

No. 25-1323

In the
Supreme Court of the United States

CITY OF BOSSIER CITY,
Petitioner,

v.

RICHARD HERSHEY, ET AL.,
Respondents.

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

**BRIEF FOR THE STATES OF LOUISIANA,
TEXAS, AND MISSISSIPPI AS *AMICI CURIAE*
SUPPORTING PETITIONER**

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INTEREST OF *AMICI CURIAE*

The States of Louisiana, Texas, and Mississippi respectfully submit this brief as *amici curiae* in support of petitioner.¹

Amici States and their municipalities employ numerous officials who do their level best every day to serve the public. To ensure that State and local officials operate within the bounds of federal law, 42 U.S.C. § 1983 authorizes a cause of action principally against such officials for violations of, among other things, federal constitutional rights. In *City of Canton v. Harris*, this Court held that a municipality likewise may be held liable under § 1983 for allegedly inadequate training of its employees, but “only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact.” 489 U.S. 378, 388 (1989); accord *Connick v. Thompson*, 563 U.S. 51, 60–62 (2011).

The majority below fundamentally altered failure-to-train liability, making such claims virtually impossible to defend against and threatening a host of severe logistical and monetary consequences for municipalities and States alike who see failure-to-train claims every day. See, e.g., *Porter v. Epps*, 659 F.3d 440 (5th Cir. 2011); *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989). *Amici* States raised this issue in an en banc amicus brief below—and they now file this brief to underscore that this Court’s review and reversal are warranted.

¹ Pursuant to Rule 37.2, Louisiana timely notified all parties of its intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For decades, this Court has “limited” the circumstances in which a local government may be held liable under § 1983 for its alleged failure to sufficiently train its employees. *Connick*, 563 U.S. at 61. Those limited circumstances exist only where “a municipality’s failure to train its employees in a relevant respect must amount to ‘deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’” *Id.* (alteration in original) (citing *Canton*, 489 U.S. at 388). And the only two bases for finding deliberate indifference are where (1) a policymaker has refused to alter its training despite a pattern of similar constitutional violations by its employees, or (2) “the unconstitutional consequences of failing to train [are] so patently obvious that a city could be liable ... without proof of a pre-existing pattern of violations.” *Id.* at 63–64.

Those two limits are deeply important to *amici* States because they ensure that failure-to-train liability stays within its proper bounds. The majority below, however, virtually erased those limits. It held that petitioner Bossier City can be liable for a single alleged constitutional violation by two police officers, even though the governing law (and even the existence of a violation) is not patently obvious, the police officers themselves are entitled to qualified immunity, and there was no preexisting pattern of similar alleged constitutional violations. That is a recipe for tailor-made, failure-to-train claims in the Fifth Circuit that will proceed past a motion to dismiss solely on a plaintiff’s breathless claim “that defendants lacked training

to handle [his] case.” App.29a (Oldham, J.). And that decision is squarely foreclosed by a proper reading of *Connick* and *Canton*.

If upheld, moreover, the decision below threatens serious consequences. It promises a proliferation of failure-to-train claims as savvy plaintiffs and plaintiffs lawyers seek to cash in on easy claims against municipalities. It introduces a host of litigation and associated costs as municipalities are now faced with new and protracted litigation. They must assess not only the pros and cons of settlements (at the expense of funding for their own projects), but also the apparent impossibility of creating and funding a training regimen that could survive constitutional scrutiny under the majority’s rule. And all that says nothing of the grave harm to our federalism: In this context, the Court has recognized, there are “serious” federalism problems that flow from federal courts “second-guessing municipal employee-training programs.” *Canton*, 489 U.S. at 392. So here. By erroneously lowering the limits on failure-to-train liability imposed by this Court, the decision below opens the door to the very federalism problems that those limits were intended to avoid.

The Court should grant the petition.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY LOWERS THE HIGH BAR FOR FAILURE-TO-TRAIN CLAIMS.

The decision below is wrong—and this Court’s review is warranted—because the decision misapplies this Court’s precedents on failure-to-train claims.

That matters to the *amici* States because they and their numerous municipalities face failure-to-train claims every day. *See, e.g., Porter*, 659 F.3d at 446; *Sample*, 885 F.2d at 1117–18. So, while the decision below technically concerns only one Louisiana city, that decision impacts every government official within the Fifth Circuit, it directly splits with decisions from sister circuits, *see* Pet.25–30, and it must be reversed.

A. Two limits traditionally have cabined failure-to-train liability. First, a plaintiff who brings a failure-to-train claim ordinarily must show “[a] pattern of similar constitutional violations”—which suggests (a) the policymaker had actual notice that his training was deficient and (b) the policymaker nonetheless made a “deliberate” (rather than negligent) choice to leave that deficiency in place. *Connick*, 563 U.S. at 61–62; *Canton*, 489 U.S. at 389–90. Second, barring a showing of such a pattern, this Court has hypothesized that failure-to-train liability might be established by a single incident where the constitutional violation was a “patently obvious” consequence of inadequate training. *Connick*, 563 U.S. at 63–64.

Each limit shares a critical feature: a fair inference that the constitutional violation itself was the product of the policymaker’s “deliberate choice” in “disregard[ing] a known or obvious consequence of his action.” *Id.* at 61–62 (first quoting *Pembauer v. Cincinnati*, 475 U.S. 469, 483 (1986), then *Board of Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)). And that critical feature, in turn, serves a critical purpose. It ensures that a failure-to-train claim does not collapse into “*de facto respondeat superior* liability.” *Id.* at 62 (quoting *Canton*, 489 U.S. at 392). After all, “[a]

municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.” *Id.* at 61. These limits thus keep failure-to-train claims within their proper bounds.

By necessity, moreover, the first “pattern of similar constitutional violations” limit informs—and indeed illustrates the demanding nature of—the second “single incident” limit. One can infer a policymaker’s deliberate indifference from “[a] pattern of similar constitutional violations” only because the policymaker’s “continued adherence to an approach that they know or should know has failed to prevent tortious conduct” arguably betrays “conscious disregard for the consequences of their action.” *Id.* at 62 (citation omitted). That inference arises only because there is a clear factual basis for imputing to the policymaker both (a) knowledge of the pattern of constitutional violations caused by his failure to adequately train his employees and (b) by virtue of his failure to remedy the training problem, a deliberate choice to greenlight such violations.

But no such clear factual basis exists where a policymaker has never seen such a violation and so cannot be charged with knowledge of such a violation or deliberate indifference to it. That is the stuff of the second limit—“that the unconstitutional consequences of failing to train could be so patently obvious that a [municipality] could be liable under § 1983 without proof of a pre-existing pattern of violations.” *Id.* at 64. In that rare situation, the only possible basis for finding liability based on a single incident is that the constitutional violation was so blindingly clear and predictable that a policymaker should be deemed to have had

constructive knowledge of that violation and to have been deliberately indifferent to it by failing to adequately train his employees. Put otherwise, the obviousness of the single-incident violation must be tantamount to the obviousness necessary to hold a policymaker liable based on a pattern of similar constitutional violations.

The “patently obvious” language used by this Court reinforces the point. That language comes from the qualified-immunity jurisprudence, which generally denies qualified immunity to a government official if his conduct “was so outrageous that no reasonable [official] would have believed the conduct was legal.” *E.g., Leiser v. Kloth*, 933 F.3d 696, 704 (7th Cir. 2019). As this Court has recognized in cases like *Hope v. Pelzer*, 536 U.S. 730 (2002), a plaintiff “may not need to cite closely analogous cases” to avoid qualified immunity (as in the usual qualified-immunity inquiry) if “the constitutional violation is ‘patently obvious.’” *Leiser*, 933 F.3d at 704 (citation omitted); *see Tyson v. Sabine*, 42 F.4th 508, 520 (5th Cir. 2022) (qualified immunity “does not immunize those officials who commit novel, but patently ‘obvious,’ violations of the Constitution” (citing *Hope*, 536 U.S. at 745)). But that is an exceedingly rare and narrow category of cases. Think, for example, of the heinous conduct by a police officer who sexually harassed and assaulted an innocent woman for two hours in her own home in ways too graphic to describe here. *See Tyson*, 42 F.4th at 520–21 (“No reasonable officer could believe that it was constitutionally permissible to use the pretense of legitimate police activity to sexually abuse a person by coercing her to perform physical sex acts for the of-

ficer’s sexual gratification.”). As that example illustrates, it is truly the rare case where a constitutional violation is so “‘patently obvious’ and ‘so outrageous’” as to warrant the denial of qualified immunity to an official, notwithstanding the absence of any factually similar authority notifying the official that his conduct was illegal. *E.g.*, *Smith v. Finkley*, 10 F.4th 725, 746 n.8 (7th Cir. 2021) (citation omitted).

The same reasoning controls the Court’s hypothesis “that the unconstitutional consequences of failing to train could be so patently obvious that a [municipality] could be liable under § 1983 without proof of a pre-existing pattern of violations.” *Connick*, 563 U.S. at 64. The best understanding of that language is that (barring persistently inadequate training in the face of a pattern of similar constitutional violations) a municipality may be held to account for an employee’s single constitutional violation only in the exceedingly rare case—namely, where the constitutional violation at issue was the patently obvious (and indeed outrageous) consequence of a failure to train. The only hypothetical the Court has identified proves the point: If a city gives its employees guns and then tells them to go forth and do justice on the streets—all without training on the constitutional use of force—it is virtually certain that the untrained and unconstitutional use of deadly force will unfold. *See Connick*, 563 U.S. at 63–64. In practice, of course, that hypothetical (thankfully) is unlikely to become reality today. But the improbability of the hypothetical demonstrates just how narrow this universe of potential cases is intended to be. So here: Absent a pattern of similar constitutional violations, a municipality may be held liable for an employee’s single constitutional violation

only in the rare and outrageous case where “the unconstitutional consequences of failing to train [are] patently obvious.” *Connick*, 563 U.S. at 64.

B. As Judge Richman and Judge Oldham explained, this is not such a rare and outrageous case. *See* App.80a (Richman, J.) (“This case does not present the ‘rare’ and ‘narrow and extreme circumstances’ that our court and the Supreme Court has said permit ‘drawing the inference’ of ‘deliberate indifference.’”); *accord* App.28a–31a (Oldham, J.). The best evidence of that is the Fifth Circuit’s *affirmance* of the grant of qualified immunity to the officers who asked respondent to stop distributing his vegetarianism pamphlets. As Judge Richman explained, qualified immunity was plainly warranted because respondent “does not point to a single decision from any court that has held, before or after the date of this incident, that an officer violated the rights of a leafleteer who was removed from a similar arena premises.” App.68a. As the petition explains, the constitutionally relevant status of these premises is unclear, as is the corresponding constitutional right respondent claims was violated. *E.g.*, Pet.21 & n.2. And for the same reasons, there is no serious claim that the police officers should have been denied qualified immunity on the ground that their alleged violations were “‘patently obvious’ and ‘[] outrageous.’” *Smith*, 10 F.4th at 746 n.8 (citation omitted).

That is what makes the decision below inexplicable. Notwithstanding that there is no plausible argument for denying the officers qualified immunity on the theory that the constitutional violations were “patently obvious,” the relevant majority below concluded that the municipality itself, Bossier City, is liable

based on this single incident. As just discussed, single-incident liability attaches only where “the unconstitutional consequences of failing to train [are] patently obvious.” *Connick*, 563 U.S. at 64. But that finding is untenable here because it would suggest that the officers are *not* entitled to qualified immunity—yet no one seriously disputes that the officers themselves are of course entitled to qualified immunity. This is an “upside down” world. App.28a (Oldham, J.). And it is worse than “*de facto respondeat superior* liability,” *Connick*, 563 U.S. at 62 (quoting *Canton*, 489 U.S. at 392), because the officers are not even liable in the first place.

The Fifth Circuit majority’s error flows from its failure to recognize that the “patently obvious” limit for single-incident liability in cases like *Connick* and *Canton* is logically coextensive with the “patently obvious” limit in qualified-immunity cases like *Hope*. In both contexts, that limit is extraordinarily demanding, and the limit cannot plausibly be understood to be respected in one context while simultaneously breached in the other. This understanding harmonizes the Court’s jurisprudence across these contexts. And it finds support in the decisions from numerous courts of appeals that have recognized the importance of cabinining the “patently obvious” cases to those rare contexts where (unlike here) the failure to train predictably leads to a violation of clearly established law. *See* Pet.26–27.

II. THE DECISION BELOW THREATENS UNTENABLE CONSEQUENCES.

This Court’s review and reversal are warranted not only because the decision below is wrong, but also because that decision dramatically lowers a plaintiff’s pleading burden in a way that threatens numerous harmful consequences.

A. Under the decision below, a plaintiff with a single-incident, failure-to-train claim “need only allege that defendants lacked training to handle plaintiff’s case—even if the *ex ante* risk of a constitutional violation was infinitesimal.” App.29a (Oldham, J.). “This doctrinal Calvinball will have predictable effect: As Judge Richman ably explained, plaintiffs can always ‘granulate allegations so finely that they arrive at a complete failure to train,’ so they will be able to allege municipal liability in ‘virtually every instance.” *Id.* (quotation marks omitted). As Justice Scalia warned, the phrase “failure to train” effectively becomes “a talismanic incantation producing municipal liability in virtually every instance” of a claimed constitutional violation. *Connick*, 563 U.S. at 74 (Scalia, J., concurring) (citation modified).

“That result cannot be squared with [this Court’s] admonition that failure-to-train liability is available only in ‘limited circumstances[.]’” *Id.* And yet that is the world endorsed by the majority below.

B. That dramatically relaxed pleading burden, in turn, threatens serious consequences, including four emphasized here.

First, it promises a proliferation of failure-to-train claims against municipalities. Under the majority’s

rule, savvy plaintiffs (and plaintiffs' lawyers in the hunt for attorney's fees on the cheap, *see* 42 U.S.C. § 1988(b)) have every incentive to go after municipalities (which lack the benefit of qualified immunity) rather than officials (who have the benefit of qualified immunity) since "they will be able to allege municipal liability in 'virtually every instance.'" App.29a (Oldham, J.). What enterprising plaintiff would not pass up the legal equivalent of shooting fish in a barrel?

Second, the relaxed pleading burden threatens untold and unjustifiable litigation costs for municipalities. In the ordinary case, a lawsuit against a local official and his municipal employer generally rises and falls on the viability of the claim against the official. If that official is entitled to qualified immunity, then that threshold determination at the outset of the case typically is also the end of the case. That is unsurprising because "every *Monell* claim requires an underlying constitutional violation," so such claims routinely fail "where the plaintiff fails to establish a § 1983 claim against an individual officer." App.29a–30a (Oldham, J.) (citation omitted).

But the rule set by the decision below flips things upside down. Where municipalities ordinarily would prevail at the motion-to-dismiss stage to avoid meritless claims, discovery burdens, and trial, now municipalities will be forced into protracted and costly litigation simply because of a plaintiff's breathless claim of a "failure to train." *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 817 & n.29 (1982) (identifying concerns with wide-ranging, time-consuming, and costly discovery, which "can be peculiarly disruptive of effective government"). This case is a prime example. The Bossier City

police officers are out of this case on qualified immunity. *See* App.39a (Ho, J.). Yet Bossier City itself remains on the hook to defend this suit through summary judgment, perhaps a trial, and then final judgment.

Third, the threat of those litigation costs carries a host of worries about other costs. For instance, some budget-strapped municipalities will be forced to consider settling these lawsuits, even if the suits lack merit, merely because of the expected length and expense of litigation that should never proceed past a motion to dismiss. They likewise will be forced to determine whether they are financially capable of funding such settlements—and even if they are capable, they will be forced to shelve other initiatives for their citizens that could have been funded by the money sunk into ending these lawsuits.

Other municipalities will be forced to assess what, if any, affirmative costly steps they should take to head off litigation before it even begins. But what can they do to avoid this litigation? Take this case as an example. The majority below apparently would demand that Bossier City have trained its officers on the ins and outs of First Amendment forum analyses, a subject that leaves even the heads of actual law students spinning. But one of the deepest ironies of this suit is that, even if Bossier City had trained its officers on the precise forum issue presented by the Winter Jam concert at CenturyLink Center, that training would have changed exactly nothing about this case. The most that training could have told the officers is what the magistrate judge and Judge Richman below

recognized: There is “divided authority on how to classify similar areas outside public arenas during private events.” Pet.12; *accord* App.70a (Richman, J.) (“[W]e cannot expect officers, even those trained in First Amendment law, to know whether a given area near an arena being used in a particular way at a given time is or is not a public forum given the uncertainties of the law in this area.”). No training, therefore, would have *obviously* (much less *patently* obviously) notified Bossier City and its officers that they should not ask respondent to stop pamphleteering. Yet the City is liable under the majority’s rule all the same.

Worse, even if Bossier City successfully trained its officers on forum analyses, what if the City failed to train its officers on some other area of First Amendment law—maybe the historical practices and understandings underlying the Establishment Clause, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), or the impermissible government coercion of private speech, *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175 (2024)? If the City is sued over some alleged First Amendment violation implicating those areas of the law, the City would be back in the same position it finds itself today. *See* App.88a–89a (Richman, J.) (reasoning that a State that trained its officers on one First Amendment subject would still face a “no training at all” claim as to a different First Amendment subject its training program did not specifically name). Rinse and repeat for every other constitutionally protected right. As these examples show, under the majority’s rule, there is seemingly no end to the time and expense that local governments must incur in attempting to avoid failure-to-train liability.

Third, and perhaps most fundamentally, the relaxed pleading standard does grave damage to our federalism. This Court has emphatically rejected any understanding of failure-to-train liability that would “engage the federal courts in an endless exercise of second-guessing municipal employee-training programs.” *Canton*, 489 U.S. at 392. That is because such an exercise is one this Court “believe[s] the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism.” *Id.* Yet that is precisely the exercise blessed by the majority below. It installs federal courts as human resources directors, combing through municipalities’ training curricula any time a plaintiff claims his specific case was not adequately anticipated by a municipality. And it allows federal courts to second-guess the training decisions made by municipalities, even where (as here) no pattern of problems could have put a municipality on notice of a need for training and the asserted constitutional violation itself is not even patently obvious. *Canton* squarely forecloses this exercise.

* * *

Failure-to-train claims are supposed to be difficult to prove. *See Connick*, 563 U.S. at 61–62. The decision below, however, drives a truck through the limits on such claims imposed by this Court’s precedents, threatening severe consequences for every municipality impacted by the decision. This Court’s review and reversal are warranted. *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (vacating and remanding where lower courts failed to properly apply the standard governing “hard to win” facial claims).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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