No. _____

In the
Supreme Court of the United States

RICHARD HERSHEY,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Richard Hershey set out to distribute religious leaflets on a public sidewalk outside of a public arena hosting a Christian rock concert. Five police and security officers soon threatened to arrest him, and forced him to leave—all the while ignoring a nearby commercial leafleteer for a local radio station.

This was a blatant violation of clearly established First Amendment law. Public sidewalks are a quintessential public forum, and viewpoint discrimination ranks among the worst of First Amendment offenses. Any reasonable officer should have known this blatant censorship of religious speech was unconstitutional, and they would not need an on-point circuit precedent involving the same egregious conduct to know as much. This Court held as much in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), in rejecting qualified immunity when bedrock constitutional prohibitions "apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" But the Fifth Circuit, alone among its sister courts, has inexplicably cabined *Hope* to Eighth Amendment claims and extended qualified immunity to protect conduct that any reasonable officer should have understood to be unconstitutional.

The question presented is:

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

PARTIES TO THE PROCEEDING

Petitioner Richard Hershey was the plaintiff-appellant below.

Respondents City of Bossier City, Bobby Gilbert, individually and in his capacity as Deputy Marshal; Daniel Stoll, David Smith, Tyshon Harvey, and Eugene Tucker were the defendants-appellees below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

- *Hershey v City of Bossier City, et al.*, No. 21-cv-460 (W.D. La.) (Report and Recommendation filed on August 23, 2021; judgment entered on September 24, 2021).
- *Hershey v City of Bossier City, et al.*, No. 21-cv-460 (W.D. La.) (Report and Recommendation filed on November 1, 2021; judgment entered on November 17, 2021).
- *Hershey v City of Bossier City, et al.*, No. 21-30754 (5th Cir.) (judgment entered on October 7, 2025).
- *Hershey v City of Bossier City, et al.*, No. 21-30754 (5th Cir.) (denying en banc rehearing on December 18, 2025).
- *Hershey v City of Bossier City, et al.*, No. 21-30754 (5th Cir.) (denying panel rehearing on January 13, 2026).
- *City of Bossier City v. Hershey, et al.*, No. 25-1323 (U.S.) (petition for certiorari filed May 13, 2026).

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PETITION FOR WRIT OF CERTIORARI

The right to evangelize in public, free of viewpoint-based government suppression, is as clearly established as any right in the firmament. It is squarely protected by two separate but overlapping clauses of the First Amendment—the Free Speech and Free Exercise Clauses—and by decisions of this Court underscoring that viewpoint discrimination is verboten and that discrimination against religious speech is viewpoint discrimination (im)pure and simple. No government official should need an on-point circuit precedent to illustrate what the Constitution itself and this Court's cases make clear beyond cavil. Yet, despite all that, five police and security officers descended on petitioner and threatened to arrest him for peacefully distributing religious leaflets in a traditional public forum—a public sidewalk in a public park surrounding a public arena—even as they passed over a nearby leafleteer who was distributing commercial advertisements for a radio station.

In any circuit but the Fifth, petitioner could seek damages for this affront to his bedrock First Amendment rights—without regard to whether any officer had previously committed such a blunder and been chastised in a published opinion. As every other circuit recognizes—because this Court explained as much in *Hope v. Pelzer*—some rights are sufficiently well established, and some government actions sufficiently egregious, that qualified immunity provides no shield even in the absence of on-point precedent. 536 U.S. 730, 738 (2002); *see also Taylor v. Riojas*, 592 U.S. 7, 8-9 & n.2 (2020). When it comes to

constitutional violations, there are no points for novelty; blatant violations of basic constitutional guarantees do not require a dead ringer in the Federal Reporter to merit relief.

Here, any reasonable officer had "fair and clear warning" that censoring the religious speech of a leafleteer in a public place, and in viewpoint-discriminatory fashion, is unconstitutional. *Hope*, 536 U.S. at 741. But the Fifth Circuit has cabined *Hope* to the Eighth Amendment context and repeatedly declined to apply it to First Amendment claims. The result is that petitioner's damages claims were barred at the threshold because circuit precedent had not applied bedrock constitutional law to a sufficiently similar fact pattern.

That is as wrong as it sounds. Indeed, despite supplying the dispositive second vote to grant qualified immunity, Judge Ho recognized that the officers' obviously unconstitutional actions "*should* have been amply sufficient to defeat qualified immunity at this preliminary stage of the proceedings." App.7 (Ho, J., concurring). He nonetheless "reluctantly concur[red] in affirming the grant of qualified immunity, as compelled by [the Fifth Circuit's] (mistaken) circuit precedent." App.4. The en banc Court declined to grant review to correct that injustice. As a result, only this Court can reaffirm that *Hope* is a transsubstantive rule that safeguards all our fundamental rights, not an anomalous Eighth Amendment rule that makes it easier for prisoners to sue than law-abiding, peaceful religious leafleteers.

There may be some areas of First Amendment law where government officials face difficult judgment

calls or competing constitutional dictates. This is not one of them. Few principles are more clearly established than the rights to peaceful leafletting on public sidewalks and to be free from viewpoint discrimination that disfavors religious speech. There is no justification for requiring an earlier on-point blunder before citizens can resort to the statutory damages remedy provided in §1983. Indeed, the Fifth Circuit's anomalous rule means that victims of the *most* egregious First Amendment violations are *least* likely to recover damages. After all, one would hope that "the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.). There is simply no excuse for the government actions alleged in petitioner's complaint. In any other circuit—and in the Fifth Circuit if he were a prisoner asserting mistreatment—his case could proceed. This Court should intervene and reaffirm that there is no novelty exception to the promise of §1983 when it comes to clearly established constitutional rights.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 156 F.4th 555 and reproduced at App.1-61. The Fifth Circuit's opinion denying rehearing en banc is reported at 165 F.4th 292 and reproduced at App.64-103. The Fifth Circuit's order denying panel rehearing is reported at 163 F.4th 976 and reproduced at App.62-63. The magistrate judge's Report and Recommendation recommending granting the motion to dismiss for Respondents-Defendants City of Bossier City, Bobby Gilbert, and Daniel Stoll, is reported at

2021 WL 4395056 and reproduced at App. 122-149, and the district court's order adopting that Report and Recommendation is reported at 2021 WL 4395043 and reproduced at App.150. The magistrate judge's Report and Recommendation recommending granting the motion to dismiss for Respondents-Defendants David Smith, Tyshon Harvey, and Eugene Tucker is reported at 2021 WL 5366900 and reproduced at App. 106-119, and the district court's order adopting that Report and Recommendation is reported at 2021 WL 5366971 and reproduced at App.120.

JURISDICTION

The Fifth Circuit issued its opinion on October 7, 2025. The Fifth Circuit denied rehearing en banc on December 18, 2025, and the panel then denied panel rehearing on January 13, 2026. Justice Alito extended the time to file a petition to June 12, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

42 U.S.C. §1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. Factual Background.

Petitioner—a senior citizen from Missouri—is a vegetarian advocate who felt compelled by his ethical beliefs to share the Christian Vegetarian Association's religious message with the world. App.153. February 28, 2020, presented an ideal opportunity for him to do so. The Bossier City Arena, currently named Brookshire Grocery Arena, was hosting a Christian rock concert (Winter Jam). App.154; App.123. Accordingly, petitioner set out to peacefully exercise his Free Speech and Free Exercise rights by distributing religious leaflets on the public sidewalk outside the Arena.[1] App.154-55.

Situated in a public park, the Arena is publicly owned by Bossier City and managed by a private entity. App.154; App.166. 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." App.14; App.154. There are no gates or fences barring access to the park or cordoning off its sidewalks from the surrounding public area. App.154. Nor is there any

[1] Though Petitioner 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* App.89 (Ho, J., concurring in denial of rehearing en banc).

formal application process or written policy governing leafleting on the public sidewalks surrounding the Arena. App.153. 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." App.143; App.166. In short, the park and its sidewalks are fully open to the public for expressive activities.

Petitioner thus began distributing his Christian vegetarianism leaflets on these public sidewalks outside the Arena with little expectation of confrontation or controversy. App.154-55. Things began without incident. Petitioner "did not create a disturbance or interfere with pedestrian or vehicular traffic." App.124. Indeed, to ensure his own safety and that of concert patrons, he kept clear of staircases and the Arena's parking lots. *Id.*; App.155. Petitioner's efforts were accompanied by at least one other person nearby distributing literature—commercial advertisement cards for the internet radio station Power 927 FM. App.155.

Unfortunately, petitioner's peaceful exercise of his constitutional rights did not last long. Shortly after he began peacefully handing out religious leaflets, petitioner was approached by respondents Bossier City Deputy Marshal Gilbert, police officer Stoll, and Arena security officer Harvey. *Id.* Deputy Gilbert approached petitioner "from the rear and made unwanted physical contact with [him]," while officer Stoll demanded that petitioner leave the public park. *Id.* Gilbert brandished handcuffs and told petitioner that if he did not stop distributing his

religious leaflets in the public park, he would be taken to jail. App.156. Petitioner 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. *Id.*

Fearing imprisonment, petitioner attempted to leave the area but was blocked by Deputy Gilbert, who was soon joined by two more security officers—respondent officers Smith and Tucker. *Id.* With four other officers now in tow, Deputy Gilbert again reproached petitioner for not leaving the sidewalk immediately. App.156-57. Petitioner replied that he would leave the premises if Deputy Gilbert stepped aside, which the officer did shortly thereafter—but only after threatening that if petitioner ever returned, he would be promptly arrested and taken to jail. App.157.

As he was leaving, petitioner asked why he was being forced to leave while the other leafleteer remained free to distribute commercial literature advertising an internet radio station. *Id.* Officer Harvey responded that he did not know if *that* commercial literature had been approved for distribution near the Arena, but he knew that petitioner's religious literature had not been approved. *Id.* Fearing arrest and imprisonment, petitioner has not returned since. App.158.

B. Procedural History.

Petitioner sued Bossier City, and the five police and security officers involved, seeking damages against the officers for the egregious violations of his

First Amendment rights under 42 U.S.C. §1983 and relief against the City for its failure to train its employees, *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Respondents all moved to dismiss on various grounds.

1. The case was referred to a magistrate judge, who issued a report and recommendation advising that the district court dismiss all of petitioner's claims. App.122-23. The magistrate first noted that "[t]here is no doubt that … peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment," that petitioner'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." App.125; App.131; App.133. The magistrate nonetheless recommended that the district court grant qualified immunity to the officers 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." App.136. The magistrate recommended dismissal of the *Monell* claim on the grounds that petitioner had failed to allege that the violation was a result of deficient training as opposed to the officers' mistake or misbehavior, or that the City was deliberately indifferent. App.137-47. Separately, the magistrate recommended dismissal of petitioner's claims against the three security officers because their conduct was not "fairly attributable" to the City. App.107. The district court adopted the magistrate's

report and recommendations in full. App.104; App.120.

2. In a brief per curiam order, a majority of the panel below affirmed the district court's dismissal of the two police officers and three security guards but reversed its dismissal of the *Monell* claim against the City for failure to train. App.1-2. Each judge issued a separate opinion concurring in full or concurring in part and dissenting in part.

Judge Ho was the only judge to concur in both aspects of the per curiam disposition. He took as an uncontroversial starting point 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." App.3. As such, the First Amendment "plainly encompasses the distribution of religious pamphlets—the activity at issue in this case." App.4. He then explained that, normally, a plaintiff seeking to defeat an assertion of qualified immunity must demonstrate not only that his rights were violated but that those rights are "clearly established" by past circuit precedent with sufficiently similar facts. App.8-9. However, as Judge Ho detailed, this 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." App.7 (citing *Hope*, 536 U.S. at 741 and *Taylor*, 592 U.S. at 8-9 & n.2).

Under that precedent, Judge Ho would allow petitioner's claims to proceed. After all, petitioner's "right to evangelize on a public sidewalk" was so obvious that, under *Hope* and *Taylor*, there was no

need for a precedent involving identical facts. App.5-8. But, as Judge Ho explained, the Fifth Circuit had previously held that *Hope* and *Taylor*'s "narrow[ ] obviousness exception" only applies in Eighth Amendment cases brought by incarcerated criminals and "should not apply to obvious violations of the First Amendment." App.8 (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. App.9. And because petitioner 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." App.4. Judge Ho, however, was not similarly constrained by mistaken circuit precedent on the *Monell* claim, and so agreed to "remand Hershey's claim against the City of Bossier for failing to train its officers to respect the constitutional rights of its citizens." App.3.

Judge Dennis concurred in part and dissented in part. He agreed with Judge Ho that "the district court erred in dismissing Hershey's *Monell* failure to train claim" because petitioner "sufficiently pleaded facts to show the City was deliberately indifferent to the violation of his First Amendment rights when it provided no training whatsoever as to an officer's duties under the First Amendment." App.15. Judge Dennis dissented from the panel's grant of qualified immunity to the police and security officers. According to Judge Dennis, petitioner "plausibly

alleged that the officers engaged in viewpoint discrimination in violation of the First Amendment," and "the law clearly established Hershey's right to leaflet in a traditional public forum without viewpoint discrimination." App.16; App.21. In short, Judge Dennis reasoned that "[q]ualified immunity does not protect blatant viewpoint discrimination," and "[a]ny reasonable officer would have understood that ejecting Hershey while permitting another leafleteer to remain violated the First Amendment." App.22.

Finally, Judge Richman took the opposite view of Judge Dennis on both issues and would have affirmed the district court across the board. She parted company with her colleagues on the *Monell* claim and voted to affirm the district court's grant of qualified immunity because petitioner had "not cited decisions that clearly establish that the conduct of" the officers "violated First Amendment rights." App.44.

3. The City petitioned for rehearing en banc on the panel majority's decision to revive petitioner's *Monell* claim, but the en banc Fifth Circuit denied rehearing by a 10 to 7 vote. App.64-65.

Concurring in the denial of rehearing en banc, Judge Ho reiterated his view that "the obviousness of [petitioner'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* and *Taylor*'s obviousness exception to Eighth Amendment cases precluded the panel from reaching that conclusion. App.66; App.69-79. He highlighted the "[n]umerous religious liberty organizations and other public interest groups" that have criticized the

Fifth Circuit's approach "for refusing to apply the obviousness exception to the First Amendment." App.75. He also dismissed any concerns about the sincerity of petitioner's religious beliefs as entirely inapposite at the motion to dismiss stage. App.87-90.

Judge Oldham, joined by six other judges, dissented from the denial of rehearing en banc. App.92. Those judges disagreed with the panel's splintered decision to allow petitioner's *Monell* claim to proceed to trial. App.95-97. 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. App.98. As the dissenters recognized, such an approach would conflict with "binding Supreme Court precedent" and "break" with nearly every other circuit. App.99. The dissenters chided Judge Ho for proclaiming himself bound by the Fifth Circuit's erroneous approach to qualified immunity but declining to "go en banc to fix it[.]" App.97. The dissenters would have granted en banc rehearing "immediately" to settle the circuit's application of qualified immunity in the First Amendment context. App.100.

4. After the City's en banc petition was denied, the panel sua sponte considered and denied panel rehearing. App.62. Judge Ho dissented from that denial. In his view, "[p]anel rehearing would have given … Hershey the opportunity to brief the qualified immunity issues that the [en banc] dissental purportedly welcomed him to present." App.63.

Based on the various opinions on qualified immunity published during the rehearing process (and additions to petitioner's legal team), petitioner moved to file an out-of-time petition for en banc rehearing on the question whether the Fifth Circuit's precedent cabining *Hope* and *Taylor*'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, the City petitioned this Court for certiorari, seeking review of the Fifth Circuit's decision to permit petitioner's *Monell* claim to proceed. *City of Bossier City v. Hershey*, No. 25-1323 (U.S. filed May 13, 2026). Specifically, the City asks this Court to decide whether it can be held liable under a single-incident *Monell* theory even though the Fifth Circuit granted qualified immunity to the individual officers.[2] *Id.* at I.

REASONS FOR GRANTING THE PETITION

The decision below got an exceptionally important issue exceptionally wrong. Compelled by erroneous precedent, a Fifth Circuit panel granted qualified immunity to police and security officers who violated

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[2] As petitioner will more fully explain in his brief in opposition to the City's petition, the City fundamentally misunderstands the Fifth Circuit's decision. Though bound by precedent to grant qualified immunity based on a lack of any factually indistinguishable case, a majority of the panel had no trouble finding that the officers obviously violated petitioner's constitutional rights.

First Amendment rights that have been clearly established for decades. Whatever difficult judgment calls government officials have to make in settings like schools or public employment, the dynamic when it comes to public sidewalks in public parks is straightforward. Citizens have a clear right to engage in peaceful leafletting and the prohibition on viewpoint discrimination, especially disfavoring religious viewpoints, is pellucidly clear. Government officials do not need an on-point circuit precedent to tell them as much. Indeed, one would hope that there is no on-point circuit precedent precisely because the constitutional line is so clearly established that no one has previously crossed it. There is no reason to grant officers immunity simply because they have gone where no prior officer ever dared to tread. Not one word in §1983 suggests that officers should escape liability in such circumstances, and this Court has already squarely rejected that anomalous suggestion.

This Court held in *Hope* that "general statements of the law ... may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful," 536 U.S. at 741, and reiterated in *Taylor*, 592 at 8-9 & n.2, that the "obviousness" of a constitutional violation can defeat qualified immunity even without factually indistinguishable precedent. That principle obviously applies here and would apply if this litigation were filed in any other circuit. The Fifth Circuit alone has consigned *Hope* and *Taylor* to the narrow remit of facilitating Eighth Amendment claims. That makes no sense, as *Hope* and *Taylor* set forth a transsubstantive principle that is necessary to vindicate both common sense and Congress' judgment

in enacting §1983. Nothing in that statute or this Court's precedents provides any support for allowing the most egregious of constitutional violations to go unremedied or for elevating Eighth Amendment claims over our First Amendment freedoms. This Court should grant certiorari to bring the Fifth Circuit into line with this Court's precedents and its sister circuits.

This case is an excellent vehicle for this Court's review. The various opinions issued in denying en banc review underscore the confusion caused by the Fifth Circuit's qualified immunity doctrine. And there is no denying that the panel's decision to dismiss petitioner's damages claims and affirm the grant of qualified immunity turned entirely on the view that *Hope* does not apply to First Amendment claims. That decision is wrong and certworthy. The panel's treatment of the *Monell* claim underscores the fundamental incoherence of the Fifth Circuit's approach. When a constitutional violation is clear enough to support failure-to-train liability for the City, it ought to be more than clear enough to support the damages remedy that the text of §1983 sets forth unambiguously. As things stand, petitioner's *Monell* claim has been remanded for trial; his claims against the respondent officers should be part of that trial.

I. The Decision Below Is Egregiously Wrong.

A. Under This Court's Precedents, the Officers Are Not Entitled to Qualified Immunity.

This case should have been straightforward for the officers and courts alike. The complaint's well-pleaded allegations set forth an obvious constitutional

violation. Petitioner was peacefully distributing religious literature on a public sidewalk outside a Christian rock concert. App.153-55. Nearby, another leafleteer was distributing commercial advertising material for a local radio station. App.155. None of this was especially surprising; "[c]oncert venues are an ideal forum for the street preacher" because they are a "public location where people gather where they're not in a hurry and can take time to listen." App.85 (Ho, J., concurring). They are an equally good venue for promoting a radio station.

When five police and security officers appeared on this scene, they had no split-second, life-or-death decision to make, nor any legally nuanced question where the failure to suppress speech could give rise to (misguided) claims of endorsement. No one had any delusion that Bossier City was endorsing religion, vegetarianism, or Power 927 FM by failing to suppress peaceful and perfectly lawful leafletting on a public sidewalk. All the officers had to do to avoid liability was to do nothing—or at least avoid singling out and punishing a religious leafleteer while ignoring a similarly situated, commercial advertiser down the sidewalk. Instead, the officers needlessly committed an obvious constitutional violation, threatening to arrest petitioner, compelling him to leave, and banishing him indefinitely from a public park on pain of arrest, all while leaving the commercial leafleteer alone. Constitutional violations do not come any plainer than that, and §1983 unambiguously promises a remedy.

1. Qualified immunity does not feature in the text of §1983, but this Court has long limited recovery to

situations where government officials violated clearly established rights. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The classic way of showing a clearly established right is by identifying a factually similar case where an official engaging in similar conduct was held to have violated the Constitution. *See White v. Pauly*, 580 U.S. 73, 79 (2017). But that is not the only way, as some constitutional violations are as obvious as they are novel. Accordingly, this Court has emphasized time and again that, to defeat qualified immunity, a plaintiff need not necessarily show that "the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. What ultimately matters is whether "in the light of pre-existing law the unlawfulness [is] apparent." *Id.*; *see also Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam) ("[T]his Court's case law does not require a case directly on point for a right to be clearly established." (quoting *White*, 580 U.S. at 79)). That principle applies with especial force in circumstances where officials commit a constitutional violation that so clearly crosses a well-established constitutional line, that no prior case law involves such an obvious blunder.

Hope exemplified that principle. There, this Court held that prison guards did not need an on-point precedent to understand that handcuffing a prisoner to a "hitching post" violated his Eighth Amendment rights. 536 U.S. at 733. The lower court had granted immunity because there was no previous case

"materially similar" to those specific facts. *Id.* at 739. But this Court reversed. It explained that under the alleged facts, "the Eighth Amendment violation is obvious." *Id.* at 738. And because the violation was "obvious," the officials were "on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. In those circumstances, a plaintiff need not identify a previous case involving "fundamentally similar" or "materially similar" facts. *Id.* Instead, "a general constitutional rule" *can* defeat qualified immunity when it "appl[ies] with obvious clarity to the specific conduct in question." *Id.* at 741. Officials are on notice that they may not inflict "obvious cruelty," *id.* at 745, whether that means cuffing a prisoner to a "hitching post," chaining him to a fence, *id.* at 742, or restraining him in a pillory, *see id.* at 737 n.6. Even the United States, with its obvious interest in invoking qualified immunity in defending federal officers, recognized that qualified immunity could be defeated even in the absence of prior caselaw involving materially similar facts. U.S.Amicus.Br.11-19, *Hope v. Pelzer*, No. 01-309 (U.S. Feb. 19, 2002).

This Court reaffirmed *Hope* in *Taylor*, summarily reversing the Fifth Circuit's grant of qualified immunity to corrections officers who confined an inmate in a pair of "unsanitary cells." *Taylor*, 592 U.S. at 7. This Court again explained that "any reasonable officer should have realized" that this conduct was unconstitutional, even without a factually similar case. *Id.* at 9-10. Notwithstanding some "ambiguity in the caselaw," this Court held that there could be no "doubt about the obviousness of [the prisoner's] right." *Id.* at 9 n.2.

Hope and *Taylor* involved violations of the Eighth Amendment, but this Court has made clear that the "obviousness" exception applies to other rights. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (recognizing, in the Fourth Amendment context, that "in an obvious case," general constitutional standards "can 'clearly establish' the answer, even without a body of relevant case law" (citing *Hope*, 536 U.S. at 738)); *accord Rivas-Villegas*, 595 U.S. at 6. The Court has applied similar principles in the context of criminal prosecutions under 18 U.S.C. §242. *See United States v. Lanier*, 520 U.S. 259, 267-72 (1997). In fact, this Court has applied these principles in the First Amendment context, reversing a grant of qualified immunity to officers who allegedly ordered a woman to stop praying without any law enforcement justification. *Sause v. Bauer*, 585 U.S. 957, 959 (2018) (per curiam). The First Amendment obviously "protects the right to pray," *id.*, and interference with that right without a "legitimate law enforcement interest[]," *id.* at 960, is not shielded by immunity even if there is no "prior case involving [that] unusual situation," *id.* at 959.

The upshot of these cases is clear: an officer is not entitled to qualified immunity for violating an "obvious" constitutional right even without a factually similar case saying so. That principle is a fundamental transsubstantive component of this Court's §1983 jurisprudence. It is not limited to the Eighth Amendment, and this Court has applied it in a variety of contexts, including the First Amendment.

2. *Hope* should have controlled this case. Petitioner had an obvious First Amendment right to

peacefully distribute religious leaflets to interested listeners on a public sidewalk without being singled out for adverse treatment on account of his religious message. Indeed, that right is triply protected.

First, petitioner had a basic free speech right to leaflet in a traditional public forum. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176 (1983) (citing cases); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 702-03 (1992) ("We have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment." (Kennedy, J., concurring)). And there is scarcely any forum where the right to leaflet is more obviously protected than the public sidewalk—doubly so when that public sidewalk is within a public park. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (recognizing *both* public parks and sidewalks as "traditional public forum[s]"). Public sidewalks 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); *accord Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968). Petitioner's "[l]eafletting 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." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997). He plainly had a "constitutional right to express his views

in an orderly fashion," including by distributing "handbills and literature."[3] *Jamison v. Texas*, 318 U.S. 413, 416 (1943).[4] To call that right clearly established (with or without a factually similar case) understates things considerably.

Second, petitioner's right to distribute his *religious* leaflets was guaranteed by the Free Exercise Clause, which "unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). That right to proselytize includes the right to distribute religious literature. Indeed, "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of

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[3] In their own petition for certiorari, the City argues, as it did below, that it was not obvious that the public sidewalk where petitioner distributed his leaflets was a traditional or designated public forum. *See* Pet.21-22, *City of Bossier City v. Hershey*, No. 25-1323 (U.S. filed May 13, 2026). In support, it cites several irrelevant decisions involving entirely different contexts. *Id.* at 21 n.2. To be sure, if petitioner had distributed his leaflets in the Arena itself, *see Calash v. City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir. 1986), or in a marked-off plaza, *see Ball v. City of Lincoln*, 870 F.3d 722, 731-36 (8th Cir. 2017), perhaps that argument would have some force. But respondents cannot refute the long-established principle in both this Court and the Fifth Circuit that public sidewalks in particular "are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Grace*, 461 U.S. at 179; *see Siders v. City of Brandon*, 123 F.4th 293, 303 (5th Cir. 2024) ("It is axiomatic that 'public sidewalks are traditional public fora that time out of mind have facilitated the general demand for public assembly and discourse.'").

[4] While expressive activity on a public sidewalk may be subject to reasonable time, place, and manner restrictions, no party has suggested that any such restriction existed in this case.

printing presses." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *Id.* at 109. It is thus "beyond controversy" that the state "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity." *Jamison*, 318 U.S. at 416-17; *accord Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 385-86 (1990).

Because petitioner was engaged in "religious speech," the First Amendment is "doubly" protective. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Id.* Respondents here clearly violated those rights. Indeed, when Officer Harvey advised that "Hershey's literature had not been approved," App.157, he essentially forbade petitioner to "proselytize … without a license." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 511 (2020) (Gorsuch, J., concurring) (discussing *Cantwell v. Connecticut*, 310 U.S. 296, 300-01 (1940)).

Finally, even putting aside those obvious First Amendment violations, respondents committed the cardinal First Amendment sin: viewpoint discrimination. It is "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "Viewpoint discrimination … represents an egregious form of content regulation, and

governments in this country must nearly always abstain from it." *Chiles v. Salazar*, 146 S.Ct. 1010, 1021 (2026). Indeed, even otherwise unprotected speech may not be regulated on the basis of viewpoint. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). This Court has thus long recognized that viewpoint-based restrictions categorically violate the First Amendment in any forum. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

That is all the more true when the government discriminates "based on 'religious viewpoint.'" *Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022); *see Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001). Indeed, the government may "not treat *any* comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam), or prohibit conduct "because it is undertaken for religious reasons," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993) (plurality op.). That "general constitutional rule … appl[ied] with obvious clarity to the specific conduct in question" here. *Hope*, 536 U.S. at 741. The officers forced petitioner to stop distributing his *religious* literature while permitting a nearby leafleteer to distribute her *commercial* material. That is blatantly unconstitutional.

In light of this "pre-existing law," *Anderson*, 483 U.S. at 640, petitioner's First Amendment right to peacefully proselytize by handing out religious leaflets free from discrimination was obviously guaranteed several times over. This is thus a classic case where the lack of prior precedent does not reflect any judicial gray areas, but, instead, the simple reality that most

officers most of the time avoid the most egregious constitutional violations. In other words, sometimes the absence of prior case law is a direct result of the constitutional rules being pellucidly clear.

Respondent officers never disputed that the constitutional prohibition on viewpoint discrimination is clearly established. To the contrary, they acknowledged that it is "likely true" that "viewpoint discrimination is a clearly established violation of the First Amendment in any forum." CA5 Dkt.32 at 13-14. But they nonetheless contended that this general constitutional rule is insufficient to defeat qualified immunity without "existing precedent 'squarely govern[ing]' the specific facts at issue." *Id.* at 12. Not so; *Hope* considered and rejected that exact, absurd argument. *Sause*, in turn, applied that principle in a First Amendment case, where there were at least some justifications for officers to take quick action. *See* 585 U.S. at 959. Unlike in *Sause*, here there was no disputed law-enforcement exigency, and any reasonable officer would have understood that "ejecting [Mr.] Hershey" for his religious leafleting and threatening him with imprisonment if he ever returned, all "while permitting another [commercial] leafleteer to remain," violated his rights. App.22 (Dennis, J., concurring in part, dissenting in part).

B. The Fifth Circuit's Ruling Conflicts With This Court's Precedents and Core First Amendment Values.

Under a straightforward application of *Hope*, the court of appeals should have made quick work of respondents' qualified immunity defense. After all, a majority of the panel agreed that the officers obviously

violated petitioner's rights. *See* App.5-8 (Ho, J concurring); App19-22 (Dennis, J. concurring in part and dissenting in part). But that is not enough in the Fifth Circuit. As Judge Ho explained, the Fifth Circuit's "(mistaken) circuit precedent" does not apply *Hope* to First Amendment claims. App.4.

1. The Fifth Circuit's miserly approach to *Hope* can be traced to *Morgan v. Swanson*, in which the en banc court affirmed a grant of qualified immunity to elementary-school principals who prohibited students from distributing religious materials at school. 659 F.3d 359 (5th Cir. 2011). The court gave lip service to *Hope* but dismissed this Court's "suggestion that generalizations can sometimes clearly establish the law" as mere "dicta." *Id.* at 373. Even some of the judges in the majority noted—and disagreed with—this (mis)treatment of *Hope*. *See id.* at 393 (Dennis, J. concurring) (observing that under *Hope*, "official conduct may so obviously fall within the prohibition of a general or abstract rule of the Constitution that any reasonable official would have 'fair warning' that his actions are unconstitutional, even absent a prior court decision to that effect"), as did the judges in the minority on the qualified-immunity issue. *See id.* at 414 n.30 (Elrod, J. dissenting).

After this Court reaffirmed *Hope* and applied it to summarily reverse the Fifth Circuit in *Taylor*, the Fifth Circuit could no longer marginalize the rule as "dicta." But it could recast *Hope* as a ticket good for one Amendment only. In *Villarreal v. City of Laredo*, the en banc Fifth Circuit again faced an assertion of qualified immunity by government officials against an "obvious[]" First Amendment violation—this time, a

reporter's right to ask questions and pursue her work as a journalist. 94 F.4th at 394.[5] The court characterized *Hope* and *Taylor* as "Eighth Amendment cases where the Supreme Court denied qualified immunity … and declined to scrutinize the cases fact-specifically," and asserted that "those cases are inappropriate templates for describing 'clearly established' law in this context." *Id.* at 395 (citing *Morgan*, 659 F.3d at 373). Rejecting *Hope*'s applicability to the First Amendment claims there, the court "adhere[d] to the general rule" that a law is not clearly established without a previous controlling case that is materially indistinguishable. *Id.* Once again, several judges dissented from the court's unduly narrow reading of *Hope*. Judge Graves observed that qualified immunity was inappropriate because the officials' conduct was "obviously unconstitutional in light of the … well-established right of journalists to engage in routine newsgathering." *Id.* at 400. And Judge Ho lamented that the court's refusal to extend *Hope* and *Taylor* to the First Amendment "treat[s] the First Amendment as a second-class right." *Id.* at 413.

The decision below is of a piece. Despite what a majority of the panel recognized to be an obvious

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[5] This Court later vacated and remanded the case for further consideration in light of *Gonzalez v. Trevino*, which held that the Fifth Circuit had taken "an overly cramped view" of this Court's precedent in requiring "very specific comparator evidence" for First Amendment retaliation claims. 602 U.S. 653, 658 (2024) (per curiam); *Villareal v. Alaniz*, 145 S.Ct. 368 (2024). On remand, the en banc court again held the defendants were entitled to qualified immunity. 134 F.4th 273, 276 (5th Cir. 2025).

violation of petitioner's First Amendment rights, the court affirmed the grant of qualified immunity because "[i]n [the Fifth] circuit, *Hope* and *Taylor* apply only to the Eighth Amendment claims of incarcerated criminals. They do not apply to the First Amendment claims of law-abiding citizens." App.8 (Ho, J., concurring). Absent that "(mistaken) circuit precedent," the panel would have denied qualified immunity and allowed petitioner to vindicate his constitutional rights. App.4; App.3 (Judge Ho noting that "if it were up to [him], [petitioner's] claims against the individual police officers and security guards would proceed to trial").

2. The Fifth Circuit's double standard is mystifying. The court should have been on notice after this Court summarily reversed it in *Taylor* "that the obviousness principle has vitality and that egregiousness matters." *Ramirez v. Guadarrama*, 2 F.4th 506, 523 (5th Cir. 2021) (Willett, J., dissenting from denial of rehearing en banc). As one Fifth Circuit judge warned his colleagues less than a year after *Taylor*, that summary reversal "sent the message that not only were we wrong, we were *obviously* wrong—more specifically, we were obviously wrong about an obvious wrong." *Id.*

Yet rather than heed that warning, the Fifth Circuit doubled down, inexplicably cabining *Hope* to the Eighth Amendment context despite nothing in the decision's language or reasoning suggesting such a narrow application. To the contrary, *Hope*'s logic necessarily covers all constitutional rights. Its "obviousness" principle is critical to protecting individuals against the most egregious official

conduct. Without it, the only way to defeat qualified immunity is to identify a factually indistinguishable case. But as then-judge Gorsuch explained (notably, in a Fourteenth Amendment case, not an Eighth Amendment one), "sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder*, 787 F.3d at 1082. That makes sense, as there will only be on-point precedent if an official has committed the same egregious rights violation and then litigated the matter to the court of appeals. It would "be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder*, 787 F.3d at 1082-83. When correctly applied, *Hope* prevents that unacceptable result by ensuring that officials may be held liable for obvious rights violations that are unprecedented in their egregiousness.

Official accountability for obviously unlawful conduct should not depend on which constitutional right an official violates. "[O]ur Constitution renounces the notion that some constitutional rights are more equal than others." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 643 (2016) (Thomas, J. dissenting); *see Espinoza*, 591 U.S. at 496-97 (Thomas, J., concurring). And relegating First Amendment rights to second-class treatment makes no sense at all, especially in a case like this implicating multiple "overlapping" guarantees of the First Amendment. *Kennedy*, 597 U.S. at 523.

II. The Decision Below Conflicts With Decisions From Every Other Circuit.

The Fifth Circuit's approach is not just irreconcilable with this Court's precedent; it is a lone outlier among its sister circuits who have received the message of *Hope* and its progeny loud and clear. Every other circuit has extended *Hope* beyond the Eighth Amendment; most have recognized it for First Amendment claims; and several have applied the doctrine in denying qualified immunity.

The Eleventh Circuit's decision in *Bailey v. Wheeler* is illustrative. 843 F.3d 473 (11th Cir. 2016). In *Bailey*, after reporting that some of his fellow officers had been racially profiling minority citizens, Officer Bailey was terminated from his job and became the subject of a "be-on-the-lookout" advisory that described him as a "loose cannon" and a "danger" to law enforcement. *Id.* at 477-78. Officer Bailey sued the police chief who issued the advisory for unlawful retaliation. The Eleventh Circuit held that Officer Bailey had sufficiently alleged a First Amendment retaliation claim, and that the chief was not entitled to qualified immunity. The court explained that in addition to identifying "a materially similar case from relevant precedent," a plaintiff can defeat qualified immunity when the defendant's conduct "lies so obviously at the very core of what the [First Amendment] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." *Id.* at 484. The court found that the "conduct alleged in this case is so egregious that [the police chief] did not need case law to know what he allegedly did was unlawful." *Id.* at

484. The court thus held that "it is certainly obvious, as a general proposition and without reference to case law, that issuing the [advisory] in this case, under the circumstances that existed at the time … clearly violated Bailey's First Amendment rights." *Id.* at 485.

The Fourth Circuit reached a similar conclusion in *Tobey v. Jones*. 706 F.3d 379 (4th Cir. 2013). A traveler who believed that airport security screening is unconstitutional printed the text of the Fourth Amendment on his chest before departing for a trip. *Id.* at 383. When the TSA selected him for enhanced screening, he disrobed to reveal the written protest. *Id.* at 384. He was then taken to a police station and threatened with various criminal sanctions. *Id.* The Fourth Circuit held that the officers violated the man's First Amendment right "to voice dissent from government policies" and denied the officers' request for qualified immunity. *Id.* at 391. The officers argued that "because there is no case on-point detailing what is a reasonable restriction on speech in an airport screening area," the constitutional right is not "clearly established." *Id.* at 392. But the Fourth Circuit disagreed. Although there was no factually similar case, the officers should have known that "the First Amendment prohibits [them] from retaliating against an individual for speaking critically of the government." *Id.* at 391. The Fourth Circuit concluded that because "peaceful, silent, nondisruptive protest is protected in a nonpublic forum," the man's "rights at the time of his arrest were clearly established." *Id.* at 393.

The Second Circuit's decision in *Nagle v. Marron*, provides yet another example. 663 F.3d 100 (2d Cir.

2011). There, the Second Circuit reversed a grant of qualified immunity to school officials for allegedly refusing to recommend a teacher for tenure based on her protected speech from four years prior. *Id.* at 103-05. The officials argued—and the district court accepted—that it was not clearly established "that speech protected at one time 'remains protected when discovered years later' in a "geographically remote community." *Id.* at 115. The Second Circuit reversed because "no reasonable official could think that such speech-retaliatory conduct was constitutionally permissible." *Id.* The court agreed with the officials "that no case in our Circuit has specifically held that First Amendment protection does not grow weaker over time and space." *Id.* But citing *Hope*, it held that the officials nevertheless "should have known that retaliation for protected speech would violate an employee's First Amendment rights." *Id.* at 115-16.

These circuits are not alone. At least two other circuits have permitted First Amendment claims to proceed over assertions of qualified immunity based on the obvious nature of a violation. *See MacIntosh v. Clous*, 69 F.4th 309, 320-21 (6th Cir. 2023) (no qualified immunity for a county commissioner brandishing a rifle during a zoom meeting in response to a resident's comment even without a factually similar case); *McGreevy v. Stroup*, 413 F.3d 359, 366-67 (3d Cir. 2005) (no qualified immunity for school officials retaliating against a school nurse because "the illegality of the officials' actions was 'sufficiently clear that they can fairly be said to have been on notice of the impropriety of their actions'").

Four other circuits have expressly recognized *Hope*'s "obviousness" exception in First Amendment cases, even if they ultimately declined to grant qualified immunity for various reasons. *See Díaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746-47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021 (10th Cir. 2021).

And the remaining two non-specialized circuits have both recognized that *Hope* is not limited to the Eighth Amendment context. *See Cheeks v. Belmar*, 80 F.4th 872 (8th Cir. 2023) (applying *Hope*'s obviousness exception to Fourteenth Amendment case); *Atherton v. D.C. Off. of Mayor*, 706 F.3d 512, 515-16 (D.C. Cir. 2013) (citing *Hope* in Fifth Amendment case).

In sum, the Fifth Circuit's approach is egregiously wrong and at war with the decisions of this Court and every other circuit. As shown by the en banc decisions establishing this aberrant approach (*Villareal* and *Morgan*) and by the Fifth Circuit's refusal to take the decision below en banc, only this Court's review will resolve the circuit split.

III. This Case Is An Ideal Vehicle To Resolve An Exceptionally Important Question.

The question presented is undeniably important. The First Amendment Free Speech and Free Exercise Clauses are "a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy*, 597 U.S. at 524. First Amendment rights "play[] a fundamental role in a democracy": they are "the matrix, the indispensable condition, of nearly every other form of freedom." *FEC*

v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986). Congress plainly intended for clear violations of the First Amendment to be fully remedied. *See* 42 U.S.C. §1983. The Fifth Circuit has vitiated that promise precisely when it is most vital—when government suppression is so flagrant as to be without precedent. As Judge Ho recognized below, "[i]t would make a mockery of our rights to grant qualified immunity just because no one in government has yet to be abusive enough to commit that particular violation—and then stubborn enough to litigate it, not only before a district court, but also in the court of appeals." App.8.

The Fifth Circuit's rule inflicts widespread harm on law-abiding citizens. According to a recent study, nearly 20% of qualified-immunity cases include First Amendment claims. *See* Jason Tiezzi et al., Inst. for Just., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, 4, 18 (Feb. 2024), perma.cc/KSV8-BMCU. So it is no surprise that organizations and public interest groups across the ideological spectrum have sounded the alarm about the Fifth Circuit's "insidious" approach. *See McMurry v. Weaver*, 142 F.4th 292, 306 (5th Cir. 2025) (Ho, J., concurring) (collecting *amici*). As one group warned, "[l]eft undisturbed, the Fifth Circuit's ruling provides dangerous license for government actors to flagrantly violate the Constitution without recourse, even against the most established rights, simply because they invoke a novel factual situation never before specifically addressed by the courts." App.76 (Ho, J., concurring in denial of rehearing en banc) (citing

Amicus.Br. for Young Am.'s Found. and Manhattan Inst., *Villarreal v. Alaniz*, 2024 WL 2786483, *9-10 (U.S. filed May 24, 2024)).

This petition also presents an ideal opportunity for this Court to correct the Fifth Circuit's upside-down approach to the obviousness exception. Because petitioner's claims were dismissed on the pleadings, there are no disputed facts complicating this Court's review. And on the facts alleged, the five officers' conduct plainly violated petitioner's constitutional rights. *See* App.21 (Dennis, J., concurring in part and dissenting in part) (noting that neither party disputes the district court's characterization of petitioner's allegations as raising an inference of viewpoint discrimination). The only issue this Court need address is whether, as a matter of law, a First Amendment violation can be sufficiently obvious to defeat qualified immunity without factually analogous cases. If that issue is resolved in petitioner's favor, his individual claims against the officers can proceed to trial alongside his *Monell* claims—just as they would in any other circuit.

To be sure, the opinions respecting rehearing below suggest some confusion about the exact state of Fifth Circuit law and some doubts by some judges about the sincerity of petitioner's beliefs. But none of that detracts from this case as a suitable vehicle for this Court's review. The latter have no relevance given the posture of this case, where the plausible allegations of the complaint must be taken as true. The former just underscores that the Fifth Circuit is deeply divided and confused about the scope of *Hope* and the proper approach to qualified immunity in the

First Amendment context. That confusion is deep-seated and can be traced back to the sharply divided en banc decision in *Morgan*. Regardless, the one thing beyond debate is that the decisive vote on the panel decision was cast on the view that the constitutional violations here were obvious but that Fifth Circuit precedent still commanded the application of qualified immunity because *Hope* is limited to the Eighth Amendment. That decision cannot be allowed to stand.

Finally, that the *Monell* claim will go to trial on remand only underscores that the claims against the officers should be part of that trial. When constitutional violations are so obvious they give rise to failure-to-train liability, they ought to be obvious enough to defeat qualified immunity.

* * *

When five officers accosted petitioner as he distributed religious literature on a public sidewalk, leaving a nearby commercial leafleteer undisturbed, any reasonable officer should have known that such viewpoint discrimination was a blatant violation of petitioner's First Amendment rights, even without on-point circuit precedent. Indeed, the most plausible explanation for the lack of a circuit precedent is that the combined effect of decades of decisions marking viewpoint discrimination as the ultimate First Amendment sin and the powerful remedies Congress provided in §1983 had deterred any similarly egregious episodes. If officers nonetheless committed this novel but egregious blunder anywhere in the country, save the Fifth Circuit, qualified immunity would offer them no shield. Only in the Fifth Circuit

are the promise of §1983 and *Hope* limited to clear but novel violations of the Eighth Amendment. The Fifth Circuit's rule is utterly irreconcilable with this Court's precedent and with the law in every other circuit. If *Hope* does not apply to First Amendment claims on *these* facts, it never will. Whether through plenary review or summary reversal, this Court should not let the decision below stand.

CONCLUSION

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

Respectfully submitted,

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June 12, 2026

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-30754

RICHARD HERSHEY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Filed: Oct. 7, 2025

Before Dennis, Richman, and Ho, *Circuit Judges.*

OPINION

Per Curiam:

This is a splintered panel decision involving an individual's First Amendment right to distribute leaflets on the sidewalk on the grounds of CenturyLink Center. A majority of the panel (Judges Dennis and Ho) agrees to reverse the district court's

dismissal of the *Monell*[1] claim against Bossier City for failure to train. A second majority (Judges Richman and Ho) agrees to affirm the grant of qualified immunity for the police officers and to affirm the dismissal of the security guards.

We AFFIRM in part and REVERSE in part the district court's judgment.

[1] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

James C. Ho, *Circuit Judge*, concurring:

The First Amendment protects not just the right to pray, but to preach. To not only worship, but to witness. The right to exercise your religion includes the right to evangelize your faith.

And that's what's at issue in this case. Richard Hershey alleges that he wanted to distribute religious pamphlets on a public sidewalk while a concert was being held nearby—but that a group of police officers and security guards threatened to arrest him if he did so.

So I agree that we should remand Hershey's claim against the City of Bossier for failing to train its officers to respect the constitutional rights of its citizens.

Moreover, if it were up to me, his claims against the individual police officers and security guards would proceed to trial as well. Unfortunately, recent precedents of our court force us to grant qualified immunity.

To be sure, I strongly disagree with our court's approach to qualified immunity as applied in the First Amendment and other contexts. *See*, *e.g.*, *Villarreal v. City of Laredo*, 94 F.4th 374, 409 (5th Cir. 2024) (Ho, J., dissenting); *see also McMurry v. Weaver*, 142 F.4th 292, 304-7 (5th Cir. 2025) (Ho, J., concurring) (discussing *Villarreal* and *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011)). Likewise, I strongly disagree with our court's approach to the First Amendment as applied to acts of evangelism on public sidewalks outside a public amphitheater. *See*, *e.g.*, *Siders v. City of Brandon*, 130 F.4th 188, 191 (5th Cir. 2025) (Ho, J., dissenting from denial of rehearing en banc).

Our court's record of protecting First Amendment rights leaves much to be desired, to say the least. But as a member of this panel, I'm bound to faithfully follow our precedents, whether I agree with them or not. So I reluctantly concur in affirming the grant of qualified immunity, as compelled by our (mistaken) circuit precedent.

I.

The First Amendment protects the "free exercise" of religion, not just the right to "worship." *Horvath v. City of Leander*, 946 F.3d 787, 795-96 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). And "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). "The dissemination of ... religious views and doctrines is protected by the First Amendment." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

This right plainly encompasses the distribution of religious pamphlets—the activity at issue in this case. As the Supreme Court observed nearly a century ago, "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). "It has been a potent force in various religious movements down through the years," as people of faith "carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents." *Id.* at 108-9. "This form of religious activity occupies the same high estate

under the First Amendment as do worship in the churches and preaching from the pulpits." *Id.* at 109.

So anyone who is "rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). "This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Id.*

II.

Hershey's right to evangelize on a public sidewalk is not undermined by the fact that the city-owned facility abutting the sidewalk happens to be managed by a private corporation. Nor should it matter that his rights were violated by private security guards working alongside police officers. Municipalities cannot abrogate the constitutional rights of their citizens simply by delegating their coercive governmental powers to private agents.

The Supreme Court addressed this very contention in *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the Court was asked to answer the following question: "Can th[e] people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?" *Id.* at 505. "For it is the State's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms." *Id.*

The Court made clear that it "cannot accept that contention." *Id.* at 506. "Whether a corporation or a municipality owns or possesses the town the public in

either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507. "The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees." *Id.* at 508. "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country." *Id.* "There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." *Id.* at 508-09.

Accordingly, the Court vacated the conviction of a member of Jehovah's Witnesses, for her only crime was leafletting on the sidewalks of the company town. *See id.* at 509 ("Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand."). *See also Lee v. Katz*, 276 F.3d 550, 557 (9th Cir. 2002) (private lessee of public plaza cannot violate the First Amendment rights of street preachers).

Like Grace Marsh, Richard Hershey's First Amendment rights should not depend on whether he was ejected by a cop or a contractor. He alleges that private security guards assisted the police in ejecting him from the area. So he has stated a cognizable claim against "[p]rivate persons" who "jointly engaged with state officials in the prohibited action." *United States v. Price*, 383 U.S. 787, 794 (1966).

III.

All of this *should* have been amply sufficient to defeat qualified immunity at this preliminary stage of the proceedings—and to allow Hershey to proceed to trial.

After all, 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. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("general statements of the law ... may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful") (cleaned up) (quoting *United States v. Lanier*, 520 U.S. 259, 270-71 (1997), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Taylor v. Riojas*, 592 U.S. 7, 8-9 & n.2 (2020) (citing *Hope* and *Lanier*) (summarily reversing our court's grant of qualified immunity due to the "obviousness" of the constitutional violation).

Under *Hope* and *Taylor*, it should be enough to defeat qualified immunity that the alleged constitutional violation is obvious. And this "obviousness" principle should be intuitive to all who treasure our constitutional rights. As then-Judge Gorsuch put it, "some things are so obviously unlawful that they don't require detailed explanation." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). "[S]ometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Id.* "[I]t would be remarkable if the most obviously unconstitutional conduct should be the

most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Id.* at 1082-83.

I most certainly agree. To my mind, "[i]t seems absurd to suggest that the most egregious constitutional violations imaginable are somehow immune from liability precisely because they're so egregious. It would make a mockery of our rights to grant qualified immunity just because no one in government has yet to be abusive enough to commit that particular violation—and then stubborn enough to litigate it, not only before a district court, but also in the court of appeals (or the Supreme Court)." *McMurry*, 142 F.4th at 304 (Ho, J., concurring).

A.

But here's the problem: In our circuit, *Hope* and *Taylor* apply only to the Eighth Amendment claims of incarcerated criminals. They do not apply to the First Amendment claims of law-abiding citizens. That's because of our decision in *Villarreal*.

In *Villarreal*, the majority acknowledged that *Hope* and *Taylor* denied qualified immunity based on "obvious" and "particularly egregious" constitutional violations—and did so without requiring a "fact-specific[]" presentation of case law. 94 F.4th at 395. But the majority distinguished those decisions on the ground that they're "Eighth Amendment cases" that establish only a "narrow[] obviousness exception" that should not apply to obvious violations of the First Amendment. *Id.* It claimed support in our earlier en banc decision in *Morgan*, 659 F.3d 359. *Contra id.* at 412, 414 n.30 (Elrod, J., dissenting in part)

(concluding that *Hope* applies to obvious First Amendment violations).

Villarreal has been widely criticized. *See McMurry*, 142 F.4th at 305-06 (Ho, J., concurring) (surveying criticism). And the Supreme Court has vacated it. *See Villarreal v. Alaniz*, 145 S. Ct. 368 (2024). But our court has now reinstated it. *See Villarreal v. City of Laredo*, 134 F.4th 273, 276 (5th Cir. 2025) ("[o]ur previous en banc majority opinion is superseded only to th[e] extent" necessary to respond to the Supreme Court's vacatur regarding the substantive requirements of a First Amendment retaliation claim).

So it doesn't matter how obvious a First Amendment violation might be demonstrated at trial. To overcome qualified immunity under *Villarreal*, the plaintiff must satisfy "the requirement that 'clearly established law' be founded on materially identical facts." 94 F.4th at 395.

B.

Hershey has been unable to identify favorable precedent with the "materially identical facts" required by *Villarreal*. *Id.*

So I'm forced to conclude that qualified immunity must be granted—to both cops and contractors alike. *See*, *e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 393-94 (2012) (holding that private individuals temporarily retained by the government may invoke qualified immunity); *Meadows v. Rockford Hous. Auth.*, 861 F.3d 672, 678 (7th Cir. 2017) (extending qualified immunity to private security guards performing governmental functions).

In fact, the closest case in recent years is profoundly unfavorable to people of faith. In *Siders*, we rejected a First Amendment challenge to a local ordinance that prevented citizens from distributing religious materials on a sidewalk outside a public amphitheater. *See Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024).

I strongly disagree with that ruling. *See Siders*, 130 F.4th at 191 (Ho, J., dissenting from denial of rehearing en banc). But our court denied rehearing en banc in that matter by a lopsided vote.[2]

So I'm bound by *Siders*. To be sure, *Siders* was decided at the preliminary injunction stage. So in theory, I suppose that Siders could still prevail on the merits. But regardless of how *Siders* is ultimately decided on the merits, it seems difficult to see how Hershey has stated a "clearly established" violation in our circuit, when another panel of our court (wrongly)

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[2] Several members of the court tried to defend the panel ruling in *Siders* by recharacterizing it. That is, they theorized that the challenged ordinance did not actually prevent any citizen from evangelizing on public grounds. *See, e.g.*, *id.* at 189 (Oldham, J., concurring in the denial of rehearing en banc) ("the ordinance does not purport to regulate prayer, conversation, t-shirts, evangelism, or tracts").

But this rationalization effort is hard to reconcile with what several members of the court said in the companion case of *Olivier v. City of Brandon*, 121 F.4th 511 (5th Cir. 2024). *See, e.g.*, *id.* at 512 (Ho, J., dissenting from denial of rehearing en banc, joined by six members of the court) (condemning same local ordinance at same public amphitheater because it prevents "an evangelical Christian who feels called to share the good news with his fellow citizens ... from doing so outside the city's public amphitheater").

found a similar claim unlikely to succeed on the merits in *Siders*. *See, e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (to find a "clearly established" violation, "existing precedent must have placed the statutory or constitutional question beyond debate"); *see also Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 606 U.S. _, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring) ("Of course, decisions regarding interim relief are not necessarily conclusive as to the merits because further litigation may follow. But regardless of a decision's procedural posture, its reasoning—its *ratio decidendi*—carries precedential weight in future cases.") (cleaned up).

C.

Qualified immunity, of course, only applies to the damages claim against the individual Defendants. Qualified immunity does not bar claims for injunctive relief. But Hershey's appeal appears to be focused only on damages, and not injunctive relief.

IV.

I turn now to Hershey's claim that the City of Bossier failed to train its officers to respect the constitutional rights of its citizens.

Under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978), municipalities may be held liable for constitutional violations. A failure to train officers to respect constitutional rights, including those protected by the First Amendment, "can without question give rise" to this liability. *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 756 (5th Cir. 2009).

To establish *Monell* liability on a failure to train theory, a plaintiff must allege that the municipality had inadequate training procedures and was deliberately indifferent in adopting them, and that the failure to train caused the violation in question. *See id.*

Although deliberate indifference is usually inferred "from a pattern of constitutional violations," we will also infer it where "the policymaker provides no training whatsoever with respect to the relevant constitutional duty." *Garza v. City of Donna*, 922 F.3d 626, 637-38 (5th Cir. 2019) (internal quotation marks omitted).

That's exactly what Hershey alleges here. His complaint contends that Bossier City did not train its police officers and private security personnel that the park surrounding the Bossier City Arena is public property, or that citizens are entitled to exercise their First Amendment rights there. Moreover, at oral argument, counsel for Hershey agreed that the officers "received literally zero training" on First Amendment issues. Oral Arg. at 13:20-13:26. If these facts are true, they show that the City provided "no training whatsoever" regarding the application of the First Amendment to the park. *Garza*, 922 F.3d at 638. They are "facts sufficient to show" that the city acted with deliberate indifference. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014).

Hershey also alleges that the City's failure caused the violations of his rights. He contends that the City's failure to inform officers that the park was public property led officers to believe that the park was private property, and that citizens could therefore be

ejected without regard to the First Amendment. He alleges that the officers who removed him from the park held this belief, and told him he had to leave the park because it was private property. In sum, he pled facts sufficient to show that the City's complete lack of training was the cause of his injury.

* * *

I agree that Hershey's *Monell* claim against the City of Bossier may proceed. I reluctantly concur that, under our court's current precedent, qualified immunity disposes of his claims against the individual Defendants.

James L. Dennis, *Circuit Judge*, concurring in part and dissenting in part:

Richard Hershey peacefully distributed free pamphlets about Christian vegetarianism on the public sidewalks outside the city-owned CenturyLink Center in Bossier City, Louisiana. The surrounding streets and sidewalks are part of a public park, open and unrestricted to the public. At the same time, another person handed out commercial advertisement cards for an internet radio station. Two City police officers—Deputy City Marshal Bobby Gilbert and Officer Daniel Stoll—and three Center security guards—David Smith, Tyshon Harvey, and Eugene Tucker—approached only Hershey and told him to stop leafletting. They waved handcuffs at Hershey and warned that if he continued, they would arrest him. Hershey attempted to explain that he had a legal right to hand out his literature, but Deputy Marshal Gilbert cut him off and told him that he was on private property, he had to leave or face arrest, and he could not return.

As Hershey was leaving, he inquired about the commercial literature being distributed by the person working for the internet radio station. Security guard Harvey responded that Hershey's literature had not been "approved" by the Center, and that Hershey had to submit his literature in advance. When Hershey repeated his question, Harvey said he did not know whether the radio station's commercial literature had been approved, but because Hershey's had not, he needed to leave. The officers and security guards then "used their command presence to assist in the removal of Hershey from the park." Hershey left without

handing out more literature and has not returned because he fears arrest and jail. The officers did not remove the other leafleteer.

Hershey sued the City, the officers, and security guards, alleging that they violated his First Amendment rights by evicting him. The district court dismissed his claims at the Federal Rule of Civil Procedure 12(b)(6) stage, ruling that (1) the officers were entitled to qualified immunity because Hershey failed to show that the law clearly established his right to distribute literature free from viewpoint discrimination in a traditional public forum; (2) the security guards did not qualify as state actors under 42 U.S.C. § 1983; and (3) Hershey did not allege a municipal policy or custom that could make the City liable under *Monell*.[3]

In my view, the district court erred in dismissing Hershey's *Monell* failure to train claim. Hershey sufficiently pleaded facts to show the City was deliberately indifferent to the violation of his First Amendment rights when it provided no training whatsoever as to an officer's duties under the First Amendment. We reverse on this claim, described more fully in Part A below.

For the officers and security guards, Judge Richman and Judge Ho affirm across the board. Judge Richman's opinion (the PR Opinion) reasons that Hershey failed to meet the clearly established prong of the qualified immunity analysis against the police officers and failed to demonstrate the security guards

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[3] *Monnell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

were acting under the color of state law for purposes of § 1983. I respectfully dissent. Because the law clearly established Hershey's right to leaflet in a traditional public forum without viewpoint discrimination, qualified immunity is inappropriate. *See* Part B. And Hershey plausibly alleged that the security guards acted under color of state law when they exercised the public function of policing. *See* Part C.

A

The district court erred by dismissing Hershey's *Monell* failure to train claim against the City. "A municipality's failure to train its police officers can without question give rise to § 1983 liability." *World Wide Street Preachers*

Fellowship v. Town of Columbia, 591 F.3d 747, 756 (5th Cir. 2009) (citations omitted). To prevail on a "failure to train theory," a plaintiff must demonstrate that (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the violations in question. *Id.*

Hershey has sufficiently alleged the first element—that the City's training procedures were inadequate. The City failed to train its officers that the Center and its surrounding area were public property, that the adjacent streets and sidewalks were a traditional public forum, and, therefore, that citizens were entitled to exercise their free speech rights there. Because of this failure to train, the officers mistakenly believed that the Center was private property. The first element is satisfied.

Under the second element, "[d]eliberate indifference may be inferred either from a pattern of constitutional violations or, absent proof of a pattern, from 'showing a *single incident* with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights.'" *Garza v. City of Donna*, 922 F.3d 626, 637-38 (5th Cir. 2019) (emphasis added) (citation modified). "The latter inference 'is possible only in very narrow circumstances' because we have 'generally reserved the single-incident method ... for cases in which the policymaker provides *no training whatsoever* with respect to the relevant constitutional duty, as opposed to training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury.'" *Id.* at 638 (emphasis added) (citation modified).

Hershey's allegations fall within the latter "narrow circumstances" because he alleged the City completely failed to train officers on their First Amendment duties. The PR Opinion characterizes the failure to train claim here as a failure to train "in one limited area"—the particular conduct giving rise to the plaintiff's injury—rather than a complete failure to train officers on the First Amendment. But this misconstrues the allegations in Hershey's complaint. Hershey alleged the City "did not have *any* policy ... regulating speech activities protected by the First Amendment." Hershey alleged the City failed to train its police officers and private security personnel of citizens' First Amendment rights on public property, including the area surrounding the Center. At oral argument, counsel for Hershey confirmed that the officers "received literally zero training" on First Amendment issues. The complaint backs this up.

Taking these facts as true, the City provided "no training whatsoever" regarding the First Amendment's application to speech in traditional public forums. *See Garza*, 922 F.3d at 638. These are "facts sufficient to show" that the City was deliberately indifferent to the deprivation of Hershey's First Amendment rights. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014).

The PR Opinion, relying on *Garza*, argues that the need for training was not "obvious" because "this is a case in which only a few individuals violated" First Amendment rights "on one occasion," and there is "no evidence" to infer any subsequent incidents relevant to the City's failure to train. But *Garza* was decided on summary judgment with the benefit of a developed record. And the failure to train claim in *Garza* was based on a theory of inadequate training in a jail, rather than a theory of no officer training whatsoever on the First Amendment. At the motion-to-dismiss stage, Hershey has alleged that the City's complete lack of training directly caused the First Amendment violation in question. At 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. This is sufficient to allege deliberate indifference.

Finally, Hershey plausibly alleged that the City's failure to train caused the violation at issue. The City's failure to train officers that the park was a public forum led officers to believe that the park was private property and that citizens could be ejected without violating their First Amendment rights. Hershey also

alleged that the officers who removed him from the park held this belief and told him he had to leave the park because it was private property. Hershey has pleaded facts sufficient to show that the City's complete lack of training was the cause of his injury.

Hershey has stated a plausible failure to train claim against the City, and the district court erred in dismissing his *Monell* claim.

B

I depart from the majority on all remaining issues, beginning with the grant of qualified immunity to the police officers at the Rule 12(b)(6) stage. Qualified immunity requires two inquiries: first, whether the officer violated a constitutional right; and second, whether that right was clearly established at the time of the misconduct. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). The PR Opinion collapses the inquiries to ultimately conclude Hershey cannot meet the clearly established prong. But taking the allegations in the complaint as true, as we must, Hershey satisfies both prongs: viewpoint discrimination, regardless of forum, violates the First Amendment, and the right to be free from viewpoint discrimination is clearly established.

Because the law governing speech depends on the forum, the threshold question is whether Hershey leafletted in a traditional public forum. Public sidewalks and parks fall squarely into that category. *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 11 (2018). Courts must assess the property at issue based on its particular facts. *Brister v. Faulkner*, 214 F.3d 675, 681-83 (5th Cir. 2000). "The location and purpose of a publicly owned sidewalk is critical" to forum analysis.

United States v. Kokinda, 497 U.S. 720, 729-30 (1990). We also consider whether the property is "indistinguishable from ... [a] city sidewalk." *Brister*, 214 F.3d at 683. Because forum status turns on factual circumstances, it rarely lends itself to resolution on a Rule 12(b)(6) motion. *See Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1018 (D.C. Cir. 1988).

The PR Opinion reasons that sidewalk status was not clearly established, relying on *Powell v. Noble*, 798 F.3d 690, 700 (8th Cir. 2015), which treated fairground sidewalks as a limited public forum. But *Powell* arose on appeal from a preliminary injunction, where the court conducted a fact-intensive review of congestion, signage, police presence, and fencing at the fair. *Id.* That context does not exist here. The PR Opinion nonetheless imports *Powell*'s fact-finding into this Rule 12(b)(6) posture, citing contractual arrangements and event management at the Center.

Hershey, however, distributed literature on a public sidewalk within a public park, where public streets and sidewalks led directly to the Center, and no gates or restrictions blocked access. The district court agreed those allegations sufficed to plead that the sidewalk qualifies as a traditional public forum, and neither party disputes that point. At this stage, we must take Hershey's allegations as true. *Brister*, 214 F.3d at 683. By discounting them, the PR Opinion departs from our Rule 12(b)(6) standard.

The second step asks what kind of restriction Hershey faced. The officers stopped him from distributing religious literature while allowing another individual to distribute commercial handbills. Harvey, the security guard, told Hershey that leaflets

required advance approval, but admitted he did not know whether the other leafleteer had approval. The district court correctly recognized that Hershey's allegations raised a plausible inference of viewpoint discrimination. Neither party disputes that characterization.

The PR Opinion instead faults Hershey for not alleging what happened after he left—for example, whether the other leafleteer stayed for a "substantial period of time." But Rule 12(b)(6) requires only well-pleaded allegations of unequal treatment, which Hershey provided. His complaint plausibly alleged that the officers engaged in viewpoint discrimination in violation of the First Amendment.

The district court nevertheless held that the right was not clearly established. That conclusion was error. The Supreme Court and this court have long recognized that viewpoint-based restrictions violate the First Amendment in any forum. *See, e.g.*, *Chiu v. Plano I.S.D.*, 260 F.3d 330, 350 (5th Cir. 2001); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). We have also refused to grant qualified immunity at the motion-to-dismiss stage when plaintiffs plausibly alleged viewpoint discrimination. *See Biggers v. Massingill*, No. 23-11023, 2025 WL 429974, at *2-3 (5th Cir. Feb. 7, 2025).

The PR Opinion leans on *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014), which warned that the general prohibition against viewpoint discrimination does not always give officials sufficient notice. But *Morgan* involved the interplay of the Establishment Clause, the Free Speech Clause, and school speech—a

uniquely complex setting. *Id.*; *see also Morgan v. Swanson*, 659 F.3d 359, 364 (5th Cir. 2011) (en banc). This case is simpler: Hershey peacefully distributed free Christian literature on a public sidewalk while another individual handed out commercial flyers. The officers forced Hershey to leave but allowed the other to continue. Construing his allegations in his favor, Hershey pleaded a straightforward claim of viewpoint discrimination in a traditional public forum.

Qualified immunity does not protect blatant viewpoint discrimination. Any reasonable officer would have understood that ejecting Hershey while permitting another leafleteer to remain violated the First Amendment. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Because Hershey has alleged both a constitutional violation and the violation of a clearly established right, reversal of the district court's grant of qualified immunity is warranted.

C

I also disagree that security guards Smith, Harvey, and Tucker were not acting under the color of state law when they removed Hershey from the public sidewalks outside the Center. Policing free speech in a traditional public forum is a traditional and exclusive function of the state or municipal government—such that it constitutes state action.

Smith, Harvey, and Tucker were employees of ASM Global, a private company, not the state. "[M]ere[] private conduct, no matter how discriminatory or wrongful," is generally excluded from § 1983's reach, unless the private conduct is fairly attributable to the state. *Richard v. Hoechst Celanese Chem. Grp.*, 355 F.3d 345, 352 (5th Cir.

2003). There are three tests that provide exceptions to the general rule: the public function test, the nexus test, and the joint action test. *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549-50 (5th Cir. 2005). Relevantly here, "[u]nder the public function test, a 'private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state.'" *Bass v. Parkwood Hosp.*, 180 F.3d 234, 241-42 (5th Cir. 1999) (quoting *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989)); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) ("[T]o qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function.").

This case involves officers regulating free speech in a traditional public forum through policing, which is an exclusive function of the state or municipal government. If, as in this case, that responsibility is delegated to a private entity, the private actors' conduct remains state action. *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (describing the "police function" as "a description of one of the basic functions of government"); *Brown v. Maryland*, 25 U.S. 419, 443 (1827) ("[P]olice power, which unquestionably remains, and ought to remain, with the States."). Several circuits have determined private security guards were state actors when delegated exclusive police powers. *Romanski v. Detroit Ent., LLC*, 428 F.3d 629, 637 (6th Cir. 2005); *see also Payton v. Rush-Presbyterian*, 184 F.3d 623, 630 (7th Cir. 1999).

The security guards, in overseeing City property, were for all purposes acting as de facto police officers. Harvey, Smith, and Tucker surrounded Hershey during the initial encounter alongside the police officers, and they used their command presence to remove Hershey from the scene. Harvey was the one explaining the allegedly unconstitutional speech regulations to Hershey as he was ejected, not a police officer. The actions taken by the police officers and the security guards were one and the same.

Further, Hershey alleged that the City employs a policy of allowing their officers and security guards to "use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights," because the Center "does not have any written or official policy prohibiting, regulating or licensing the distribution of leaflets on its grounds." In allowing the security guards to use their discretion to decide which types of speech are permissible, the City has empowered private security guards who patrol its property to regulate speech with no oversight.

Taking all well-pleaded facts as true and in the light most favorable to him, Hershey has sufficiently alleged that the individual security guards were state actors under the public function test.[4] The district court erred in dismissing Hershey's § 1983 claims against Smith, Harvey, and Tucker.

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[4] A wholly different version of the facts may be presented as the case progresses to trial. But taking all well-pleaded facts as true and in the light most favorable to him, Hershey has sufficiently alleged that the individual security guards were state actors at this juncture.

* * *

In sum, the panel affirms the district court's judgment in part and reverses it in part. As to Hershey's *Monell* claim, Judge Ho and I hold that the district court reversibly erred. Judge Richman dissents. As to the district court's dismissal of Hershey's claims against the City officers and Center security guards, Judges Richman and Ho affirm. I respectfully dissent as to those issues.

Priscilla Richman, *Circuit Judge*, concurring in part and dissenting in part:

With great respect, the panel majority radically expands *Monell*[1] municipal liability in at least two unprecedented and unwarranted respects: (1) by sanctioning a "gotcha" claim based on "failure to train at all"; and (2) by holding that a municipality is liable for failure to train security guards *hired by a private entity* that leases and operates property owned by the municipality.

First: This is a single-incident case. It involves nuanced First Amendment law. Instead of adhering to the boundaries that limit the "very narrow circumstances" in which courts will permit an inference of deliberate indifference to be drawn from "an obvious potential for violation of constitutional rights,"[2] the separate opinions of Judge Dennis and Judge Ho open the door to permit a broad swath of failure-to-train claims to defeat a municipality's qualified immunity.

The Supreme Court has made clear that municipal liability based on *Monell* requires deliberate indifference.[3] Deliberate indifference may be inferred in failure-to-train-at-all cases "in a narrow range of circumstances" if the violation of federal rights is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to

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[1] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[2] *Garza v. City of Donna*, 922 F.3d 626, 637-38 (5th Cir. 2019).

[3] *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

handle recurring situations."[4] The Supreme Court emphasized that whether such a consequence is "obvious" depends on "[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights."[5]

There is no allegation in this case that viewpoint discrimination by a Bossier City law enforcement officer against someone engaging in free exercise of religion or free speech has ever previously occurred. It is not highly predictable that law enforcement officers would have recurring encounters with individuals paid to distribute literature outside a large, ticketed event and that, absent training about what is "public" versus "private" property and viewpoint discrimination, those officers would discriminate based on the content of the literature being distributed. Judge Dennis's and Judge Ho's opinions say that if a city fails to train "at all" regarding the First Amendment, then it is "obvious" that a constitutional violation will occur. This not only permits liability for what may be, at most, mere negligence, it essentially imposes strict liability for a failure to train.

Second: Perhaps even more remarkably, Judge Dennis's and Judge Ho's opinions say a municipality can be liable for failure to train private security guards who are hired by a private entity for an event at an arena it has leased from the municipality and

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[4] *Bd. of Cnty. Commissioners of Bryan Cnty. v. Brown*, 520 U.S. 397, 409-410 (1997).

[5] *Id.*

operates. Hershey has alleged that Bossier City should have trained private security personnel who were engaged for a large concert event and that Bossier City is liable for that failure to train. The panel's majority opinions allow this claim to proceed on the basis that it was obvious Bossier City needed to train security guards hired by a third party, even though the law is far from clear that a city has a duty to train security guards.

As to the liability of the individual defendants in this case (Bossier City law enforcement officers and private security guards), Judge Ho and I agree that the district court did not err in dismissing the claims against them, though our views as to why are not congruent.

I would affirm the district court's judgment in all respects. I therefore concur in part and dissent in part.

I

The City of Bossier City, Louisiana owns a multi-purpose arena (which I will call the Center), formerly known as CenturyLink Center, and also Bossier City Arena. It is currently known as Brookshire Grocery Arena. The Center has been the site of sporting events, such as NBA and NCAA basketball games, and an NHL hockey game.[6] The forum has hosted well-known entertainers including, but not limited to, Paul McCartney, Elton John, Taylor Swift, Cher, Carrie

[6] *See Brookshire Grocery Arena*, Wikipedia, https://en.wikipedia.org/wiki/Brookshire_Grocery_Arena (last visited October 6, 2025).

Underwood, Justin Timberlake and Miranda Lambert, to name a few.[7]

The Center is located in a public park. At the time relevant to this litigation, the Center was managed by ASM Global, a private entity. ASM Global leased both the interior space and outdoor areas of the Center for events. On February 28, 2020, the Center hosted a Christian rock concert known as Winter Jam. Guests paid to attend.

Hershey's Amended Complaint alleges that he is a vegetarian and that on the day of the Winter Jam concert, he was distributing "free, educational, noncommercial, religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association." He is paid "by various nonprofit organizations for his advocacy and distribution of literature." He further alleges that he was peacefully engaging in leafleting activity when he was approached by Bossier City Deputy Marshal Bobby Gilbert, Bossier City police officer Daniel Stoll, and three private security agents (David Smith, Tyshon Harvey, and Eugene Tucker) employed by ASM Global.

Hershey's Amended Complaint asserts he was told by Deputy Marshal Gilbert that he was on private property and that "he had to leave, that he would be arrested if he did not leave." Hershey alleges that another person was handing out cards for a radio station, for a commercial purpose, but that person had not been asked to leave when Hershey was approached by the Bossier City officers and ASM Global security

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[7] *Id.*

guards. Hershey says he was told he had to leave the area because he had not obtained authorization to distribute booklets ahead of time. Hershey alleges he inquired about the person distributing cards for a radio station and was told essentially, "We don't know whether he [that other person] has permission." Hershey left the premises and was not arrested.

He brought this suit, alleging § 1983 claims against the City law enforcement officers, the private security guards, and Bossier City. Hershey asserts in his briefing that he was subjected to viewpoint discrimination. He also alleges that each of the ASM Global security guards was "a willing participant in joint action with state actors."

In framing his claims, Hershey repeatedly alleges that the Center and the areas surrounding it are public property, or in the alternative, that the disputed area is a designated public forum. Hershey asserts in his briefing that he was asked to leave based on his or the leaflets' viewpoint. He further alleges that Bossier City failed to train its officers and ASM Global's security guards about the public nature of the property and attendant First Amendment considerations. He asserts that the Bossier City officers and private security personnel whom he encountered engaged in viewpoint discrimination and should be liable because Hershey was on public, not private, property.

Hershey also alleges that Bossier City "has a long-standing custom of allowing police officers, employees and/or officials of CenturyLink Center to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their

First Amendment rights from the CenturyLink property." However, he does not allege that Bossier City officials or officers or private security personnel have ever removed anyone from the Center or the surrounding property who was peacefully exercising their First Amendment rights, other than himself.

Almost a year after the incident in question, Hershey's attorney contacted ASM Global and was told in an email, which is attached as an exhibit to Hershey's Amended Complaint, that ASM Global's policies regarding the Center are as follows:

> If the public would like to engage in a peaceful protests [sic] or distribution of pamphlets, they are free to do so as long as it does not interfere with the safe ingress or egress of guests. This is especially important when the facility and property has been exclusively leased for an event.
>
> In addition, CenturyLink Center has instituted a CODE OF CONDUCT which must be adhered to while on the premises. This Code of Conduct (copy inserted) is posted on our website under Arena Info.

Hershey's counsel had also asked for an "incident report" regarding the day Hershey was told to leave the area near the Center, which was February 28, 2020. The author of the ASM Global email responded:

> I did see an incident report from 2/28/2020, that states "Security Observed two individuals handing out pamphlets in the Parking Lots A & D. The individuals became argumentative and Security called for Bossier City Police for assistance." It further states

> the Pamphleteers then left the property. (It does not state they were removed.)
>
> I, myself, remember this incident, as I heard the call over the radio for police assistance and went to the area. When I arrived, I saw police talking with two people. I did not interject. Our security guards (ASM Global employees) told me that two people with pamphlets were shouting at our guests in line that they were going to Hell for attending this event, and that it made a few "children" cry. It is my understanding that the Police asked the pamphleteers to stop upsetting the guests and that they left of their own accord.
>
> I see no other documentation or incidents pertaining to the subject of your request.

It is unclear whether the "incident report" in this email or the events recounted in that email involved Hershey.

As the magistrate judge's report reflects, this is not the first time Hershey has had an encounter that has given rise to First Amendment litigation.[8] Hershey is a serial plaintiff.

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[8] *See* ROA.130 n.1, which reflects:

> *Hershey v. Jasinski et al*, United States District Court, Western District of Missouri, St. Joseph Division, Docket No. 20-06088-CV-WBP; (2) *Hershey v. Turner*, No. CIV-19-344-SPS, 2020 WL 1932911 (E.D. Okla. Apr. 21, 2020); (3) *Hershey v. Kansas City Kansas Cmty. Coll.*, No. 2:16-CV-2251-JTM, 2017 WL 661581 (D. Kan. Feb. 17, 2017); (4) *Hershey v. Goldstein*, 938 F. Supp. 2d 491 (S.D.N.Y. 2013); (5) *Hershey v. Multi-Purpose Civic Ctr. Facility Bd. for Pulaski Cty.,*

The defendants moved to dismiss the suit. The magistrate judge prepared a detailed report and recommendations, recommending dismissal based on qualified immunity and for failure to state a claim. The district court agreed with those recommendations and dismissed the suit.

II

Hershey's first contention on appeal is that Marshal Gilbert and Officer Stoll are not entitled to qualified immunity because the right to be free from viewpoint discrimination was clearly established on February 20, 2020, the date the incident in question occurred. The magistrate judge concluded otherwise,

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Arkansas, No. 4:18-CV- 00476 BSM, 2020 WL 4741900 (E.D. Ark. Aug. 14, 2020);(6) *Hershey v. Walker*, No. 4:12CV01603 ERW, 2013 WL 657873 (E.D. Mo. Feb. 22, 2013); (7) *Hershey v. Thomas et al*, United States District Court, Eastern District of Arkansas, Central Division, Docket No. 4:20-cv-01397-KGB; (8) *Hershey v. Junior College District of St. Louis-St. Louis County et al*, United States District Court, Eastern District of Missouri, Docket No. 4:10-cv-1116; (9) *Hershey v. The Curators of University of Missouri et al,* United States District Court, Eastern District of Missouri, Docket No. 4:16-cv-1229; (10) *Hershey v. Junior College District of Central Southwest Missouri et al,* United States District Court, Western District of Missouri, Docket No. 6:14-cv-3375; (11) *Hershey v. The Curators of the University of Missouri, et al,* United States District Court, Western District of Missouri, Central Division, Docket No. 2:20-cv-04239-BCW; (12) *Hershey v. Oldham, et al*, United States District Court, Middle District of Tennessee, Docket No. 2:20-cv-0012; (13) *Hershey v. Oldham*, et al, United States District Court, Middle District of Tennessee, Docket No. 2:20-cv-0264.

and after a conducting a de novo review, the district court agreed with the magistrate judge.

Hershey maintains that based on First Amendment law, the Center is a traditional public forum or, in the alternative, that it is a designated public forum. The magistrate judge's report reasoned that only the sidewalks outside the arena are at issue, and that some decisions have held that sidewalks outside an arena are either nonpublic or limited forums. Ultimately, the magistrate judge concluded

> Plaintiff 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. The discussions above demonstrate that there are many nuances to First Amendment claims of this nature, beginning with questions about the category of the forum and continuing through the reasonableness of various regulations or restrictions. Very little about this field of law is clearly established.

I agree with the magistrate judge and the district court.

The Supreme Court has explained that "[t]he standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum."[9] The Eighth Circuit has explained, for example, that "[l]imited public forums (sometimes called nonpublic forums) include public properties

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[9] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

that are not by tradition or designation public forums but have been opened by the government for limited purposes, communicative or otherwise."[10] That court further explained that "[t]he government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."[11] "'[T]he location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.'"[12] The Eighth Circuit concluded that sidewalks serving the purpose of admitting thousands of people to a state fair were a limited public forum.[13] It held that restrictions on speech in a limited public forum must be reasonable and viewpoint neutral.[14] It further held that the plaintiff in that case was not likely to prevail on his claim that his First Amendment rights were violated when he was prohibited from holding a pole with a poster-sized sign

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[10] *Powell v. Noble*, 798 F.3d 690, 699 (8th Cir. 1997) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

[11] *Id.* at 699-700 (quoting *United States v. Grace*, 461 U.S. 171, 178 (1983)).

[12] *Id.* (quoting *United States v. Kokinda*, 497 U.S. 720, 728-29 (1990) (plurality opinion)).

[13] *Id.* at 700.

[14] *Id.* (citing *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 (2010) ("Recognizing a State's right to preserve the property under its control for the use to which it is lawfully dedicated, the Court has permitted restrictions on access to a limited public forum ... with this key caveat: Any access barrier must be reasonable and viewpoint neutral.")).

on it while on sidewalks near entrances to a state fair.[15]

Judge Dennis's opinion notes that the Eighth Circuit's decision in Powell was reached only after the court held a preliminary injunction hearing and "conducted a fact-intensive review of congestion, signage, police presence, and fencing at the fair."[16] It was only then, Judge Dennis's opinion posits, that the court was able to conclude that the law was not clearly established as to the character, for First Amendment purposes, of the area in which the plaintiff had displayed his sign.[17] But this discussion exemplifies the whole point of qualified immunity. First, *Powell* was, as noted, a preliminary injunction case. Qualified immunity is not a defense to injunctive relief. The present case is a suit for damages. Second, we do not hold officers like the individual defendants in the present case liable for damages after we conduct a hearing to determine, in hindsight, whether they property they were policing was a public forum. Our inquiry is whether the law was clearly established when the defendant acted or failed to act. Third, we 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.

Hershey proceeds on the basis that the law was (and is) clearly established that the sidewalk

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[15] *Id.* at 701-02.

[16] *Ante* at 17.

[17] *Id.*

surrounding the Center was a public forum even though the city-owned arena was managed by a private entity and that private entity oversaw the concert that was ongoing at the time of the incident at issue. There is evidence, from an exhibit to the Amended Complaint, that the outside of the Center as well as the inside can be leased for events. Hershey alleges that the sidewalks just outside the concert were public, but he does not consider what contractual arrangements ASM Global may have had in place with the concert organizers.

Several courts have recognized that public property may change its character for purposes of First Amendment forum analysis based on temporary uses. In considering the public sidewalks used for the Iowa State Fair, the Eighth Circuit concluded that the public property "should be considered a limited public forum, *at least during the 11 days each year when the Iowa State Fair is underway*."[18] The Supreme Court similarly found that the Minnesota State Fair "is a limited public forum in that it exists to provide a means for a great number of exhibitors *temporarily*."[19]

Our court recently addressed a factual situation that is similar to the one presented in this case. In *Siders v. City of Brandon, Mississippi*,[20] a Christian evangelist challenged a city ordinance that restricted protesting and demonstrating on a sidewalk outside a city-owned and operated public amphitheater during

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[18] *Powell*, 798 F.3d at 700 (emphasis added).

[19] *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) (emphasis added).

[20] 123 F.4th 293 (5th Cir. 2024).

time periods surrounding a live, ticketed concert event.[21] In that case, we determined the sidewalk outside the amphitheater to be a traditional public forum.[22] We nevertheless held that the plaintiff was not likely to succeed on the merits of the claim that the ordinance violated First Amendment rights. As to whether the sidewalks at issue were a traditional public forum, *Siders* is distinguishable from the instant case because here a private entity was involved in managing the Center. Additionally, given that the Supreme Court has indicated that sidewalks on public property are not automatically public forums[23] and that the district court considered several cases concerning the forum status of spaces surrounding arenas that do not speak in unison,[24] the forum status of the space in question was not clearly established. Hershey has not overcome the qualified immunity defense.

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[21] *Id.* at 296.

[22] *Id.* at 303.

[23] *See, e.g.*, *Kokinda*, 497 U.S. at 730 (noting it "is not [] settled doctrine" to "designate all sidewalks open to the public as public fora"); *Burson v. Freeman*, 504 U.S. 191, 216 (1992) (Scalia, J., concurring) ("'Streets and sidewalks' are not public forums in all places.") (emphasis omitted).

[24] *See Ball v. City of Lincoln*, 870 F.3d 722, 736 (8th Cir. 2017) (holding a plaza area outside of a city-owned arena to be a nonpublic forum); *Pomicter v. Luzerne Cnty. Convention Ctr. Auth.*, 939 F.3d 534, 537 (3d Cir. 2019) (analyzing concourse outside of a publicly-owned arena as a nonpublic forum). *But see Brister v. Faulkner*, 214 F.3d 675, 683 (5th Cir. 2000) (affirming that public university property between an arena and a city sidewalk is a traditional public forum).

I also note that in the district court, the Bossier City defendants argued that Hershey had failed to allege facts to support his claim that the officers discriminated against him on the basis of viewpoint. They pointed out that Hershey failed to allege that the officers looked at the content of his leaflets or otherwise knew about the content. Nor did he allege the officers heard any statements Hershey made while passing out leaflets. As to the alleged differing treatment accorded the person who was distributing cards for a radio station, Hershey says he was told he had to leave the premises because he had not obtained authorization ahead of time to distribute leaflets outside of and during a large concert that patrons paid to attend. Hershey inquired about the person distributing cards and was told essentially, "We don't know whether he has permission." Hershey left the premises and does not allege what occurred thereafter.

Hershey does not allege that the officer or security guard who asked him to leave subsequently failed to ascertain whether the other individual had prior authorization. Hershey does not allege that after he left, the other person was permitted to continue to hand out cards for any substantial period of time even though he did not have prior authorization. The Amended Complaint depends on speculation to draw an inference that Hershey was singled out based on the content of his literature. The Amended Complaint does not sufficiently allege content or viewpoint discrimination.

Even assuming Hershey could allege that he was treated differently from the person distributing cards

for the radio station, the magistrate judge and district court correctly concluded that the law regarding viewpoint discrimination is not clearly established in circumstances like those in the present case.

"The First Amendment provides that 'Congress shall make no law ... abridging the freedom of speech ....' There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."[25] "It is also true that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"[26] "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'"[27] However, if an area is a limited public forum or a nonpublic forum, "[t]he government can restrict access ... as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[28]

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[25] *United States v. Grace*, 461 U.S. 171, 176 (1983) (quoting U.S. Const. amend. I).

[26] *Id.* at 177.

[27] *Id.* (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

[28] *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 347 (5th Cir. 2001) (alteration in original) (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998)).

It is, of course, "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[29] But that principle is a very general one. It does not clearly establish what the First Amendment prohibits or requires of law enforcement officers when they are policing an area in circumstances similar to those existing at the Center during the Winter Jam concert.

Our court's decision in *Morgan v. Swanson*[30] is instructive on this point. In *Morgan*, the plaintiff argued that "his right to distribute religious material is clearly established because 'regardless of forum, viewpoint discrimination regarding private speech is unconstitutional.'"[31] Our court acknowledged that while this is "generally true," that proposition was too broad to denote a clearly established right.[32] The *Morgan* decision explained, "such a broad generalization is exactly the kind of proposition that will not suffice for the purposes of qualified immunity analysis, as it simply does not provide the official with any sense of what is permissible under a certain set of facts."[33] Our court concluded, "[f]or example, the nearly universal prohibition against viewpoint discrimination does not inform an official as to what, precisely, constitutes viewpoint discrimination."[34] The

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[29] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

[30] 755 F.3d 757 (5th Cir. 2014).

[31] *Id.* at 761.

[32] *Id.*

[33] *Id.*

[34] *Id.*

Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality."[35]

Hershey addresses *Morgan* in his briefing. He says: "Morgan ... involved the governmental actors attempting to balance competing, significant constitutional interests," making the case "inapplicable" to this one. He characterizes *Morgan*'s outcome as the result of the "special First Amendment context" present in public schools.

But our analysis in *Morgan* did not turn on the complexity of the context. Rather than focusing on any "special First Amendment context," *Morgan* hinged on whether the official was on notice that their conduct was unconstitutional.[36] Under Supreme Court precedent, "'[t]he dispositive question' ... is whether the violative nature of [the] *particular* conduct is clearly established.."[37]

Hershey relies on the statement in *Chiu v. Plano Independent School District*[38]: "It is well settled that viewpoint discrimination is a clearly established violation of the First Amendment in any forum."[39] Our decision in *Morgan* considered *Chiu* "inapposite" because of factual dissimilarities and concluded: "[W]hile *Chiu* may indeed be relevant in discerning

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[35] *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

[36] *Morgan*, 755 F.3d at 760.

[37] *Cunningham v. Castloo*, 983 F.3d 185, 191 (5th Cir. 2020) (quoting *Mullenix*, 577 U.S. at 12).

[38] 260 F.3d 330 (5th Cir. 2001) (per curiam).

[39] *Id.* at 350.

the nature and extent of Morgan's rights in the classroom, the case does not itself establish those rights. "[40] Just as *Morgan* eschewed *Chiu* as clearly establishing law that governed in that case, we should do likewise in the present case.

Writing for the Court in *Anderson v. Creighton*,[41] Justice Scalia cogently explained "that the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'"[42] The Court recounted the underpinnings of the doctrine of qualified immunity.[43] It then said, "[s]omewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action ... assessed in light of the

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[40] *Morgan v. Swanson*, 755 F.3d 757, 761 (2014).

[41] 483 U.S. 635 (1987).

[42] *Id.* at 642 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring)).

[43] *See id.* at 638:

> ("When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." (internal citations omitted).

legal rules that were 'clearly established' at the time it was taken."[44] The Court continued, "[t]he operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."[45] The Court admonished that if the level of generality at which the legal rule is identified is too high, "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading."[46]

Hershey has not cited decisions that clearly establish that the conduct of Marshal Gilbert and Officer Stoll violated First Amendment rights.

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[44] *Id*. at 639 (internal citation omitted).

[45] *Id*.; *see also id*. at 639-40 ("It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (internal citation omitted).

[46] *Id*. at 639; *see also id*. ("Such an approach, in sum, would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'") (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

III

Hershey's second contention on appeal is that Marshal Gilbert and Officer Stoll are not entitled to qualified immunity because the law was clearly established that they had to provide Hershey with ample alternative channels of communication, and they did not. Hershey asserts in his briefing that if the officers "were attempting to enforce a time, place and manner restriction, they must also 'leave ample alternative channels of communication.'"

Here again, the law as to how the Center should be characterized for First Amendment purposes is far from clear. More pointedly, Hershey has not cited any authority that would put on notice a law enforcement officer policing an event like the one at the Center on the date in question that the officer, personally, was required to provide an alternate forum for distributing leaflets.

IV

Hershey's third contention on appeal is that Marshal Gilbert and Officer Stoll are not entitled to qualified immunity because they are either plainly incompetent or knowingly violated the law. He argues that if they "genuinely believed that Plaintiff did not have any First Amendment rights on the Bossier City Arena property because it was private property, then they are 'plainly incompetent.'" Here again, Hershey cites no decision that would have clearly put the officers on notice that the Center was not comparable to "private property" for First Amendment purposes during the Winter Jam concert, or that their conduct in asking Hershey to leave the area violated his First Amendment rights.

V

Hershey contends that he has pled a facially plausible *Monell* claim based on his allegations that Bossier City failed to train both its own law enforcement officers and ASM's private security guards "allowed to serve as security personnel" at the Center. The Supreme Court has made clear that municipal liability based on *Monell*[47] requires *deliberate indifference*.[48] With great respect, Judge Dennis's and Judge Ho's opinions in the present case substantially erode and trivialize that principle.

This is a single-incident case in which Hershey relies on his own confrontation with city officers and private security guards to establish municipal liability. 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."[49]

A

The Supreme Court established in *Monell*[50] that "municipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving

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[47] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[48] *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

[49] *Garza v. Donna*, 922 F.3d 626, 638 (5th Cir. 2019) (quoting *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616 (5th Cir. 2018)).

[50] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

force' is the policy or custom."[51] A party must sufficiently allege each element before municipal liability can attach.[52]

The Supreme Court explained in *City of Canton v. Harris*[53] that "[m]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers."[54] The Supreme Court continued, "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983."[55] While a failure to train can be a "policy,"[56] that determination usually requires a pattern of

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[51] *Winder v. Gallardo*, 118 F.4th 638, 647 (5th Cir. 2024), cert. denied, 145 S. Ct. 2816 (2025) (quoting *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

[52] *See Brown v. Tarrant County, Tex.*, 985 F.3d 489, 497 (5th Cir. 2021) (concluding that this court need not consider whether the plaintiff sufficiently alleged the policymaker or constitutional violation element when "he did not link his allegedly unconstitutional confinement to any county 'policy or custom'); *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010) (not considering the "moving force factor" because the plaintiff had "not established a 'custom or policy'").

[53] 489 U.S. 378 (1989).

[54] *Id.* at 389 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (opinion of Rehnquist, J.)).

[55] *Id.*

[56] *See Garza*, 922 F.3d at 637.

constitutional violations.[57] There is nothing in Hershey's Amended Complaint that reflects a deliberate or conscious choice by Bossier City among various alternatives regarding the need for training its law enforcement officers. There had been no prior incident in which it was even alleged that city officers had violated the First Amendment by telling individuals they could not pass out literature without prior approval, much less allegations of viewpoint discrimination.

The Supreme Court explained its rationale more fully in *Board of County Commissioners of Bryan County v. Brown*.[58] The Court said that in *Canton*, it "spoke ... of a deficient training 'program,' necessarily intended to apply over time to multiple employees."[59] The Court reasoned that:

> [i]f a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the "deliberate indifference"—necessary to trigger municipal liability.[60]

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[57] *Harris*, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part); *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997).

[58] 520 U.S. 397, 409-410 (1997).

[59] *Id.* at 407.

[60] *Id.*

The Supreme Court again emphasized in *Connick v. Thompson*[61] that "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."[62]

The Supreme Court has made clear that in *Monell*[63] cases, deliberate indifference may be inferred in failure-to-train-at-all cases "in a narrow range of circumstances" if the violation of federal rights is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations."[64] The Supreme Court emphasized that whether such a consequence is "obvious" depends on "[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights."[65]

There is no allegation that viewpoint discrimination by a Bossier City law enforcement officer against someone engaging in free exercise of religion or free speech has ever previously occurred.[66]

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[61] 563 U.S. 51 (2011).

[62] *Id.* at 62.

[63] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[64] *Bd. of Cty. Commissioners of Bryan Cty. v. Brown*, 520 U.S. 397, 409-410 (1997).

[65] *Id.*

[66] *But see Littell v. Houston Indep. Sch. Dist.,* 894 F.3d 616, 624-25 (5th Cir. 2018) ("The municipal entity must have 'fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is

It is not highly predictable that law enforcement officers would have recurring encounters with individuals paid to distribute literature outside a large, pay-to-attend event. Nor is it highly predictable that, absent specific training about what is "public" versus "private" property and viewpoint discrimination, those officers would discriminate based on the content of the literature being distributed.

Judge Dennis's and Judge Ho's opinions permit an outsized path to liability because many plaintiffs would be able to granulate allegations so finely that they arrive at a "complete failure to train" as to the relevant conduct. This ignores the Supreme Court's repeated warning: "[I]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city could have done to prevent the unfortunate incident."[67] "[V]irtually every instance"[68] is just the opposite of the "rare"[69] and "extreme"[70] circumstances in which the single-incident exception should apply.

Hershey says, and Judge Dennis's and Ho's opinions agree, that if a city fails to train "at all" regarding the First Amendment, then it is "obvious"

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certain to face.'" (emphasis added) (quoting *Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring)).

[67] *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (internal quotation marks omitted).

[68] *Id.*

[69] *Littell*, 894 F.3d at 627.

[70] *Id.*

that a constitutional violation will occur. This not only permits liability for what may be, at most, mere negligence, it essentially imposes strict liability for a failure to train.[71]

Our court has said that in some circumstances "there is a difference between a *complete failure to train* ... and a failure to train in one limited area."[72] Hershey alleges the City failed to train its officers on the public nature of the arena and surrounding park

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[71] *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 61-62, (2011) ("[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.... A less stringent standard of fault for a failure-to-train claim 'would result in *de facto respondeat superior* liability on municipalities ...'" (quoting *City of Canton v. Harris*, 489 U.S. at 392 (1989))); *see also Loera v. Kingsville Indep. Sch. Dist.*, __ F.4th__, No. 24-40481, 2025 WL 2425186, at *5 (5th Cir. Aug. 22, 2025) ("Deliberate indifference 'is a stringent standard, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.' 'A showing of simple or even heightened negligence will not suffice.'" (first quoting *Brown v. Bryan County*, 219 F.3d 450, 457 (5th Cir. 2000) (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 410 (1997), then quoting *Brown*, 520 U.S. at 410)).

[72] *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273 (5th Cir. 2002) (alteration and internal quotation marks omitted) (quoting *McClendon v. City of Columbia*, 258 F.3d 432, 442-43 (5th Cir. 2001), *vacated for reh'g en banc*, 285 F.3d 1078 (5th Cir. 2001), *decision on rehearing en banc*, 305 F.3d 314 (5th Cir. 2002)); *see also Peterson v. City of Fort Worth*, 588 F.3d 838, 849 (5th Cir. 2009) ("[The] 'narrow' single incident exception has applied when the court finds a complete failure to train, not just a failure to train in 'one limited area'" (quoting *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 383, 386 (5th Cir. 2005)).

and the corresponding First Amendment implications.[73] In other words, Hershey alleges a "failure to train in one limited area" and not "a complete failure to train."[74] But even if Hershey's Amended Complaint could be characterized as alleging a complete failure to train, to say that the need for training was "obvious" in this case would undermine virtually every precept of our *Monell* jurisprudence.

Our court has refused to allow single-incident failure-to-train cases to diminish the bedrock concepts underpinning *Monell* liability, even when the plaintiff's injury was severe and it might seem "obvious" to a lay person that training likely would have prevented the injury. Our decision in *Garza*[75] is just one example. Judge Dennis's and Judge Ho's opinions both rely on *Garza*, but it completely undermines the positions espoused in those opinions. In *Garza*, Garza's mother sought help from law enforcement when she feared her son, who was intoxicated, would take his own life or would hurt himself.[76] Garza was taken into custody at a detention center.[77] Sometime after 8:00 a.m., he obscured the lens of the camera that was trained on him in his cell.[78] The person tasked with monitoring the camera

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[73] *See Ante* at 25.

[74] *Peña v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018).

[75] *Garza v. City of Donna*, 922 F.3d 626 (5th Cir. 2019).

[76] *Id.* at 630-31.

[77] *Id.*

[78] *Id.* at 631.

feed, Minerva Perez, said that after 8:00 a.m., when jailers arrived for their shifts, it was their responsibility to monitor the jail inmates.[79] When the jailers were on duty, they became occupied putting up a sarcastic "welcome" sign for inmates and the logo of a comic-book character, and they "missed that Garza had hanged himself."[80] ICE agents arrived at 8:40 a.m. and found Garza dead at 8:49 a.m.[81] In the ensuing litigation, Garza's survivors claimed that "Perez displayed 'utter confusion' about her responsibility to monitor the jail's camera feeds, invoking the failure-to-train principles articulated by *City of Canton v. Harris*."[82] Our court held that this claim failed because "[a]s we have emphasized, deliberate indifference may be inferred this way 'only in narrow and extreme circumstances,' and decisions by our court drawing the inference are rare."[83] We further explained that "the record has no evidence about the population that passes through the City's jail or about the jail's operations from which the possibility of recurring situations threatening to constitutional rights might be assessed. It is apparent that this record is inadequate to support a failure-to-train theory as to Perez."[84]

So too, in this case. There is no allegation as to how many individuals frequent areas outside the

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 637.

[83] *Id.* at 638.

[84] *Id.*

Center during events in order to distribute literature. There is no allegation from which the risk of recurring situations like the one at issue in this case can be assessed. Again, the Supreme Court has emphasized that whether a consequence is "obvious" depends on "[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights."[85]

Saying that the need for training was "obvious" in this case would call into question the core tenets of our *Monell* jurisprudence, for the reasons discussed above. Even if Hershey's constitutional rights were violated, this is a case in which only a few individuals violated those rights on one occasion. This a not a case for application of the "obvious" exception. We have reserved that exception for cases of a far different ilk than this one.

Judge Dennis's opinion asserts that Hershey alleged Bossier City "did not have *any* policy ... regulating speech activities protected by the First Amendment."[86] This implies, if not states, that if Bossier City had provided at least some training on any aspect of the First Amendment, there could be no "complete failure to train" claim, and we would be in ordinary "failure-to-train" territory. The logic here escapes me. If Bossier City had trained its law enforcement officers about how to address an entirely *different* First Amendment issue—for instance, permissible means of policing protestors who shut

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[85] *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997).

[86] *Ante* at 15.

down a highway with their presence—how would that have affected Hershey's claim? Such training would not bear on preventing viewpoint discrimination against someone handing out leaflets. Yet, it would be "some" First Amendment training, so the "no training at all" theory would be inapplicable. This elusive and slippery nature of a failure-to-train-at-all claim in the context of this case is apparent from the very next sentence in Judge Dennis's opinion, which says, "Hershey alleged the City failed to train its police officers and private security personnel of citizens' First Amendment rights on public property, including the area surrounding the Center."[87] That is a much more specific claim, and if Bossier City had notice that it needed to train for that specific potentiality, Hershey likely would have stated a claim. So, to be clear, the failure-to-train-at-all theory in a case like the present one is nothing more than a "gotcha." Providing some First Amendment training, even though it had no bearing at all on the alleged First Amendment violation, would foreclose reliance on the theory. But failure to train "at all" results in strict liability when there was no notice "at all" of the need to train for the specific First Amendment violation alleged.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," and "'[d]eliberate indifference' is a stringent standard of fault."[88] The requisite standard of fault is not met here and Hershey has therefore

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[87] [*Id.*]

[88] *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

failed to sufficiently plead allegations of liability under *Monell*.[89]

B

Hershey's Amended Complaint seeks money damages from Bossier City for its failure to train not only its own law enforcement officers but the *private security guards who were hired by ASM Global* for a concert on a particular day. Hershey's brief cites no decision whatsoever that holds a municipality liable for failure to train a private party's employees.

Nevertheless, Judge Dennis's and Ho's opinions permit Hershey to proceed with his claim that Bossier City is liable for failing to train security guards ASM hired. I disagree and would affirm the district court's judgment in this regard.

VI

In a fifth issue raised in Hershey's appeal, he asserts that ASM Global's private security guards worked together with the Bossier City defendants to eject him from the Center and that he has stated a cause of action under the "nexus/joint action tests." "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by *a person acting under color of state law*."[90]

A

The nexus test asks "whether the State has inserted 'itself into a position of interdependence with

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[89] *Supra* note 50 and accompanying text.

[90] *West v. Atkins*, 487 U.S. 42, 48 (1988) (emphasis added).

the [private actor, such] that it was a joint participant in the enterprise.'"[91] In other words, the question is whether there is a "'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[92]

Hershey's complaint alleges virtually no facts regarding "interdependence" between Bossier City and ASM Global's private security guards. The Amended Complaint alleges that the City "owns and operates a public facility known as the Bossier City Arena, which at all times relevant herein was known as the CenturyLink Center." It alleges that defendant security guards were security guards at the CenturyLink Center. It then alleges: "Defendant the City has a long-standing custom of allowing police officers, employees and/or officials of CenturyLink Center to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights from the CenturyLink property." This latter allegation is entirely conclusory. It provides no factual support whatsoever for this assertion.

These allegations are insufficient to permit a factfinder to infer that there is such a close nexus between Bossier City and ASM Global security guards that the actions of the latter "may be fairly treated as

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[91] *Cornish v. Corr. Srvs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (alteration in original) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58 (1974)).

[92] *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson*, 419 U.S. at 351).

that of the State itself."[93] There are no allegations about the nature of the contractual relationship between Bossier City and ASM Global, or between ASM Global and its security guards. Nor are there factual allegations about whether the City routinely relies on private security guards to police the areas abutting or surrounding the Center.

B

Under the joint action test, "private actors will be considered state actors where they are 'willful participant[s] in joint action with the State or its agents.'"[94] "[T]he plaintiff must allege and prove that the citizen conspired with or acted in concert with state actors."[95]

Hershey's Amended Complaint alleges that Bossier City Marshal Gilbert approached Hershey with security guard Harvey and police officer Stoll. Marshal Gilbert waived a pair of handcuffs at Hershey, and Officer Stoll told Hershey that he had been told to leave the park. Marshal Gilbert then told Hershey that he had bracelets for Hershey and would put them on him and take him to jail. Marshal Gilbert said that "people were there to have a good

time." Security guards Smith and Tucker arrived shortly thereafter. Hershey asked about the commercial leafleteer distributing literature nearby, and security guard Harvey replied that Hershey's

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[93] *See Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351).

[94] *Cornish v. Corr. Srvs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

[95] *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989).

literature was unauthorized—but that Harvey did not know whether the commercial leafleteer was authorized.

The facts alleged regarding security guards Smith and Tucker are not sufficient to meet the joint action test. The complaint alleges only that "Smith and Tucker were present during Hershey's ejectment from the park ... and, acting jointly with the other Defendants, used their command presence to assist in the removal of Hershey from the park by Defendant Deputy Marshal Gilbert, Officer Stoll, and Harvey." Smith and Tucker allegedly "arrived shortly" after Marshal Gilbert had told Hershey to leave and had waived handcuffs at him. A reasonable factfinder could not infer from Smith and Tucker's presence that they willfully participated in Hershey's removal. Nor does the complaint allege that the "use[]" of their "command presence" meant more than that Smith and Tucker were present during the incident.

Security guard Harvey spoke to Hershey in the presence of the two Bossier City law enforcement officers. But security guard Harvey's statements do not indicate he understood or believed that Bossier City, as opposed to ASM Global, required prior approval before literature could be distributed. Hershey alleged quite specifically that security guard Harvey said that Hershey's "literature had not been approved by CenturyLink Center, and that Hershey had to submit his literature in advance for approval." That is a requirement of a private, not a state, actor. Neither of the city law enforcement officers indicated that they thought there was a prior-approval requirement by either Bossier City or ASM Global.

Hershey's allegations do not sufficiently allege joint action.

VII

Hershey contends in his sixth and final issue on appeal that he stated a claim against the private security guards under the public function test. Under that test, "a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the State.'"[96] But, "to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function" and "[t]he [Supreme] Court has stressed that 'very few' functions fall into that category."[97] One of those narrow categories is "operating a company town."[98]

Hershey argues that the defendants "engaged in the regulation of speech on the public sidewalk" and that "[t]he regulation of speech in a public forum has been traditionally and exclusively a function of the state." However, the only authority he cites for this proposition is *Marsh v. Alabama*,[99] a case involving the regulation of speech in a company town.[100] That

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[96] *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (quoting *Jackson*, 419 U.S. at 352).

[97] *Id.* (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).

[98] *Id.*

[99] 326 U.S. 501, 505-06 (1946).

[100] *See id.* ("Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of

case does not carry the day based on the facts Hershey has alleged.

The Center was being used to host a concert at the time Hershey was asked to leave. Hershey has cited no authority that policing the sidewalks abutting an arena like the Center during such an event is a power exercised exclusively by state actors.

Hershey's complaint does not allege that the defendant security guards were licensed by Bossier City or "endowed by law with plenary police powers such that they are *de facto* police officers."[101] Nor does he allege that the private security guards were licensed by the city and empowered by an ordinance to exercise "all of the powers of the regular police patrol."[102]

* * *

I would AFFIRM the judgment of the district court.

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press and religion simply because a single company has legal title to all the town?").

[101] *See Romanski v. Detroit Ent., L.L.C.*, 428 F.3d 629, 637 (6th Cir. 2005).

[102] *See Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (7th Cir. 1999). (quoting Chi., Ill., Mun. Code § 4-340-100 (1992)).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-30754

RICHARD HERSHEY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Filed: Jan. 13, 2026

Before Dennis, Richman, and Ho, *Circuit Judges*.*

OPINION

Per Curiam:

IT IS ORDERED that panel rehearing is DENIED. *See* Fed. R. App. 40(a); 5th Cir. R. 40 I.O.P.

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* Judge Dennis did not participate in this decision.

James C. Ho, *Circuit Judge,* dissenting:

I would have granted panel rehearing, and taken the en banc dissental at its word, regarding its sudden and profoundly surprising change of heart on qualified immunity. Panel rehearing would have given Richard Hershey the opportunity to brief the qualified immunity issues that the dissental purportedly welcomed him to present. But I'm now reminded that "dissents ... carry no legal force." *Georgia v. Public.Resource.Org, Inc.,* 590 U.S. 255, 273 (2020). So whatever assurances Hershey thought he was getting, it turns out that "comments in a dissenting opinion about legal principles and precedents are just that: comments in a dissenting opinion." *Id.* (cleaned up). I regret that things have come to this. The judiciary possesses neither the sword nor the purse. All we have is our word.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-30754

RICHARD HERSHEY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Filed: Dec. 18, 2025

Before Dennis, Richman, and Ho, *Circuit Judges.*

ORDER

Per Curiam:

The petition for rehearing en banc is DENIED. At the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (Fed. R. App. P. 40 and 5th Cir. R. 40).

In the en banc poll, seven judges voted in favor of rehearing (Judges Jones, Smith, Richman, Duncan, Engelhardt, Oldham, and Wilson), and ten judges

voted against rehearing (Chief Judge Elrod, and Judges Stewart, Southwick, Haynes, Graves, Higginson, Willett, Ho, Douglas, and Ramirez).

James C. Ho, *Circuit Judge*, concurring in the denial of rehearing en banc:

Popular speech doesn't need protection. It's only when speech is unpopular that you need the First Amendment.

That's why the devout look to the judiciary for protection. Religious speech is often unpopular speech, as people of faith have known for thousands of years. *See, e.g.*, John 15:18-19 ("If the world hates you, you know that it has hated Me before it hated you. If you were of the world, the world would love you as its own; but because you are not of the world, but I chose you out of the world, because of this the world hates you.").

It should go without saying, then, that the freedom of speech secured by the First Amendment includes religious speech. It protects not only the right to pray, but to preach—not just to worship, but to witness—to exercise your faith by evangelizing your faith. Our Founders secured these rights even if—indeed, *especially* if—the government doesn't want you to exercise them.

So it should be obvious that believers have the right to share the good news with others. And the obviousness of that right should have been enough to defeat qualified immunity in this case, without the need for a factually identical case saying so.

Our now-Chief Judge made this point in *Morgan v. Swanson*, 659 F.3d 359, 414 n.30 (5th Cir. 2011) (Elrod, J., dissenting in part). But a majority of our en banc court refused that view in *Morgan*. And a majority of our en banc court affirmatively rejected it in *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024). I detailed all of this in my dissent in

Villarreal, 94 F.4th at 413-14, and again in *McMurry v. Weaver*, 142 F.4th 292, 304-07 (5th Cir. 2025) (Ho, J., concurring), and *Hershey v. City of Bossier City*, 156 F.4th 555, 557, 55-60 (5th Cir. 2025) (Ho, J., concurring). But I'm duty-bound to follow our en banc precedents, whether I agree with them or not.

Governing precedent does not, however, foreclose municipal liability under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). To the contrary, the Supreme Court has unanimously held that "the need to train officers ... can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989).[1] "[I]n the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training." *Connick v. Thompson*, 563 U.S. 51, 64 (2011).

The petition for rehearing en banc asks us to shield obvious violations of religious liberty under *Monell*. What's more, it would allow municipalities to trample on religious liberty simply by deputizing private actors to do their dirty work. *But see NRA v. Vullo*, 602 U.S. 175, 198 (2024) ("the First Amendment prohibits government officials from wielding their

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[1] *Harris* refers to "fleeing felons," but nothing in § 1983 suggests that courts should favor the rights of criminals over the rights of law-abiding citizens. We made that mistake as to qualified immunity, *see Villarreal v. City of Laredo*, 94 F.4th 374, 413 (5th Cir. 2024) (Ho, J., dissenting), and I'm grateful that we won't be repeating that mistake here as to municipal liability.

power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries"); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Murthy v. Missouri*, 603 U.S. 43, 79-80, 99 (2024) (Alito, J., dissenting).

That's wrong, and I'm glad we're not going along with it. I concur in the denial of the petition for rehearing en banc.

* * *

My dissenting colleagues would grant the petition for rehearing en banc. In doing so, they claim that I'm wrong on three fronts. I'm wrong about our court's qualified immunity jurisprudence. I'm wrong about our approach to municipal liability under *Monell*. And most importantly, I'm wrong that there's a sincere concern about religious liberty presented here.

I'll begin by responding to the two procedural justifications for shielding even obvious First Amendment violations from judicial review, before addressing my colleagues' curious skepticism about the legitimate religious liberty concerns implicated in this case (which should be resolved in the first instance at trial in any event).

In doing so, I note that it's become a regrettable but unfortunately common practice of judges to invent reasons to avoid addressing sensitive matters of conscience on the merits—whether it's by concocting procedural problems or distorting the facts. I'm not the only one to notice this tactic.[2] But I note it here

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[2] *See, e.g.*, *Christian Legal Society v. Martinez*, 561 U.S. 661, 707-18 (2010) (Alito, J., dissenting) (detailing the numerous ways in which "[t]he Court provides a misleading portrayal of this

because this case is Exhibit A in the use of these stratagems.

I.

Let's start with qualified immunity. For any citizen who seeks damages from a public official for violating their rights, it's not enough that their rights have been violated. Their rights must also be "clearly established" at the time of the violation. One way to make this showing is to identify binding precedent with sufficiently similar facts that the violation should have been clear to the public official at the time of the incident.

But that's not supposed to be the only way to do it. Under *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Taylor v. Riojas*, 592 U.S. 7 (2020), a plaintiff can also overcome qualified immunity if the violation is so egregious that it should've been obvious to the official, without the need for a materially similar case. *See*

[religious liberty] case"); *Parents Protecting Our Children v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14-15 (2024) (Alito, J., dissenting from the denial of certiorari) ("I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions."); *see also Tucker v. Gaddis*, 40 F.4th 289, 293-97 (5th Cir. 2022) (Ho, J., concurring) (collecting examples from other circuits about misuse of procedural doctrines to avoid deciding religious liberty claims); *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677-78 (5th Cir. 2023) (Ho, J., dissenting) (misuse of mootness to avoid deciding religious liberty challenge to vaccine mandate); *Neese v. Becerra*, 127 F.4th 601, 603-06 & n.1 (5th Cir. 2025) (Ho, J., dissenting from the denial of rehearing en banc) (misuse of standing and mischaracterization of facts to avoid addressing conscience objections to gender ideology mandate).

Hope, 536 U.S. at 741 ("general statements of the law ... may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful") (cleaned up) (quoting *United States v. Lanier*, 520 U.S. 259, 270-71 (1997), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Taylor*, 592 U.S. at 8-9 & n.2 (summarily reversing our court's grant of qualified immunity due to the "obviousness" of the constitutional violation) (citing *Hope* and *Lanier*).

Unfortunately, we didn't follow this principle in *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024). The en banc majority held that *Hope* and *Taylor* are Eighth Amendment cases that do not apply in other contexts, such as the First Amendment. *Id.* at 395. I dissented, noting the oddity of treating claims from incarcerated criminals more favorably than law-abiding citizens. *Id.* at 413-14 (Ho, J., dissenting).[3]

Naturally, I wish my views had prevailed in *Villarreal*. But they didn't, and I'm bound to acknowledge that fact in all intellectual honesty.

What I could not have fathomed is what my colleagues are saying about *Villarreal* today. Having won in *Villarreal*, they now dispute what it is that they won. They deny that they held in *Villarreal* that

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[3] The Supreme Court vacated our en banc decision in *Villarreal*. 145 S. Ct. 368 (2024). But on remand, our court reinstated its earlier en banc decision. *See Villarreal v. City of Laredo*, 134 F.4th 273, 276 (5th Cir. 2025) ("[o]ur previous en banc majority opinion is superseded only to th[e] extent" necessary to respond to the Supreme Court's vacatur regarding the substantive requirements of a First Amendment retaliation claim).

"the obviousness exception does not apply in First Amendment cases." *Post*, at 29.

So let's just roll the tape. Here's verbatim what the *Villarreal* en banc majority said about qualified immunity, *Hope*, *Taylor*, and obvious violations:

> Villarreal cites no case, nor are we aware of one, where the Supreme Court, or any other court, has held that it is unconstitutional to arrest a person, even a journalist, upon probable cause for violating a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit. Under the normal standards of qualified immunity, no "clearly established law" placed the officers on notice of Villarreal's First Amendment right not to be arrested. Villarreal, however, relies on Eighth Amendment cases where the Supreme Court denied qualified immunity for deliberate indifference to unconstitutional prison conditions and declined to scrutinize the cases fact-specifically. *See Hope v. Pelzer*, 536 U.S. 730, 738-39 (2002) ("[T]he risk of harm [to the prisoners] is obvious."); *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.") (footnote omitted)); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (instructing the court to reconsider an Eighth Amendment case "in light of *Taylor*").

> *Hope* and its progeny express a general, but decidedly narrow, obviousness exception to the requirement that "clearly established law" be founded on materially identical facts. In any event, those cases are inappropriate templates for describing "clearly established" law in this context. In *Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (en banc), a case involving First Amendment free exercise rights, this court noted that *Hope* does not stand for the broad proposition that plaintiffs need not offer any similar cases to prove that an officer should have been on notice that his conduct violated the Constitution....
>
> Consequently, we adhere to the general rule that for an asserted right to be clearly established for purposes of qualified immunity, it must "have a sufficiently clear foundation in then-existing precedent" that it is "settled law." *Wesby*, 583 U.S. at 63 (citation omitted). "The precedent must be clear enough that *every* reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* (emphasis added). The law is not clearly established if referenced cases are "materially distinguishable and thus do[] not govern the facts of this case." *Rivas-Villegas*, 595 U.S. at 6.

94 F.4th at 395 (cleaned up).

It's hard to misread this passage. *Villarreal* reads *Hope* and *Taylor* to apply only to "Eighth Amendment cases." *Id.* *Hope* and *Taylor* don't apply in cases

"involving First Amendment free exercise rights." *Id.* And the court justifies this result by citing our earlier en banc decision in *Morgan*. *Id.*

Now I'll quote verbatim what I said in response in my dissent:

> The Supreme Court has made clear that public officials who commit obvious constitutional violations are not entitled to qualified immunity. In fact, the Court has repeatedly reversed circuits, including ours, for granting qualified immunity for obvious violations of constitutional rights. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Taylor v. Riojas*, 592 U.S. 7, 9 (2020).
>
> The majority responds that the standard articulated in *Hope* and *Taylor* doesn't apply here, because those cases arose under the Eighth Amendment, not the First Amendment. *Ante*, at 395.
>
> But that would treat the First Amendment as a second-class right. Nothing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens. Nothing in *Hope* or *Taylor* indicates that those decisions apply only to prison conditions. And no other circuit takes the approach urged by our colleagues in the majority. To the contrary, nine circuits have indicated that the standards articulated in *Hope* apply specifically in the First Amendment context. *See*, *e.g.*, *Diaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle*

> *v. Marron*, 663 F.3d 100, 115-116 (2nd Cir. 2011); *McGreevy v. Stroup*, 413 F.3d 359, 366 (3rd Cir. 2005); *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2013); *MacIntosh v. Clous*, 69 F.4th 309, 399 (6th Cir. 2023); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746-47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021-22 (10th Cir. 2021); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345-46 (11th Cir. 2013). *See also Cheeks v. Belmar*, 80 F.4th 872, 877 (8th Cir. 2023) (applying *Hope* to the Fourteenth Amendment); *Atherton v. Dist. of Columbia Off. of the Mayor*, 706 F.3d 512, 515 (D.C. Cir. 2013) (applying *Hope* to the Fifth Amendment).
>
> So I would apply *Hope* and *Taylor* in the First Amendment context. *See also Morgan v. Swanson*, 659 F.3d 359, 412, 414 n.30 (5th Cir. 2011) (en banc) (Elrod, J., dissenting in part) (concluding that *Hope* applies to obvious First Amendment violations).

Id. at 413-14 (Ho, J., dissenting) (cleaned up).

If my dissent mischaracterized the majority's ruling, surely they would've taken me to task. But they didn't. Because I didn't. (Put it another way: If our colleagues agreed with my dissent that *Hope* and *Taylor* apply to the First Amendment, why did they vote against Priscilla Villarreal?)

People can debate, of course, who's right about qualified immunity, *Hope*, and *Taylor*—the en banc

majority or my dissent. But we should be candid about what our opinions do and don't say.

Numerous religious liberty organizations and other public interest groups have filed amicus briefs criticizing *Villarreal* for refusing to apply the obviousness exception to the First Amendment.

Start with the Alliance Defending Freedom and the Dhillon Law Group, and their amicus brief on behalf of the Young America's Foundation and the Manhattan Institute. Here's what they said:

> Some applications of laws are so "obvious[ly]" unconstitutional, *Rivas-Villegas*, 595 U.S. at 6, or "egregious," *Taylor*, 592 U.S. at 9, that qualified immunity dissolves without a factually analogous case on the books. Often this principle is associated with *Hope v. Pelzer*, 536 U.S. at 741, where this Court said "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." Accord, *e.g.*, *Anderson*, 483 U.S. at 640 (rejecting the notion "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful").
>
> The Fifth Circuit en banc majority avoided this conclusion by throwing out the obviousness exception to "normal" qualified-immunity rules in the free-speech and free-exercise context. *Villarreal*, 94 F.4th at 395. It refused to accept that "the 'obvious' violation exception applies broadly to arrests that may impinge on First Amendment

> rights." *Id.* at 392. Obviousness, the majority said, is "no more than a *possible* exception," *ibid.*, or one narrowly confined to "Eighth Amendment cases," *id.* at 395.
>
> This dispelling of the obviousness exception is mistaken. Eighth Amendment precedent has its oddities but qualified immunity isn't one of them. Nothing in *Hope* or *Taylor* suggests that the exception applies only to claims of cruel and unusual punishment. Nor does confining the obviousness exception to that narrow context make sense. Freedoms of speech, press, and religion are among our proudest liberties, not "second-class right[s]." *Villarreal*, 94 F.4th at 413 (Ho, J., dissenting).

Brief for Young America's Foundation and Manhattan Institute as Amici Curiae Supporting Petitioner, *Villarreal v. Alaniz*, 145 S. Ct. 368 (2024) (No. 23-1155), 2024 WL 2786483, *9-10.

According to ADF, Dhillon, and company, *Villarreal* is "dangerous" for religious liberty: "Left undisturbed, the Fifth Circuit's ruling provides dangerous license for government actors to flagrantly violate the Constitution without recourse, even against the most established rights, simply because they invoke a novel factual situation never before specifically addressed by the courts." *Id.* at *12.

Consider also what the First Liberty Institute wrote:

> The approach taken by the Fifth Circuit towards qualified immunity is exactly the kind of approach this Court castigated in

> *Hope* and its progeny. In *Hope*, this Court indicated that public officials who commit obvious constitutional violations are not entitled to qualified immunity. *See* 536 U.S. at 740-42, 745-46. Although this principle was first articulated in the Eighth Amendment context, it has been extended to cases involving the First Amendment, by [the Supreme] Court and nine circuits."

Brief of First Liberty Institute as Amicus Curiae in Support of Petitioner, *Villarreal v. Alaniz*, 145 S. Ct. 368 (2024) (No. 23-1155), 2024 WL 2058693, *10.

The First Liberty Institute concluded that *Villarreal* is an "insidious" ruling for religious liberty: "Whatever value qualified immunity has, it cannot be predicated on the distinctly un-American notion that our freedoms are *only* cognizable in the light of judicial pronouncements cast down from on high." *Id.* at *11.

These are the views of the Nation's most respected religious liberty law firms. And they aren't alone. A number of other organizations have also filed Supreme Court amicus briefs protesting our court's elimination of the obviousness exception in First Amendment cases. *See* Docket, *Villarreal v. Alaniz*, No. 23-1155 (U.S.); Docket, *Villarreal v. Alaniz*, No. 25-29 (U.S.); *see also McMurry*, 142 F.4th at 305-06 (Ho, J., concurring) (citing amici).

So they may be surprised to see what our colleagues have to say today.

* * *

One possible explanation for their dissent is that our colleagues regret what they did in *Villarreal* (and

before that in *Morgan*). But if that is so, I just wish they had expressed this regret to the rest of us earlier, when we could've done something about it. Because it's not what they've ever said before today. It's not what our dissenting colleague said in her opinion at the panel stage. And it's certainly not what Defendants have urged in their petition for rehearing en banc. They said none of this until today's dissent.

And notably, Hershey himself did not file an en banc rehearing petition asking us to overturn *Villarreal*—presumably because he and his counsel know how to read opinions and count votes.

But make no mistake: Now that everyone's on record, I'd welcome an en banc petition from Hershey asking us to overturn the mistaken principles of *Morgan* and *Villarreal*, deny qualified immunity, and grant Hershey the opportunity to go to trial. Because it sounds like there are now the votes to do it.

That said, Hershey may prefer to preserve his *Monell* win, and leave it to someone else to invoke today's surprising developments to try to overturn *Villarreal*. And that leads me to my final point on *Villarreal*. I'm beyond delighted by this surprising turn of events, to be sure. But it bears noting that this is precisely the kind of "surprise switcheroo" that members of our court have criticized federal agencies for doing. *Wages and White Lion Investments, L.L.C. v. FDA*, 90 F.4th 357, 386 (5th Cir. 2024), *rev'd*, 604 U.S. 542 (2025).

I'd hold us to the same standard that we apply to others. As imperfect human beings, we're allowed to change our mind, of course. But we should be candid, not caustic, when we do so. "When an agency changes

its existing position, it ... must at least display awareness that it is changing position." *Id.* at 381 (quotations omitted). At least one influential scholar has suggested the same. *See* Josh Blackman, *A Fifth Circuit Disgrantle in the Alien Enemies Act Case*, Reason.com, Oct. 1, 2025 (comparing the dueling en banc opinions in *United States v. Abbott*, 110 F.4th 700 (5th Cir. 2024), with later developments).[4]

Finally, the dissent asks a question that deserves a fulsome response: "Why say 'We are bound by this terrible opinion,'" but "oppose rehearing to fix the purportedly terrible opinion?" *Post*, at 32. "Wouldn't it be easier to do the right thing and vote for rehearing now?" *Id.*

My two responses to their question/offer: It's deeply disingenuous.

But I happily accept.

First, it's disingenuous. Defendants' petition for rehearing en banc (obviously) doesn't ask the court to reverse its qualified immunity win by revisiting *Villarreal*. Their petition is solely about *Monell*. The en banc poll is solely about *Monell*. And the poll closed

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[4] My colleagues deny the surprise switcheroo, and insist that we must read *Villarreal* "in the context in which it was decided." *Post*, at 31. In their view, *Villarreal* wasn't about refusing *Hope* and *Taylor* at all—it was about the "concededly untainted intermediary and the valid arrest warrant." *Post*, at 30. But that's wrong on both fronts. It's wrong because it can't be squared with the verbatim language from *Villarreal* that I quoted earlier. And it's wrong because the intermediary and warrant issues weren't "*conceded*" at all—to the contrary, multiple dissents in *Villarreal* discussed in detail the tainted intermediary and invalid warrant. *See, e.g.*, 94 F.4th at 403-04 (Higginson, J., dissenting); *id.* at 418-19 (Ho, J., dissenting).

long ago in any event—well before any of them ever told me (or anyone else, from what I can tell) that they suddenly share my opposition to *Villarreal*.

So they can theorize all they want that I somehow secretly like what happened in *Villarreal*. But personally, I don't think it passes the laugh test. *See*, *e.g.*, *Villarreal*, 94 F.4th at 409 (Ho, J., dissenting) (opposing the en banc decision in *Villarreal*); *McMurry*, 142 F.4th at 302 (Ho, J., concurring) (opposing the en banc decision in *Villarreal*); *Hershey*, 156 F.4th at 557 (Ho, J., concurring) (opposing the en banc decision in *Villarreal*); *see also Oliver v. Arnold*, 19 F.4th 843, 843 (5th Cir. 2021) (Ho, J., concurring in the denial of rehearing en banc) (supporting relief in *Villarreal*); *Mayfield v. Butler Snow*, 78 F.4th 796, 797 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (supporting relief in *Villarreal*); *Gonzalez v. Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (supporting relief in *Villarreal*). I regret the increasing lack of candor that has come to pervade our court's en banc proceedings of late.

But no matter. I vote for rehearing.

I'm happy to let bygones be bygones, and ignore from here on out what my colleagues may or may not have said before, in either *Morgan* or *Villarreal*. I'm delighted to go back to what we said in my original panel majority opinion in *Villarreal*: Of course the obviousness exception of *Hope* and *Taylor* applies to the First Amendment.

So as a member of the panel, I vote for the panel to rehear this case. After today's order is out, I'm sure

that the panel will deny qualified immunity in this case. And that will be that.

II.

Next, municipal liability. It's established law that, to obtain liability under *Monell*, an extensive pattern of past violations by municipal employees is sufficient—but it's not necessary. 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."

Our dissenting colleagues insist that that's wrong. Indeed, they claim that it's "a sea change from our court's prior approach" to contend that "a political subdivision is liable under *Monell* when it provides *'no training whatsoever' on the First Amendment*." *Post*, at 27-28 (emphasis added).

But virtually every member of the dissent has previously agreed that "a political subdivision is liable under *Monell* when it provides 'no training whatsoever'"—at least in other constitutional contexts. *Id. See, e.g.*, *Henderson v. Harris Cnty*, 51 F.4th 125, 131 (5th Cir. 2022) (*Monell* liability available under the Fourth Amendment where "the government actor was provided *no training whatsoever*") (quotations omitted); *York v. Welch*, 2024 WL 775179, *5 (5th Cir.) (again, *Monell* liability available under the Fourth Amendment where "the government actor was provided no training whatsoever") (quotations omitted); *Covington v. City of Madisonville*, 812 F. App'x 219, 225 (5th Cir. 2020) (*Monell* liability available where "it should have been apparent" that the complete "failure to train" would result in a Fourteenth Amendment violation)

(quotations omitted); *Peterson v. City of Fort Worth*, 588 F.3d 838, 849 (5th Cir. 2009) (*Monell* liability available under the Fourth Amendment based on "a complete failure to train"). None of these cases suggest a different rule for the First Amendment. To the contrary, a municipality is liable if it provides "'no training whatsoever' *with respect to the relevant constitutional duty*." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 625 n.5 (5th Cir. 2018) (emphasis added).

So I don't see a "sea change"—I see equal respect for religious liberty when we apply *Monell* liability to a municipality that "provides 'no training whatsoever' *on the First Amendment*." *Post*, at 28 (emphasis added).

The dissenters wonder what might happen if we apply our established law to the First Amendment. They worry, for example, that federal judges might start forcing cities to train all of their employees on "the intricacies of commercial speech." *Post*, at 28. Rest assured that no one is saying that. Nor is anyone ordering municipal waste workers to be taught about *Obergefell*, or insisting that firefighters be instructed on tax law.

We're only saying what the law already says—and what the dissenters once agreed: a municipality is liable if it provides "'no training whatsoever' *with respect to the relevant constitutional duty*." *Littell*, 894 F.3d at 625 n.5 (emphasis added). If the training isn't relevant, then it isn't required.

And that gets us to what I believe is the heart of the dispute. The dissent seems to think that the

problem with this case is that the "risk of a constitutional violation was infinitesimal." *Post*, at 26.

I have a different view. Street preaching is not some infinitesimally rare and obscure practice. Nor is it one that municipalities never bother with.

People of faith have long sought opportunities to spread the gospel in the public square. Nearly a century ago, the Supreme Court observed that "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). "It has been a potent force in various religious movements down through the years," as people of faith "carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents." *Id.* at 108-9. So anyone who is "rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). "This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Id.*

It's a religious practice that dates back thousands of years. The Bible speaks of the Great Commission, in which Jesus calls on the disciples to go forth and spread the word to others in every nation. Matthew 28:16-20. "[O]pen-air preaching was a preferred method of Jonah, Jeremiah, the apostle Paul, and many others." Ryan Denton, *Into the Highways and Hedges: A Primer for Open-Air Preaching*, Desiring God, Feb. 4, 2024, *available at* www.desiringgod.org/articles/into-the-highways-and-hedges. "They went to

the people and preached God's word." *Id.* After all, "Jesus went into the boat or up on the mountainside to preach the good news." *Id.*

My dissenting colleagues question why I invoke "thousands of years" of religious tradition. *Post*, at 24. But they invoked millennia of legal tradition in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 123 F.4th 309 (5th Cir. 2024)—even where it didn't seem relevant.[5] So if we're going to consider millennia of legal tradition since at least the time of Roman rule, then we ought to consider millennia of *religious* tradition since Roman times as well—particularly where it's actually relevant to the issues presented.

The Harvard Religious Freedom Clinic certainly thinks it relevant. Just this year, they briefed the U.S. Supreme Court that street preaching is an "ancient tradition" with "deep historical roots." Brief of Stephen Nylen et al. as Amici Curiae Supporting Petitioner, *Olivier v. City of Brandon*, No. 24-993 (U.S.), 2025 WL 2676057, *4. I agree that it's relevant in cases like this that the devout have sought to spread the gospel to others as an essential part of their faith for millennia.

The most effective way to spread the word to others, of course, is to go where lots of people

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[5] In that case, I questioned the relevance of Roman law to the established practice of American courts on dismissing appeals as improvidently granted. I'm grateful that my colleagues stepped away from the point shortly thereafter. *See, e.g.*, *Silverthorne Seismic v. Sterling Seismic Srvs.*, 125 F.4th 593, 598 & n.5 (5th Cir. 2025) (discussing practice of dismissing discretionary appeals as improvidently granted).

congregate. "The First Amendment protects the right of every citizen to reach the minds of willing listeners *and to do so there must be opportunity to win their attention*." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (cleaned up, emphasis added).

Concert venues are an ideal forum for the street preacher. As one of the most famous street preachers has observed, "music venues" are a "good open-air setting" for street preaching because it's a "public location where people gather where they're not in a hurry and can take time to listen." Ray Comfort, *Fifty Years Of Open-Air Preaching* 50 (2024). *See also* Denton, *Into the Highways* ("open-air preaching is especially useful ... outside a sporting event").

Municipalities are not only well aware of this—a number of them don't like it, and endeavor to stop it. In fact, municipalities are so actively opposed to street preaching that our court has had to adjudicate constitutional objections to their restrictive policies in case after case. *See*, *e.g.*, *Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024) (Christian advocate prevented from evangelizing outside public amphitheater); *Herridge v. Montgomery Cnty.*, No. 21-20264, 2022 WL 989421 (5th Cir. Apr. 1, 2022) (Christian advocate prevented from distributing pamphlets near outdoor pavilion in Houston); *Olivier v. City of Brandon*, 2023 WL 5500223 (5th Cir.) (street preacher prevented from evangelizing outside public amphitheater), *cert. granted*, 145 S. Ct. 2871 (2025); *Denton v. City of El Paso*, 861 F. App'x 836 (5th Cir. 2021) (Christian advocate prevented from evangelizing at an outdoor farmer's market); *Roy v.*

City of Monroe, 950 F.3d 245 (5th Cir. 2020) (street preacher prevented from evangelizing on the sidewalk outside of a local bar); *Allen v. Cisneros*, 815 F.3d 239 (5th Cir. 2016) (street preacher prevented from evangelizing on the streets of Houston); *Grisham v. City of Fort Worth*, 837 F.3d 564 (5th Cir. 2016) (Christian advocate prevented from distributing literature on public sidewalks).

Our dissenting colleagues know this. Take *Siders*, for example, about a "Christian who seeks to evangelize and share the gospel with others." 123 F.4th at 298. She "particularly likes to share the gospel on public ways near and outside of public events ... because such occasions offer her an opportunity to reach a meaningful number of people with her message." *Id.* She likes preaching at music venues because "she can find meaningful pedestrian traffic flow on days of amphitheater events as attendees walk toward the amphitheater." *Id.*

Our colleagues have acknowledged that this is no obscure exercise of faith—to the contrary, they've suggested that there's so much of it that they worry about obstructing traffic. *See Siders v. Mississippi*, 130 F.4th 188, 190 (5th Cir. 2025) (noting concerns about "congestion," "interference with ingress or egress," "ensuring public safety and order," and "promoting the free flow of traffic on streets and sidewalks" to justify shutting down street preachers).

In sum: In *Hershey*, the activity is rare, so there's no liability. In *Siders*, the activity occurs far too much, so there's no liability.

I would not treat these conflicts as infinitesimally rare. I would suggest that we're all just making a

judgment call as to whether we think this is a First Amendment right worth protecting—or not.[6]

III.

That brings us to the main event—religious liberty. As I noted at the outset, the First Amendment violation presented here should be obvious. Of course people have the right to spread the gospel in public spaces. Yet our colleagues deny that this case presents a legitimate religious liberty issue.

Richard Hershey claims the right to share religious materials in public spaces. But our

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[6] Our dissenting colleagues highlight the amicus brief filed by the states in our circuit. It's not surprising, of course, that the states would oppose litigants who seek to hold government officials liable. Counsel for government always argues against liability for government. That's their job. It's our job to enforce the Constitution.

The states are concerned about being flooded with frivolous prisoner complaints. So am I. Of course, they're already flooded with such suits—since well before *Hershey*.

We can—and we must—protect the First Amendment rights of law-abiding citizens, even as we work to shield prison officials from frivolous prisoner complaints. We can walk and chew gum at the same time. As federal judges, we're paid to do so.

And that leads me to the question we should really be asking. Why acknowledge only the government amici? Why not also acknowledge the numerous amici who have filed brief after brief after brief expressing grave concerns about the state of freedom of speech and religious liberty in our circuit? *See*, *e.g.*, *McMurry*, 142 F.4th at 305-06 (Ho, J., concurring) (noting broad range of amici and religious liberty experts who have criticized our decisions in *Morgan* and *Villarreal*); *Gonzalez v. Trevino*, 60 F.4th 906, 913 & n.4 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (same).

colleagues deny that his claim has anything to do with religious liberty.

To begin with, their challenge to Hershey's sincerity is ultimately a red herring. Because the rule of liability they propose would govern the most faithful as well as the most imperfect (which is to say, all of us).

It's also an issue to be resolved by a jury—not appellate judges. The amended complaint makes clear that "Hershey was distributing free, educational, noncommercial, religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association." ROA.75. It's a message that Hershey has made clear he "feels compelled to share with others." ROA.192. My colleagues question Hershey's bona fides as a Christian. But that strikes me as (among other things) beyond our province at this stage of the proceedings.

Hershey's sincerity was not doubted by the district court. And even at the panel stage, one of our dissenting colleagues doubted only whether Defendants had ever "*previously*" targeted "someone engaging in free exercise of religion or free speech." *Hershey*, 156 F.4th at 577-78 (Richman, J., concurring in part and dissenting in part). Defendants themselves have acknowledged on appeal that Hershey "travels around the country spreading his Christian vegetarian message on college campuses, at event centers, and other forums." Brief for Defendants, *Hershey v. City of Bossier*, 156 F.4th 555 (2025) (No. 21-30754), 2022 WL 1136998, *3 (quotations omitted).

But our dissenting colleagues now question "what [the Christian Vegetarian Association] has to do with Christianity." *Post*, at 24.

Paul's epistle to the Romans acknowledges that some people of faith will only eat vegetables. Paul warns believers to respect such views. "The one who eats everything must not treat with contempt the one who does not, and the one who does not eat everything must not judge the one who does, for God has accepted them. Who are you to judge someone else's servant? To their own master, servants stand or fall. And they will stand, for the Lord is able to make them stand." Romans 14:3-4.

Our colleagues also highlight the fact that "Hershey gets paid" for spreading these religious views. *Post*, at 24. But recall Paul's first epistle to the church in Corinth. *See* 1 Corinthians 9:3-14. Paul observes that "those who preach the gospel *should* receive their living from the gospel." 1 Corinthians 9:14 (emphasis added). *See also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("Speech ... is protected even though it is ... 'sold' for profit."); *Villarreal*, 94 F.4th at 420 (Ho, J., dissenting) ("There is no pro bono requirement to the freedom of speech.").

So I would not question the sincerity of Hershey's faith (and especially not at this early stage of the proceedings, on review of a motion to dismiss). Nor is this the first time we've seen unwarranted skepticism when it comes to religious liberty. In *Siders*, our colleagues argued that the ordinance challenged there did not prevent citizens from evangelizing on public grounds. *See, e.g.*, 130 F.4th at 189 (Oldham, J.,

concurring in the denial of rehearing en banc) ("[T]he ordinance does not purport to regulate prayer, conversation, t-shirts, evangelism, or tracts."). But in *Olivier*, by contrast, they condemned the same ordinance at the same amphitheater because it prevents "an evangelical Christian who feels called to share the good news with his fellow citizens ... from doing so outside the city's public amphitheater." 121 F.4th 511, 512 (5th Cir. 2024) (Ho, J., dissenting from denial of rehearing en banc, joined by five members of the court).[7]

* * *

Judicial opinions should be read charitably. But I struggle to see how our dissenting colleagues haven't reversed themselves on qualified immunity under

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[7] Finally, the dissent suggests that I am violating party presentation by treating this as a religious liberty case, rather than as a free speech case. *Post*, at 33-34. My colleagues made the same point in *Siders*. And my response is the same: "religious expression is, of course, protected under the Freedom of Speech Clause." *Siders*, 130 F.4th at 192 (Ho, J., dissenting from the denial of rehearing en banc). The Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), was based on the Free Speech Clause. Would the dissenters be horrified if anyone called that decision a win for religious liberty? Surely not. As the Supreme Court recently reminded us, "the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). "That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. In Anglo-American history, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.* (cleaned up).

Villarreal and *Morgan*—or on whether *Monell* applies when there's been no training whatsoever—or on what government actions threaten religious liberty. If I was one of the religious liberty groups who devotes their God-given talents, time, and treasure to advocating for folks like Spring Siders, Gabriel Olivier, Richard Hershey, and Priscilla Villarreal, I'd wonder why they're being accused of misrepresenting this court's precedents and fabricating religious liberty threats out of thin air. I'd also wonder about the unexplained changes of position that they've seen from this court. I'd "wonder what's driving all of these gymnastics." *Post*, at 35.

Andrew S. Oldham, *Circuit Judge*, joined by Jones, Smith, Richman, Duncan, Engelhardt, and Wilson, *Circuit Judges*, dissenting from the denial of rehearing en banc:

Richard Hershey is a "vegetarian advocate whose ethical beliefs compel him to share his message with others." ROA.75. When security officers told Hershey to stop distributing his leaflets, he sued for "deprivation of his rights of speech." ROA.85, 86-87. Hershey does not allege that the officers even knew of the content of his vegetarianism leaflets—let alone targeted him for his vegetarian views. *See* ROA.75-79. Nor does Hershey allege *anything* about his religion. You'll look in vain for *any* mention in Hershey's complaint about faith, religiosity, the First Amendment's Religion Clauses, or evangelism. The closest he gets is to allege that he distributed leaflets from "the Christian Vegetarian Association"—without any allegation about what that organization is, what it has to do with Christianity, what it has to do with Hershey's faith, or whether Hershey is even a man of any faith. ROA.75. To the contrary, the complaint alleges that Hershey gets paid to distribute leaflets "by various nonprofit organizations"—without regard to religion of any kind. *Ibid.*

But you would not know that from the opinion concurring in the denial of rehearing en banc. In that opinion, this case about vegetarian ethics somehow transforms into a battle over street preaching, the Great Commission, hatred of Christians, and religious persecution dating back "thousands of years." *Ante*, at 17 (Ho, J., concurring); *see also Siders v. Mississippi*, 130 F.4th 188, 191 (Ho, J., dissenting from the denial

of rehearing en banc) (5th Cir. 2025) (doing the same thing). This quixotic effort does nothing to justify the panel's badly splintered, three-judge-four-opinion approach to this case. And while it tilts at windmills that appear nowhere in this case, it does nothing to justify our court's refusal to reconsider the matter en banc.

At the panel stage, the three-judge panel issued *four* opinions. The per curiam opinion recognized that the panel was (to put it mildly) "splintered." *Hershey v. City of Bossier City*, 156 F.4th 555, 556 (5th Cir. 2025) (per curiam). Then all three judges issued their own opinions. Judges Richman and Ho wrote the controlling rule on qualified immunity. Judge Ho declared that he would have sided with Judge Dennis on qualified immunity had circuit precedent not prevented him. Then Judges Dennis and Ho wrote the controlling rule on the City's liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Given the far-reaching implications of the qualified immunity rule embraced by Judge Ho, given the *Monell* holding embraced by Judges Dennis and Ho, and given that future parties will need Venn diagrams to understand what this deeply fractured panel held, we should have taken the case en banc.

I begin with (I) the panel's *Monell* holding, because it's the most egregious. Then I address (II) the panel's qualified-immunity holding. Finally, I address the hyperbolic assertion that (III) rehearing this case would have been comparable to throwing Christians to the lions.

I

First, *Monell*. I begin with (A) the *Monell* rule announced by Judges Dennis and Ho and then turn to (B) its anomalies.

A

Judges Dennis and Ho turn the world upside down. *See Hershey*, 156 F.4th at 561 (Ho, J., concurring); *id.* at 563-64 (Dennis, J., concurring in relevant part). Before the panel's decision, plaintiffs could allege a *Monell* claim based on a single incident only if a municipality "fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624-25 (5th Cir. 2018) (quoting *City of Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part and dissenting in part)). Such circumstances were "very narrow." *Id.* at 624. The classic example: if a city gave its officers guns but no training on when to use them. *See Canton*, 498 U.S. at 390 n.10.

Under the rule embraced by Judges Dennis and Ho, however, plaintiffs need only allege that defendants lacked training to handle plaintiff's case—even if the *ex ante* risk of a constitutional violation was infinitesimal. ROA.86; *see also Hershey*, 156 F.4th at 561 (Ho, J., concurring); *id.* at 563-64 (Dennis, J., concurring in relevant part). 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.* at 578 (Richman, J., dissenting in relevant part) (quotation omitted).

That might be a good rule; it might be a bad one. But either way, it's a sea change from our court's prior approach. *See Pineda v. City of Houston*, 291 F.3d 325, 334 (5th Cir. 2002) (emphasizing that this court has "necessarily [] been wary of finding municipal liability" based on a single incident). And it's the sort of thing that our en banc court should announce with clarity—not the sort of thing we should sort-of say in a four-way fractured decision that has all the precision of a cubist painting.

B

The controlling *Monell* rule creates a host of anomalies. Three bear emphasis.

First, *Monell* liability is generally derivative of an underlying constitutional tort committed by an officer. "As is well established, every *Monell* claim requires an underlying constitutional violation." *Hicks-Fields v. Harris County*, 860 F.3d 803, 808 (5th Cir. 2017) (quotation omitted). Consequently, we routinely dismiss *Monell* claims against political subdivisions where the plaintiff fails to establish a § 1983 claim against an individual officer. But one of the panel opinions does the opposite: It says no individual officer ever can be held liable—even for the most obvious First Amendment violation—but every political subdivision can always be held liable for any failure to train—even for potentialities that could not reasonably be foreseen. *See Hershey*, 156 F.4th at 561 (Ho, J., concurring).

Second, the panel's *Monell* rule proves both too much and too little. The rule provides that a political

subdivision is liable under *Monell* when it provides "no training whatsoever" on the First Amendment. *Hershey*, 156 F.4th at 561 (Ho, J., concurring); *id.* at 563-64 (Dennis, J., concurring in relevant part). That proves far too much because if Bossier City had provided training on say, the intricacies of commercial speech, then presumably this case would have come out differently? It also proves far too little because Hershey provided no evidence whatsoever of a failure to train. Nor did Hershey do anything to show that officers ever faced another vegetarian-ethicist pamphleteer (or any other pamphleteer, or any other speech problem for that matter). *See* ROA.85-86. So even if Bossier City did not provide any training, that fact does not save Hershey's deficient pleadings.

Third, the *Monell* rule is equally applicable to failure-to-train cases under the Fourth or Eighth Amendments. Plaintiffs need only allege that officers were not trained the specific situation at hand and, *voila*, the plaintiff has a *Monell* claim. That is why every State in our circuit urged us to rehear this case—and warned us that lawsuits will proliferate, discovery costs will soar, and municipalities will be forced to re-allocate precious time and resources. Br. for the States of Louisiana, Mississippi, and Texas as Amici Curiae, at 6-10. This burden will weigh most heavily on prisons and jails, which face constant failure-to-train allegations. *See id.* at 8. And it will embolden judges to find *Monell* violations in such contexts. *See, e.g.*, *Alvarez v. City of Brownsville*, 904 F.3d 382, 402 (5th Cir. 2018) (en banc) (Dennis, J., dissenting) (dissenting from court's rejection of *Monell* claim that city failed to disclose exculpatory evidence); *see also Bond v. Nueces County*, No. 20-40050, 2022

WL 4595000, at *9 (5th Cir. Sept. 30, 2022) (opinion of Dennis., J.) (vacating district court's rejection of plaintiff's *Monell* claim based on alleged constitutional violations by a prison).

The predictable consequences of the panel's flawed *Monell* holding further underscore why we should have taken this case en banc.

II

Next, qualified immunity. According to Judge Ho, our court's approach to qualified immunity in First Amendment cases is deeply flawed. *So* flawed that it has garnered scathing criticism from the Alliance Defending Freedom, the First Liberty Institute, and other religious-liberty organizations. If our precedent is that bad, however, we should *obviously* go en banc to overturn it. It's surpassing strange to say, "our precedent requires persecution of Christians," and then say, "we should *not* go en banc to fix it!" *See ante*, at 3 (Ho, J., concurring) (saying that).

I explain (A) Fifth Circuit precedent and (B) the puzzling decision to recognize an error, refuse to overturn it, and then complain about it anyway.

A

At the panel stage in this case, two judges would have denied qualified immunity. *See Hershey*, 156 F.4th at 558-59 (Ho, J., concurring); *id.* at 564 (Dennis, J., dissenting in relevant part). But one of these panel members opted to grant qualified immunity because, apparently, our court has held that the obviousness exception does not apply in First Amendment cases. *See id.* at 560 (Ho, J., concurring) (citing *Villarreal v.*

City of Laredo, 94 F.4th 374, 395 (5th Cir. 2024) (en banc) (*Villarreal II*); *see also ante*, at 3 (same).

I do not read *Villarreal II* that way. In that case, the panel itself held the state statute at issue was "not one of those 'obviously unconstitutional' statutes" on its face. *Villarreal v. City of Laredo*, 44 F.4th 363, 372 (5th Cir. 2022) (opinion of Ho, J.) (*Villarreal I*). So the question for the en banc court in *Villarreal II* was whether officers unconstitutionally applied that valid statute to a "citizen journalist"—even after an independent intermediary found probable cause for the citizen's arrest and issued a valid warrant. 94 F.4th at 393-94; *see also id.* at 394 (noting Villarreal alleged nothing to say the independent intermediary was somehow tainted). "[I]n this context," the court held, cases discussing "obvious" constitutional violations like *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Taylor v. Riojas*, 592 U.S. 7 (2020), were "inappropriate templates" for the qualified-immunity inquiry. *Villarreal II*, 94 F.4th at 395. That does not forever and for all reasons reject obviousness as a ground for denying qualified immunity. It simply holds that, in the context of the particular circumstances of the concededly untainted intermediary and the valid arrest warrant in Villarreal's case, the officers did not obviously violate the Constitution by arresting her. *See id.* at 397 (holding Villarreal failed to show an "obvious" constitutional violation—not that "obviousness" is no longer a cognizable claim in our circuit (quotation omitted)).

Judge Ho's contrary reading of *Villarreal II* is the opposite of "charitabl[e]." *Ante*, at 23. Both because it

requires reading lines in *Villarreal II* out of context, and because it pits *Villarreal II* against binding Supreme Court precedent. As the Supreme Court has said, "[t]here can be no doubt that the First Amendment protects the right to pray"—even in the absence of a case so holding. *Sause v. Bauer*, 585 U.S. 957, 959 (2018) (per curiam). Indeed, *the entire point* of § 1983 liability in First Amendment cases is that plaintiffs can prevail *without* pointing to earlier, on-point cases. *See, e.g.*, *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (per curiam). Our sister circuits agree. Some have denied qualified immunity in the First Amendment context on obviousness grounds. *See MacIntosh v. Clous*, 69 F.4th 309, 320 (6th Cir. 2023); *Tobey v. Jones*, 706 F.3d 379, 392 (4th Cir. 2013). Many have granted qualified immunity in the First Amendment context while acknowledging that alleged facts did not fall within the obviousness exception. *See Diaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle v. Marron*, 663 F.3d 100, 115-16 (2d. Cir. 2011); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746-47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021-22 (10th Cir. 2021); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1346 (11th Cir. 2013). We should not lightly presume that *Villarreal II* meant to break with all these authorities—especially when a more plausible and narrower reading of the precedent is readily available.

That is not a "surprise switcheroo." *Ante*, at 13 (Ho, J., concurring). That is simply reading an opinion in the context in which it was decided.

B

But insofar as *Villarreal II* held what Judge Ho says it held, that is *all the more reason* to go en banc and to do so immediately. "This is terrible, so please do not fix it" is an incoherent basis for voting against rehearing. It is even more incoherent to deny rehearing, end the case in this court, and then invite the parties to continue litigating. *See ante*, at 14 (Ho, J., concurring). Why say "We are bound by this terrible opinion," oppose rehearing to fix the purportedly terrible opinion, celebrate the order preserving the purportedly terrible opinion, and then invite additional litigation to, what, remain bound by the purportedly terrible opinion? Wouldn't it be easier to do the right thing and vote for rehearing now? Unless the point of all of this is to imagine a horrible rule for the purpose of inveighing against it? Whatever the point, a vote to deny en banc rehearing here *protects* a precedent that Judge Ho reads to "treat[] claims from incarcerated criminals more favorably than law-abiding citizens." *Ante*, at 6. An "oddity" for sure. *Ibid.*

III

Finally, a word about the religious-liberty implications of this case. Judge Ho says the court was correct to deny rehearing in this case because doing so protects "the right to spread the gospel in public spaces." *Ante*, at 20. Again, this assertion is bizarre.

Perhaps it's true that the rules announced in the panel's four-way, deeply fractured opinions implicate religious liberty. That is all the more reason to rehear this case en banc rather than rely on future parties and panels to decipher the relevant holding in the short per curiam opinion—which is the only opinion

that garnered a majority vote. That is especially true if the premise of this entire mess was a reading of *Villarreal II* that conflicts with Supreme Court precedent, splits from every other circuit to consider the question, and portends disastrous consequences for people of faith. *See* Part II, *supra*.

But even if it's true that this case has implications for Christian evangelism, that does not mean that Richard Hershey is himself a Christian evangelist. If Hershey alleged something—*anything*—about his faith, we'd obviously be bound to accept it. Courts have "no license to declare ... whether an adherent has 'correctly perceived' the commands of his religion." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 651 (2018) (Gorsuch, J., concurring). We take a plaintiff's religious claims as they come, since it is "not for us to say that [a plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). The problem is that Hershey himself alleges nothing about Rome, persecuted Christians, street preaching, the Great Commission, religious liberty, or *anything* that implicates the First Amendment's Religion Clauses in *any* way. *But see ante*, at 22 (Ho, J., concurring) (invoking 1 Corinthians 9:3-14 for the proposition that Richard Hershey is a Christian pastor?). Observing that fact says nothing about the sincerity of Hershey's belief. In fact, it does the opposite: it recognizes and honors the belief that Hershey chose to identify in his court filings—namely, the belief that he has a free speech right to hand out vegetarianism pamphlets for money.

In other circumstances, members of our court care about party presentation:

> In our adversarial system of adjudication, we follow the principle of party presentation. We rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. Our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief. In short: Courts are essentially passive instruments of government. They do not sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.

Gonzalez v. CoreCivic, Inc., 986 F.3d 536, 540 (5th Cir. 2021) (Ho, J., concurring) (quotations omitted). But in this case, the court apparently is an active instrument of government that can sally forth and right wrongs that Richard Hershey and his able counsel never imagined.

* * *

At the end of the day, my concurring colleague presents an imaginary case that implicates persecuted Christians in Rome, "religious liberty," and the "ancient tradition" of street preaching, *ante*, at 17, 4 (Ho, J., concurring)—rather than the facts of this case. He reads our precedent to create catastrophic consequences for religious liberty—and then says we should *retain* that horrible precedent and *embrace* the

horrible consequences. And then he turns *Monell* upside down and celebrates a new failure-to-train theory that will benefit hardened criminals and saddle political subdivisions in every § 1983 case. You have to wonder what's driving all of these gymnastics. I would have granted en banc rehearing to figure it out.

I respectfully dissent.

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 21-cv-00460

RICHARD HERSHEY,

Plaintiff,

v.

CITY OF BOSSIER CITY, et al.,

Defendants.

Filed: Nov. 17, 2021

JUDGMENT

The Report and Recommendation of the Magistrate Judge [Doc. No. 39] having been considered, together with the written Objection [Doc. No. 40] thereto filed with this Court, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended therein is warranted,

IT IS ORDERED, ADJUDGED, and DECREED that the Defendants' Motion to Dismiss [Doc. No. 28] is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that all claims against Tyshon

Harvey, David Smith, and Eugene Tucker are **DISMISSED WITH PREJUDICE.**

MONROE, LOUISIANA, this 16th day of November 2021.

[handwritten: signature]
Terry A. Doughty
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 21-cv-00460

RICHARD HERSHEY,

Plaintiff,

v.

CITY OF BOSSIER CITY, et al.,

Defendants.

Filed: Nov. 1, 2021

REPORT AND RECOMMENDATION

Introduction

This civil rights action was filed by Richard Hershey ("Plaintiff") after a policeman ordered him to leave a public park or be arrested due to his distribution of leaflets on the grounds of the park. Plaintiff alleges that his threatened arrest and/or ejectment from the park violated his First Amendment rights. The district court later dismissed all claims against the law enforcement officers involved in the incident and the City of Bossier City. The sole claims that remain are those asserted under 42 U.S.C. § 1983 against three private citizens who were hired as security guards by a company which manages the public arena.

Before the court is a motion to dismiss (Doc. 28) filed by the security guards. They contend that the facts offered in the complaint are not adequate to plead a plausible § 1983 claim as their conduct was not "fairly attributable" to the City. This court agrees. For the reasons that follow, it is recommended that the motion to dismiss be granted.

Rule 12(b)(6)

The security guards move for dismissal based on Fed. R. Civ. P. 12(b)(6). In assessing the motion, the court must accept as true all well-pleaded facts in the complaint and view those facts in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). Those facts must state a claim that rises above the speculative level and is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007); *Amacker v. Renaissance Asset Mgmt., LLC*, 657 F.3d 252, 254 (5th Cir. 2011). A complaint is not sufficient if it offers only "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 127 S.Ct. at 1965).

The Allegations

The relevant facts for purposes of assessing the motion to dismiss are found in Plaintiff's First Amended Complaint (Doc. 17). Plaintiff, a senior citizen from Missouri, is a vegetarian advocate whose ethical beliefs compel him to share his message with others. He is compensated by various nonprofit organizations for his advocacy and distribution of literature. First Amended Complaint, ¶¶ 4, 15-17.

A Christian rock concert known as Winter Jam was held on February 28, 2020 at a Bossier City arena that was then known as CenturyLink Center. ¶ 24. The facility has since been rebranded as Brookshire Grocery Arena (the "Arena"). The Arena is owned by the City, but it is managed by a private company. ¶ 13, Ex. 1, Doc. 25. The security guards work for the management company, not the City. ¶¶ 8-10.

The Arena is situated in a public park, with no restriction on access to any of the sidewalks and streets through the park. ¶ 21. The Arena does not have any written or official policy regarding the distribution of leaflets on its grounds, and it does not have any formal application process to request permission to distribute leaflets. ¶¶ 18-19. Instead, the City has a longstanding custom of allowing police officers or officials of the Arena to use unfettered discretion to remove persons who are peacefully exercising their Frist Amendment rights. ¶ 20.

Plaintiff was on a public sidewalk on the grounds of the Arena and distributing free religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association. ¶¶ 14-15. His activity was entirely peaceable and non-aggressive, and he did not create a disturbance or interfere with pedestrian or vehicular traffic. ¶¶ 22-23. Also, out of concern for safety, he did not distribute his booklets on the staircases of the Arena or in the parking lots. ¶ 26. At least one other person, not associated with Plaintiff, was distributing commercial advertisement cards for an internet radio station. ¶ 27.

Plaintiff was initially encountered by two policemen and one of the security guards, Tyshon

Harvey ("Harvey"). ¶¶ 28-30. During that initial encounter, the policemen informed Plaintiff that he could either leave the public park or be handcuffed and taken to jail. ¶¶ 31-34. After some arguing about his legal rights to continue handing out his literature in the park, Plaintiff attempted to leave the park but was blocked by one of the policemen. ¶ 39. The other two security guards, David Smith ("Smith") and Eugene Tucker ("Tucker"), arrived on the scene shortly thereafter. ¶ 40. After some additional back and forth between Plaintiff and the policemen, Plaintiff asked the group at large why he was not allowed to hand out his literature when there had been another person handing out business cards in essentially the same location. ¶44. Harvey responded that Plaintiff did not have the approval of the venue to hand out his literature, and, as a result, he would have to leave the park. ¶¶ 45-47. During this entire episode, Smith and Tucker were present and used their "command presence" to assist the two policemen and Harvey in removing Plaintiff. ¶ 48. Following this encounter, Plaintiff left the park and, fearing arrest, has not returned since. ¶¶49-51.

Section 1983 Analysis

"To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Cornish v. Correctional Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005). "[T]here can be no § 1983 liability unless the plaintiff has "suffered a constitutional violation ... at the hands of ... a state actor." *Doe ex rel.*

Magee v. Covington Cty. Sch. Dist., 675 F.3d 849, 867 (5th Cir. 2012) (en banc).

Plaintiff concedes that the three security guards are private citizens. "Private individuals generally are not considered to act under color of law," *Ballard v. Wall*, 413 F.3d 510, 518 (5th Cir. 2005), but "private action may be deemed state action when the defendant's conduct is 'fairly attributable to the State,'" *Priester v. Lowndes County*, 354 F.3d 414, 423 (5th Cir. 2004) (quoting *Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir. 1999)). To establish fair attribution,

> the plaintiff must show: (1) that the deprivation was caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state, or by a person for whom the state is responsible, and (2) that the party charged with the deprivation may fairly be said to be a state actor.

Moody v. Farrell, 868 F.3d 348, 352 (5th Cir. 2017) (citing *Daniel v. Ferguson*, 839 F.2d 1124, 1130 (5th Cir. 1988)).

The Supreme Court utilizes different tests for determining whether the conduct of a private actor can be "fairly attributable" to a state actor: (1) the public function test, (2) the nexus or state-action test, (3) the joint-action test, and (4) the state coercion or encouragement test.[1] *Cornish*, 402 F.3d at 549-550.

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[1] The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply

Regardless of which test is used, "[d]eciding whether a deprivation of a protected right is fairly attributable to the State 'begins by identifying the specific conduct of which the plaintiff complains.'" *Id.* at 550 (quoting *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 51, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999)).

a. Public function test

Under the public function test, a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state. While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the state." *Bass*, 180 F.3d at 241-42 (internal citations and quotation marks omitted). Thus, to satisfy the public function test, the function at issue must be both traditionally and exclusively governmental.

Applying the public function test to the conduct of Smith and Tucker, the court concludes that the Complaint lacks sufficient facts to assert a plausible claim that they engaged in any public function. Plaintiff's sole assertion about the conduct of Smith and Tucker is that they were present when a policeman ordered Plaintiff to leave or face arrest and they "assisted" the police by virtue of their "command presence." ¶ 48. The Complaint does not suggest that Smith or Tucker did anything more than merely observe the Plaintiff leaving the park after a policeman asked him to leave or face arrest. They were not present when the policeman spoke with Plaintiff.

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different ways of characterizing [this] necessarily fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

They are not alleged to have spoken with or touched Plaintiff. They are not alleged to have encouraged the police to eject Plaintiff from the park. Even if they had, encouraging the police to act does not confer state-actor authority to private parties. Private parties do not become state actors merely by calling upon law enforcement for assistance. *Daniel,* 839 F.2d at 1130. The "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982); *Manax v. McNamara*, 842 F.2d 808, 813 (5th Cir. 1988) ("Providing information to the state and pressing for more state action against an individual, without more, cannot suffice to make a private entity liable under section 1983 as a state actor"); *Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc.*, 673 F.2d 771, 772 (5th Cir. 1982) (where a police officer made his own decision to arrest, his reliance on a private party's information did not convert the private party into a state actor).

Next, the court will examine the conduct of Harvey. Plaintiff complains that Harvey was present during his initial encounter with a policeman. ¶¶ 28-30. He alleges that after the policeman ordered him to leave or face arrest, he decided to leave. ¶ 38. As he was leaving, he asked Harvey why he needed to leave when other people engaging in similar conduct were permitted to stay. ¶ 44. Harvey told Plaintiff that he did not have the approval of the venue to distribute his literature, and, as a result, he would have to leave. ¶¶ 45, 47.

These facts do not show that Harvey performed a function traditionally within the exclusive prerogative of state officials. In *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929, 204 L. Ed. 2d 405 (2019), the Supreme Court explained that "to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have *traditionally and exclusively* performed the function." 139 S. Ct. at 1929 (emphasis added). "Under the Court's cases, those functions include, for example, running elections and operating a company town." *Id.* (collecting cases). Here, Plaintiff cites no authority for the position that the security guards (or their employer) performed a traditional and exclusive function of the government.

Importantly, the Complaint does not allege that the security guards, or their employer, derived any power from the City to regulate speech in the public park. To the contrary, Plaintiff alleged that the Arena "does not have any written or official policy prohibiting, regulating or licensing the distribution of leaflets on its grounds." ¶ 19. The Arena does not have any formal application process for requesting permission to distribute leaflets (¶ 18), and the City employs a longstanding custom of allowing police officers and other officials "to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights" on the property. ¶ 20.

The management company's lack of power to regulate speech is important because the focus of the state actor inquiry is whether the source of the private actor's power comes from the state. "The Supreme

Court has explained that 'when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.'" *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460 (5th Cir. 2003) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966)). If the private actor derived no actual power from the state, such as the power to regulate speech, the private actor cannot be said to have rendered a public function.

The Complaint did not plausibly allege that the security guards were "endowed by the State with powers or functions governmental in nature." *Id.* Where, as here, the City retained the ultimate power to enforce its laws within the public park and to arrest people for violating those laws, private actors cannot be said to have public-function authority. "If a police officer can decline or agree to arrest the individuals whom the private actor has detained or arrested for protesting on the sidewalk, then the private actor does not have the ultimate public-function authority." *Solomon v. Las Vegas Metro. Police Dep't*, 441 F. Supp. 3d 1090, 1098 (D. Nev. 2020). Accordingly, the Complaint does not satisfy the public function test.

b. Nexus or state-action test

The nexus test "considers whether the State has inserted 'itself into a position of interdependence with the [private actor, such] that it was a joint participant in the enterprise.'" *Cornish*, 402 F.3d at 550 (alteration in original) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). "[T]he focus of the inquiry into

whether a private actor can be subjected to constitutional liability is whether 'such a close nexus between the State and the challenged action' exists 'that seemingly private behavior may be fairly treated as that of the State itself.'" *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 747-48 (5th Cir. 2001) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)). To satisfy the nexus test, the court must find that the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

There are simply no allegations in the Complaint asserting or implying that the government exerted coercive power or that it inserted itself into a position of "interdependence" with the security guards or their employer. There is nothing in the Complaint to indicate the existence of a "close nexus" between the challenged action of the security guards and the State. Accordingly, the Complaint does not satisfy the nexus test.

c. Joint action test

The joint action test asks whether private actors were "willful participant[s] in joint action with the State or its agents." *Cornish*, 402 F.3d at 549 (alteration in original) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980)). To satisfy this test, a plaintiff "must allege facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional

right, and that the private actor was a willing participant in joint activity with the state or its agents." *Pikaluk v. Horseshoe Ent., L.P.*, 810 F. App'x 243, 246-47 (5th Cir. 2020) (citing *Polacek v. Kemper County*, 739 F. Supp. 2d 948, 952 (S.D. Miss. 2010)). A meeting of the minds does not occur merely by calling upon law enforcement, even when the information furnished is used to effect an arrest. *Id. see also Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994) (internal citations omitted) (observing that, to prove a conspiracy, a plaintiff must provide evidence of "an agreement between the private and public defendants to commit an illegal act....").

Although the Complaint expressly alleges that the security guards acted as "willing participants" in "joint action" with the law enforcement officers, ¶¶ 8-10, these assertions, without more, are simply a "formulaic recitation of the elements of a cause of action" that will not satisfy the federal pleading standard and are insufficient to satisfy the joint action test. *Twombly*, 550 U.S. at 555. Plaintiff included no facts in his Complaint which would suggest that the security guards entered into an agreement or were acting at the direction of any government official. The Complaint does not allege that there was a meeting of the minds or a conspiracy to deprive Plaintiff of his constitutional rights. The Complaint does not allege that there was a plan, custom or policy that substituted the judgment of the security guards for that of the police or allowed the private security guards to exercise state power. Accordingly, the Complaint does not satisfy the joint-action test.

d. State coercion or encouragement test

Under the state coercion test, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Bass*, 180 F.3d at 242. This test is based on the degree of the state's influence over the private actor; thus, the test is broader in reach than the private function test. "Coercion" and "encouragement" refer to the "kinds of facts that can justify characterizing an ostensibly private action as private instead." *Brentwood*, 531 U.S. at 303. That is, did the private actor have a choice to refrain from engaging in the conduct?

In this case, Plaintiff has not claimed that he can satisfy the state coercion or encouragement test. The Complaint fails to allege facts to show that there was any coercion by any state actor. Accordingly, the Complaint does not satisfy the state coercion test.

Conclusion

For the above reasons, the security guards are entitled to dismissal because the Amended Complaint does not allege sufficient facts to plead an actionable § 1983 claim. Accordingly, it is recommended that the Motion to Dismiss (Doc. 28) be **granted** and that all claims against Tyshon Harvey, David Smith, and Eugene Tucker be dismissed with prejudice.

As this court stated in the prior ruling (Doc. 33), Plaintiff has once amended his complaint, he did not seek leave to amend a second time when faced with the challenges presented by the motion to dismiss, and his memorandum in opposition to the motion to

dismiss did not suggest that further amendment could cure the challenges. The court would have almost certainly granted leave to amend after the motion to dismiss was filed, but any request to amend after the court has invested time in making this report and recommendation will not be granted by the undersigned. Such post-recommendation requests to amend are heavily disfavored because they are considered sandbagging and result in serial motion practice and a great waste of the court's resources that could have easily been avoided.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. U.S.A.A.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 1st day of November, 2021.

[handwritten: signature]
Mark L. Hornsby
U.S. Magistrate Judge

Appendix F

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 21-cv-00460

RICHARD HERSHEY,

Plaintiff,

v.

CITY OF BOSSIER CITY, et al.,

Defendants.

Filed: Sept. 24, 2021

JUDGMENT

The Report and Recommendation of the Magistrate Judge [Doc. No. 33] having been considered, together with the written Objection [Doc. No. 37] thereto filed with this Court, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended therein is warranted,

IT IS ORDERED, ADJUDGED, and DECREED that the Defendants' Motion to Dismiss [Doc. No. 19] is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that all claims against the City of Bossier City, Bobby Gilbert, and Daniel Stoll are **DISMISSED WITH PREJUDICE.**

MONROE, LOUISIANA, this 24th day of September 2021.

[handwritten: signature]
Terry A. Doughty
United States District Judge

Appendix G

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 21-cv-00460

RICHARD HERSHEY,

Plaintiff,

v.

CITY OF BOSSIER CITY, et al.,

Defendants.

Filed: Aug. 23, 2021

REPORT AND RECOMMENDATION

Introduction

Richard Hershey ("Plaintiff") was distributing leaflets outside a public arena when a policeman ordered him to leave or be arrested and taken to jail. Plaintiff left. He later filed this civil rights action against the City of Bossier City, two law enforcement officers, and three security officers. He alleges that his eviction from the grounds violated his First Amendment rights. Before the court is a Motion to Dismiss (Doc. 19) filed by the City and the two law enforcement officers. The three security officers have filed a separate motion to dismiss (Doc. 28) that will be addressed later. For the reasons that follow, it is

recommended that the City Defendants' motion to dismiss be granted.

Rule 12(b)(6)

The City Defendants move for dismissal based on Fed. R. Civ. Pro. 12(b)(6). In assessing the motion, the court must accept as true all well-pleaded facts in the complaint and view those facts in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). Those facts must state a claim that rises above the speculative level and is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007); *Amacker v. Renaissance Asset Mgmt., LLC*, 657 F.3d 252, 254 (5th Cir. 2011). A complaint is not sufficient if it offers only "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 127 S.Ct. at 1965).

The Allegations

The relevant facts for purposes of assessing the motion to dismiss are found in Plaintiff's First Amended Complaint (Doc. 17). Plaintiff, a senior citizen from Missouri, is a vegetarian advocate whose ethical beliefs compel him to share his message with others. He is compensated by various nonprofit organizations for his advocacy and distribution of literature. First Amended Complaint, ¶¶ 4, 15-17.

A Christian rock concert known as Winter Jam was held on February 28, 2020 at a Bossier City arena that was then known as CenturyLink Center. ¶ 24. The facility has since been rebranded as Brookshire Grocery Arena. The court will refer to it as the Arena.

The Arena is situated in a public park, with no restriction on access to any of the sidewalks and streets through the park. ¶ 21. The Arena does not have any written or official policy regarding the distribution of leaflets on its grounds, and it does not have any formal application process to request permission to distribute leaflets. ¶¶ 18-19. Instead, the City has a longstanding custom of allowing police officers or officials of the Arena to use unfettered discretion to remove persons who are peacefully exercising their First Amendment rights. ¶ 20.

Plaintiff was on a public sidewalk on the grounds of the Arena and distributing free religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association. ¶¶ 14-15. His activity was entirely peaceable and non-aggressive, and he did not create a disturbance or interfere with pedestrian or vehicular traffic. ¶¶ 22-23. Also, out of concern for safety, he did not distribute his booklets on the staircases of the Arena or in the parking lots. ¶ 26. At least one other person, not associated with Plaintiff, was distributing commercial advertisement cards for an internet radio station. ¶ 27.

Plaintiff was approached by Deputy City Marshal Bobby Gilbert and Bossier City Police Officer Daniel Stoll, along with three Arena security officers. ¶ 28. Gilbert waved a pair of handcuffs at Plaintiff, and Stoll told Plaintiff that he had been told to leave the public park. Plaintiff replied that no one had told him to leave. Gilbert responded that he had bracelets for Plaintiff and would put them on Plaintiff and take him to jail. ¶¶ 31-34.

Plaintiff attempted to explain that he had a legal right to pass out his literature, but Gilbert cut him off and told him that he was on private property and had to leave or be arrested. Plaintiff believed that this order was unlawful but, fearing arrest, he agreed to leave. Gilbert, after first blocking Plaintiff's egress, allowed Plaintiff to leave and told him that he would go to jail if he returned. ¶¶ 35-43.

As Plaintiff was leaving, he asked about the radio station cards that were being distributed. Defendant Harvey, one of the Arena security officers, said that Plaintiff's literature had not been approved by the Arena, and he had to submit his literature in advance for approval. Harvey said he did not know if the radio station literature had been approved, but Plaintiff's literature was not approved, so he had to leave. Plaintiff left the grounds, while the radio station leafleteer continued to hand out her commercial literature without interference from officials. There were no alternative avenues available to Plaintiff to hand out his literature to concert attendees. Plaintiff, fearing arrest, has not returned to the Arena. ¶¶ 44-51.

Forum Analysis

"There is no doubt that as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment." *U.S. v. Grace*, 103 S.Ct. 1702, 1706 (1983). The government's ability to limit such speech activities depends in part on a forum analysis. "There are two broad categories of forums: (1) traditional and designated public forums and (2) limited public forums and nonpublic forums." *Freedom from Religion*

Foundation v. Abbott, 955 F.3d 417, 426 (5th Cir. 2020).

Plaintiff alleged in his complaint (¶¶ 52 & 53) that the sidewalks and grassy areas outside the Arena are a traditional public forum or, in the alternative, a designated public forum. If Plaintiff is correct, regulations on speech in those areas are subject to strict scrutiny review. They must be narrowly tailored to serve a compelling state interest. *Freedom from Religion*, 955 F.3d at 426, citing *Fairchild v. Liberty ISD*, 597 F.3d 747, 758 (5th Cir. 2010). The government has more leeway to restrict speech in a limited public forum or nonpublic forum. *Id.*

The City Defendants argue that Plaintiff has not alleged sufficient facts to set forth a plausible claim that the areas at issue could be a traditional public forum or designated public forum. They argue that, because Plaintiff does not rely on any other forum theory, the claims against them must be dismissed. The court will review the forum analysis rules and then compare them to the allegations in the complaint.

Traditional public forums are places that by long tradition or by government fiat have been devoted to assembly or debate. *Chiu v. Plano ISD*, 260 F.3d 330, 344 (5th Cir. 2001). Public places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Grace*, 103 S.Ct. at 1707.

In addition to traditional public forums, "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by

certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S.Ct. 3439, 3449 (1985). "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S.Ct. 948, 955 (1983). Examples of designated forums include university meeting facilities, a schoolboard meeting, and a municipal theater. *Id.*

Plaintiff made the following allegations regarding the setting of his activity:

> 21. The CenturyLink Center is situated in a public park encompassed by the boundary streets of Arthur Ray Teague Parkway, Angelle Drive, CenturyLink Center Drive, and Reeves Marine Drive which are connected to the public streets and sidewalks through the park leading to the CenturyLink Center. There is no gate or restriction on access to any of the public sidewalks and streets through the park to the CenturyLink Center.
>
> *****
>
> 25. Within the park surrounding the Center, the sidewalks, including the sidewalk where Hershey was distributing his literature, streets, staircases, grassy areas, and parking lots were all open to the public.

> 26. Because of potential safety concerns, Hershey did not distribute his booklets on the staircases or in the parking lots.
>
> *****
>
> 52. The sidewalks traversing the CenturyLink park grounds and the grassy areas constitute a traditional public forum for the exercise of First Amendment rights.
>
> 53. In the alternative, the sidewalks traversing the CenturyLink Center park grounds and the grassy areas constitute a designated public forum for the exercise of First Amendment rights.
>
> 54. Hershey had a right protected by the First Amendment to the United States Constitution to distribute literature on the sidewalks on the outdoor grounds of CenturyLink Center.

Plaintiff attached email correspondence as an exhibit to his amended complaint. Doc. 25. The exhibit is a part of the complaint for all purposes, Fed. R. Civ. Pro. 10(c), so it may be considered part of the complaint for purposes of a Rule 12(b)(6) motion. *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 375 (5th Cir. 2004). The exhibit includes an email from the general manager of the Arena, who explained that the Arena was owned by Bossier City and managed by a private management company. The Arena, both inside and outside, can be leased by organizations to host events. The manager wrote, "If the public would like to engage in a peaceful protests (sic) or distribution of pamphlets, they are free to do

so as long as it does not interfere with the safe ingress or egress of guests."

Defendants argue that the complaint lacks sufficient factual detail to make the case that the forum at issue is a traditional or designated public forum. Only the sidewalks outside the arena are at issue, and Plaintiff has alleged that they are part of a public park. The Supreme Court said in *Grace* that sidewalks and parks are considered, without more, to be public forums. *Grace*, 103 S.Ct. at 1707. But some sidewalks and similar areas have, in particular cases, been held to not be part of a public forum. *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990) (sidewalk that led only from parking area to front door of post office was not a traditional public forum sidewalk).

Defendants cite decisions in which certain areas outside public arenas were held to be either nonpublic or limited forums. *See, e.g.*, *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 736 (8th Cir. 2017) (plaza area outside Pinnacle Bank Arena was nonpublic forum); *Pomicter v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 537 (3d Cir. 2019) (concourse outside Mohegan Sun Arena was nonpublic forum); *Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2d Cir. 1986) (Kennedy Stadium was either nonpublic or limited forum). None of those decisions, however, were made in a Rule 12(b)(6) setting. *Ball* was decided on summary judgment, and *Pomicter* was decided after a bench trial. The appellate court in *Pomicter* noted that the nature of the forum is a "highly fact-specific" issue. *Calash* was decided after a hearing on a motion for preliminary injunction, and it involved the entire

stadium rather than an outdoor area such as a sidewalk.

Defendants also point to *Hershey v. Multi-Purpose Civic Center Facility Board for Pulaski County*, 2020 WL 4741900 (E.D. Ark. 2020). The court there held that sidewalks adjacent to an arena where this plaintiff sought to leaflet were a limited public forum during arena events. But that decision was made based on a motion for summary judgment, and the record included photographs and detailed information about the layout and features of the property. This motion must be decided solely on the allegations in the complaint and its exhibits.

In Plaintiff's favor is *Brister v. Faulkner*, 214 F.3d 675 (5th Cir. 2000), which recognized an area outside a sports arena as a traditional public forum. *Brister* affirmed a decision, made after a trial, that a gravel area between the sidewalk and the entrance of the University of Texas' Erwin Center was a traditional public forum. The plaintiff in that case was also distributing leaflets and was told by a police officer that he was in violation of policy.

Plaintiff's mere legal conclusions that the sidewalks are a traditional or designated public forum would not suffice. But Plaintiff has also alleged facts regarding the surrounding area and the nature of its use. Those additional facts give rise to at least a plausible basis for a claim that the sidewalks in a park area could be a traditional or designated public forum, such as in *Grace* and *Brister*. Plaintiff needs to allege a plausible case, but he need not allege every specific fact needed to prevail on the merits. For example, a plaintiff in an employment discrimination suit does

not have to allege specific facts establishing each element of a prima facie case of discrimination. *Swierkiewicz v. Sorema N.A.*, 122 S.Ct. 992 (2002). Defendants might be able to present evidence, either on a motion for summary judgment or at a trial, that would undermine the allegations in the complaint or provide additional information that would defeat Plaintiff's claims on this issue. But Plaintiff has alleged sufficient facts to withstand Rule 12(b)(6) review on the forum challenge.

Reasonable Regulation; Viewpoint Discrimination

The government is strictly limited in its ability to regulate private speech in a traditional public forum such as a park or sidewalk. Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny. That is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited. *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1132 (2009).

Defendants argue that Plaintiff has not alleged facts to establish that he was subjected to an unreasonable regulation on speech. Their argument refers to decisions that have approved certain restrictions on leafleting activity outside arenas. In this case, however, there is no allegation that Bossier City had any particular regulation or restriction in place. To the contrary, Plaintiff alleged that the Arena "does not have any written or official policy prohibiting, regulating or licensing the distribution of leaflets on its grounds." ¶ 19. It does not have any

formal application process for requesting permission to distribute leaflets (¶ 18), and the City employs a longstanding custom of allowing police officers and other officials "to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights" on the property. ¶ 20. One of the security officers present when Plaintiff was ordered to leave the property allegedly referred to a policy that required prior approval of literature before it could be distributed on the property. But the general manager of the Arena later wrote that a member of the public is free to distribute pamphlets so long as they do not interfere with the safe ingress or egress of guests.

Plaintiff alleges that the City requires prior approval of literature passed out near the Arena. When a regulation requires prior approval but contains no limit on the scope of discretion of the decisionmaker, the regulation is subject to being struck down for vesting unbridled discretion in a government official to engage in content or viewpoint censorship. *Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2144 (1988). *See also Freedom from Religion Foundation*, 955 F.3d at 427-28 (discussing the unbridled discretion doctrine and noting that circuit courts have applied in even in limited and nonpublic forums). There are other characteristics of approval-policies that must also be examined to determine whether they satisfy the First Amendment. No other facts are known about this alleged policy, so it cannot be analyzed for reasonableness at this stage of the case.

Plaintiff has also alleged that the City allows officers on the grounds of the Arena to use unfettered discretion, which could lead to viewpoint discrimination. The facts alleged allow a reasonable inference the officer who removed Plaintiff engaged in viewpoint discrimination. Plaintiff alleged that there were two persons passing out leaflets, the officer was aware of both of them, and he ordered Plaintiff to leave while taking no action with respect to the other person. These allegations allow a reasonable inference that the officer engaged in viewpoint discrimination based on the nature of Plaintiff's literature, compared to the radio station promotion passed out by the other person. A policy that permits "communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship," and "[t]his danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood*, 108 S.Ct. at 2147.

There is a lack of clarity regarding any applicable prior-approval policy or regulation at the Arena, but there is an allegation that any regulation that exists allows unbridled discretion of the approving official. The facts allow a reasonable inference that the police officer on the scene engaged in viewpoint discrimination. Given these considerations, Defendants have not demonstrated that they are entitled to dismiss Plaintiff's complaint for lack of satisfaction of this element of his claim.

Qualified Immunity; Gilbert & Stoll

Deputy Marshal Gilbert and Police Officer Stoll argue that they are entitled to qualified immunity

from the damages claims against them. Qualified immunity provides government officials performing discretionary functions with a shield against civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987). The plaintiff must show that the officer's alleged conduct violated a federal right and that the right in question was clearly established at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his conduct. The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate a law clearly established at the time. *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019).

"Once a defendant properly invokes the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the doctrine's protection." *Howell v. Town of Ball*, 827 F.3d 515, 525 (5th Cir. 2016). "A plaintiff does not overcome the qualified immunity defense by alleging the violation of a right that is only defined 'at a high level of generality.'" *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014), quoting *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011). "Instead, there must exist a clearly established 'particular right' such that the official had 'fair notice' of that right and its concomitant legal obligations." *Morgan*, 755 F.3d at 760. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.*

To say that an officer's conduct was proscribed by clearly established law at the time of the incident, the

court "must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Shumpert v. City of Tupelo*, 905 F.3d 310, 320 (5th Cir. 2018), quoting *Morgan v. Swanson*, 659 F.3d 359, 371-372 (5th Cir. 2011) (en banc). In determining what constitutes clearly established law, the Fifth Circuit looks to Supreme Court precedent and then to its own precedent. *Shumpert*, 905 F.3d at 320. If there is no directly controlling authority, the court may rely on decisions from other circuits to the extent that they constitute a robust consensus of cases of persuasive authority. *Id.* "For conduct to be objectively unreasonable in light of clearly established law, there need not be a case directly on point, but 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Tucker v. City of Shreveport*, 998 F.3d 165, 173-74 (5th Cir. 2021), quoting *White v. Pauly*, 137 S.Ct. 548, 551 (2017).

Officers Gilbert and Stoll challenged Plaintiff to point to authority that clearly established his right, as of February 28, 2020, to hand out leaflets on the sidewalks outside the Arena during an event. Plaintiff responded that leafleting on matters of public concern is protected by the First Amendment. That general principle may be true, and "peaceful pamphleteering "is not fundamentally different from the function of a newspaper.'" *City of Lakewood*, 108 S.Ct. at 2146. But protected speech in a public forum may still be subject to reasonable time, place, and manner regulations as long as the restrictions are content-neutral, narrowly tailored to serve a significant government interest,

and leave open ample alternative channels of communication. *Grace*, 103 S.Ct. at 1707.

Plaintiff 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. The discussions above demonstrate that there are many nuances to First Amendment claims of this nature, beginning with questions about the category of the forum and continuing through the reasonableness of various regulations or restrictions. Very little about this field of law is clearly established.

The lack of clarity and its relationship to qualified immunity is demonstrated by the *Morgan v. Swanson* en banc decision. The Court afforded qualified immunity to a principal who interfered with a third-grader's attempt to distribute religious gifts at a school winter party. Immunity was appropriate because the relevant First Amendment law was too complex for the principal to have known how to handle the situation. Immunity was warranted "because the general state of the law in this area is abstruse, complicated, and subject to great debate among jurists." *Id.*, 659 F.3d 359.

The third-grader's parent later argued that his own rights were violated when he was not allowed to distribute religious material to consenting adults in the classroom. The plaintiff-parent argued that his right to distribute religious materials was clearly established because, regardless of forum, viewpoint discrimination was unconstitutional. The Fifth Circuit accepted that the assertion was generally true, but it again afforded the principal qualified immunity. The

Court noted that it had already rejected the viewpoint discrimination principle as "far too general" to have clearly established the law for the particular setting, and the plaintiff's counsel could not name a single case that clearly established his right to distribute the gifts at school. *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014).

The *Morgan* decisions demonstrate the difficult burden on a First Amendment plaintiff to point to clearly established law, in an area of the law that is often unsettled or highly fact-specific, that recognizes a right in a particular setting and context. Plaintiff relies solely upon general statements of law concerning the First Amendment. He has not pointed to any controlling authority or other clearly established law that would have made clear to Gilbert and Stoll, beyond debate, that their prohibition of distributing leaflets on the sidewalks outside the Arena during a concert event was unconstitutional. Both officers are entitled to dismissal based on qualified immunity.

***Monell* Liability of Bossier City**

A. Introduction

A municipality is not entitled to qualified immunity based on the good faith of its officers. *Owen v. City of Independence*, 100 S.Ct. 1398, 1409 (1980). It is also not subject to Section 1983 liability based on respondeat superior. "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury

that the government as an entity is responsible under § 1983." *Monell v. Department of Social Services*, 98 S.Ct. 2018, 2037-38 (1978).

Plaintiff argues that he has alleged adequate claims of municipal liability based on the City's failure to train its officers and based on a municipal policy or custom that caused the violation of his rights. Before addressing Plaintiff's theories of municipal liability, it is worth noting that the granting of qualified immunity to the City's employees does not necessarily preclude the City being held liable. If the Section 1983 claims against the police officers were dismissed based on the lack of an allegation of a constitutional violation, that would defeat the claims against the City. *Romero v. City of Grapevine*, 888 F.3d 170, 178-79 (5th Cir. 2018). But here it is recommended that the claims against the officers be dismissed based on qualified immunity due to the lack of clearly established law. In these circumstances, the City may still be liable despite the dismissal of the claims against the officers. *See Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 271 (5th Cir. 2019) (turning to *Monell* claim against school district even though claims against individual employees were dismissed due to lack of clearly established law); *Howell v. Town of Ball*, 827 F.3d 515 (5th Cir. 2016) (assessing *Monell* claim against the town after dismissing claims against individual employees due to lack of clearly established law); and *Brown v. Lyford*, 243 F.3d 185, 191 n. 18 (5th Cir. 2001) (explaining that a municipality may be liable if a plaintiff states a claim against an official but the official is protected by qualified immunity).

B. Failure to Train

The City argues that Plaintiff has not pleaded any plausible claim of municipal liability. Plaintiff's first response is that he has alleged a claim based on the City's failure to train its officers with regard to First Amendment rights at the Arena. Plaintiff alleged in his amended complaint that the City failed to provide adequate training for its law enforcement officers "by failing to train them that the Bossier City Arena and the park surrounding it are public property and, therefore, the citizens using that property are entitled (to) their constitutional rights guaranteed by the First Amendment." ¶ 67. Plaintiff alleged that this lack of training led Deputy Gilbert and the other individual defendants to believe that the Arena and park surrounding it are private property that allowed them to order citizens off of the property with no regard to their First Amendment rights. ¶ 68. Plaintiff also accused the City of failing to train its officers how to take into account the First Amendment rights of citizens on the Arena property by enforcing only reasonable time, place, and manner restrictions rather than blanket denials of access to the property. ¶ 69. This lack of training is alleged to be the moving force behind the removal of Plaintiff from the property. ¶ 70.

A city policy "can take the form of a failure to train, provided that the failure is 'closely related to the ultimate injury' and not just attributable to a particular officer's shortcomings." *Garza v. City of Donna*, 922 F.3d 626, 637 (5th Cir.), *cert. denied*, 140 S. Ct. 651 (2019), quoting *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). In addressing a city's potential

liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. *Shumpert*, 905 F.3d at 317.

A plaintiff must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy. *Shumpert*, 905 F.3d at 317. "The deficiency in training must be the actual cause of the constitutional violation." *Id.*

Plaintiff does not focus on any particular inadequacy of the City's training of its police officers and deputy city marshals. Rather, Plaintiff makes general allegations of failure to train. He points to the incident in which he was involved and concludes, in his memorandum, that "[a]pparently" the officers received no training or improper training. Doc. 26, pg. 17. No particular facts about the City's training program are alleged. It is not sufficient, when attempting to plead a claim of municipal liability based on failure to train, to point to a particular officer's alleged shortcomings in a single incident and assume that it must be the result of improper training. That does not allege a plausible claim that a deficiency in training, as opposed to the mistake or misbehavior of the police officer, was the actual cause of any constitutional violation.

Plaintiff's complaint also lacks an allegation that the City was "deliberately indifferent" in adopting its training policy. Plaintiff does argue in his memorandum that the alleged poor training could amount to deliberate indifference. He does not take

the typical route of arguing that deliberate indifference can be inferred from a pattern of constitutional violations. Instead, he again argues that the single incident that happened to him is enough to make the inference.

The single-incident inference "is possible only in very narrow circumstances" because the Fifth Circuit has "generally reserved the single-incident method ... for cases in which the policymaker provides no training whatsoever with respect to the relevant constitutional duty, as opposed to training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury." *Garza*, 922 F.3d at 638, quoting *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 625 & n.5 (5th Cir. 2018). "To base deliberate indifference on a single incident, 'it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy.'" *Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018) (en banc), quoting *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998).

Plaintiff does not allege that there was no training whatsoever with respect to persons passing out leaflets at the Arena or similar public areas. He alleges that the City did not provide "adequate" training. Amended Complaint, ¶ 67. His allegations are not sufficient to plead a plausible element of deliberate indifference based on the single incident exception or otherwise. If the allegations in this case were enough, it would risk permitting the single-incident exception to "swallow the rule that forbids mere respondeat superior liability." *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005). *See also*

Alvarez, 904 F.3d at 390 ("The causal link 'moving force' requirement and the degree of culpability 'deliberate indifference' requirement must not be diluted, for 'where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'").

C. Policy or Custom

1. Plaintiff's Burden

Plaintiff also argues that the City can be liable based on a policy or custom that caused a constitutional violation. To plead such a claim of municipal liability under Section 1983, a plaintiff must allege that (1) an official policy (2) promulgated by the municipal policy maker (3) was the moving force behind the violation of a constitutional right. *Hicks-Fields v. Harris City*, 860 F.3d 803, 808 (5th Cir. 2017). The "official policy" prong includes the decisions of a government's law makers, the acts of its policy-making officials, and practices so persistent and widespread as to practically have the force of law. *Pena v. City of Rio Grande City*, 879 F.3d 613, 621-22 (5th Cir. 2018).

To proceed beyond the pleadings stage, a complaint's "description of a policy or custom in its relationship to the underlying constitutional violation … cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir. 1997). The *Twombly* standard discussed above "applies to municipal liability claims," so to survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Ratliff v. Aransas County, 948 F.3d 281, 284-85 (5th Cir. 2020).

2. Plaintiff's Allegations

Plaintiff alleged that the Arena does not have any written or official policy regarding the distribution of leaflets (¶ 19), and the letter from the general manager states that the Arena allows persons to distribute pamphlets so long as they do not interfere with the safe ingress or egress of guests. Plaintiff then alleged that the City has "a long-standing custom of allowing police officers, employees and/or officials of [the Arena] to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights from the [Arena] property." ¶ 20. Plaintiff also offered the following allegations relevant to these issues:

> 55. At all relevant times, Defendant the City did not have any official or unofficial viewpoint neutral policy regulating speech activities protected by the First Amendment to the United States Constitution and restricting access to the CenturyLink Center public sidewalks in the park in which the CenturyLink Center is located.
>
> 56. Defendant City's custom or policy of requiring prior approval of a leaflet prior restraint on speech and, therefore, bears a "heavy presumption of unconstitutionality." *Chiu v. Plano Independent School Dist.*, 339 F.3d 273, 280-81 (5th Cir. 2003).

57. Defendant City's custom or policy of requiring prior approval of a leaflet before the leafleteer is allowed to distribute it on the CenturyLink property is facially unconstitutional because it is over-broad in that it does not provide for "specified brief period" of time within which the CenturyLink Center official shall approve or deny the request to distribute the leaflet on the CenturyLink Center property, and because it does not provide for expeditious judicial review, and that it does not provide that the censor bear the burden of going to court to suppress the speech. *Freedman v. State of Md.*, 380 U.S. 51, 58-59 (1965).

58. Defendant City's failure to have a policy, or by acquiescence in the arbitrary and capricious denial of citizens' First Amendment rights by the CenturyLink Center officials, or by failing to train its police officers, employees and officials that the Bossier City Arena, aka CenturyLink Center, is public property and a traditional public forum, has created an unconstitutional custom by the City of Bossier City, Louisiana. That unconstitutional custom or policy was the moving force behind the security officers of CenturyLink Center, police officers of the City, and Deputy Marshal of the City's, interference with Hershey's exercise of his First Amendment rights on the CenturyLink Center outdoor grounds.

> 59. Defendant City's policy or custom as applied to Hershey is unlawful in at least the following ways:
>
> a. It restricts more speech than necessary to achieve a significant government interest.
>
> b. It restricts more speech than necessary to achieve a reasonable government interest.
>
> c. It allows arbitrary and capricious enforcement.
>
> d. It is based on content and viewpoint discrimination.
>
> e. It utilizes prior restraint.
>
> f. It preferentially allows commercial speech while prohibiting noncommercial speech.
>
> g. It is not narrowly tailored to achieve a compelling, significant or legitimate government interest.
>
> h. It provides no alternate channels for speech.

Plaintiff appears to be asserting claims in the alternative, which is allowed by Fed. R. Civ. Pro. 8(d)(2). He alleges on one hand that (1) the city has a policy of requiring prior approval of a leaflet, which he bases on the statement of an Arena security officer. On the other hand, he appears to take the Arena's general manager at her word that the public is allowed to distribute pamphlets, but he contends that the City has (2) a longstanding custom of allowing police

officers and employees to use their unfettered discretion to remove persons from the property.

3. Prior Approval Policy

With respect to the alleged City policy of requiring prior approval of a leaflet, Plaintiff bases it only on the words of a security officer. He does not point to any alleged ordinance, regulation, or written policy enacted by the City. That leaves only the potential for an unwritten custom. "A city cannot be liable for an unwritten custom unless '[a]ctual or constructive knowledge of such custom' is attributable to a city policymaker." *Pena*, 879 F.3d at 623, quoting *Hicks-Fields*, 860 F.3d at 808. The complaint in *Pena* "invite[d] no more than speculation that any particular policymaker, be it the chief of police or the city commission, knew about the alleged custom." *Pena*, 879 F.3d at 623. Thus, her allegation failed the second prong, which requires an allegation that the policy was promulgated by the municipal policymaker. Plaintiff's allegations are lacking in this same regard, so dismissal of this theory of municipal liability is warranted.

4. Custom of Unfettered Discretion

Plaintiff next contends that he has pleaded a claim that the City has a longstanding custom of allowing police officers to use unfettered discretion to remove persons from the Arena property. Once again, the complaint lacks any allegation that the City or any particular policymaker, whether it be the mayor, city council, or some other official, had actual or constructive knowledge of the alleged custom. Specific facts are necessary to plead a claim that goes beyond alleging the wrongdoing of an officer and asserts a

viable claim of a widespread custom known to city officials that could result in municipal liability. Otherwise, the doctrine of respondeat superior has crept in where it is not allowed.

The allegation of a custom itself is also lacking in supporting allegations. The Fifth Circuit set forth the rules for such customs in *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc) and required: "A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Plaintiff's complaint describes only one incident where an officer allegedly exercised discretion to remove some who was handing out leaflets. "Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n. 3 (5th Cir. 1984). Thus, "[a] customary municipal policy cannot ordinarily be inferred from single constitutional violations." *Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir. 2001), citing *Webster*, 735 F.3d at 851. The facts offered in the complaint are not adequate to plead a plausible claim of an actionable municipal custom.

Conclusion

Plaintiff has alleged sufficient facts to overcome the forum and viewpoint discrimination challenges. But the city police officers are entitled to dismissal based on qualified immunity because Plaintiff has not made an adequate showing of clearly established law in the context of this case. The City of Bossier City is

entitled to dismissal because the amended complaint does not allege sufficient facts to plead an actionable *Monell* claim of municipal liability.

Plaintiff has once amended his complaint, he did not seek leave to amend a second time when faced with the challenges presented by the motion to dismiss, and his memorandum in opposition to the motion to dismiss did not suggest that further amendment could cure the challenges. The court would have almost certainly granted leave to amend after the motion to dismiss was filed, but any request to amend after the court has invested time in making this report and recommendation will not be granted by the undersigned. Such post-recommendation requests to amend are heavily disfavored because they are considered sandbagging and result in serial motion practice and a great waste of the court's resources that could have easily been avoided.

Accordingly, it is recommended that the Motion to Dismiss (Doc. 19) be granted and that all claims against the City of Bossier City, Bobby Gilbert, and Daniel Stoll be dismissed with prejudice.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a

courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. U.S.A.A.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 23rd day of August, 2021.

[handwritten: signature]
Mark L. Hornsby
U.S. Magistrate Judge

Appendix H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

No. 21-cv-00460

RICHARD HERSHEY,

Plaintiff,

v.

CITY OF BOSSIER CITY, et al.,

Defendants.

Filed: May 20, 2021

FIRST AMENDED COMPLAINT

Preliminary Statement

1. This is a civil rights action in which Plaintiff Richard Hershey seeks relief for violation of his rights secured by the Civil Rights Act of 1871, 42 U.S.C. § 1983 and by the United States Constitution, including its First and Fourteenth Amendments. Plaintiff seeks compensatory damages, declaratory judgment and injunctive relief, an award of costs and attorney's fees under 42 U.S.C. §1988, and such other and further relief as this court deems equitable and just.

Jurisdiction

2. This action is brought pursuant to the Constitution of the United States, including its First and Fourteenth Amendments and pursuant to 42 U.S.C. § 1983. Jurisdiction is conferred upon this Court by 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and 1343(a)(3) and (4), this being an action seeking redress for the violation of Plaintiff's Constitutional Rights.

Venue

3. Venue is proper for the United States District Court, Western District of Louisiana, Shreveport Division, pursuant to 28 U.S.C. § 1391 (a), (b), and (c).

Parties

4. Plaintiff Richard Hershey (hereinafter "Hershey") is a senior citizen and resident of the United States, and at all times relevant herein was a resident of the State of Missouri.

5. Defendant City of Bossier City, Louisiana, (hereinafter "City"), is a municipality which owns and operates a public facility known as the Bossier City Arena, which at all times relevant herein was known as the CenturyLink Center.

6. Defendant Deputy Marshal Bobby Gilbert (hereinafter "Gilbert"), badge number 3913, was at all times relevant herein acting under color of Louisiana state law as a deputy marshal of the City of Bossier City, Louisiana. Defendant Gilbert is named herein in his individual capacity.

7. Defendant Daniel Stoll, badge number 4085, was at all times relevant herein acting under color of Louisiana state law as a police officer of the City of

Bossier City, Louisiana. Defendant Stoll is named in his individual capacity.

8. Defendant David Smith was at all times relevant herein acting under color of Louisiana state law as a security officer of the CenturyLink Center and at all times relevant herein was a willing participant in joint action with state actors. David Smith is named in his individual capacity.

9. Defendant Tyshon Harvey was at all times relevant herein acting under color of Louisiana state law as a security officer of the CenturyLink Center and at all times relevant herein was a willing participant in joint action with state actors. Tyshon Harvey is named in his individual capacity.

10. Defendant Eugene Tucker was at all times relevant herein acting under color of Louisiana state law as a security officer of the CenturyLink Center and at all times relevant herein was a willing participant in joint action with state actors. Eugene Tucker is named in his individual capacity.

11. At all times relevant herein, all Defendants were acting in concert and should, therefore, be held liable individually, jointly, and in solido.

12. Plaintiff, through his counsel, used due diligence in order to positively identify Daniel Stoll, named in the original Complaint as John Doe I, Badge number 4085, named herein, by calling the Bossier City Police Department, the Bossier City Marshal's Office and the Bossier Parish Sheriff's Office requesting the identity of Doe I, Badge number 4085, but was advised, perhaps mistakenly, by each of those law enforcement agencies that they had no such badge

number in use on the date in question in this Complaint.

13. Plaintiff, through his counsel, used due diligence in order to positively identify all of the Defendants who were named as John Doe Defendants in the original Complaint and who are now specifically named herein by requesting, pursuant to a Freedom of Information Act request to the Bossier City Arena, previously known as the CenturyLink Center, for a copy of the incident report pertaining to Plaintiff's removal from the property, but was told that the Freedom of Information Act does not apply to ASM Global, the management company hired to manage the Bossier City Arena, and that the report would not be provided. [Exhibit 1, attached hereto]

Applicable Facts

14. On the afternoon of February 28, 2020, Plaintiff Hershey was on the public sidewalk on the grounds of CenturyLink Center.

15. At all times relevant herein, Hershey was distributing free, educational, noncommercial, religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association.

16. Hershey is a vegetarian advocate whose ethical beliefs compel him to share his message with others.

17. Hershey is compensated by various nonprofit organizations for his advocacy and distribution of literature.

18. CenturyLink Center does not have any formal application process for requesting permission to distribute leaflets.

19. CenturyLink Center does not have any written or official policy prohibiting, regulating or licensing the distribution of leaflets on its grounds.

20. Defendant the City has a long-standing custom of allowing police officers, employees and/or officials of CenturyLink Center to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights from the CenturyLink property.

21. The CenturyLink Center is situated in a public park encompassed by the boundary streets of Arthur Ray Teague Parkway, Angelle Drive, CenturyLink Center Drive, and Reeves Marine Drive which are connected to the public streets and sidewalks through the park leading to the CenturyLink Center. There is no gate or restriction on access to any of the public sidewalks and streets through the park to the CenturyLink Center.

22. Hershey's leafleting activity was entirely peaceable and non-aggressive in all respects and was designed only to share information concerning vegetarian issues with those who were interested in receiving the information.

23. At no time relevant herein did Hershey ever create a disturbance or interference with pedestrian or vehicular traffic or violate any other law.

24. On February 28, 2020, there was a Christian rock concert known as Winter Jam being held at CenturyLink Center.

25. Within the park surrounding the Center, the sidewalks, including the sidewalk where Hershey was

distributing his literature, streets, staircases, grassy areas, and parking lots were all open to the public.

26. Because of potential safety concerns, Hershey did not distribute his booklets on the staircases or in the parking lots.

27. At least one other person, who was not associated with Hershey, was distributing commercial advertisement cards for an internet radio station, Power 927 FM, and Hershey accepted a card from that leafleteer on the sidewalk on outdoor grounds of CenturyLink Center.

28. After Hershey had begun to distribute booklets, Hershey was approached by Defendants Gilbert, acting under color of Louisiana law as a Deputy City Marshal of Bossier City; Officer Daniel Stoll, acting under of color of Louisiana law as police officer of Bossier City; David Smith, acting under of color of Louisiana law as a security officer of the CenturyLink Center and at all times relevant herein was a willing participant in joint action with state actors; Tyshon Harvey, acting under color of Louisiana law as a security officer for CenturyLink Center and as a willing participant in joint action with state actors; Eugene Tucker, acting under color of Louisiana law as a security officer for CenturyLink Center and as a willing participant in joint action with state actors.

29. Gilbert approached Hershey from the rear and made unwanted physical contact with Hershey by placing his hand on Hershey while Hershey was distributing his literature outdoors on the grounds of the CenturyLink Center.

30. Hershey turned around to see defendants Gilbert, Stoll, and Harvey standing there, and Hershey objected to Gilbert's unwanted physical contact.

31. Gilbert waved a pair of handcuffs at Hershey.

32. Stoll told Hershey that he had been told to leave the public park.

33. Hershey replied that nobody had told him to leave.

34. Gilbert told Hershey that he had bracelets for Hershey, that he would put the bracelets on him, and that he would take him to jail.

35. Hershey attempted to explain that he had a legal right to hand out his literature, but Gilbert cut him off and would not allow him to explain.

36. Gilbert told Hershey that he was on private property, that he had to leave, that he would be arrested if he did not leave, and that he could not return.

37. Gilbert stated to Hershey as reason for stopping his leafleting to the attendees being that people were there to have a good time.

38. Although Hershey believed the order to be unlawful, fearing arrest, he agreed to leave.

39. Hershey attempted to leave, but Gilbert was blocking his egress.

40. Defendants Smith and Tucker arrived shortly thereafter.

41. Gilbert asked Hershey why he wasn't leaving, and Hershey replied that Gilbert was blocking his egress.

42. Gilbert then allowed Hershey to leave.

43. Gilbert informed Hershey that if he returned, he would go to jail.

44. As Hershey was leaving, he inquired about the commercial literature distribution, and Hershey showed the card from the radio station Power 927 FM to Defendants Gilbert, Stoll, Harvey, Smith, and Tucker.

45. Defendant Harvey replied that Hershey's literature had not been approved by CenturyLink Center, and that Hershey had to submit his literature in advance for approval.

46. Hershey asked again why they were allowing the commercial literature distribution.

47. Harvey replied that because he didn't know if the other literature had been approved, but that Hershey's literature was not approved so he had to leave.

48. Smith and Tucker were present during Hershey's ejectment from the park surrounding CenturyLink Center, and, acting jointly with the other Defendants, used their command presence to assist in the removal of Hershey from the park by Defendant Deputy Marshal Gilbert, Officer Stoll, and Harvey.

49. Hershey left the grounds of the park outside of CenturyLink Center without handing out any more of his literature while the other leafleteer continued to hand out her commercial literature without interference from Bossier City officials.

50. There were no alternate avenues available to Hershey for handing out his literature to the concert attendees.

51. Fearing arrest and jailing, Hershey has not returned to the CenturyLink grounds to distribute his literature or for any other reason.

Count I

DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF PUSUANT TO 42 U.S.C. SECTION 1983 AND FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

52. The sidewalks traversing the CenturyLink park grounds and the grassy areas constitute a traditional public forum for the exercise of First Amendment rights.

53. In the alternative, the sidewalks traversing the CenturyLink Center park grounds and the grassy areas constitute a designated public forum for the exercise of First Amendment rights.

54. Hershey had a right protected by the First Amendment to the United States Constitution to distribute literature on the sidewalks on the outdoor grounds of CenturyLink Center.

55. At all relevant times, Defendant the City did not have any official or unofficial viewpoint neutral policy regulating speech activities protected by the First Amendment to the United States Constitution and restricting access to the CenturyLink Center public sidewalks in the park in which the CenturyLink Center is located.

56. Defendant City's custom or policy of requiring prior approval of a leaflet before the leafleteer is allowed to distribute them on the CenturyLink property is a prior restraint on speech and, therefore,

bears a "heavy presumption of unconstitutionality." *Chiu v. Plano Independent School Dist.*, 339 F.3d 273, 280-81 (5th Cir. 2003).

57. Defendant City's custom or policy of requiring prior approval of a leaflet before the leafleteer is allowed to distribute it on the CenturyLink property is facially unconstitutional because it is over-broad in that it does not provide for a "specified brief period" of time within which the CenturyLink Center official shall approve or deny the request to distribute the leaflet on the CenturyLink Center property, and because it does not provide for expeditious judicial review, and that it does not provide that the censor bear the burden of going to court to suppress the speech. *Freedman v. State of Md.*, 380 U.S. 51, 58-59 (1965).

58. Defendant City's failure to have a policy, or by acquiescence in the arbitrary and capricious denial of citizens' First Amendment rights by the CenturyLink Center officials, or by failing to train its police officers, employees and officials that the Bossier City Arena, aka CenturyLink Center, is public property and a traditional public forum, has created an unconstitutional custom by the City of Bossier City, Louisiana. That unconstitutional custom or policy was the moving force behind the security officers of CenturyLink Center, police officers of the City, and Deputy Marshal of the City's, interference with Hershey's exercise of his First Amendment rights on the CenturyLink Center outdoor grounds.

59. Defendant City's policy or custom as applied to Hershey is unlawful in at least the following ways:

a. It restricts more speech than necessary to achieve a significant government interest.

b. It restricts more speech than necessary to achieve a reasonable government interest.

c. It allows arbitrary and capricious enforcement.

d. It is based on content and viewpoint discrimination.

e. It utilizes prior restraint.

f. It preferentially allows commercial speech while prohibiting noncommercial speech.

g. It is not narrowly tailored to achieve a compelling, significant or legitimate government interest.

h. It provides no alternate channels for speech.

60. Hershey suffers and will continue to suffer irreparable harm by Defendants' interference with the exercise of his First Amendment rights as applied to the states by the Fourteenth Amendment.

61. Plaintiff Hershey has a fair chance of prevailing on the merits of his claims, thus justifying a preliminary injunction in this matter. To obtain a preliminary injunction, a movant must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury to the movant outweighs the injury to the party to be enjoined; and (4) that granting the injunction will not disserve the public interest. *Jefferson Cmty.*

Health Ctrs., Inc. v. Jefferson Par. Gov't., 849 F.3d 615, 624 (5th Cir. 2017).

62. Without action by this Court, the denial of rights protected by the First and Fourteenth Amendments to the United States Constitution is capable of repetition in a manner that evades meaningful judicial review.

63. No harm will be inflicted upon Defendants should an injunction issue.

64. The issuance of such a preliminary injunction is in the public interest.

WHEREFORE, Plaintiff Richard Hershey prays for declaratory judgment and injunctive relief, including a preliminary injunction against Defendant the City, finding that the First and Fourteenth Amendments protect Plaintiff's right to engage in peaceable distribution of leaflets on the public sidewalks and grassy areas of the CenturyLink Center outdoor grounds, holding that the First and Fourteenth Amendments protect Plaintiff's right to engage in peaceable distribution of leaflets on all sidewalks and grassy areas, declaring the policy or custom applied to Hershey to be unlawful, enjoining Defendant the City from enforcing the policy or custom applied to Hershey, and further enjoining Defendant the City from interfering with Plaintiff's exercise of his First Amendment rights, for costs and attorney's fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as to this Court seems just and proper.

Count II

DAMAGES AGAINST DEFENDANTS THE CITY, DEPUTY MARSHAL GILBERT, OFFICER DANIEL STOLL, OFFICER DAVID SMITH, TYSHON HARVEY, AND EUGENE TUCKER PURSUANT TO 42 U.S.C. SECTION 1983 AND THE FIRST AND FOURTEENTH AMENDMENTS

65. As a direct and proximate result of the Defendants the City, Gilbert, Stoll, Smith, Harvey, and Tucker's, exclusion of Hershey from the public forum on the sidewalk on the outdoor grounds of CenturyLink Center, Hershey suffered the following damages

a. Loss of his rights to advocate and distribute literature in a public forum secured by the First and Fourteenth Amendments of the United States Constitution;

b. Loss of income derived from advocacy organizations;

c. Deprivation of his freedom to be present on the grounds of the CenturyLink Center on an ongoing basis;

d. Humiliation, embarrassment, psychological and emotional injury and stress as a result of being subject to removal from the public forum and banning from returning to the public forum;

e. Travel, lodging, and meal expense.

66. The Defendants the City and the Defendants named in their individual capacity are not entitled to qualified immunity because Hershey's right to free

speech by his advocacy and distribution of literature have been established by binding precedent long before the events described herein and that no reasonable police officer, deputy marshal, or security officer could believe that their actions were a constitutional exercise of authority.

WHEREFORE, Plaintiff Richard Hershey prays for judgment against Defendants the City, Gilbert, Stoll, Smith, Harvey, and Tucker for pecuniary damages pursuant to 42 U.S.C. § 1983 for deprivation of his rights of speech protected by the First Amendment to the United States Constitution; for costs and attorney's fees pursuant to 42 U.S.C. § 1988; for psychological and emotional injury, stress, humiliation, embarrassment, loss of income, costs, and expenses; and for such other and further relief as to this Court seems just and proper.

Count III

DAMAGES AGAINST THE CITY FOR FAILURE TO TRAIN

67. Defendant the City failed to provide adequate training for its law enforcement officers and others allowed to serve as security personnel at the Bossier City Arena by failing to train them that the Bossier City Arena and the park surrounding it are public property and, therefore, the citizens using that property are entitled their constitutional rights guaranteed by the First Amendment.

68. The lack of training by the City led to the belief by Defendant Deputy Marshal Gilbert and the other individually named Defendants that the Bossier City Arena and the park surrounding it are private

property and, thus, citizens could be ordered off of the property with no regard to the citizen's First Amendment rights.

69. Defendant the City failed to train its law enforcement officers and others allowed to serve as security personnel at the Bossier City Arena how to take into account the First Amendment rights of citizens on the Arena property by enforcing only reasonable time place and manner restrictions on the rights of citizens as opposed to blanket denials of access to the property.

70. The 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 but for cause of, and the proximate cause of Hershey's removal from the property on February 28, 2020.

WHEREFORE, Plaintiff Richard Hershey prays for judgment against Defendant the City, for pecuniary damages pursuant to 42 U.S.C. § 1983 for deprivation of his rights of speech protected by the First Amendment to the United States Constitution; for costs and attorney's fees pursuant to 42 U.S.C. § 1988; for psychological and emotional injury, stress, humiliation, embarrassment, loss of income, costs, and expenses; and for such other and further relief as to this Court seems just and proper.

Respectfully submitted,

* * *

Exhibit 1 – Email Exchange Between R. Bonnevier and K. Wren re: FIOA – Bossier City (Feb. 2021)

From: Rebecca Bonnevier <* * *>
Sent: Tuesday, February 23, 2021 5:40 PM
To: Keith Wren
Subject: FW: FIOA – Bossier City

Mr. Wren:

I had been unavailable until now due to the severe weather we experienced here.

AMS Global does not give out copies of internal reports. As a private management company, we are not subject to provide this.

Rebecca L. Bonnevier
General Manager | ASM Global – *Brookshire Grocery Arena*
* * *

From: Keith Wren <* * *>
Sent: Tuesday, February 9, 2021 5:19 PM
To: Rebecca Bonnevier <* * *>
Subject: FW: FIOA – Bossier City

Dear Ms. Bonnevier:

I never received the 2/28/2020 incident report that I requested in my FOIA request. I would appreciate it if you would send it to me as soon as possible.

Thank you.

Sincerely,
M. Keith Wren
Attorney at Law
* * *

From: Keith Wren <* * *>
Sent: Monday, November 9, 2020 11:39 AM
To: Rebecca Bonnevier <* * *>
Subject: RE: FIOA – Bossier City

Dear Ms. Bonnevier:

Would you please send me a copy of the 2/28/2020 incident report?

Keith Wren

From: Rebecca Bonnevier <* * *>
Sent: Monday, November 2, 2020 4:16 PM
To: Keith Wren <* * *>
Subject: FIOA – Bossier City
Importance: High

Dear Mr. Wren:

The arena, known as CenturyLink Center, is owned by the City of Bossier City, La, and managed by ASM Global, a private management company. The arena, both inside and outside, can be leased by organizations to host events. If the public would like to engage in a peaceful protests or distribution of pamphlets, they are free to do so as long as it does not interfere with the safe ingress or egress of guests. This is especially important when the facility and property has been exclusively leased for an event.

In addition, CenturyLink Center has instituted a CODE OF CONDUCT which must be adhered to while on the premises. This Code of Conduct (copy inserted) is posted on our website under Arena Info.

I have researched our event files from January 1, 2019 to the present in order to seek documented

instances in which anyone was removed from the property due to distribution of leaflets or other materials, or while demonstrating on CenturyLink Center property. I found no such information.

I did see an incident report from 2/28/2020, that states "Security Observed two individuals handing out pamphlets in the Parking Lots A & D. The individuals became argumentative and Security called for Bossier City Police for assistance." It further states the Pamphleteers then left the property. (It does not state they were removed.)

I, myself, remember this incident, as I heard the call over the radio for police assistance and went to the area. When I arrived, I saw police talking with two people. I did not interject. Our security guards (ASM Global employees) told me that two people with pamphlets were shouting at our guests in line that they were going to Hell for attending this event, and that it made a few "children" cry. It is my understanding that the Police asked the pamphleteers to stop upsetting the guests and that they left of their own accord.

I see no other documentation or incidents pertaining to the subject of your request.

I have also inserted a map of the property per your request.

Rebecca L. Bonnevier
General Manager | ASM Global – *Brookshire Grocery Arena*

* * *

From: Keith Wren <* * *>
Sent: Thursday, October 22, 2020 2:04 PM
To: Rebecca Bonnevier <* * *>
Subject: RE: FIOA – Bossier City

Thank you.

Mr. Wren:

CenturyLink Center is managed by a private management company, therefore I will need to investigate whether we are subject to the FOIA laws. If so, I will research if any of the requested documents exist.

Due to COVID, we currently have only 5 staff members here at the arena's administration. It will likely take me about 2 weeks to research. I will be able to responds to you by Thursday, November 5, 2020.

Rebecca L. Bonnevier
General Manager | ASM Global – *Brookshire Grocery Arena*
* * *

From: Keith Wren <* * *>
Sent: Wednesday, October 21, 2020 1:30 PM
To: Rebecca Bonnevier <* * *>
Subject: RE: FIOA – Bossier City

Dear Ms. Bonnevier:

Under the Louisiana Public Records Act § 44:1 et seq., I am requesting to obtain copies of the following public records:

1. Any and all policies concerning leafleting and/or the distribution of other written material on

the property commonly known as CenturyLink Center/Bossier City Arena in effect on and since January 1, 2019.

2. Any and all policies concerning speech, picketing and/or demonstrations on the property commonly known as CenturyLink Center/Bossier City Arena in effect on and since January 1, 2019.

3. A map of the property commonly known as CenturyLink Center/Bossier City Arena.

4. Any and all reports, recordings, letters, e-mails, notes, memorandums and/or documentation of any kind whatsoever regarding the removal from the property commonly known as the CenturyLink/Bossier City Arena of any person or persons who were leafleting, distributing other written material and/or demonstrating on the property commonly known as CenturyLink Center/Bossier City Arena on and since January 1, 2019.

If you are not the correct person to whom this request should be directed please advise me of the correct person to whom this request should be sent.

If there are any fees for searching or copying these records, please inform me if the cost will exceed $25.00.

Section 44:32(D) of the Louisiana Public Records Act requires a response within three business days. If access to the records I am requesting will take longer than that time period, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for your cooperation in this matter.

M. Keith Wren
Attorney at Law

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