT OF CERTIORARI

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Petitioner Anthony Novak spent four days in jail for making fun of his local police department on Facebook. The founders designed the Bill of Rights to prevent that sort of tyranny, but the Sixth Circuit chose not to apply the First Amendment to Novak's case. Pet. App. 8a–9a. Defending that decision, respondents claim (at 1) that this "is a qualified immunity case," "not a First Amendment case, as Novak and the media argue." The district court similarly observed that "Novak's First Amendment claim, though significant in a general sense, is irrelevant" in the face of qualified immunity. Pet. App. 50a. But these statements beg the question Novak's petition puts to the Court: Whether government officials can arrest an individual solely for his speech, so long as no court has previously held the *particular* speech is protected.

The circuits are split over this question. In the Sixth, Eighth, and Eleventh Circuits, police can arrest government critics for their speech, but in the Ninth and Tenth Circuits, they cannot. (Until recently, the Fifth Circuit also precluded arrests for speech.) The reason for the split is both simple and unavoidable due to competing lines of this Court's cases. While First Amendment doctrine requires deference to the speaker, qualified-immunity doctrine requires deference to the government. When the interests of a speaker and the government are opposed—as they often are—there is no clear path forward.

This is a case in point, and respondents' opposition to certiorari underscores the need for this Court's review in several ways:

First, respondents acknowledge (at 27–28) that the circuits have reached different outcomes when addressing the interaction of free speech and qualified immunity. But these conflicting outcomes do not amount to a circuit split, according to respondents, because there are minor factual distinctions between the cited cases. Far from clearing up the split, respondents accidentally identify the issue at its heart—whether fundamental First Amendment principles are enough to warn police that arresting an individual for speech is unconstitutional. Compare, *e.g.*, *Ballentine* v. *Tucker*, 28 F.4th 54, 66 (9th Cir. 2022) (holding that a First Amendment "right can be clearly established despite a lack of factually analogous preexisting case law"), with *Crocker* v. *Beatty*, 995 F.3d 1232, 1240–1241 (11th Cir. 2021) (holding that general free-speech concepts cannot override qualified immunity, unless prior caselaw addressing "the specific situation" provides "detail about the contours of the right").

Second, respondents assert (at 23–25) that the question of "whether Novak's speech was entitled to First Amendment protection" is an "unresolved question of fact" that makes this case a poor vehicle for certiorari. To the contrary, respondents identify a question of law, and the parties agree on the facts necessary to adjudicate it. That is crystal clear because this appeal arises from cross-motions for summary judgment. Pet. App. 27a. Thus, this case is an exceptionally clean vehicle for review; the Court needs only to apply law to uncontested facts to answer the questions presented. Moreover, respondents' argument (at 23–24) that free speech is irrelevant to this case exemplifies how qualified immunity allows courts to

sanction First Amendment violations in even the most obvious cases. See Pet. App. 29a (district court stating it "does not even have to resolve the First Amendment issue to rule on the parties' motions for summary judgment"). If the First Amendment does not prevent the government from jailing its critic for parody, this Court should say so.

Third, respondents claim (at 17–23) "there is no considered reason" to revisit immunity doctrine, but there are many. See, *e.g.*, Pet. 34–35 nn.14–19) (providing reasons). This Court's "qualified immunity jurisprudence stands on shaky ground." *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2421 (2021) (mem.) (Thomas, J., statement respecting denial of certiorari).

The Court should grant Novak's petition because, even after years of percolation, the important questions it presents cannot be resolved by the lower courts.

I. Respondents attempt to distinguish the split but, instead, highlight the circuit conflict over the first question presented.

Respondents try (at 27–28) to explain away the circuit split by pointing to picayune differences between the conflicting cases. But whether "a lack of factually analogous preexisting case law" shields police from liability for arresting individuals for exercising the freedom of speech is the very issue over which the circuits are split. See *Ballentine*, 28 F.4th at 66 (citation omitted). The Sixth, Eighth, and Eleventh Circuits say no, but the Ninth and Tenth Circuits say yes. (Until recently, so did the Fifth Circuit. Now, it is up in

the air as the circuit prepares to issue its *third* opinion in *Villarreal* v. *City of Laredo*.)

A. When can government officials punish individuals for their speech? The circuits cannot agree.

Three circuits agree with respondents (at 19) that "unusual facts" in First Amendment cases require the application of qualified immunity. In these circuits, police who arrest individuals for their speech are immune from liability unless a court has previously blessed the particular speech at issue. So, the Sixth Circuit below granted respondents immunity because Novak could not identify an earlier case involving the deletion of comments and reposting of a government notice on social media. Pet. App. 9a. The Eighth Circuit granted immunity to police who threatened to arrest a woman for filming in a public park because no earlier case had invalidated the vague statute supporting the threat. *Ness* v. *City of Bloomington*, 11 F.4th 914, 921 (8th Cir. 2021). And the Eleventh Circuit granted immunity to an officer who arrested a man for filming the aftermath of a traffic accident because no earlier case addressed that "specific situation." *Crocker*, 995 F.3d at 1241. In these circuits, the courts effectively permit police to arrest individuals for their speech.

At least two circuits reject respondents' argument. In these circuits, basic First Amendment principles provide fair warning to officials "even in novel factual circumstances." *Ballentine*, 28 F.4th at 66 (citation omitted). So, the Ninth Circuit denied immunity to an officer who arrested activists for chalking political

messages on sidewalks, *id.* at 58–59, and the Tenth Circuit refused to shield a parole officer who had an atheist parolee arrested for refusing to engage in mandatory prayer and church attendance at a Christian halfway house, *Janny* v. *Gamez*, 8 F.4th 883 (10th Cir. 2021). See also *Thompson* v. *Ragland*, 23 F.4th 1252 (10th Cir. 2022) (denying immunity to a college administrator who punished a student for online speech); *Williams* v. *Snyder*, No. 20-1512, 2022 WL 1078226 (7th Cir. Apr. 11, 2022) (denying immunity to a prison official who confiscated inmate mail).

In line with the Sixth Circuit's side of the split, respondents nowhere attempt to argue that their actions satisfy the First Amendment. Fair enough. Freedom of speech cannot be squared with the ability of government officials to jail their critics. All respondents offer instead (at 26–28) is the observation that there are inconsequential factual differences between the type of speech Novak engaged in and the types of speech at issue in the decisions of the Fifth, Ninth, and Tenth Circuits. Respondents point out (at 27) that the Ninth Circuit addressed speech made in sidewalk chalk and (at 26 n.10) the Fifth Circuit considered verbal speech, while Novak's speech was made online. But respondents do not explain why those factual distinctions matter under the First Amendment.

No case has cabined *Cohen* v. *California*, 403 U.S. 15, 18 (1971), to speech emblazoned on jackets, or restricted *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 54–55 (1988), to speech printed in adult magazines. Yet the aggressive form of qualified immunity respondents advocate does just that. Besides

distinguishing chalk from talk, respondents try (at 25) to differentiate this case from *Hustler* because *Hustler* involved parody in "a one-page advertisement printed on the inside front cover of [a] magazine[,]" whereas Novak's parody "used a dynamic medium which evolved as he added and deleted information over time."

The differences respondents identify are irrelevant to the First Amendment but—at least in the Sixth, Eighth, and Eleventh Circuits—dispositive for qualified immunity. In those circuits, little is left of the free-speech protections our Constitution guarantees.

B. The Fifth Circuit's recent grant of en banc review in *Villarreal* v. *City of Laredo* further demonstrates the circuit conflict.

While the other circuits are divided over Novak's first question presented, the Fifth Circuit cannot seem to make up its mind at all. As Novak's petition explained, the Fifth Circuit's decision in *Villarreal* v. *City of Laredo*, 44 F.4th 363 (5th Cir. 2022) (*Villarreal II*), contrasted with the Sixth Circuit's decision below, exemplifying the circuit split. But as respondents note (at 26), a month after Novak filed his petition, the Fifth Circuit granted en banc review, vacating *Villarreal II*. 52 F.4th 265 (5th Cir. 2022) (mem.). Now, rather than exemplifying the circuit split over Novak's first question presented, *Villarreal* exemplifies the sheer confusion over that issue among the circuit bench.

Villarreal involved very similar facts to those here. Annoyed with a local critic, police concocted a pretext to arrest her under a broadly written Texas statute, relying on her speech as the basis for probable cause. *Villarreal II*, 44 F.4th at 368–369. When the case arrived at the Fifth Circuit, the Court denied qualified immunity in a decision written by Judge Ho and joined by Judge Graves. *Villarreal* v. *City of Laredo*, 17 F.4th 532 (2021) (*Villarreal I*). *Villarreal I* held that the arrest represented an obvious violation of the First Amendment for which the officers were not entitled to qualified immunity. *Id.* at 540. The court went further and invalidated the Texas statute as unconstitutional. *Id.* at 541. Chief Judge Richman dissented but did not release an opinion at the time of publication. *Id.* at 536 n.*.

Ten months later, Judge Richman issued her dissent. The panel simultaneously withdrew and replaced its decision in *Villarreal I*. See *Villarreal II*, 44 F.4th at 367. Again joined by Judge Graves, Judge Ho authored *Villarreal II*, which tracked closely with *Villarreal I*. This time, however, the Fifth Circuit stopped short of invalidating the Texas statute, concluding that it was only unconstitutional as applied. *Villarreal 2*, 44 F.4th at 372. Judge Ho separately concurred to more thoroughly address Judge Richman's dissenting arguments. See Pet. 17–20 (discussing *Villarreal II* at length).

Two months later (and one month after Novak filed this petition), the Fifth Circuit granted en banc review, vacating *Villarreal II*, and the State of Texas has intervened to defend the constitutionality of its

statute. Tex. Br., *Villarreal* v. *City of Laredo*, No. 20-40359 (5th Cir. Jan. 11, 2023).

The Fifth Circuit's grant of en banc review removed *Villarreal II* from the circuit split Novak originally identified, but not from this Court's consideration of whether to grant certiorari in this case. No matter the outcome of *Villarreal III*, the arguments between Judges Ho and Richman will continue to parallel the arguments made by the circuits on either side of the split. Because they represent the clash between competing lines of this Court's cases, they are irreconcilable without this Court's guidance. And the fact that the Fifth Circuit will ultimately require *three* decisions to determine whether police can arrest a critic for her speech only underscores the need for the Court to grant review here and settle the conflict.

Indeed, Texas's intervention in *Villarreal* to defend the constitutionality of its statute will only muddy issues that are clean here because Novak does not challenge the constitutionality of the Ohio statute under which respondents arrested him. See Tex. Br., *supra*, at 16–19 (discussing how Texas courts would interpret the word "solicit" to mean an inchoate offence under Texas Penal Code § 39.06(c)), 30–39 (detailing what would support probable cause under the statute considering other unique features of Texas law).

II. Respondents attempt to introduce vehicle problems but only illustrate how courts are using qualified immunity to avoid simple free-speech questions.

Respondents contend (at 23–25) that since the Sixth Circuit declined to answer "whether Novak's speech was entitled to First Amendment protection," this case is an inappropriate vehicle for certiorari. Quite the opposite. This case involves a simple constitutional question: Can police arrest an individual based solely on speech parodying the government, so long as no case has previously held the particular speech is protected? To resolve it, this Court need only apply the law to uncontested facts, which makes this case a good vehicle to address the questions presented.

Respondents claim (at 24) that "whether Novak's speech was entitled to First Amendment protection" is an unresolved issue of fact. It is not. It is a dispute of law, and the parties agree on the facts necessary to decide it. See, *e.g.*, Pet. App. 51a n.7 (district court noting this agreement). Novak created a Facebook page mocking the Parma Police Department, where he published six parody posts. Pet. App. 139a–141a. When commenters and the department tried to spoil the joke by disclaiming it as fake, Novak deleted those comments and reposted the department's notice. *Id.* at 3a. For his speech, respondents searched, arrested, jailed, and prosecuted Novak for a felony. *Id.* at 2a–5a.

Because Novak's parody is protected speech, the lower courts faced a straightforward First Amendment question. But the Sixth Circuit used qualified

immunity to dismiss Novak's case without addressing respondents' constitutional violations. Respondents defend this (at 23–24) because the "reasonable reader" standard for parody is a fact-bound one that must go to a jury. See Pet. App. 88a–91a. But the reliance on qualified immunity to evade even the easiest First Amendment issues does not provide a reason for the Court to deny certiorari; it emphasizes the need for this Court to intervene.

Respondents' observation that the lower courts refused to decide whether Novak's speech was constitutionally protected before tossing his case crystalizes the circuit split. While the Eighth and Eleventh Circuits may have also thrown out Novak's case without considering the First Amendment, the Ninth and Tenth Circuits would not have. That's because, in the Ninth and Tenth Circuits, First Amendment plaintiffs are not forced to engage in "a scavenger hunt for prior cases with precisely the same facts," see *Janny*, 8 F.4th at 915, while plaintiffs in the Sixth, Eighth, and Eleventh Circuits are, see Pet. App. 9a ("Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech.").

The need for plaintiffs like Novak to find identical precedent or else have the merits of their constitutional claims ignored is a feature unique to qualified immunity. The only reason why the Sixth Circuit *could* sidestep the constitutional issues at summary judgment is because qualified immunity empowered it to do so. See *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009) (allowing courts to skip the constitutional merits under the clearly established test). Cases involving

clear First Amendment violations like this one—especially those that do not involve split-second decision making or dangerous situations—illustrate how some circuits are using qualified immunity as a constitutional escape hatch. See, *e.g.*, Pet. App. 9a ("[W]hile probable cause here may be difficult, qualified immunity is not."). Situations like Novak's also demonstrate why *Pearson*'s permission to skip constitutional questions should not apply in obvious cases. See 555 U.S. at 237 (suggesting that courts should not skip the constitutional merits where it is "obvious * * * there is such a right").

At bottom, the circuit split this case identifies rests on the irreconcilable conflict between this Court's speech and immunity doctrines. See Pet. at 25–32. In its cases addressing free speech, the Court has repeatedly warned lower courts they must defer to speech. See, *e.g.*, *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2384 (2021) (citation omitted) ("First Amendment freedoms need breathing space to survive[.]"). In its cases addressing qualified immunity, the Court has also repeatedly warned lower courts they must defer to immunity. See, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731,743 (2011) ("Qualified immunity gives government officials breathing room[.]"). So, when a case like Novak's pits speech against immunity, the circuits are split over what to do. In the Ninth and Tenth Circuits, speech gets the breathing room, but in the Sixth, Eighth, and Eleventh, immunity does. Only this Court can decide which is correct.

III. There are many reasons to reconsider or recalibrate qualified immunity.

Finally, constitutional scholars and jurists across the ideological spectrum—including members of this Court—disagree with respondents' unsupported assertion (at 16, 17, 23, 31) that there is no "compelling or considered reason" to revisit the doctrine of qualified immunity. There are many.

Justice Thomas, for instance, has expressed "strong doubts about [the] qualified immunity doctrine." See *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1864–1865 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari). Justice Sotomayor has likewise objected that qualified immunity guts constitutional protections. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam) (Sotomayor, J., dissenting). Accord *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265–2278 (2022) (citing bases for overruling harmful precedent).

In the face of these and the many other reasons Novak has provided, see, *e.g.*, Pet. 34–35 nn.14–19, perhaps the Court should reconsider qualified immunity entirely. Or perhaps it should simply recalibrate the doctrine in one or more targeted ways. See, *e.g.*, *Pearson*, 555 U.S. at 236 (merits skipping); *Mitchell* v. *Forsyth*, 472 U.S. 511, 524–530 (1985) (interlocutory review); *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam) (obvious violations).

Regardless, the two questions Novak presents are independent. If the Court chooses to grapple with broader objections to its qualified immunity doctrine, this case is a suitable vehicle. If the Court chooses not

to, this case is still a suitable vehicle to resolve the intractable split over how to reconcile its free-speech cases with its qualified-immunity cases. The petition for certiorari should therefore be granted.

CONCLUSION

The Court should grant Novak's petition.

Respectfully submitted,

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