

No. 25-1389

IN THE
Supreme Court of the United States

RICHARD HERSHEY,
Petitioner,

— v. —

CITY OF BOSSIER CITY, LOUISIANA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF CATHOLICVOTE AND NATIONAL
APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

DAVID J. GUTIERREZ
Counsel of Record
YETTER COLEMAN LLP
600 Travis Street
Suite 5400
Houston, Texas 77002
(713) 632-8000
dgutierrez@yettercoleman.com

*Attorney for Amici Curiae
CatholicVote and NACLC*

TABLE OF CONTENTS

Table of Authorities	iii
Identity and Interest of <i>Amici Curiae</i>	1
I. CatholicVote.....	1
II. National Apostolic Christian Leadership Conference.	3
Summary of the Argument.....	5
Argument	7
I. The First Amendment Protects the Religious Rights of Individuals.	7
II. Section 1983 Was Designed to Provide a Federal Remedy for Obvious Violations of Fundamental Civil Rights Like Those Protected by the First Amendment.	8
A. The text of Section 1983 clearly provides liability to persons who have violated another’s constitutional rights.	8
B. The common law shows that Section 1983 protects an individual’s right to religious freedom under nineteenth-century tort law.	10
C. The Fifth Circuit’s holding in <i>Hershey</i> contradicts the statutory text and the common-law principles underlying Section 1983.	13
III. The Common-Law Background of Section 1983 Supports the <i>Hope</i> Obviousness Principle, Not the Fifth Circuit’s Limitation of That Principle to Eighth Amendment Cases.	15

A. This Court’s decision in Hope provides the correct framework for analyzing Section 1983 claims.....	15
B. The Hope obviousness principle applies to the First Amendment, particularly to religious liberty.	17
IV. Section 1983’s Remedial Purpose Is Especially Important Where Officials Suppress Religious Exercise and Religious Expression.....	20
Conclusion	22

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	19
<i>Atherton v. Dist. of Columbia Off. of the Mayor</i> , 706 F.3d 512 (D.C. Cir. 2013).....	19
<i>Browder v. City of Albuquerque</i> , 787 F.3d 1076 (10th Cir. 2015)	9, 10, 14
<i>Cantwell v. State of Connecticut</i> , 310 U.S. 296 (1940)	7, 8, 13
<i>Carey v. Piphus</i> , 435 U.S. 247 (1978)	10, 13
<i>Chapman v. Houston Welfare Rights Org.</i> , 441 U.S. 600 (1979)	20
<i>Cheeks v. Belmar</i> , 80 F.4th 872 (8th Cir. 2023).....	19
<i>Combs v. Corr. Corp. of Am.</i> , 977 F. Supp. 799 (W.D. La. 1997)	11
<i>Fair Assessment in Real Estate Ass’n v. McNary</i> , 454 U.S. 100 (1981)	9

<i>Hague v. C.I.O.</i> , 307 U.S. 496 (1939)	7, 8
<i>Hershey v. City of Bossier City</i> , 156 F.4th 555 (5th Cir. 2025)	10, 19
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002)	2, 15, 17
<i>In re Rutter’s Inc. Data Sec. Breach Litig.</i> , 511 F. Supp. 3d 514 (M.D. Pa. 2021)	16
<i>In re Soc. Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig.</i> , 777 F. Supp. 3d 1016 (N.D. Cal. 2025)	16
<i>Jamison v. McClendon</i> , 476 F. Supp.3d 386 (S.D. Miss. 2020)	12
<i>Kunz v. New York</i> , 340 U.S. 290 (1951)	7
<i>Lawrence v. Reed</i> , 406 F.3d 1224 (10th Cir. 2005)	18
<i>LeBlanc-Sternberg v. Fletcher</i> , 67 F.3d 412 (2d Cir. 1995)	7
<i>Leichtman v. WLW Jacor Commc’ns, Inc.</i> , 92 Ohio App. 3d 232 (1994)	16

<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938)	7, 8
<i>MacIntosh v. Clous</i> , 69 F.4th 309 (6th Cir. 2023)	18
<i>McMurry v. Weaver</i> , 142 F.4th 292 (5th Cir. 2025)	10, 14, 19, 20, 21
<i>Monell v. Dep’t of Soc. Servs. of City of New York</i> , 436 U.S. 658 (1978)	21
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	9
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105 (1943)	2, 7, 8
<i>People of State of New York ex rel. Bryant v. Zimmerman</i> , 278 U.S. 63 (1928)	12
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020)	12
<i>Rehberg v. Paulk</i> , 566 U.S. 356 (2012)	10, 11, 13
<i>Sause v. Bauer</i> , 585 U.S. 957 (2018)	18
<i>Stagl v. Delta Airlines, Inc.</i> , 52 F.3d 463 (2d Cir. 1995)	16

<i>Taylor v. Riojas</i> , 592 U.S. 7 (2020)	2, 15, 17
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951)	11
<i>The T.J. Hooper</i> , 60 F.2d 737 (2d Cir. 1932)	16
<i>Tobey v. Jones</i> , 706 F.3d 379 (4th Cir. 2013)	18
<i>Villarreal v. City of Laredo, Tex.</i> , 94 F.4th 374 (5th Cir. 2024), <i>cert.</i> <i>granted, judgment vacated sub nom.</i> <i>Villarreal v. Alaniz</i> , 145 S. Ct. 368, 220 L. Ed. 2d 137 (2024)	2, 18, 19, 23
<i>Wilson v. Garcia</i> , 471 U.S. 261 (1985)	11, 13
CONSTITUTIONAL PROVISION AND STATUTE	
42 U.S.C. § 1983	2, 8, 9
U.S. CONST. AMEND. 1	7
OTHER AUTHORITIES	
Cong. Globe, 42d Cong., 1st Sess., 374 (1871)	12, 21

David Pietrusza, <i>The Ku Klux Klan in the 1920s</i> , THE BILL OF RIGHTS INSTITUTE, available at: <a href="https://billofrightsinstitute.org/essay
s/the-ku-klux-klan-in-the-1920s/">https://billofrightsinstitute.org/essay s/the-ku-klux-klan-in-the-1920s/	12, 13
---	--------

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

I. CATHOLICVOTE.

CatholicVote.org (“CatholicVote”) is an organization of patriotic Americans who believe the timeless truths of the Catholic faith are good for America. Founded in 2005 as the Fidelis Center, the CatholicVote.org Education Fund is dedicated to inspiring every Catholic in America to live out the truths of our faith in public life. Although most of its members are Catholic, tens of thousands of Americans of other faiths—and some of no particular faith—have joined CatholicVote because they find its mission and vision compelling.

Central to CatholicVote’s mission is the conviction that Americans of faith must be free to live out and share their beliefs in the public square without fear of government suppression or reprisal. This case implicates that conviction directly. Petitioner Richard Hershey—a senior citizen who felt compelled by his ethical and religious beliefs to share a faith-based message—set out to distribute religious leaflets on a public sidewalk outside a public arena hosting a Christian rock concert, only to be threatened with arrest and forced to leave by five police and security officers who ignored a nearby commercial leafleteer. The hand distribution of

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*’s intent to file this brief. No party’s counsel authored this brief in whole or part; no party, counsel for a party, or any person other than *amici curiae* or their counsel made a monetary contribution toward the preparation and submission of this brief.

religious literature is “an age-old form of missionary evangelism” that lies at the heart of both the Free Speech and Free Exercise Clauses. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). CatholicVote’s members regularly engage in precisely this kind of protected activity—public witness, evangelization, and the peaceful distribution of literature—and thus have a concrete and enduring interest in ensuring that those who exercise these rights may obtain a remedy when government officials violate them.

CatholicVote’s interest is sharpened by the specific question this case presents. By cabining the obviousness principle of *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Taylor v. Riojas*, 592 U.S. 7 (2020), to the Eighth Amendment, the Fifth Circuit has held that even blatant, viewpoint-discriminatory suppression of religious speech cannot overcome qualified immunity absent a factually indistinguishable precedent. The practical result is that “victims of the most egregious First Amendment violations are least likely to recover damages” (Pet. 3), and that the rights to peaceful leafletting and to be free from viewpoint discrimination against religious speech are relegated to “second-class” status. *Villarreal v. City of Laredo, Tex.*, 94 F.4th 374, 413 (5th Cir. 2024) (Ho, J., dissenting), *cert. granted, judgment vacated sub nom. Villarreal v. Alaniz*, 145 S. Ct. 368, 220 L. Ed. 2d 137 (2024).

CatholicVote submits this brief to explain why that result is irreconcilable with the historical understanding of 42 U.S.C. § 1983 and the nineteenth-century tort principles against which

Congress legislated—principles under which the obviousness of a wrong, not the existence of an identical prior case, determined liability. Religious liberty claims were among the core civil rights that Section 1983 was enacted to protect, and the Fifth Circuit’s rule contradicts that promise precisely when government suppression of religious liberty is most flagrant.

CatholicVote is well positioned to offer this perspective. As an organization inspired and organized by faithful Catholic laity, and one that represents members who exercise their expressive and religious freedoms in public spaces every day, CatholicVote has a direct stake in preserving the statutory damages remedy that Section 1983 guarantees for clear violations of First Amendment rights. It respectfully urges the Court to grant the petition and to reaffirm that the obviousness principle safeguards all fundamental rights—including the religious liberty of those who, like petitioner, seek only to share their faith peacefully in a public forum.

II. NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE.

The National Apostolic Christian Leadership Conference (“NACLC”) is an organization advocating for issues of public concern to Apostolic Pentecostal Christians (“Apostolics”). There are an estimated three to four million Apostolics in the United States who share certain theological commitments and who congregate together through many denominations and independent churches. A reasonable estimate is

that there are 15,000 Apostolic Pentecostal congregations in the United States.

As an independent organization, the NACLC seeks to represent the views of Apostolics in the public square especially in areas of freedom of conscience and freedom of religion.

Pentecostalism is often referred to as a conversionist faith because initially all its members were converted from another religion or no religion. While children are born to parents already in the church, each believer is encouraged to receive his or her own Pentecostal experience, be baptized in the name of Jesus Christ, pursue a life of holiness, and engage in ministry service.

Pentecostals take seriously the Great Commission of Jesus Christ to go into all the world to preach, teach, make disciples, and baptize. *See* Matthew 28:19-20; Mark 16:15-18; Luke 24:46-49; John 20:21-23; Acts 1:4-8. The United Pentecostal Church International (“UPCI”) is the largest denomination of Apostolic believers in the United States. The UPCI comprises nearly 5,000 local congregations and 12,000 credentialed ministers in the United States. Its General Constitution states that its purpose is to take “the whole gospel to the whole world by the whole church,” establish new churches, and evangelize the world.

Apostolics apply the scriptural mandate to spread the Gospel by sharing their testimony with others and by engaging in outreach activities, which include inviting others to church services and

distributing religious pamphlets, tracts, and other literature.

Apostolics believe freedom of religion is a core freedom protected by the First Amendment and is an unalienable right integral to life, liberty, and the pursuit of happiness.

Given these principles and beliefs, the NACLC likewise requests that the Court grant the petition and hold that the obviousness principle safeguards the religious liberty rights of individuals, like the petitioner, who share their faith and spread the Gospel peacefully in a public forum.

SUMMARY OF THE ARGUMENT

Section 1983 provides a federal remedy for the deprivation of federal rights by persons acting under color of state law. In construing the statute, this Court has looked to nineteenth-century tort principles, which never required a plaintiff to identify a prior case involving materially identical facts before recovering for an obvious legal wrong. Liability turns on the violation of a legal duty, not on factually identical duplication in prior decisions, particularly where First Amendment rights are involved.

Hope reflects the same principle: officials have fair notice that their conduct is unlawful where general constitutional rules apply with obvious clarity, even absent a prior case on the same facts. The Fifth Circuit's contrary rule, limiting *Hope* to Eighth Amendment claims, has no basis in Section 1983's text, history, or common-law background, especially as to First Amendment violations. Its

cabining of *Hope* perversely leaves obvious violations of First Amendment, religious liberty rights least likely to be remedied precisely because they are unprecedented in their flagrancy.

That rule is especially intolerable in cases involving religious liberty. The right to preach, proselytize, distribute religious literature, and speak from a religious viewpoint lies at the heart of the First Amendment's protections for speech and free exercise, and Section 1983 exists to remedy state actors' violation of such fundamental civil rights. By denying a damages remedy for the suppression of religious leafletting on a public sidewalk, the Fifth Circuit relegated religious expression to second-class status and betrayed the remedial promise Congress enacted.

The Court should thus grant the petition and correct the Fifth Circuit's error.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RELIGIOUS RIGHTS OF INDIVIDUALS.

The First Amendment declares that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. U.S. CONST. AMEND. 1; *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940). The First Amendment is applicable to the states through the Fourteenth Amendment. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 426 (2d Cir. 1995).

Those guarantees protect more than the inward freedom to hold religious beliefs. *See Cantwell*, 310 U.S. at 303. They also protect the outward exercise of religion, including the right to speak, preach, pray, proselytize, and disseminate religious views. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Cantwell*, 310 U.S. at 303. The freedom to believe would be diminished if the government could suppress the ordinary means by which religious believers live out and communicate their faith. *See Cantwell*, 310 U.S. at 303.

For that reason, this Court has long recognized that the First Amendment protects the circulation of pamphlets, leaflets, and other religious literature as a core form of expressive and religious activity. *See Lovell v. Griffin*, 303 U.S. 444 (1938); *Murdock*, 319 U.S. at 108.

That protection has special force in traditional public forums such as streets and sidewalks. *See Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939); *Kunz v. New York*, 340 U.S. 290, 293 (1951). Those places

have historically been held open for assembly, communication, and the exchange of views. *Hague*, 307 U.S. at 515-16. When an individual peacefully distributes religious literature on a public sidewalk, he is not engaging in marginal or peripheral conduct. *See Lovell*, 303 U.S. 444; *Murdock*, 319 U.S. at 108; *Hague*, 307 U.S. at 515-16. He is exercising rights at the intersection of the Free Speech Clause and the Free Exercise Clause. *See Cantwell*, 310 U.S. at 303.

II. SECTION 1983 WAS DESIGNED TO PROVIDE A FEDERAL REMEDY FOR OBVIOUS VIOLATIONS OF FUNDAMENTAL CIVIL RIGHTS LIKE THOSE PROTECTED BY THE FIRST AMENDMENT.

A. The text of Section 1983 clearly provides liability to state actors who have violated another's constitutional rights.

Section 1983 supplies the federal remedy when state actors violate constitutional rights, including the right to religious liberty. 42 U.S.C. § 1983. The statute reaches any person who, acting under color of state law, subjects another to the deprivation of rights secured by the Constitution and laws, and it makes that person liable to the injured party in an action for redress. *Id.*

Every 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

42 U.S.C. § 1983.

Its language is broad because its purpose is broad: to ensure that federal rights have a federal remedy when state officials misuse governmental authority. *See Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100 (1981) (discussing *Monroe v. Pape*, 365 U.S. 167 (1961)).

Section 1983 is written in the language of legal responsibility. It provides that every person who, under color of state law, subjects another to the deprivation of rights secured by the Constitution and laws “shall be liable” to the injured party in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not say that an officer is liable only after another officer has previously committed the same wrong, in the same setting, and lost in a published appellate decision. Indeed, “sometimes 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.). “[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.*

Following this logic, Section 1983 instead unequivocally says that a person who, under color of state law, causes the deprivation of federally secured rights “shall be liable” to the injured party. Otherwise, “it seems absurd to suggest that the most egregious constitutional violations imaginable are somehow immune from liability precisely because they’re so egregious.” *Hershey v. City of Bossier City*, 156 F.4th 555, 559 (5th Cir. 2025) (Ho, J., concurring) (quoting *McMurry v. Weaver*, 142 F.4th 292, 304 (5th Cir. 2025) (Ho, J., concurring)).

In short, “[s]ome things are so obviously unlawful that they don’t require detailed explanation.” *Browder*, 787 F.3d at 1082.

B. The common law shows that Section 1983 protects an individual’s right to religious freedom under nineteenth-century tort law.

Section 1983’s text reflects the remedial logic of nineteenth-century tort law: a legal wrong that injures a protected interest gives rise to a remedy. “[C]enturies” of common-law tort principles no doubt “provide the appropriate starting point for the inquiry under § 1983.” *Carey v. Phipps*, 435 U.S. 247, 257-58 (1978). And this “Court has long recognized that the statute was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits.” *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012).²

² For instance, Section 1983 “did not abrogate the long-established absolute immunity enjoyed by legislators for actions taken within the legitimate sphere of legislative authority.” *Id.*

To that end, as the basis for claims seeking redress for constitutional violations, Section 1983 unequivocally protects religious liberty: “The first freedom protected in the Bill of Rights to the Constitution is that of religious liberty.” *Combs v. Corr. Corp. of Am.*, 977 F. Supp. 799, 801 (W.D. La. 1997).

Section 1983’s roots in common-law tort principles aimed at protecting religious liberty are unsurprising given the historical context in which it was promulgated. “The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights.” *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

As the congressional debates in 1871 show, Congress was clearly concerned about the violence and coercion happening in the South during the Reconstruction era:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the

Instead, “[i]mmunities ‘well grounded in history and reason,’ . . . were not somehow eliminated ‘by covert inclusion in the general language’ of § 1983.” *Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

night that hides them,
 conspiracies, wicked as the
 worst of felons could devise, have
 gone unwhipped of justice.
 Immunity is given to crime, and
 the records of public tribunals
 are searched in vain for any
 evidence of effective redress.

Cong. Globe, 42d Cong., 1st Sess., 374 (1871)
 (remarks of Rep. Lowe).

And along with the threat of the Ku Klux Klan, state governments in that era and afterward were particularly concerned about related “efforts to dilute ‘the influence of racial, ethnic, and religious minorities’” particularly on juries and in society at large. *See Jamison v. McClendon*, 476 F. Supp.3d 386, 422 n.284 (S.D. Miss. 2020) (quoting *Ramos v. Louisiana*, 590 U.S. 83, 88 (2020)). The Ku Klux Klan itself, as it developed over time, targeted religious minorities, particularly Catholics and Jews. *See, e.g., People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 76–77 (1928) (noting that the Ku Klux Klan was “conducting a crusade against Catholics, Jews, and negroes, and stimulating hurtful religious and race prejudices; that it was striving for political power, and assuming a sort of guardianship over the administration of local, state, and national affairs; and that at times it was taking into its own hands the punishment of what some of its members conceived to be crimes.”); David Pietrusza, *The Ku Klux Klan in the 1920s*, THE BILL OF RIGHTS INSTITUTE (explaining the roots of the Ku Klux Klan’s hostility against “blacks, Catholics, and

Jews”).³

Reviewing this historical context, this Court has characterized the harms and damages that Congress sought to remedy as “plainly sound[ing] in tort.” *Wilson*, 471 U.S. at 277. “Relying on this premise,” this Court “found tort analogies compelling in establishing the elements of a cause of action under § 1983, and in identifying the immunities available to defendants.” *Id.* (citations omitted). And because religious liberty and freedom of speech have always been recognized as part of the “fundamental concept of liberty,” *Cantwell*, 310 U.S. at 303, there is no doubt that Section 1983 serves as a basis for tort-sounding lawsuits designed to protect religious liberty and seek remedies for the harms a person inflicts on that fundamental, core individual right.

C. The Fifth Circuit’s holding in *Hershey* contradicts the statutory text and the common-law principles underlying Section 1983.

Thus, this Court has often looked to the common law in construing Section 1983. *See Rehberg*, 566 U.S. at 363. And the Court did so as a means of effectuating the statute, not defeating it: the “new federal claim created by § 1983 . . . is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort.” *Id.* at 366; *see also Carey*, 435 U.S. at 258 (“The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went

³ Available at: <https://billofrightsinitiative.org/essays/the-ku-klux-klan-in-the-1920s/> (date last accessed: July 14, 2026).

uncompensated simply because the common law does not recognize an analogous cause of action.”).

That point is important here. The Fifth Circuit’s rule in *Hershey* is not a faithful application of tort law principles or the actual statutory text. It is a departure from it. At common law, liability simply turned on wrongful conduct in breach of a legal duty, not on whether the plaintiff could identify a prior reported decision involving the same unusual facts. A trespass, for instance, does not become actionable only after an earlier trespasser had entered the same kind of land by the same route. A false arrest does not become wrongful only after an earlier officer had made the same threat in the same public place. And a government official’s suppression of protected religious expression does not become actionable only after another official has already suppressed the same kind of religious leaflet outside the same kind of arena.

The Fifth Circuit’s contrary rule creates the very anomaly Section 1983 was enacted to prevent. The more obvious and outrageous a constitutional violation is, the less likely it is that an earlier official will have committed it, litigated it through appeal, and generated a factually indistinguishable precedent. See, e.g., *Browder*, 787 F.3d at 1082; *McMurry*, 142 F.4th at 304.

The rule therefore makes the clearest, most obvious violations the hardest to remedy. That is not nineteenth-century tort law. It is not the text of Section 1983. And it is not a sensible account of Congress’s decision to provide a federal remedy for the deprivation of constitutional rights, particularly

in cases involving obvious violations of the First Amendment.

III. THE COMMON-LAW BACKGROUND OF SECTION 1983 SUPPORTS THE *HOPE* OBVIOUSNESS PRINCIPLE, NOT THE FIFTH CIRCUIT’S LIMITATION OF THAT PRINCIPLE TO EIGHTH AMENDMENT CASES.

A. This Court’s decision in *Hope* provides the correct framework for analyzing Section 1983 claims.

Consistent with the letter and spirit of Section 1983 and common-law tort principles, this Court has acknowledged 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.” *Hope*, 536 U.S. at 741 (alteration omitted). Accordingly, “particularly egregious facts” involving a violation of an individual’s constitutional rights “offend[s] the Constitution” and are actionable under Section 1983. *Taylor*, 592 U.S. at 9.

Hope is best understood as a faithful application of Section 1983’s historical premises. The question under Section 1983 is not whether the defendant had advance notice that a federal reporter would later describe his precise misconduct in the precise same terms. The question the Section 1983 qualified immunity analysis hinges on—at its roots—is whether the official had “fair notice” that he was violating a legal right. *Hope*, 536 U.S. at 739.

Hope’s obviousness principle answers that question in a way that tracks ordinary tort reasoning: when the legal duty is clear and the defendant’s

conduct plainly violates it, liability does not disappear merely because the factual details are novel. *See, e.g., The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.) (“[A] whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.”); *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 469 (2d Cir. 1995) (“The law deals with that problem not by redefining the defendant’s duties in each case, but by asking whether—considering all the circumstances of the particular case—the defendant breached its duty of care.”); *see also In re Rutter’s Inc. Data Sec. Breach Litig.*, 511 F. Supp. 3d 514, 528 (M.D. Pa. 2021) (“[I]n new factual scenarios, a court need not undertake the burdensome task of carving out new legal duties, but, instead, courts can and should apply longstanding duties where possible.”); *In re Soc. Media Adolescent Addiction/Pers. Injury Prods. Liab. Litig.*, 777 F. Supp. 3d 1016, 1029 (N.D. Cal. 2025) (“[A] new platform of conduct does not make defendants’ conduct less negligent.”).

In sum, tort law imposes responsibility when a person breaches a duty of care or intentionally invades a protected interest. As the cases above show, tort law does not reward novelty in wrongdoing. A defendant who finds a new way to commit an old wrong is still liable because the duty, not the factual novelty, supplies the rule of decision. *See Leichtman v. WLW Jacor Commc’ns, Inc.*, 92 Ohio App. 3d 232, 234-35 (1994) (novel fact situation involving the intentional blowing of cigarette smoke in plaintiff’s

face was grounds for battery under traditional tort law principles because “[n]o matter how trivial the incident, a battery is actionable, even if damages are only one dollar”). *Hope* carries that same principle into qualified-immunity doctrine. When the law gives fair warning and the wrong is obvious, an official cannot demand a prior case repeating his precise misconduct before the injured party may proceed. That is why *Hope* rejected the same rigid mistake the Fifth Circuit made in *Hershey*. A plaintiff need not always point to a prior case holding “the very action in question” unlawful. *Hope*, 536 U.S. at 741. Under *Hope* and *Taylor*, general constitutional rules may provide fair warning when they apply with obvious clarity to the conduct at issue. *See Hope*, 536 U.S. at 741; *Taylor*, 592 U.S. at 9.

B. The *Hope* obviousness principle applies to the First Amendment, particularly to religious liberty.

Here, *Hershey* presents an even simpler case for applying *Hope*’s obviousness principle. The officers were not making a decision in a dangerous prison setting involving convicted criminals and the potential threat of violence. *Hope*, 536 U.S. at 734-35; *see also Taylor*, 592 U.S. at 7-9. Instead, the officers in *Hershey* encountered a peaceful religious leafleteer on a public sidewalk, threatened him with arrest, forced him to leave, and permitted a nearby commercial leafleteer to remain. *See Pet.* 6-7. The First Amendment rules against suppressing religious expression in a public forum and against viewpoint discrimination applied with obvious clarity.

In fact, “nine circuits have indicated that the

standards articulated in *Hope* apply specifically in the First Amendment context.” *Villarreal*, 94 F.4th at 413 (collecting cases). Similarly, a broad consensus exists among the circuits that “some statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages if they don’t.” *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005). And this Court itself has applied the principles illustrated in *Hope* to a case involving the First Amendment. *See Sause v. Bauer*, 585 U.S. 957, 959 (2018) (“There can be no doubt that the First Amendment protects the right to pray.”).

Yet the Fifth Circuit has refused to apply *Hope* to clear, obvious, and flagrant violations of First Amendment rights. The Fifth Circuit’s position contradicts its sister circuits that have directly applied the obviousness exception to cases involving alleged violations of the First Amendment. *See, e.g., MacIntosh v. Clous*, 69 F.4th 309, 320–21 (6th Cir. 2023) (applying *Hope* to conclude that “[n]o reasonable official could believe that it was permissible to brandish a deadly weapon in response to MacIntosh’s public comment asking the official to condemn violence”; concluding that “MacIntosh’s allegations plausibly show that Clous is not entitled to qualified immunity because it was clearly established that Clous’s conduct violated MacIntosh’s First Amendment rights”); *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013) (applying general First Amendment principles and caselaw to conclude “it is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the

government disagrees with it.”). And at least two other courts have applied the obviousness exception analysis to other amendments. *See, e.g., Cheeks v. Belmar*, 80 F.4th 872, 877-78 (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). To that end, as this Court explained, it is not necessary that there be “a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

So, the Fifth Circuit’s refusal to apply *Hope* to the First Amendment cannot be reconciled with Section 1983’s structure and application, and it directly contradicts its sister circuits’ holdings applying the obviousness exception to the First Amendment, and indeed, other amendments of the Constitution. *See Hershey*, 156 F.4th at 559 (Ho, J., concurring) (recounting widespread criticism of the Fifth Circuit’s rule); *McMurry*, 142 F.4th at 305-06 (same).

Section 1983 does not protect some constitutional rights more generously than others. “[N]othing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens.” *Villarreal*, 94 F.4th at 413. Section 1983 instead supplies a remedy for the deprivation of rights secured by the Constitution and laws, including the First Amendment, which protects many of “the most established rights” of an individual. *McMurry*, 142 F.4th at 305 (citations omitted).

Simply put, the Eighth Amendment is no more important than an individual's First Amendment rights to free speech and religious freedom. Even during the congressional debates in 1871, it was recognized that Section 1983 authorizes "civil suits" based "upon the right of the citizen"—meaning *all* rights, not just those the Eighth Amendment protects. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979). Thus, the principles articulated in *Hope* should apply with equal force to protect an individual's First Amendment rights. Without the Supreme Court's intervention here, the Fifth Circuit is effectively allowed to convert a statute designed to remedy official violations of federal rights into a "free-pass" rule for the most flagrant First Amendment abuses. Under such a rule, officials may escape damages not because the law was unclear, but because their conduct was so obviously unlawful that few officials had previously dared to do the same thing. That result is exactly backward and improperly treats the First Amendment as a "second-class right." *McMurry*, 142 F.4th at 306.

IV. SECTION 1983'S REMEDIAL PURPOSE IS ESPECIALLY IMPORTANT WHERE OFFICIALS SUPPRESS RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION.

At bottom, the wrong alleged in *Hershey* is not a marginal constitutional technicality. It is the suppression of religious expression in a public place. Section 1983 exists precisely for this kind of case: a state actor, invoking governmental authority, deprives a citizen of a federally secured liberty—one of the first and most fundamental rights protected by the Constitution—and the injured citizen seeks a

federal remedy.

This Court has described Section 1983 as a federal forum for many deprivations of civil liberties. It was enacted against the background of Reconstruction-era failures by state authorities to protect federal rights and punish those who violated them. This Court previously confirmed that Congress used broad language reaching unconstitutional customs and usages because it was concerned with persistent and widespread discriminatory practices by state officials. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 685 (1978). And this Court likewise emphasized Section 1983's "remedial" character and the need to construe civil-rights remedies with the breadth appropriate to statutes designed to preserve "human liberty and human rights." *Id.* at 684 (quoting 1871 debates).

Religious liberty falls at the center of that remedial tradition. The First Amendment protects not only private belief and worship, but also religious exercise, religious witness, and religious expression in public. The right to preach, proselytize, and disseminate religious views is not a lesser, "second-class" civil right. *McMurry*, 142 F.4th at 306. It is one of the liberties that gives meaning to constitutional freedom. So, when the government threatens a religious leafleteer with arrest for sharing his message on a public sidewalk while allowing secular commercial leafletting to continue, it strikes at both free exercise and free speech.

That is why the Fifth Circuit's rule is so damaging. It does not merely deny damages in an isolated qualified-immunity dispute. It tells citizens

that obvious official suppression of religious speech may go without a remedy unless some earlier official committed the same wrong in the same way. That message is incompatible with Section 1983's role as a federal remedy for civil-rights deprivations. It is especially incompatible with the protection of religious liberty, where the whole point of the constitutional guarantee is to prevent officials from deciding which religious messages may be shared in the public square.

CONCLUSION

This Court should grant the petition because the Fifth Circuit's rule is not just an erroneous application of qualified immunity, it is also a mistaken account of Section 1983 itself. The statute supplies a federal remedy for the deprivation of constitutional rights. Its common-law background and statutory text confirm that obvious wrongs do not become immune merely because they are novel. And its purpose of protecting religious liberty confirms that federal courts must remain open when state actors deprive citizens of fundamental civil liberties.

The need for review is particularly acute where, as here, the right at stake is religious liberty. CatholicVote and NACLC's members and supporters participate in public witness, evangelization, and the distribution of religious literature. They depend on the assurance that public officials may not suppress their message because it is religious and then escape accountability because no earlier official committed the same violation in the same factual setting. Section 1983 was designed to provide a remedy when government officials deprive citizens of federally

protected rights. The Fifth Circuit's rule denies that remedy when it is most needed.

The Court should therefore grant the petition, correct the Fifth Circuit's error, and make clear that *Hope* applies to the First Amendment's protection of religious liberty and free speech, consistent with common-law tort principles and the historical context in which Section 1983 was promulgated. Granting the petition will thus show that the "First Amendment deserves the same respect" as other rights enshrined in the Bill of Rights. *Villarreal*, 94 F.4th at 420.

Respectfully submitted,

DAVID J. GUTIERREZ
Counsel of Record
YETTER COLEMAN LLP
600 Travis Street
Suite 5400
Houston, Texas 77002
dgutierrez@yettercoleman.com
(713) 632-8000

Attorney for Amici Curiae
CatholicVote and NACLC