

No. 25-1323

In the
Supreme Court of the United States

CITY OF BOSSIER CITY, LOUISIANA,

Petitioner,

v.

RICHARD HERSHEY, et al.,

Respondents.

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

BRIEF IN OPPOSITION

KELLY J. SHACKELFORD	PAUL D. CLEMENT
JEFFREY C. MATEER	<i>Counsel of Record</i>
DAVID J. HACKER	JEFFREY C. THALHOFFER
HIRAM S. SASSER, III	NICHOLAS A. AQUART
ERIN E. SMITH	ILAN J. POSNER
FIRST LIBERTY	CLEMENT & MURPHY, PLLC
INSTITUTE	706 Duke Street
2001 W. Plano Pkwy.	Alexandria, VA 22314
Ste 1600	(202) 742-8900
Plano, TX 75075	paul.clement@clementmurphy.com

(additional counsel listed on inside cover)

Counsel for Respondent Richard Hershey

July 29, 2026

NATHAN W. KELLUM
FIRST LIBERTY
INSTITUTE
699 Oakleaf Office Lane
Suite 107
Memphis, TN 38117

Sarah Giglio
GILMER & GIGLIO,
L.L.C.
3541 Youree Dr.
Shreveport, LA 71105

QUESTION PRESENTED

Whether petitioner Bossier City can be held liable under 42 U.S.C. §1983 for its egregious failure to train its law enforcement officers on the First Amendment, which predictably resulted in the violation of respondent Richard Hershey's clearly established First Amendment right to peacefully distribute religious leaflets on a public sidewalk in a public park.

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INTRODUCTION

On February 28, 2020, respondent Richard Hershey set out to peacefully distribute religious leaflets on a public sidewalk, situated in a public park, outside of a public arena hosting a Christian rock concert in Bossier City, Louisiana. Not long after he began spreading his message, five police and security officers approached, threatened to arrest Mr. Hershey for his religious leafletting, and banned him indefinitely from the premises—all the while ignoring a nearby commercial leafleteer. That was a blatant violation of Mr. Hershey's clearly established First Amendment rights. Religious leafletting is doubly protected by the First Amendment, public sidewalks are a quintessential public forum, and viewpoint discrimination ranks among the worst of First Amendment offenses. It should have been clear beyond cavil to any adequately trained law enforcement officer that Mr. Hershey's leafletting was constitutionally protected and singling out his speech for suppression was unlawful. Unfortunately and all too evidently, petitioner Bossier City provided its officers with absolutely no training whatsoever on the First Amendment. That complete failure to train predictably led to a clear violation of Mr. Hershey's First Amendment rights.

This Court has repeatedly affirmed that a local government may be held liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) where its obvious failure to provide law enforcement with adequate training predictably results in a constitutional violation. Mr. Hershey's allegations satisfy—indeed, surpass—that standard. As a

majority of the panel explained in allowing his claim to proceed past the pleadings stage, Mr. Hershey plausibly alleged that petitioner's failure to provide any First Amendment training whatsoever to its law enforcement officers led those officers to go where properly trained officers wisely fear to tread.

Petitioner nonetheless asks this Court to review that unremarkable application of *Monell* based on a remarkable misreading of the panel's decision and by invoking a circuit split that does not, in fact, exist. According to petitioner, the panel should not have allowed Mr. Hershey's *Monell* claim to proceed past the pleadings stage without also finding that the officers' underlying conduct violated a clearly established right. But this Court has never suggested that *Monell* liability is limited to the failure to train about obvious constitutional violations, as opposed to more subtle ones. Regardless, the panel majority held that the conduct here amounted to an obvious violation of Mr. Hershey's clearly established right to peacefully leaflet free from viewpoint discrimination. The panel majority further held that the officers' clear constitutional violation was a predictable result of petitioner's obvious failure to train its officers on the First Amendment. That is a textbook application of *Monell* liability.

Indeed, the only oddity here is that while the panel majority held that the conduct here was an obvious violation of clearly established constitutional rights, it nonetheless granted the officers qualified immunity because of the absence of a circuit precedent involving comparably egregious facts. *But see Hope v. Pelzer*, 536 U.S. 730, 738 (2002). While Mr. Hershey

agrees there is considerable tension between the Fifth Circuit’s *Monell* and qualified immunity holdings, that tension is a direct result of the Fifth Circuit’s failure to apply *Hope* outside the Eighth Amendment context, rather than any error in its *Monell* analysis. *See* Pet.App.39a-40a (Ho, J., concurring). The proper way to eliminate that tension is to grant Mr. Hershey’s petition asking this Court to affirm that *Hope* is not limited to the Eighth Amendment context, as a host of amici have urged. And in the unlikely event the Court is inclined to grant plenary review of the City’s petition, it should clearly grant Mr. Hershey’s petition. Mr. Hershey should have a remedy from both the officers and the City for the unconstitutional harm he has endured. The one result that would have nothing to recommend it would be to consider eliminating the City’s liability while leaving the Fifth Circuit’s anomalous qualified immunity ruling undisturbed.

STATEMENT OF THE CASE

A. Factual Background.

Respondent Richard Hershey—a senior citizen from Missouri—is a vegetarian advocate who feels compelled by his ethical beliefs to share the Christian Vegetarian Association’s religious message with the world. Pet.App.126a-127a.¹ By that evangelism, Mr. Hershey seeks to convert others to adopt a plant-based diet as an expression of good Christian stewardship. February 28, 2020, presented an ideal opportunity for

¹ These facts are drawn from Mr. Hershey’s complaint, which the court accepts as true at this stage of the litigation. *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 181 (2024).

him to do so. The Bossier City Arena, currently named Brookshire Grocery Arena, was hosting a Christian rock concert (Winter Jam). Pet.App.128a. Accordingly, Mr. Hershey set out to peacefully exercise his Free Speech and Free Exercise rights by distributing religious leaflets on the public sidewalk outside the Arena.² Pet.App.127a-128a.

Situated in a public park, the Arena is publicly owned by petitioner and managed by a private entity. Pet.App.127a; Pet.App.140a. The public park in which the Arena sits is directly connected to the surrounding streets, and the park's sidewalks and streets are all "open and unrestricted to the public." Pet.App.49a; Pet.App.127a. There are no gates or fences barring access to the park or cordoning off its sidewalks from the surrounding public area. Pet.App.127a. Nor is there any formal application process or written policy governing leafletting on the public sidewalks surrounding the Arena. Pet.App.127a. Instead, as the Arena's manager explained, any member of the public is "free" to "engage in ... peaceful protests or distribution of pamphlets ... as long as it does not interfere with the safe ingress or egress of guests." Pet.App.140a. In short, the park and its sidewalks are fully open to the public for expressive activities.

² Though Mr. Hershey was compensated for his advocacy, "a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988); *see also* Pet.App.24a-25a (Ho, J., concurring in denial of rehearing en banc).

Mr. Hershey thus began distributing his Christian vegetarianism leaflets on these public sidewalks outside the Arena with little expectation of confrontation or controversy. Pet.App.128a. Things began without incident. Mr. Hershey did not “create a disturbance or interference with pedestrian or vehicular traffic.” Pet.App.127a. Indeed, to ensure his own safety and that of concert patrons, Mr. Hershey kept clear of staircases and the Arena’s parking lots. Pet.App.127a; Pet.App.128a. Mr. Hershey’s efforts were accompanied by at least one other person nearby distributing literature—commercial advertisement cards for the internet radio station Power 927 FM. Pet.App.128a.

Unfortunately, Mr. Hershey’s peaceful exercise of his constitutional rights did not last long. After he began handing out religious leaflets, Mr. Hershey was approached by Bossier City Deputy Marshal Gilbert, police officer Stoll, and Arena security officer Harvey. Pet.App.128a. Deputy Gilbert approached Mr. Hershey “from the rear and made unwanted physical contact with [him],” while officer Stoll demanded that petitioner leave the public park. Pet.App.128a-129a. Gilbert brandished handcuffs and told Mr. Hershey that if he did not stop distributing his religious leaflets in the public park, he would be taken to jail. Pet.App.129a. Mr. Hershey tried to explain that he had a constitutional right to distribute his religious leaflets on the public sidewalk, but Gilbert was unmoved. He opined that the open public sidewalk was actually private property and threatened arrest. Pet.App.129a.

Fearing imprisonment, Mr. Hershey attempted to leave the area but was blocked by Deputy Gilbert, who was soon joined by two more security officers, Smith and Tucker. Pet.App.129a. With four other officers now in tow, Deputy Gilbert again reproached Mr. Hershey for not leaving the sidewalk immediately. Pet.App.129a. Mr. Hershey replied that he would leave the premises if Deputy Gilbert stepped aside, which the officer did shortly thereafter—but only after threatening that if Mr. Hershey ever returned, he would be promptly arrested and taken to jail. Pet.App.129a-130a.

As he was leaving, Mr. Hershey asked why he was being forced to leave while the other leafleteer remained free to distribute commercial literature advertising an internet radio station. Pet.App.130a. Officer Harvey responded that he did not know if *that* commercial literature had been approved for distribution near the Arena, but he knew that Mr. Hershey's religious literature had not been approved. Pet.App.130a. Fearing arrest and imprisonment, Mr. Hershey has not returned since. Pet.App.131a.³

³ Petitioner suggestively highlights a separate incident logged by the Arena on that day, involving “two individuals handing out pamphlets,” both of whom “‘became argumentative’ with concertgoers.” Pet.10. But that incident—which involved “two people with pamphlets [who] were shouting at [concertgoers] in line that they were going to Hell for attending th[e] event,” Pet.App.66a—did not involve Mr. Hershey. No one disputes that Mr. Hershey leafletted alone or that his activities were peaceful and unintrusive. Moreover, as petitioner admits, “[t]he incident report does not name Hershey.” Pet.10.

Though plainly unjustified, the officers' conduct was predictable given their utter lack of First Amendment training, including with respect to the First Amendment rights available on public parks and sidewalks, the privileged status of efforts to evangelize, and the particular vice of viewpoint discrimination. Pet.App.136a. In lieu of such training, petitioner has a long-standing de facto custom of simply allowing police officers to use unfettered discretion to arbitrarily and capriciously remove individuals peacefully exercising their individual rights. Pet.App.127a.

B. Procedural History.

Based in part on petitioner's failure to train, Mr. Hershey sued petitioner, and the five police and security officers involved. He sought damages against the officers for the egregious violations of his First Amendment rights under 42 U.S.C. §1983, and relief against petitioner under *Monell* for its failure to train its employees. Petitioner and the individual officers all moved to dismiss on various grounds.

1. The case was first referred to a magistrate judge, who recommended dismissal of all Mr. Hershey's claims. Pet.App.97a. The magistrate noted that "[t]here is no doubt that ... peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment," that Mr. Hershey's complaint demonstrated that the public park and sidewalks outside the Arena were a traditional public forum where the government is "strictly limited in its ability to regulate private speech," and that the officers had "engaged in viewpoint discrimination." Pet.App.100a;

Pet.App.105a; Pet.App.107a. The magistrate nonetheless recommended that the district court grant qualified immunity to the officers solely because there is not “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.” Pet.App.109a.

As for Mr. Hershey’s *Monell* claim, the magistrate emphasized that “the granting of qualified immunity to the City’s employees does not necessarily preclude the City being held liable.” Pet.App.111a. But the magistrate still recommended dismissal of the *Monell* claim, concluding that Mr. Hershey failed to allege either that the officers’ constitutional violations resulted from deficient training or that there was no training whatsoever with respect to leafletting in public areas. Pet.App.113a-115a. The district court adopted the magistrate’s report and recommendations in full. Pet.App.96a.

2. In a brief per curiam order, a majority of the panel below affirmed the qualified immunity ruling but reversed dismissal of the *Monell* claim. Pet.App.38a-39a. Each judge issued a separate opinion concurring in full or concurring in part and dissenting in part.

Judge Dennis would have reversed the district court across the board and allowed both Mr. Hershey’s individual-officer claim and his *Monell* claim to proceed. On the individual-officer claim, Judge Dennis explained that Mr. Hershey had “plausibly alleged that the officers engaged in viewpoint discrimination in violation of the First Amendment,” and “the law clearly established [Mr.] Hershey’s right

to leaflet in a traditional public forum without viewpoint discrimination.” Pet.App.56a; Pet.App.51a. Judge Dennis reasoned that “[q]ualified immunity does not protect blatant viewpoint discrimination,” and “[a]ny reasonable officer would have understood that ejecting [Mr.] Hershey while permitting another leafleteer to remain violated the First Amendment.” Pet.App.57a. Judge Dennis further found that “the district court erred in dismissing the *Monell* failure to train claim” because Mr. Hershey “sufficiently pleaded facts to show [petitioner] was deliberately indifferent to the violation of his First Amendment rights.” Pet.App.50a-51a. He explained that taking the allegations in the complaint as true, petitioner provided “no training whatsoever” regarding the First Amendment’s application to speech in traditional public forums, which would “predictably and obviously result in recurring violations of citizens’ First Amendment rights.” Pet.App.53a. Indeed, that very failure “led officers to believe that the park was private property and that citizens could be ejected without violating their First Amendment rights.” Pet.App.53a-54a.

Judge Ho was the only judge to concur in both aspects of the per curiam disposition: dismissing the individual-officer claims but allowing the *Monell* claim to proceed, but only because he viewed the Fifth Circuit’s qualified immunity jurisprudence as both binding and deeply flawed. Judge Ho agreed with Judge Dennis that the officers’ “alleged constitutional violation [was] obvious.” Pet.App.44a. After all, it is uncontroversial that “[t]he First Amendment protects not just the right to pray, but to preach” and “to witness,” and that the “right to exercise ... religion

includes the right to evangelize.” Pet.App.39a. As such, the First Amendment “plainly encompasses the distribution of religious pamphlets—the activity at issue in this case.” Pet.App.41a. That, Judge Ho observed, *should* have been enough to defeat qualified immunity. As he explained, while normally a plaintiff seeking to defeat qualified immunity must demonstrate that his rights are “clearly established” by factually on-point circuit precedent, the Supreme Court “has repeatedly denied qualified immunity where it found the constitutional violation so ‘obvious’ that it didn’t require the plaintiff to identify factually indistinguishable case law.” Pet.App.43a (citing *Hope*, 536 U.S. at 741 and *Taylor v. Riojas*, 592 U.S. 7, 8-9 & n.2 (2020)). But, as Judge Ho explained, the Fifth Circuit previously held that *Hope*’s “obviousness exception” was limited to the Eighth Amendment and “should not apply to obvious violations of the First Amendment.” Pet.App.45a (quoting *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024)). In the Fifth Circuit, he lamented, “it doesn’t matter how obvious a First Amendment violation might be demonstrated at trial,” there is no defeating qualified immunity without a factually indistinguishable case. Pet.App.45a. And because Mr. Hershey could not identify a prior case involving such an obvious violation of the right to distribute religious leaflets on a public sidewalk, Judge Ho “reluctantly concur[red] in affirming the grant of qualified immunity, as compelled by [the court’s] (mistaken) circuit precedent.” Pet.App.40a.

At the same time, Judge Ho agreed with Judge Dennis that the *Monell* claim should proceed. He echoed Judge Dennis’ finding that according to Mr.

Hershey's well-pleaded allegations, "the officers 'received literally zero training' on First Amendment issues" and that petitioner's "failure caused the violations of [Mr. Hershey's] rights." Pet.App.48a. He therefore agreed to "remand [Mr.] Hershey's claim against the City of Bossier for failing to train its officers to respect the constitutional rights of its citizens." Pet.App.39a.

Finally, Judge Richman would have affirmed the district court across the board. She parted company with her colleagues on the *Monell* claim because she interpreted Mr. Hershey's allegations as a "failure to train in one limited area" and not "a complete failure to train." Pet.App.86a. She also voted to affirm the district court's grant of qualified immunity because Mr. Hershey had "not cited decisions that clearly establish that the conduct of" the officers "violated First Amendment rights." Pet.App.78a.

3. Petitioner sought rehearing en banc on the *Monell* claim, but the en banc Fifth Circuit denied rehearing. Pet.App.1a-2a.

Concurring in the denial of rehearing en banc, Judge Ho reiterated his view that "the obviousness of [Mr. Hershey's] right should have been enough to defeat qualified immunity in this case, without the need for a factually identical case saying so," but that the Fifth Circuit's erroneous (but binding) precedent cabining *Hope's* obviousness exception to Eighth Amendment cases precluded the panel from reaching that conclusion. Pet.App.2a; Pet.App.5a-10a. Defending the panel's decision on *Monell*, Judge Ho described how a "single incident can also trigger liability, but only if there's an obvious risk of a

constitutional violation if the municipality provides ‘no training whatsoever.’” Pet.App.16a. That rule, he explained, perfectly applies to this case where, according to Mr. Hershey’s allegations, the City “provide[d] ‘no training whatsoever’ on the First Amendment.” Pet.App.17a-18a (emphasis omitted). He also dismissed any concerns about the sincerity of Mr. Hershey’s religious beliefs as entirely inapposite at the motion to dismiss stage. Pet.App.23a-25a.

Judge Oldham, joined by six other judges, dissented from the denial of rehearing en banc. Pet.App.26a. Those judges disagreed with the panel’s decision to allow the *Monell* claim to proceed to trial. The dissenting judges did not dispute that *Monell* liability attaches to a municipality that “fail[s] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face.” Pet.App.28a. But they thought that here, the risk of a constitutional violation was too low. Pet.App.29a. As to qualified immunity, the dissenting judges would have granted en banc review to make clear that Fifth Circuit precedent does not “forever and for all reasons reject obviousness as a ground for denying qualified immunity” in the First Amendment context. Pet.App.32a. They would have granted en banc rehearing “immediately” to settle the circuit’s application of qualified immunity in the First Amendment context. Pet.App.34a.

4. After petitioner’s en banc petition was denied, the panel sua sponte considered and denied panel rehearing. Pet.App.145a. Judge Ho dissented from that denial. He would have given Mr. Hershey “the

opportunity to brief the qualified immunity issues” addressed in the en banc dissent. Pet.App.146a.

Based on the various opinions on qualified immunity published during the rehearing process (and additions to Mr. Hershey’s legal team), Mr. Hershey moved to file an out-of-time petition for en banc rehearing on whether the Fifth Circuit’s precedent cabining *Hope*’s obviousness exception to Eighth Amendment cases should be reconsidered in light of the fact that “eight judges of th[e] Circuit ... indicated they are interested in resolving th[e] confusion and specifically in this very case.” CA5.Dkt.121 at 6. The en banc court denied the motion without comment. CA5.Dkt.136.

On May 13, 2026, petitioner filed its petition for certiorari, seeking review of the Fifth Circuit’s decision to permit Mr. Hershey’s *Monell* claim to proceed past the pleadings stage. Mr. Hershey separately filed his own petition for certiorari, seeking review of the panel’s decision to affirm qualified immunity to the individual officers despite their obvious constitutional violation. Pet., *Hershey v. City of Bossier City*, No. 25-1389 (U.S. filed June 12, 2026).

REASONS FOR DENYING THE PETITION

The decision below does not merit this Court’s attention, as it is correct, factbound, and does not implicate any split of authority. The real problem in this case is not the panel’s routine application of *Monell*, but its inexplicable cabining of *Hope* to Eighth Amendment claims.

The decision below is plainly correct on the *Monell* claim. As the panel majority explained, Mr. Hershey alleged that petitioner failed to provide its law

enforcement with any training whatsoever on the First Amendment, including, crucially, that citizens have First Amendment rights on public property such as the right not to be discriminated against based on their religious viewpoint. Predictably, that abject failure to train led the officers in this case to violate Mr. Hershey's clearly established First Amendment rights. Under this Court's precedents, that is enough to allow the *Monell* claim to proceed. *Connick v. Thompson*, 563 U.S. 51, 64 (2011).

Petitioner nevertheless contends that Mr. Hershey's *Monell* claim must be dismissed at the pleadings stage because the officers' underlying conduct was not a violation of a clearly established constitutional right. That conflates qualified immunity and *Monell* principles and is wrong twice over. First, this Court has never limited *Monell* liability to obvious or clearly established constitutional violations for the obvious reasons that governments should train their officers to avoid predictable constitutional violations, whether obvious or subtle. Indeed, this Court rejected petitioner's view in *Owen v. City of Independence*, 445 U.S. 622 (1980) as an impermissible attempt to provide municipalities with the same immunity guaranteed to individual officers. Second, that question is academic here because a majority of the panel correctly found that the officers *did* violate Mr. Hershey's clearly established First Amendment rights. Thus, under petitioner's own legal test, the panel correctly allowed the *Monell* claim to proceed.

To be sure, petitioner correctly identifies the tension in the panel's conclusion that petitioner can be

held liable under *Monell* for failing to train its officers while the officers themselves are entitled to qualified immunity because the violations of clearly established constitutional rights were sufficiently obvious that no other officer had blundered in a similar enough fashion to produce circuit precedent. But the root cause for that admitted tension has nothing to do with the Fifth Circuit's *Monell* holding and lies instead in its mistaken cabining of *Hope*. The correct way to relieve the tension that petitioner identifies, thus would be to grant Mr. Hershey's petition in No. 25-1389, and bring the Fifth Circuit into line with its sister circuits by clarifying that *Hope* is not some bespoke Eighth Amendment doctrine, but a foundational principle that prevents the most egregious of constitutional violations from going unremedied.

The balance of the City's petition amounts to a plea for error correction on the factbound *Monell* issue. As noted, there is no error to correct, but even if there were it would not provide sufficient grounds for plenary review. There is a certworthy issue in the decision below, but it concerns *Hope* and qualified immunity, not a factbound application of *Monell*.

I. The Decision Below Is Correct.

The panel below was entirely correct to allow Mr. Hershey's *Monell* claim to proceed past the pleadings stage. As the panel majority explained, Mr. Hershey alleged that the officers violated his fundamental First Amendment rights, and that the obvious violation directly resulted from petitioner's failure to provide them any training on the First Amendment. That readily supports a viable *Monell* claim.

Petitioner's contrary arguments miss the mark. Petitioner primarily contends that this Court must correct the panel's error in allowing Mr. Hershey's *Monell* claim to proceed without an underlying violation of a clearly established right. That submission is wrong on the law, and irrelevant on the facts alleged here. Petitioner's secondary contention that Mr. Hershey failed to adequately allege a complete failure to train likewise ignores the panel's findings, not to mention the plain text of the complaint, and the deference owed to Mr. Hershey's allegations at this stage of the litigation.

A. The Fifth Circuit's Decision Allowing Mr. Hershey's *Monell* Claim to Proceed Is Correct and Does Not Conflict With This Court's Precedent.

At the threshold, petitioner faults the panel for allowing Mr. Hershey's *Monell* claim to proceed past the pleadings stage without alleging a violation of a clearly established constitutional right. While no such allegation is required to establish *Monell* liability under this Court's precedent, Mr. Hershey did in fact allege a violation of a clearly established constitutional right, and the panel acknowledged as much. Petitioner's contrary position rests on a misreading of both this Court's precedent and the panel's decision.

1. As to precedent, in *Monell*, this Court held that a city can be liable under §1983 when the city itself causes a constitutional violation. 436 U.S. at 690. By extension, this Court explained eleven years later that "the inadequacy of police training may serve as the basis for §1983 liability." *City of Canton v.*

Harris, 489 U.S. 378, 388 (1989). A failure-to-train claim is cognizable if “the city’s failure to provide training to municipal employees result[s] in the constitutional deprivation” suffered by the plaintiff, and requires “deliberate indifference” on the part of the city “to the constitutional rights of its inhabitants.” *Id.* at 392.

One way of showing that a city’s failure to train reflects deliberate indifference is by pointing to a pattern of similar constitutional violations by untrained employees. *Connick*, 563 U.S. at 62. But that is not the only way. “[T]he unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under §1983 without proof of a pre-existing pattern of violations.” *Id.* at 64. In such single-incident cases, it is the “city’s deliberate indifference to the ‘highly predictable consequence,’ namely, violations of constitutional rights,” that justifies holding the city liable. *Id.* The focus of single-incident claims is, accordingly, on the city’s conduct because what ultimately matters “[i]n resolving the issue of a city’s liability” is the “adequacy of the training program in relation to the tasks the particular officers must perform.” *Canton*, 489 U.S. at 390. “The city’s ‘policy of inaction’ in light of notice that its program will cause constitutional violations ‘is the functional equivalent of a decision by the city itself to violate the Constitution.” *Connick*, 563 U.S. at 61-62. And so, the relevant question in such cases is whether a city has failed to provide training that is “obvious[ly]” needed to prevent an otherwise likely constitutional violation. *See id.*

Ignoring all that precedent, petitioner posits that single-incident *Monell* liability in failure-to-train cases turns instead on whether municipal policymakers were on notice that the right violated by the untrained officer was clearly established. Pet.22-24. But this Court has never suggested that any type of *Monell* liability is limited to clearly established rights. On the contrary, the Court's decision in *Owen v. City of Independence*, 445 U.S. 622 (1980) rejected precisely that position as an improper conflation of immunity and *Monell*. In *Owen*, the Eighth Circuit dismissed a police chief's *Monell* claim against the City of Independence, Missouri, which had violated the chief's "right to a name-clearing hearing" as "a government employee allegedly stigmatized in the course of his discharge." *Id.* at 634. The City argued in *Owen*, just as petitioner does here, that it was immune from suit because the alleged constitutional right was not "crystallized" (i.e. clearly established) by existing precedent at the time of the violation. *Id.* The Eighth Circuit agreed, and "extend[ed] the limited immunity ... applied to the individual defendants to cover the City as well"; like the individual defendants, the City had no notice of the chief's right, and so could not be held liable for its officer's "good faith" violation of it. *Id.*; see also Pet.19-20 (arguing the same).

This Court reversed. It explained that the only immunities that survived Congress' "expansive" liability-creating "language" in §1983 were those "tradition[s] of immunity ... so firmly rooted in the common law and ... supported by ... strong policy," and it held that "neither history nor policy support[ed]" the City's "clearly established" prerequisite to municipal liability. *Owen*, 445 U.S. at

637-38 & 651 n.33. “Indeed, where the issue was discussed” in our history, “the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful” because the right it violated was not clearly established. *Id.* at 641; accord *Pembaur v. City of Cincinnati*, 475 U.S. 469, 474, 485 (1986).

To that end, this Court later clarified in *Canton* that the deliberate indifference standard in failure-to-train cases is an objective one based on the “obvious” need for “more or different training” and the “likely[hood],” or probability, of a resulting constitutional violation in the absence of such training. See *Canton*, 489 U.S. at 390. This Court could have but did not extend the “clearly established” requirement of individual-officer immunity to municipal immunity. *Contra* Pet.19-20.

Preferring the dissent in *Canton*, petitioner insists it is a “bedrock” rule of this Court’s jurisprudence that the “individual-officer” immunity guaranteed in the absence of a violation of a clearly established constitutional right applies with equal force to municipalities. Pet.19-20 (citing *Canton*, 489 U.S. at 396-397 (O’Connor, J., concurring in part and dissenting in part)). But in *Owen*, this Court held exactly the opposite in part because “[t]he concerns that justified” its qualified immunity decisions regarding “government officials” “are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.” *Owen*, 445 U.S. at 653 & n.37. Put simply, the “injustice[s]” and decision-paralyzing risks of forcing an official to pay for a plaintiff’s unforeseen constitutional injury in the

absence of bad faith “is simply not implicated when the damages award comes not from the official’s pocket, but from the public treasury.” *Id.* at 654-56. Accordingly, unlike in the individual-officer context, once there is any “violation of federal rights,” a city may be held liable for its failure to train so long as that failure “present[ed] an obvious potential for such a violation.” *See Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409 (1997).⁴

2. Regardless, the legal question petitioner presents is purely academic in this case. Again, petitioner contends that a single-incident *Monell* claim cannot proceed past the pleadings stage without an allegation of a “clear constitutional violation.” Pet.19 (capitalization altered). But the panel did, in fact, find that Mr. Hershey adequately alleged a clear constitutional violation. To be sure, the clarity of the

⁴ Some lower courts have reasoned that *Owen* and its progeny do not govern failure-to-train cases because they do not address “claims of deliberate municipal indifference.” *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017); *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 395 (8th Cir. 2007) (en banc). But this Court has already explained that *Owen* governs single-incident cases “where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation,” and that “failure-to-train cases” fit that bill, so long as they allege that the “violation of federal rights”—clearly established or not—was “a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.” *Brown*, 520 U.S. at 405, 409-10. In that circumstance, “[t]he high degree of predictability” regarding the rights violation supports an inference of fault and “an inference of causation—that the municipality’s indifference led directly to the very consequence that was so predictable.” *Id.*

constitutional violation was not enough—absent on-point circuit precedent—to defeat qualified immunity in the eyes of two panel members. But that just highlights the Fifth Circuit’s mistaken view of *Hope* and qualified immunity. The fact that no other municipality’s officers previously blundered in a similar enough fashion to generate circuit precedent in no way detracts from the panel’s conclusion that the constitutional violation here was clear and obvious.

The panel majority is clear on this point. The panel majority—consisting of Judges Dennis and Ho—unambiguously held that Mr. Hershey had “alleged both a constitutional violation and the violation of a clearly established right.” Pet.App.57a (Dennis, J., concurring in part and dissenting in part). Specifically, Judge Dennis found that Mr. Hershey “plausibly alleged that the officers engaged in viewpoint discrimination in violation of the First Amendment,” and that “the right to be free from viewpoint discrimination is clearly established.” Pet.App.54a; Pet.App.56a. And Judge Ho explained that the First Amendment “plainly encompasses the distribution of religious pamphlets—the activity at issue in this case.” Pet.App.41a. Accordingly, he agreed with Judge Dennis that the officers’ “alleged constitutional violation [was] obvious.” Pet.App.44a.

The panel majority was plainly correct. Mr. Hershey has a clearly established First Amendment right to peacefully distribute religious leaflets on a public sidewalk in a public park outside a public arena without being singled out for adverse treatment based on his message. That right is in fact triply protected. First, by the incontrovertible free-speech right to

leaflet in a traditional public forum. *See, e.g., Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.”). Second, by the free-exercise right to distribute *religious* materials to the public. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (“The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses.”); *Jamison v. Texas*, 318 U.S. 413, 416-17 (1943) (it is “beyond controversy” that the officers “[can]not prohibit the distribution of handbills in the pursuit of a clearly religious activity”). And third, by the clear prohibition on viewpoint discrimination. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (it is “axiomatic that the government may not regulate speech based on its substantive content or the message it conveys”); *Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022) (highlighting the obvious prohibition on discrimination “based on ‘religious viewpoint’”); *Chiles v. Salazar*, 146 S.Ct. 1010, 1030 (2026) (Kagan, J., concurring) (“viewpoint-based” discrimination is “egregious” and “implicat[es] First Amendment concerns to the highest possible degree”).

Those well-established constitutional rules “apply with obvious clarity to the specific conduct in question” here. *Hope*, 536 U.S. at 741. The officers forced Mr. Hershey to stop distributing religious literature on a public sidewalk in a public park surrounding a public arena, while permitting at least

one nearby leafleteer to distribute her commercial material in the same space. *See* pp.3-7, *supra*. That is patently unconstitutional. Indeed, when Officer Harvey advised Mr. Hershey that his “literature had not been approved,” Pet.App.130a, he practically forbade Mr. Hershey to “proselytize ... without a license.” *See Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 511 (2020) (Gorsuch, J., concurring).

Petitioner speculates that Mr. Hershey’s right to evangelize on the public sidewalk was not clearly established because “courts have come to different conclusions about whether the spaces surrounding various arenas are public forums.” Pet.21. Tellingly, that contention goes to the merits of the panel majority’s determination, not the broader question petitioner claims is presented here. But any dispute about the precise status of the public sidewalk on which Mr. Hershey distributed his religious leaflets is beside the point, as Mr. Hershey had a clearly established constitutional right not to be singled out for viewpoint discrimination. *See* Pet.App.55a (Dennis, J., concurring in part and dissenting in part) (noting that neither party disputes that Mr. Hershey’s allegations raise an inference of viewpoint discrimination). After all, this Court has long recognized that viewpoint-based restrictions categorically violate the First Amendment—whether in a public or a nonpublic forum. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *Rosenberger*, 515 U.S. at 828; *accord R.A.V. v. St. Paul*, 505 U.S. 377, 386-89 (1992); *Chiles*, 146 S.Ct. at 1030 (Kagan, J., concurring). Petitioner’s failure to grapple with that reality dooms its petition.

Moreover, if the officers here were confused about the status of the areas where they accosted Mr. Hershey, that is all the more reason they need training. While the public-forum status of *some* public spaces may be debatable, there is scarcely any forum where the right to leaflet is more clearly protected than a public sidewalk—doubly so where, as here, the public sidewalk is within a public park surrounding a public arena. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018). Indeed, public sidewalks like the one Mr. Hershey was ousted from are the “archetype of a traditional public forum” which “[t]ime out of mind’ ... ha[s] been used for public assembly and debate.” *Snyder v. Phelps*, 562 U.S. 443, 456 (2011). People have a First Amendment right to engage in the most deplorable speech on the public sidewalks, *see id.*; the reality that they have a First Amendment right to engage in religious proselytizing on the same sidewalks free from viewpoint discrimination is beyond obvious.⁵ Thus, even indulging the notion that *Monell* liability requires a violation of a clearly established right, there is no controversy for this Court to resolve here.

⁵ None of the cases petitioner footnotes suggests otherwise. *Ball v. City of Lincoln* involved a marked-off plaza used as a security screening area for patrons that was “[u]nlike a typical public sidewalk.” 870 F.3d 722, 731-36 (8th Cir. 2017). *Calash v. City of Bridgeport* involved the inside of a stadium, not a public sidewalk in a public park. 788 F.2d 80, 83-84 (2d Cir. 1986). And *Pomicter v. Luzerne County Convention Center Authority*, involved a concession from the plaintiffs that the relevant concourse was a nonpublic forum. 939 F.3d 534, 540-41 (3d Cir. 2019).

B. The Fifth Circuit’s Conclusion That Mr. Hershey Sufficiently Alleged a Complete Failure to Train Was Without Error.

Much like its threshold position, petitioner’s secondary argument does not merit this Court’s attention. According to petitioner, the panel majority erroneously held “that a plaintiff can plead a single-incident claim by alleging that a municipality failed to provide training on the specific circumstances giving rise to the claim,” as opposed to an allegation that it failed to provide any training whatsoever. Pet.22 (emphasis omitted). Once again, petitioner’s objection to the decision below requires attributing an error to the decision below that the panel majority did not commit.

The animating principle behind a single-incident, failure-to-train *Monell* claim is that a city can be responsible if “the unconstitutional consequences of failing to train [are] patently obvious.” *Connick*, 563 U.S. at 64. Of course, a city cannot be expected to train officers on every “nuance” of the law or every “specific scenario.” *Id.* at 67. But when, “in the absence of training, there is no way for novice officers to obtain the legal knowledge they require,” a city’s failure to provide that basic training constitutes deliberate indifference. *Id.* at 64.

That is exactly what a majority of the panel found Mr. Hershey to have alleged here—namely, that petitioner entirely failed to train its officers on fundamental First Amendment principles. As Judge Ho explained, Mr. Hershey alleged that petitioner “provide[d] no training whatsoever with respect to the relevant constitutional duty.” Pet.App.48a; *see also*

Pet.App.17a-18a (Ho, J., concurring in denial of rehearing en banc). Judge Ho further found that Mr. Hershey “pled facts sufficient to show that the City’s *complete lack of training* was the cause of his injury.” Pet.App.49a (emphasis added).

Judge Dennis agreed. He described how Mr. Hershey “alleged the City completely failed to train officers on their First Amendment duties,” Pet.App.52a, and observed that taking the complaint as true “the City provided ‘no training whatsoever’ regarding the First Amendment’s application to speech in traditional public forums,” Pet.App.53a. Judge Dennis concluded that “[a]t this stage, entirely failing to train officers about their duties under the First Amendment will predictably and obviously result in recurring violations of citizens’ First Amendment rights.” Pet.App.53a. Far from “bless[ing] failure-to-train allegations that were tailored to the precise facts here,” *contra* Pet.4, the panel majority understood Mr. Hershey to have alleged that petitioner completely failed to train its officers on the First Amendment. To be sure, Judge Richman read the complaint differently. Pet.App.86a. But it is hard to imagine a more factbound (and less certworthy) dispute than the proper reading of a complaint in a particular case.

In all events, the panel majority’s view was the correct one, as courts are instructed to apply “liberal pleading standards” in construing a complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). At the motion-to-dismiss stage, a court must read a complaint “as a whole,” credit all “plausibl[e]” allegations, and “draw reasonable inferences” in the

plaintiff's favor. *Vullo*, 602 U.S. at 194. Here, Mr. Hershey expressly alleges that “[t]he lack of training was so great and so inadequate and the risk of constitutional harm was so obvious by the failure to train the delineation between public and private property, that it became an unconstitutional custom or policy of the City and was the moving force behind” the violation of his rights. Pet.App.136a. Mr. Hershey further alleges how petitioner’s complete failure to train predictably led the officers “to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights.” Pet.App.127a. Drawing all reasonable inferences in favor of Mr. Hershey, those allegations readily satisfy the pleading requirements for a *Monell* claim.

While Mr. Hershey additionally raised some fact-specific failure-to-train allegations, those allegations only reinforce his *Monell* claim by showing how petitioner’s failure to train predictably led the officers to violate his rights. For example, Mr. Hershey alleges that due to petitioner’s failure to train its officers on their constitutional duties, those officers did not know “how to take into account the First Amendment rights of citizens on the Arena property.” Pet.App.136a. And he further explains how the officers had no training that citizens using the public areas around the Arena “are entitled to [their] constitutional rights guaranteed by the First Amendment.” Pet.App.136a. Far from insufficient, those are precisely the sort of allegations required to show that petitioner’s deliberate indifference directly caused the violation at issue.

Nothing in *Connick* undermines the sufficiency of those allegations. *Contra* Pet.23. There, this Court held that a district attorney's office was not liable under *Monell* for failure to train its attorneys based on a single incident in which the attorneys willfully suppressed evidence they believed to be exculpatory in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Connick*, 563 U.S. at 54. This Court observed that there was no "obvious need for specific legal training" because the prosecutors' own legal training, continuing legal education, and ethical obligations to understand the law, were more than sufficient, and it was "undisputed" that the prosecutors "were familiar with the general *Brady* rule." *Id.* at 63-64, 67. The plaintiff was thus forced to plead that the prosecutors were not trained on "the specific scenario related to the violation in his case," which was a level "of nuance" that "simply [could not] support an inference of deliberate indifference." *Id.* at 67-68 ("[S]howing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability."). None of those conditions is present here, where Mr. Hershey plausibly alleges that petitioner's police officers *were not* independently familiar with the constraints of the First Amendment, and that petitioner offered *zero* First Amendment training despite the obvious need for such training to ensure that officers would not commit basic viewpoint discrimination against individuals evangelizing on public sidewalks in public parks. Pet.App.17a-18a; Pet.App.48a; Pet.App.136a.

In the end, petitioner concedes that single-incident *Monell* liability is appropriate for the "combustible combination of zero training and

overwhelming risk.” Pet.23. That is just what Mr. Hershey has alleged and the panel majority found. *See* Pet.App.136a.

II. There Is No Reason To Grant Review.

Petitioner’s efforts to conjure a circuit split or other compelling justification to review the panel majority’s correct and factbound *Monell* holding fall flat.

1. Petitioner first asks this Court to grant review because it claims the panel created a circuit split on the question whether a right must be clearly established for a plaintiff to state a single-incident *Monell* claim. There is no such split. As already explained, *see* pp.20-24, *supra*, the panel majority did *not* hold that Mr. Hershey could pursue his *Monell* claim in the absence of a clearly established constitutional violation. On the contrary, the majority justified its *Monell* decision in part because Mr. Hershey’s First Amendment right to peacefully distribute religious leaflets on a public sidewalk in a public park surrounding a public arena without being singled out for adverse treatment on account of his religious message was both clearly established and clearly violated. *See* Pet.App.57a (Dennis, J., concurring in part and dissenting in part); Pet.App.44a (Ho, J., concurring). It only granted qualified immunity to the relevant officers because of the Fifth Circuit’s erroneous precedent requiring not just a clearly established right but an on-point circuit precedent involving substantial similar misconduct. *See* pp.20-21, *supra*. That means the panel’s decision below is harmonious with the precedent petitioner

identifies and would not provide an opportunity to resolve any circuit split that did exist. *See* Pet.25-27.⁶

2. As for its second question presented, petitioner claims there is “confusion among the courts of appeals” on the question whether “a plaintiff can plead single-incident municipal liability without alleging a complete lack of training on the constitutional right in question.” Pet.28-29. Here too, this case presents no occasion to resolve any “confusion” on that issue as the majority found sufficient allegations of a complete failure to train. As Judge Ho put it, Mr. Hershey’s pleadings sufficiently alleged that petitioner “provide[d] no training whatsoever with respect to the relevant constitutional duty.” Pet.App.48a (Ho, J., concurring); *accord* Pet.App.52a (Dennis, J., concurring in part and dissenting in part); *see also* pp.25-29, *supra*.

Petitioner believes that the panel majority might “have overread the complaint,” Pet.24, but “at oral argument, counsel for Hershey [confirmed] that the officers ‘received literally zero training’ on First Amendment issues.” Pet.App.48a (Ho, J., concurring) (quoting CA5.Oral Arg. at 13:20-13:26). Regardless, if this dispute boils down to how best to read Mr.

⁶ In fact, one of the cases petitioner cites as demonstrating a conflict with the panel’s *Monell* decision only confirms that there is a circuit split on the panel’s qualified immunity decision. *See, e.g., Townes v. City of New York*, 176 F.3d 138, 144 (2d Cir. 1999) (recognizing, contra Fifth Circuit precedent, that “[e]ven in the absence of binding precedent, a right is clearly established if ‘[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right....’” (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

Hershey’s complaint, the lack of a certworthy issue is manifest.

All that aside, there is no circuit split. *Contra* Pet.28, the Eleventh Circuit has not held that a plaintiff cannot “plead single-incident municipal liability without alleging a complete lack of training on the constitutional right in question.” Indeed, *Knight ex rel. Kerr v. Miami-Dade County*, 856 F.3d 795 (11th Cir. 2017), and *Keith v. DeKalb County*, 749 F.3d 1034 (11th Cir. 2014) say nothing of the sort—as petitioner points out, Pet.28, those cases simply quote this Court’s decision in *Connick*. And in *Lewis v. City of West Palm Beach*, the Eleventh Circuit rejected a single-incident claim for failure to train where the municipality did in fact “provide training” despite there being no need to train and no “flagrant risk of [a] constitutional violation” without the relevant training. 561 F.3d 1288, 1293 (11th Cir. 2009). Nor has the Sixth Circuit required a complete lack of training in this context. As petitioner is forced to admit, “deficient” training is sufficient in that circuit, as it is in every other, including the Tenth. *See* Pet.29 (quoting *Howell v. NaphCare, Inc.*, 67 F.4th 302, 320 (6th Cir. 2023) and *Valdez v. Macdonald*, 66 F.4th 796, 816-820 (10th Cir. 2023) among others). Moreover, *contra* Pet.29, *Harris v. City of Saginaw*, held only that a plaintiff cannot “establish municipal liability” by “showing merely that additional training would have been helpful in making difficult decisions.” 62 F.4th 1028, 1039 (6th Cir. 2023). None of that shows a circuit split or demonstrates any conflict with the majority’s *Monell* decision below.

3. Petitioner and its amici envision a host of “harmful consequences” emanating from the panel’s *Monell* decision. *See, e.g.*, States.Br.10. But all those consequences depend on petitioner’s misreading of the decision below. Given that the panel majority found both the violation of a clearly established right and a complete failure to train, the prospects that the decision below will lead to a “flood of single-incident *Monell* claims,” Pet.25, are slim and none. The real problem with the decision below is that it will perversely allow officers to escape liability for the most egregious constitutional violations—blunders so obvious they have no on-point precedent—and perversely privileges Eighth Amendment claims over efforts to vindicate First Amendment rights. But the way to avoid those baleful consequences is to grant Mr. Hershey’s petition in No. 25-1389.

The answer to the question of what local governments can “do to avoid this” kind of “litigation,” States.Br.12, is straightforward: Provide basic training to law enforcement officers on fundamental constitutional rights that they are likely to encounter (like First Amendment rights). This case is narrowly directed at petitioner’s obvious failure to train its officers on the fundamental First Amendment rights of its citizens. Nothing more is at stake.

Petitioner’s and its amici’s various concerns about municipal budgets and federalism are all wide of the mark. This case is an outlier and a poster child for the kind of case where municipal liability is appropriate. Allowing leafletting on a public sidewalk is not a close call, it is simply a recognition of a clearly established constitutional right. And whatever one might think of

a police department that mistakenly sweeps a public square of all leafleteers, a police department that ousts a religious leafleteer while allowing commercial leafletting to proceed unmolested has flunked First Amendment 101 and is in desperate need of training. Congress resolved the federalism issues here long ago in enacting §1983 and this case is a heartland case for liability under that statute.

4. Finally, petitioner asserts that this case presents an excellent vehicle for this Court's review. But, as demonstrated, this case does not even present the *Monell* issues that petitioner asks this Court to review. In reality, this case presents an excellent vehicle to review the qualified immunity issue presented in Mr. Hershey's petition in No. 25-1389. The Fifth Circuit's misguided cabining of *Hope* is the source of both the injustice in this case and the tension between the qualified immunity and *Monell* holdings of the shifting panel majorities in the decision below. The panel's qualified immunity decision is worthy of certiorari; its *Monell* decision is not.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

KELLY J. SHACKELFORD	PAUL D. CLEMENT
JEFFREY C. MATEER	<i>Counsel of Record</i>
DAVID J. HACKER	JEFFREY C. THALHOFER*
HIRAM S. SASSER, III	NICHOLAS A. AQUART
ERIN E. SMITH	ILAN J. POSNER
FIRST LIBERTY	CLEMENT & MURPHY, PLLC
INSTITUTE	706 Duke Street
2001 W. Plano Pkwy.	Alexandria, VA 22314
Suite 1600	(202) 742-8900
Plano, TX 75075	paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

NATHAN W. KELLUM
FIRST LIBERTY
INSTITUTE
699 Oakleaf Office Lane
Suite 107
Memphis, TN 38117

Sarah Giglio
GILMER & GIGLIO,
L.L.C.
3541 Youree Dr.
Shreveport, LA 71105

Counsel for Respondent Richard Hershey

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