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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should overrule police officers' qualified immunity based on a statutory interpretation which Congress could have, but has not, revisited.

2. Whether qualified immunity is properly applied to police officers' investigation of a disruption of police or governmental operations prohibited by statute where the officers seek advice from the city law director, appear before a magistrate and judges for search and arrest warrants, and the grand jury subsequently indicts the individual.

3. Whether the constitutional avoidance doctrine precludes further review of this case because it is properly resolved on the basis of qualified immunity grounded in 42 U.S.C. § 1983.

4. Whether the determinations by the lower courts that there is a question of fact render this matter unsuitable for further consideration because this is a Court of final review and not first view.

5. Whether there is a conflict between the Circuits where they simply applied settled law to differing fact patterns.

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JURISDICTIONAL AND PRUDENTIAL IMPEDIMENTS TO REACHING THE PROFFERED ISSUES

This is a qualified immunity case. This is not a First Amendment case, as Novak and the media argue. Given the posture of this case and this Court's prior jurisdictional and prudential precedent, Respondents Kevin Riley, Thomas Connor, and the City of Parma, Ohio (the "Parma Defendants"), respectfully maintain that this Court will not be able to reach the issues proffered by Petitioner Novak for two reasons:

1. The lower courts did not address whether there was any First Amendment violation but decided the case based on 42 U.S.C. § 1983 qualified immunity. Pursuant to the constitutional avoidance doctrine, this Court does not address issues of constitutional magnitude if the case can be resolved on other grounds. *Escambia County, Fla. v. McMillan*, 466 U.S. 48 (1984).

2. Both courts below found that there is a dispute of material fact as to whether Novak's activity was protected by the First Amendment. *Novak v. City of Parma, Ohio,* No. 1:17-CV-2148, 2021 WL 720458, at *8 (N.D. Ohio Feb. 24, 2021) and *Novak v. City of Parma, Ohio*, 33 F.4th 296, 304 (6th Cir. 2022). This Court does not resolve issues of fact because "this is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*) (cleaned up); *National Collegiate Athletic Association v. Smith*, 525

U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below.").[1]

STATEMENT OF FACTS

A. Novak creates a fake Facebook page purporting to be that of the Parma Police.

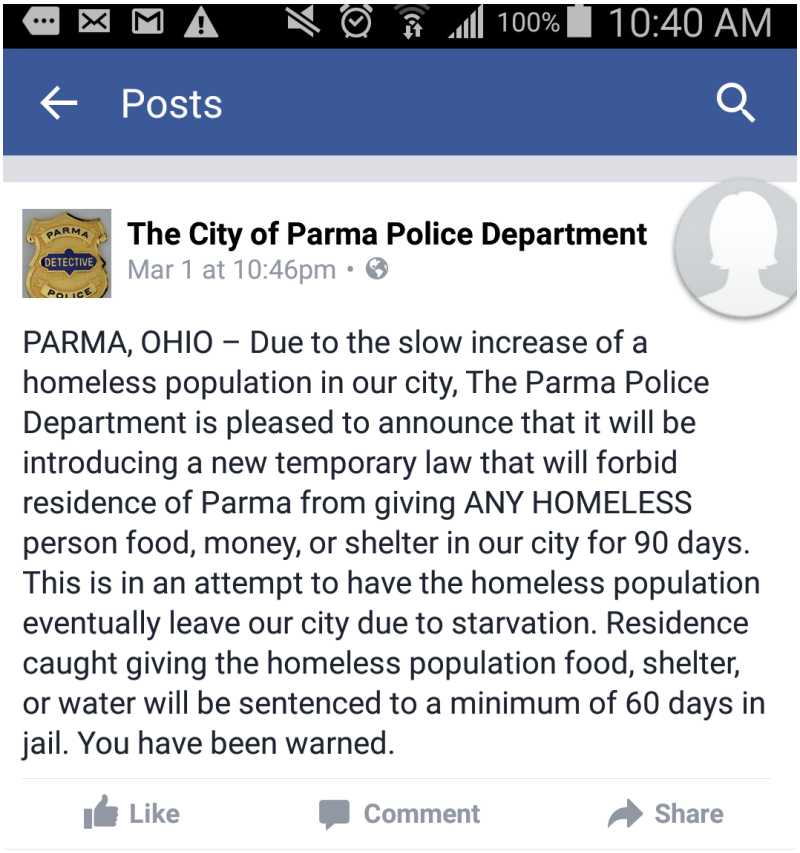
This case arises out of the Parma Defendants' investigation and prosecution of Novak pursuant to Ohio R.C. 2909.04(B), which prohibits any person from "us[ing] any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police…or governmental operations." In particular, in the waning hours of March 1, 2016, Novak created a Facebook page (the "Fake Page") that was nearly indistinguishable from the official Parma Police Department Facebook page (the "Official Police Page"). The same badge, patch, color, font, and format are found in both, as the below images reveal:

[1] Ignoring the decisions of the District Court and Sixth Circuit, Novak incorrectly asserts that "There are no…messy fact disputes ...." at p. 36 of his Petition for a Writ of Certiorari.

The only difference is that the Official Police Page (the left one) in small print reads: "Police Station - Government Organization" while the Fake Page reads: "Community."[2]

On March 1, 2016, at 10:46 p.m., Novak made his first post on the Fake Page, which falsely warned residents that the Parma Police were implementing a new law that would criminalize giving food, money, or shelter to any homeless person in Parma (the "Homeless Post"). (*Id.*, Page ID #4739.) Novak then shared only this specific post (*not* a link to the Fake Page itself) on his personal Facebook page along with the comment "Thanks Parma." (*Id.*, Page ID #4856.) The Homeless Post, when shared across Facebook, appeared as follows:

[2] Initially, the Fake Page included the word "The" before "Parma Police Department." Novak quickly realized that the legitimate page did not include the word "The" in its title so he edited the Fake Page to mirror the Official Police Page. (Novak Dep., R.90-1, Page ID ##4580, 4594.)



(Plaintiff Novak's Opposition to Defendant City of Parma's Motion for Summary Judgment, R.124-2, Page ID #24839, "residence" and "Residence" sic.)

This post reflected the reality that similar laws have been enacted nationwide.[3] Some people

[3] John J. Ryan, a nationally recognized expert, authored a 154-paragraph report. That report is unrebutted because Novak never retained an expert. At paragraph 147 of that report, Ryan opines as follows: "While content does not appear to have been a determining factor in motivating the charging or arrest

believed the post and reacted with dismay and disgust:

> User [Redacted User 1]
>
> Text When I am home on leave from serving this beautiful nation, I will make it my #1 priority to feed the homeless in front of one of your police stations.
>
> User [Redacted User 2]
>
> Text How can you treat these people like animals? Idc [*sic*] what the law is..My religion to god will not leave someone hungry or someone who needs help.
>
> User [Redacted User 3]
>
> Text You should be helping the people of your city. Not throwing them to the curb. These are PEOPLE

(Novak Dep., R. 90-1, Page ID ##4739, 4748, 4759.)

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decision, I would note that some of the posts were not so absurd as to establish that a reasonable reader would conclude that the post was not real but was instead satire or parody. For example, numerous cities around the country have been criticized and even sued for enacting legislation that creates civil or criminal sanctions for feeding the homeless. https://www.npr.org/sections/thesalt/2014/10/22/357846415/more-cities-are-making-it-illegal-to-hand-out-food-to-the-homeless." (Affidavit and report of John J. Ryan, R.119-1, Page ID ##23147-91.)

At 11 p.m. Novak made another post about Parma recruiting police but discouraging minorities from applying. (*Id.*, Page ID #4736.) Shortly after midnight he posted about a robbery committed by a white male but the police asking for help identifying a loitering African American. (*Id.*, Page ID #4735.)

The morning of March 2, 2016, Novak saw that the Homeless Post had gone viral, having been shared about 1,000 times. (Kozelka Dep., R. 97-1, Page ID #6127). Novak began discussing taking the Fake Page down with his roommate and long-time friend, Andrew Kozelka, because the Fake Page "was becoming a more serious problem and that wasn't our intention. It was just to mess with a few dumb people." (Kozelka Dep., R.97-1, Page ID #6133.) The disruption caused by that particular post sparked the investigation by the Parma Defendants.

Riley, then a lieutenant but now a captain, became aware of the phone calls following the Homeless Post.[4] He assigned the matter to Detective Thomas Connor because he was one of the most senior and experienced detectives; was competent and honest; and had an impeccable record without any complaints by other officers, prosecutors, or defense attorneys. (Riley Dep., R. 95-1; Page ID #5483.) Riley had "never seen anything like this in my entire career….I didn't know what to do with it."

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[4] Not all calls to the City of Parma were documented or preserved, i.e., calls were made to City Hall and the Law Department. Calls to police dispatch, which began receiving calls at 9:32 a.m. on March 2, 2016 were preserved. (Crim. Tr. R. 6-1, Page ID ##1491-1500.)

At that point there was no criminal investigation. Riley told Connor to call the Law Department. (*Id*., Page ID #5471.) Connor sought advice from Law Director Timothy Dobeck pursuant to Riley's instruction and consistent with Connor's training to confer with the Law Department when he did not know how to handle a matter. (Affidavit of Thomas Connor, R.118-1, Page ID #23139-44.) Dobeck advised Connor to investigate the matter as a possible violation of R.C. 2909.04(B) (the Disruption Statute), which prohibits any person from using a computer, electronic device, or the internet so as to disrupt, interrupt, or impair the functions of any police or governmental operations. (Dobeck Dep., R.120-1, Page ID ##23217-18.)

B. Police advise residents of the Fake Page and identify their page as the Official Police Page.

Riley, the public information officer for Parma, sent out a press release to the media, in particular, four local television channels, a local news radio station, the Associated Press, and Cleveland.com to alert the public about the Fake Page. (Riley Dep., R.95-1, Page ID ##5459, 5464, 5476, 5508.) Riley also posted the following warning on the Official Police Page:

> The Parma Police Department would like to warn the public that a fake Parma Police Facebook page has been created. This matter is currently being investigated by the Parma Police Department and Facebook. ***This is the***

> ***Parma Police Department's official Facebook page***. The public should disregard any and all information posted on the fake Facebook account. The individual(s) who created this fake account are not employed by the police department in any capacity and were never authorized to post information on behalf of the department.

(Riley Dep., R.95-1, Page ID ##5459, 5476; Novak Dep., R.90-1, Page ID #4717 (emphasis added).)

C. Novak copies verbatim the police warning onto his Fake Page and deletes comments noting that his page is fake.

Novak realized that the comments "were kind of flooding in…." In fact, Facebook estimated 50,000 projected views of the Fake Page. (Novak Dep., R. 90-1, Page ID #4584, 4587.) Novak acknowledged that he deleted comments warning that his page was fake in order to conceal its falseness. (*Id*., Page ID #4581.)

Riley was interviewed by a local television reporter that afternoon; he restated what had been in the press release, *i.e*., that the Fake Page was not from the City of Parma. (Riley Dep., R.95-1, Page ID ##5507–08.) Novak admitted that Riley did not make any threats of criminal prosecution in the interview. (Novak Dep., R.90-1, Page ID #4605.)[5]

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[5] Novak has offered a subjective opinion that the Parma Defendants targeted him for prosecution based on his alleged parody. The District Court rejected those unsupported claims,

At 11:04 a.m. Novak put up a fourth post on the Fake Page advertising free teen abortions. (*Id.,* Page ID #4727.)

At 12:41 p.m. Novak published his fifth post about a pedophile reform effort. (*Id.,* Page ID #4721.)

At 4:52 p.m. Novak intentionally copied and pasted verbatim the warning from the Official Police Page onto his Fake Page:

> The Parma Police Department would like to warn the public that a fake Parma Police Facebook page has been created. This matter is currently being investigated by the Parma Police Department and Facebook. ***This is the Parma Police Department's official Facebook page***. The public should disregard any and all information posted on the fake Facebook account. The individual(s) who created this fake account are not employed by the police department in any capacity and were

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concluding that "[t]he evidence does not show that Detective Thomas Connor and his co-defendants were acting as hot-headed police officers seeking revenge against Novak for his 'parody.' Rather, it shows that they sought advice from multiple sources about the legality of Novak's Facebook page and followed the proper procedures by obtaining warrants before arresting Novak, searching his property, and presenting the facts of their investigation to the County Prosecutor and grand jury." *Novak*, 2021 WL 720458, at *1.

> never authorized to post information on behalf of the department.

(*Id.*, Page ID #4717 (emphasis added).)

Novak pondered his potentially unlawful conduct. At 6:42 p.m., Novak's friend Seth Kopchu sent Novak this message: "Did you break a law…Like impersonating an officer" (Kopchu Dep., R.94-1, Page ID #5371.) Novak responded that two other people had also suggested that to him. (*Id.* Page ID #5372.) Then Novak sent this text: "Like part of me is saying Anthony delete this before you accidentally get in trouble…." (*Id.*, Page ID #5400, 5409.)

At 7:59 p.m. that day, Novak made his last post announcing a fake mandatory curfew in Parma. (Novak Dep., R. 90-1, Page ID #4710.)

At 10:08 p.m. Novak texted Kopchu: "Should I delete this page hahaha" (Kopchu Dep. R.94-1, Page ID #5375.) By 10:10 p.m. Novak deleted the Fake Page on his own. (*Id.*, Page ID #5376.)[6]

D. Police obtain a search warrant for Facebook records.

On March 3, 2016, Connor appeared before Judge Kenneth Spanagel, who issued a search warrant for Facebook records. Connor's affidavit in support of the search warrant included the content of

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[6] The dates and times are confirmed by the UTC time stamps on the Facebook records. The Fake Page was up for about twenty-four hours before Novak took it down.

some of the Fake Page posts. (Novak Dep., R.90-1, Page ID ##4875–79.)

On March 18, Connor noted that he had received 2,796 pages of Facebook records, which he provided to Dobeck. (*Id.*, Page ID #4883.)

E. The City Law Director reviews the posts.

Dobeck reviewed all the posts and dozens of comments from people who were misled, and concluded that there was real confusion and disruption, noting that "…there were dozens of comments of people that were misled and thought that this was a believable page." (Dobeck Dep., R.120-1, Page ID ##23245–46.) He also immediately appreciated the broader implications. Dobeck testified that, the Official Police Page "is use[d] for very legitimate purposes, and we would hope that the public maintains confidence in it. It's used for road closures. It's used for crimes. It's used for tips. It's used for important information, safety information to get out to the public." Novak "cast[ ] doubt on a very important governmental function that the Parma Police had of letting people know things that are going on from a safety standpoint in the City and severing the confidence that the public has in that." (*Id.*, Page ID ##23251, 23373.)

Dobeck found probable cause existed because the calls to police dispatch, the Law Department, and the Safety Department constituted a disruption caused by Novak pursuant to R.C. 2909.04(B). (*Id.,* Page ID #23252.) Dobeck determined that there was sufficient evidence to constitute probable cause and

advised Connor that he could take the next step of seeking the review by a judicial official. Dobeck believed that Novak intended disruption because he deleted statements from people saying it was a fake site and copied the warning from the Official Police Page onto the Fake Page to make it appear legitimate. (*Id.*, Page ID ##23253–54.)[7]

F. A magistrate issues an arrest warrant.

On March 18, 2016, Connor went before Magistrate Edward Fink to seek a warrant to arrest Novak. Fink could not distinguish the Fake Page from the Official Police Page. (Fink Dep., R.92-1, Page ID # 5097.) He found that there was probable cause to arrest Novak for violating the Disruption Statute, and issued an arrest warrant. Fink, who could not recall ever having a case under division B of that statute, explained why he signed the arrest warrant: "Based on the complaint itself and the information that [Connor] gave me, I felt that this was a legitimate probable cause situation and that's why I signed it." (*Id.*, Page ID ##5099-5101.) "It was not a matter of being classified as a parody or anything like that. It was classified as confusing to the public and interfering with police function. … That is where I made the probable cause determination." (*Id.*, Page ID ##5106–07.)

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[7] Kopchu confirmed that Novak created the page "just to screw with people," which is "something he liked doing…." (Kopchu Dep., R.94-1, Page ID #5220.)

G. A judge issues a search warrant.

On March 25, 2016, Connor obtained a search warrant for Novak's computers and other electronic equipment from Judge Deanna O'Donnell. (O'Donnell Dep., R.91-1, Page ID #5041-42.) She, like Fink, could not tell which page was fake and which was real. (*Id*., Page ID #5097.) Thereafter, Connor and other officers executed the search warrant while Novak's roommate, Kozelka, was present. Kozelka testified that "Connor was the best one out of all the detectives....He was good and answered my questions about the warrant...." (Kozelka Dep., R.97-1, Page ID #6138.) Novak was arrested that same day. After learning of the arrest, Connor sought to interview Novak in jail, but Novak invoked his right to counsel. Novak admits that Connor did not offend him and was not abusive. (Novak Dep., R.90-1, Page ID #4570.)

H. The Grand Jury indicts Novak for violating R.C. 2909.04(B).

On April 11, 2016, the case was presented to the Grand Jury by Assistant Prosecuting Attorney John Gallagher, and Connor was called to testify. (Grand Jury Tr., R.86-1, Page ID #4429-38.) As part of his Grand Jury testimony, Connor stated: "…there's no issues with the first amendment, but you can't do what he did and absolutely mirror a government page and then portray yourself to be something you're not." (*Id.*, Page ID ##4434–35.)[8]

[8] Following Novak's arrest, Connor had learned that there were questions about whether Novak's Fake Page constituted satire, parody, or implicated any First Amendment concerns. Based on

The Grand Jury thereafter indicted Novak for violating the Disruption Statute.

Cuyahoga County Prosecutor Timothy McGinty independently reviewed the case. (McGinty Dep., R.93-1, Page ID #5154.) McGinty also believed that Novak could be prosecuted under the Disruption Statute. He recognized the public harm caused by Novak's Fake Page as "affect[ing] the public's confidence in the police department…." (*Id.*, Page ID #5156.) He remembered having the impression that he couldn't tell the difference between the Fake Page and the Official Police Page. (*Id.*, Page ID #5157.) He further observed that some people took the Fake Page extremely seriously and that it undermined the public's confidence in the Parma Police Department and the Official Police Page. (*Id.*, Page ID #5163.) When asked if Connor pressured him into prosecuting Novak, McGinty said: "Hardly, you know, nope. I don't take pressure well from any police officer or any attorney. There was no pressure whatsoever." (*Id.*, Page ID #5166.)

The case was prosecuted by Assistant Prosecuting Attorneys Anna M. Woods and Anthony T. Miranda before Cuyahoga County Judge Maureen Clancy. Novak's defense attorney filed a motion to dismiss the charges based on the First Amendment. On August 2, 2016, Judge Clancy, following an oral argument, denied the motion. (Plaintiff Novak's Reply in Support of Plaintiff's Motion for Partial

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his discussions with Dobeck, Connor believed that this case involved a disruption of public service as opposed to any First Amendment issues. (Affidavit of Thomas Connor, R.118-1, Page ID #23140.)

Summary Judgment, R.127-13, Page ID #25692.) Judge Clancy also denied: (1) Novak's request to give an instruction on the First Amendment, finding that it was unwarranted; and (2) Novak's motion for acquittal. The case was sent to the jury. (Crim. Trial Tr., R.6-1, Page ID #1556-1567.) The jury thereafter acquitted Novak. (*Id.*, Page ID #1620.)

In summary, Connor and Riley at all times proceeded in accordance with the guidance and/or court orders of others, including Law Director Dobeck, Judge Spanagel, Magistrate Fink, Judge O'Donnell, Assistant Prosecuting Attorney Gallagher, the Grand Jury which issued a true bill, Prosecuting Attorney McGinty, Assistant Prosecuting Attorneys Woods and Miranda, and Judge Clancy.[9]

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[9] Expert John J. Ryan also opined that Connor and Riley acted in keeping with generally accepted policies, practices, training, and legal mandates to officers; Riley did not play any role in the charging decision, arrest decision, or the search warrants; police are trained to seek the advice of prosecutors when they are uncertain about legal principles; dispatch personnel who answered the calls prompted by the Fake Page were drawn away from other duties, including answering emergency calls; educated attorneys and jurists determined that the charges were appropriate, so clearly, any reasonable and well-trained officer, based on the advice of a prosecutor and the agreement of a magistrate and judge, would conclude that the arrest and search warrants were proper and consistent with generally accepted policies, practices, and training; and when officers are confronted with non-routine issues they should seek the advice of the prosecutor, consistent with the best practices in law enforcement. (Affidavit and report of John J. Ryan, R. 119-1, Page ID #23147-91, at paragraphs 138, 139, 140, 142, 149, and 151.) The Ryan report also presents another impediment to addressing the issues Novak raises; because it was unrebutted,

SUMMARY OF THE ARGUMENT

The key question is not whether at some point a court may find a First Amendment issue under the circumstances of this case, but rather, whether Connor and Riley violated established law that was sufficiently clear so that every reasonable officer would have understood that what they were doing was unlawful.

The following specific arguments establish that this case is not suitable for review by this Court.

There is no considered reason to overrule qualified immunity case law based on the interpretation of a statute which Congress could have, but has not, revisited.

Prudential and jurisdictional considerations preclude further review of this matter.

The determinations by the lower courts that there are unresolved questions of fact as to any First Amendment issues render this matter unsuitable for consideration because this is a Court of final review and not first view.

There is no conflict between the Circuits, which have merely applied settled law to differing fact patterns. No uniform legal principle emerges from this case, so it is a poor vehicle for further review.

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it establishes the reasonableness of the Parma Defendants' conduct.

ARGUMENTS WHY PETITION SHOULD BE DENIED

I. There is no considered reason to overrule qualified immunity case law based on the interpretation of a statute which Congress could have, but has not, revisited.

Novak petitions this Court to revisit qualified immunity, but presents no compelling or considered reason to do so. Indeed, principles of *stare decisis* give particular force to the precedent holding that qualified immunity bars this suit.

A. The continued vitality of qualified immunity.

The doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Courts are admonished not to define clearly established rights at a high level of generality. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 742 (2011). While a case on point is not required, existing precedent must have placed the question "beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

This Court has reaffirmed the vitality of qualified immunity in 2021 in *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9 (2021), and *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021). In *Tahlequah*, this Court held: (1) "We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place .... On this record, the officers plainly did not violate any clearly established law."; and (2) "We have repeatedly told courts not to define clearly established law at too high a level of generality." *City of Tahlequah, Oklahoma*, 142 S. Ct. at 11. The same is true of this Court's holding in *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021). In that case this Court held that the qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. at 7-8 (citations omitted).

Connor and Riley were not plainly incompetent and did not knowingly violate the law. Moreover, they did not, in the context of this case, run afoul of any clearly established constitutional right which every reasonable official would have deemed beyond debate. They appropriately sought advice from Law Director Dobeck in keeping with their training; conducted a thorough investigation to gather information; prudently warned the public about the Fake Page; responsibly applied for search and arrest warrants; faithfully executed the warrants; and properly cooperated with the County Prosecutor who concluded that the matter should be prosecuted.

As noted earlier, the key question in this case is not whether some court in the future may decide

that the First Amendment extends to circumstances like those in this case, but rather, whether Connor and Riley contravened established law that was sufficiently clear so that every reasonable officer would have understood that what they were doing was unlawful. Novak in effect is contending that they should have ignored both legal advice and court orders—conduct which may have resulted in discipline, if not prosecution. Because there is no prior case law even approaching the unusual facts presented by this case, including, but not limited to, Novak intentionally and falsely replicating the official police warning and deleting comments of others who figured out that his page was bogus, they are entitled to qualified immunity. Indeed, this is a textbook case for the application of qualified immunity.

The reasonableness of the Parma Defendants' conduct is also supported by case law which precludes people from falsely representing themselves as government officials. This Court has held that "[s]tatutes that prohibit falsely representing that one is speaking on behalf of the Government [as Novak expressly did here], or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech." *United States v. Alvarez*, 567 U.S. 709, 721 (2012). This Court reasoned that:

> Title 18 U.S.C. § 912, for example, prohibits impersonating an officer or employee of the United States .... the statute is itself confined to

> "maintain[ing] the general good repute and dignity of ... government ... service itself [just as the Disruption Statute is limited to causing disruption]." The same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation (FBI) in a manner calculated to convey that the communication is approved, see § 709, or using words such as "Federal" or "United States" in the collection of private debts in order to convey that the communication has official authorization, see § 712.

Id. (citations omitted).

The Sixth Circuit embraced that rationale:

> Whether these actions—deleting comments that made clear the page was fake and reposting the Department's warning message—are protected speech is a difficult question. After all, impersonating the police is not protected speech. And for good reason—one can easily imagine the mayhem that a scam IRS or State Department website could cause....Indeed, Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech. So…the officers could reasonably believe that some of Novak's Facebook activity was

> not parody, not protected, and fair grounds for probable cause.

Novak, 33 F.4th 296, 305. (citations omitted).

Thus, there is considerable doubt as to whether copying a governmental warning verbatim is even Novak's own expression within the scope of the First Amendment. Furthermore, Novak's conduct in copying the warning from the Official Police Page distinguishes this matter from the authority he relies upon, and certainly establishes that investigating and prosecuting him was not a violation of clearly established law.

The reasonableness of the conduct of the police in this case is further buttressed by the true bill returned by the Grand Jury. Such a finding of probable cause, even in the face of First Amendment claims, protects state actors. Thus, in *Hartman v. Moore*, 547 U.S. 250, 252 (2006), this Court held that a plaintiff seeking recovery pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), or § 1983 must allege and prove the absence of probable cause. That burden is appropriate because it is difficult to divine the state of mind of the official. *Hartman* at 261-263.

In reaffirming *Hartman*, this Court in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), announced a bright line test: claimants must plead and prove a lack of probable cause in retaliatory arrest cases. This Court held that a claimant must show not only that the official acted with a retaliatory motive, but also that the motive was a "but-for" cause of the injury. *Id.* at 1722. Still, mindful of the risk that

police could use arrest power as a means of suppressing speech, *Nieves* recognized a narrow qualification that removes the no-probable-cause requirement when a claimant presents objective evidence that other similarly situated individuals were not arrested. *Id.* at 1727. Significantly, there is no such allegation here.

B. Because a statute is involved, principles of *stare decisis* give particular force to prior decisions.

A statute such as 42 U.S.C. § 1983 is analyzed differently than a pure constitutional question. As this Court explained in *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446 (2015): "What is more, *stare decisis* carries enhanced force when a decision...interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.… Indeed, we apply statutory *stare decisis* even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects." *Id.* at 456.

Here, the "ball" of eliminating qualified immunity has been in Congress's proverbial court for many decades, and the statute has not been modified by any amendment. Rather, its interpretation is

settled law relied upon nationwide. Novak presents no considered reason to revisit it.

Further, there are compelling reasons for this Court not to accept this case, as detailed in the following two sections of this Brief.

II. Prudential and jurisdictional considerations preclude further review of this matter.

The qualified immunity doctrine is effectively part of 42 U.S.C. § 1983. *Kimble*, 576 U.S. at 455–56. Thus, the constitutional avoidance doctrine is applicable and has been consistently applied by this Court to hold that federal courts will not decide a constitutional issue if there are other statutory grounds that resolve the case. *Escambia County, Fla. v. McMillan*, 466 U.S. 48, 51 (1984) ("Affirmance on the statutory ground would moot the constitutional issues presented by the case. It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). If a court addresses a pertinent statutory issue and so resolves the case, any constitutional issue is moot and need not be considered.

Here, the Sixth Circuit deemed it unnecessary to address the First Amendment issues: "Whether Novak's satirical posts were protected parody is a question of fact." The Court had no difficulty concluding that qualified immunity applied because it "protects officers who 'reasonably pick [ ] one side or the other' in a debate where judges could 'reasonably disagree.'" *Novak*, 33 F.4th 296, 304-5.

(citation omitted). The Court observed: "…the officers had good reason to believe they had probable cause. Both the City's Law Director and the judges who issued the warrants agreed with them…. That's enough to shield Riley and Connor from liability." *Id.* at 305. The District Court followed the same approach: "the Court does not even have to resolve the First Amendment issue to rule on the parties' motions for summary judgment." *Novak*, 2021 WL 720458, at *1.

In sum, the constitutional avoidance doctrine precludes further review of this case.

III. The determinations by the lower courts that there is an unresolved question of fact render this matter unsuitable for further consideration because this Court is one of final review and not first view.

This Court does not resolve issues of fact because this Court is one of final review and not first view. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*); *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below."). Yet in this case, the courts below found an issue of fact as to whether Novak's speech was entitled to First Amendment protection. The District Court held as follows: "This Court agrees that there is a genuine dispute of material facts on whether the Facebook post was protected by the First Amendment." *Novak*, 2021 WL 720458, at *8. The Sixth Circuit agreed: "Whether Novak's satirical posts were protected parody is a question of fact."

Novak v. City of Parma, Ohio, 33 F.4th at 304. Despite Novak's claim at page 36 of his Petition that "There are … no messy fact disputes.…" both lower courts expressly found that a question of fact was presented.

That determination by the lower courts may have been grounded in the number of posts and the means by which Novak communicated them. Novak used a dynamic medium which evolved as he added and deleted information over time. Those facts distinguish this matter from cases like *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46 (1988). In *Hustler,* the parody at issue was a one-page advertisement printed on the inside front cover of the magazine's November 1983 issue. The parody was self-contained, and its full context was apparent to anyone who saw the advertisement. Readers did not have to scour the magazine or wait until the next month's issue to get the joke. Moreover, that ad contained a disclaimer that it was parody. While Novak did not have to label his page as such, he cannot intentionally and falsely copy a warning from the Official Police Page onto his Fake Page.

The determinations of the lower courts that there are unresolved factual disputes render this case unsuitable for review by this Court.

Finally, this case should not be accepted for review because there is no Circuit conflict and this matter is a poor vehicle to render a generally applicable statement of law.

IV. There is no conflict between the Circuits which have merely applied settled law to differing fact patterns. No uniform legal principle emerges from this case, so it is a poor vehicle for further review.

A. There is no Circuit conflict.

Novak claims that the Fifth Circuit's decision in *Villarreal v. City of Laredo, Texas*, 44 F.4th 363 (5th Cir. 2022), is somehow in conflict with the Sixth Circuit's decision here. The panel opinion in that case, however, has been VACATED. On October 28, 2022 the Fifth Circuit in *Villareal* issued the following order:

> IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion in this case dated August 12, 2022, is VACATED.

Villareal v. City of Laredo, Texas, 52 F.4th 265 (5th Cir. 2022). (The case is set for rehearing on January 25, 2023.)[10]

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[10] Moreover, *Novak* is distinguishable from *Villarreal*, which: (1) involved only speech, not conduct; (2) concerned a statute which made the simple act of asking the police questions (speech) illegal; (3) involved a single, verbal question to the police rather than a series of posts on a dynamic social media platform; (4) did not present an unprecedented factual scenario; (5) did not involve copying verbatim an official police warning and falsely claiming that a fake website was an official one;

The decisions of the Ninth and Tenth Circuits cited by Novak also demonstrate that there is no conflict among the circuits. The Ninth Circuit's decision in *Ballentine v. Tucker*, 28 F.4th 54 (9th Cir. 2022), involved arrests based on clear probable cause because of the acts, not the content, i.e., writing in chalk on sidewalks resulting in an expensive mess to clean up. However, it was shown that, in comparable situations, where officers had probable cause to make arrests for similarly placed chalk marks on sidewalks, they typically exercised their discretion not to do so. Ballentine alleged and presented evidence that his arrest was specifically in retaliation for protected First Amendment speech. Novak has not alleged or offered any evidence of disparate treatment. The record is devoid of evidence supporting Novak's assertion that he was arrested because of the content of his speech. Indeed, the District Court concluded that the police were not seeking revenge because of Novak's speech. See footnote 5, *infra.*

There also is no conflict with the Tenth Circuit's decision in *Thompson v. Ragland*, 23 F.4th 1252 (10th Cir. 2022), which involved one student asking others to review a professor. In reversing an order granting a motion to dismiss, the Tenth Circuit

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(6) did not involve deceptive conduct, including deleting comments from those who realized that the posts were fake; (7) did not raise issues of public safety; (8) did not involve consultation and approval by judges and attorneys of warrants authorizing searches and a subsequent arrest; and (9) was presented on a motion to dismiss governed by the allegations of the complaint.

found the case to be an "easy one" because the student's speech was restricted. The Court concluded that the law was clearly settled that Thompson could not be disciplined for sending an email to fellow students, at least based on the facts alleged in the complaint. Thus, *Thompson* was a straight forward application of settled law to a completely different fact pattern.

Moreover, the Homeless Post (which generated the initial disruption and prompted the investigation) concerned prohibiting feeding the homeless. Similar laws have, in fact, been enacted nationwide. See footnote 3, *infra*. The Homeless Post, coupled with Novak's conduct in copying verbatim the warning from the Official Police Page, his intentional deletion of others' speech identifying the falsity of his posts, and the appearance of his Fake Page which was effectively indistinguishable from the Official Police Page, does not resemble any prior case where parody was found, including the cases Novak relies upon. Accordingly, there is no conflict between the Circuits necessitating this Court's review.

B. This case is a poor vehicle for review because it does not present a generally applicable statement of law.

This case does not present an opportunity to establish First Amendment or qualified immunity precedent of universal application pursuant to a rule of law.

The weakness of Novak's position is apparent from the first question he presents in his Petition: "Whether an officer is entitled to qualified immunity for arresting an individual based solely on speech parodying the government, so long as no case has previously held the particular speech is protected." The record establishes that Novak was investigated, charged, and prosecuted for violating the Disruption Statute, not because of his speech. More fundamentally, this question has already been answered. In *White v. Pauly*, 137 S. Ct. 548, 551 (2017), this Court expressly stated that a case on point is not required. What is necessary to strip officers of qualified immunity is that existing precedent place the statutory or constitutional question "beyond debate."

Qualified immunity determinations are necessarily fact intensive. How close the facts must be to prior precedent is not amenable to a uniform legal principle. *White* provides the appropriate guidance. The instant case involves an isolated incident which is highly fact bound. Accordingly, this matter does not lend itself to any uniform statement of legal principle.

One additional issue warrants comment: this matter raises weighty public safety issues that could affect policing and safety nationwide.

Both the Parma Defendants and Cuyahoga County Prosecutor McGinty were concerned about the safety of the public. Novak imitated a police web page designed to warn the public of time-sensitive matters, including road closures and criminal

activity. This feature of this case not only distinguishes it from other cases, and thus renders it a poor vehicle for review, but also raises the specter of further erosion of trust in law enforcement tools, including official social media sites. A reversal of this case may pose risks to the public and the police.

In addition, a reversal of this case could exacerbate the nationwide crisis police agencies are experiencing. Police departments across the country are faced with critical staff shortages which threaten the safety of citizens and the police.[11] As a result, there are longer waits for emergency and non-emergency calls, longer response times, fewer crimes solved (in part due to longer response times), and more officer burn out. For instance, in Denver, Colorado, since 2018 the average response time for lower-priority 911 calls increased to over 34 minutes – more than 5 1/2 minutes longer than in 2018. Further, since 2018, response times for the highest priority calls, like those for shootings, increased nearly 3 minutes to about 14 1/2 minutes.[12]

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[11] Ryan Young, Devon M. Sayers and Ray Sanchez, *'We need them desperately': US police departments struggle with critical staffing shortages*, CNN (last modified July 20, 2022) <https://www.cnn.com/2022/07/19/us/police-staffing-shortages-recruitment/index.html> (noting decreased staffing resulting in longer wait times for 911 callers).

[12] Matt Jablow, *Denver sees alarming increase in police response times*, NBC's KUSA Channel 9 News Denver (last modified Sept. 6, 2022) <https://www.9news.com/article/news/investigations/denver-police-longer-response-times/73-313872e8-945c-4ce8-a1d5-8f31a35ca724>.

In this particular case, expert Ryan has opined that the dispatch personnel who answered the calls prompted by the Fake Page were drawn away from other duties. See footnote 9, *infra*.

Public trust in the police is eroding. Overall confidence in the police was as high as 64% in 2005 but in 2019 dipped to 53%.[13] Conduct like Novak's further erodes public trust in law enforcement agencies and tools like the Official Police Page they use to inform and protect the public.

This Court stated in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), that qualified immunity was recognized, in part, because civil rights litigation may divert official energy from pressing public issues and dampen the ardor of all but the most resolute in the unflinching discharge of their duties. This case is a prime example of how police departments and their officers may be diverted from critical public safety matters and discouraged from investigating and prosecuting offenders.

CONCLUSION

Qualified immunity jurisprudence is well-established and based on the interpretation of a statute which Congress could have, but has not, revisited. There is no considered basis to overrule the prior cases decided by this Court, particularly in light of principles of *stare decisis*.

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[13] Congressional Research Service, Public Trust and Law Enforcement—A Discussion for Policymakers (updated July 13, 2020) <https://sgp.fas.org/crs/misc/R43904.pdf>. Figure 1.

The determinations by the lower courts that there are unresolved issues of fact render this matter unsuitable for further consideration because this is a Court of final review and not first view.

There is no conflict between the Circuits, which merely have applied settled law to differing fact patterns. Accordingly, there is no uniform legal principle at issue, making this matter a poor vehicle for review.

For the foregoing reasons, the Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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