

IN THE
Supreme Court of the United States

RICHARD HERSHEY,

Petitioner,

v.

CITY OF BOSSIER CITY, LOUISIANA, *et al.*,

Respondents.

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

**BRIEF OF THE NATIONAL RELIGIOUS
BROADCASTERS (NRB) AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

MICHAEL P. FARRIS
SARAH SIU
NATIONAL RELIGIOUS
BROADCASTERS
800 Maryland Avenue NE
Washington, DC 20002

JUSTIN W. AIMONETTI
VINSON & ELKINS LLP
2001 Ross Avenue,
Suite 3900
Dallas, TX 75201

MICHAEL A. HEIDLER
Counsel of Record
VINSON & ELKINS LLP
200 W 6th Street, Suite 2500
Austin, TX 78701
(512) 542-8400
mheidler@velaw.com

ALEX RANT
VINSON & ELKINS LLP
2200 Pennsylvania Avenue
NW, Suite 500 West
Washington, DC 20037

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE¹

National Religious Broadcasters (NRB) is a nonpartisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,035 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media. NRB is a network of communicators committed to spreading the life-changing truth of the Gospel of Jesus Christ through every electronic medium available.

Since its founding in 1944, NRB has worked to protect its members against efforts to infringe their constitutional rights. It is important to preserve the rights of broadcasters and livestreamers to create content and for faith-based communicators to be able to share their message in a rapidly changing media landscape without the fear of government infringement.

INTRODUCTION & SUMMARY OF ARGUMENT

The First Amendment secures not only the right to speak, but the right to do so without fear of government retribution. The distribution of religious literature on a public sidewalk lies at the very heart of the First Amendment. Yet the decision below holds that an officer

1. Counsel of record for all parties—and Respondents themselves—received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to its preparation or submission.

who suppresses such expression—no matter how obvious the constitutional violation—escapes all accountability unless the speaker can produce a prior decision involving materially identical facts. That rule does more than deny relief to Petitioner. It chills the expression of every speaker who must now weigh whether to risk a violation that, by the Fifth Circuit’s own logic, no court will ever remedy.

The government can suppress speech not only through outright prohibition but also through enforcement practices that leave speakers unable to discern the line between lawful and unlawful conduct. When the boundaries of protected activity are uncertain, rational speakers do not test them. They fall silent. That is the precise harm the chilling effect doctrine guards against, and it is the harm the decision below inflicts.

By requiring a factually identical precedent before any official can be held to account—regardless of how plainly the officer’s conduct violates the Constitution—the Fifth Circuit’s approach guarantees that speakers can never know whether those who violate their rights will face any consequence or whether such violations will go unremedied. Petitioner’s own experience proves the point. Confronted with the threat of arrest for peacefully distributing religious leaflets, he did exactly what the chilling effect doctrine predicts a reasonable speaker will do: he left the public sidewalk and did not return. And Petitioner is no anomaly. Courts have repeatedly recognized obvious First Amendment violations only to deny any remedy because the precise factual scenario had not yet been adjudicated. This doctrinal possibility teaches officials that they may suppress speech first and answer for it never.

The tension between qualified immunity and freedom of expression has not gone unnoticed. States like Colorado, New Mexico, and California have each moved to restore meaningful remedies for constitutional violations, whether by withdrawing qualified immunity as a defense to state constitutional claims or by channeling liability to public bodies. Their experience confirms that the interests underlying qualified immunity can be preserved without the rigid “clearly established” requirement the Fifth Circuit has imposed, and that robust enforcement of constitutional rights and fair protection for public officials are not mutually exclusive.

The consequences are especially grave for the communities NRB represents. As Americans increasingly turn to broadcasting, livestreaming, and citizen journalism for their news and their religious instruction, the right to record and transmit events as they unfold has become inseparable from the freedoms of speech and press themselves. A rule that allows officials to silence protected expression without consequence will fall hardest on faith-based communicators and citizen journalists, whose work so often depends on speaking and recording in precisely the unscripted, contested settings where officials are most tempted to act. Because the decision below will chill that expression and leave the most obvious violations of First Amendment rights unredressed, this Court should grant the petition.

ARGUMENT

I. This Court Has Long Recognized That The Enforcement of Laws Can Chill Constitutional Expression.

The government and its actors can stifle First Amendment freedoms both through direct prohibitions and also via enforcement practices that deter citizens from exercising their rights. *See First Choice Women's Res. Ctrs., Inc. v. Davenport*, 146 S. Ct. 1114, 1122–23 (2026) (recognizing that compelled disclosure requirements may deter association and thereby squelch speech). This Court has labeled the latter the “chilling effect,” covering instances in which a speaker cannot discern the boundaries of lawful conduct and elects to forgo exercising liberties. *See Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The chilling effect has particular force where a law regulating speech is vague, overbroad, or enforced through standardless discretion. *See, e.g., Reno v. Am. C.L. Union*, 521 U.S. 844, 871–72 (1997) (explaining that vagueness in regulations raises “special First Amendment concerns because of its obvious chilling effect”); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609 (1967) (explaining that overbroad laws inhibit protected expression as speakers “limit their behavior to that which is unquestionably safe”).

This Court’s chilling effect doctrine recognizes the many ways in which laws and their enforcement may “tend[] to chill” constitutional expression by causing “caution and timidity” among would-be speakers. *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter,

J., concurring). That concern is well founded. The cost of chilled expression falls not only on the speaker who forgoes “a constitutional right,” but on the public, which suffers the “general societal loss which results when the freedoms guaranteed by the [F]irst [A]mendment are not exercised.” Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. Rev. 685, 693 (1978). When speakers fall silent, the Nation loses the “uninhibited exchange of information, the active search for truth[,] and open criticism of the government.” *Id.*

Empirical evidence confirms that this harm is concrete, not hypothetical. Studies of online behavior have found that the prospect of government scrutiny leads substantial numbers of people to censor themselves, avoid sensitive subjects, and conform their speech to perceived official expectations. *See, e.g.*, Jonathon Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 Berkeley Tech. L.J. 117, 145–53 (2016); Elizabeth Stoycheff, *Under Surveillance: Examining Facebook’s Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, 93 Journalism & Mass Commc’n Q. 296, 304–08 (2016). That concern carries special force today, as online broadcasting has become a leading source of news. Nic Newman, et al., *Digital News Report 2025*, Reuters Inst. for the Study of Journalism at 12 (2025).

To safeguard the people’s constitutional rights, this Court has made it clear that the chilling effect doctrine applies when government action reasonably deters people from engaging in activity protected by the First Amendment. *See Davenport*, 146 S. Ct. at 1125. The doctrine applies even before a government actor elects

to enforce vague laws. *See id.* The key inquiry is whether someone self-censors in response to a “well-founded fear that the law will be enforced.” *Id.* at 1127 (quoting *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988)).

II. The Decision Below Demonstrates That The Invocation Of Qualified Immunity Can Chill Constitutional Expression.

Qualified immunity shields government officials from civil liability unless their conduct violates “clearly established” law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine requires courts to wrestle with two questions: (1) whether the officer violated a constitutional right, and (2) whether any prior decision had established that right with sufficient factual specificity to put a reasonable officer on notice. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Since *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), courts have been permitted to bypass the first question entirely—resolving cases on the “clearly established” prong without ever determining whether a constitutional violation occurred.

The bypass option coupled with qualified immunity creates vagueness—when courts decline to define the boundaries of the people’s constitutional rights, “[o]fficers are left without a clear statement of what may be constitutional going forward, and plaintiffs are left clueless as to whether the challenged conduct violated the Constitution—and remediless even if it did.” Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1901–02 (2018). The result is that law enforcement officers may wrongly decide to

enforce the law in instances where the First Amendment protects the challenged activity, yet the same officers will face no repercussions for violating the person's First Amendment rights because courts previously punted on the constitutionality question and therefore no on-point precedent controls the precise situation. Given this conundrum, rational speakers will err on the side of self-censorship when the legal boundaries of permissible activity lack clarity. *See* Schauer, *Fear, Risk and the First Amendment*, at 693–94.

The decision in *Hershey v. City of Bossier City*, 156 F.4th 555 (5th Cir. 2025) demonstrates the tension between qualified immunity and the chilling effect doctrine. Petitioner engaged in a core First Amendment activity: peacefully distributing religious leaflets on a public sidewalk—expression protected several times over by the Free Speech Clause, the Free Exercise Clause, and the bedrock prohibition on viewpoint discrimination. *See* *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). Officers approached Petitioner and threatened him with arrest, all while ignoring a nearby leafleteer who was distributing commercial advertisements for a radio station. Confronted with the coercive power of the state, Petitioner did what the chilling effect doctrine predicts a rational speaker will do when faced with legal uncertainty: Petitioner self-censored, left the public sidewalk, and did not return.

Petitioner brought suit under 42 U.S.C. § 1983 to vindicate his constitutional rights. The Fifth Circuit nonetheless upheld the district court's grant of qualified immunity to the officers, reasoning that no on-point precedent "clearly established" the right at the time of

the officers’ conduct. *Hershey*, 156 F.4th at 560–61 (Ho, J., concurring). That conclusion rested on a rule unique to the Fifth Circuit. This Court has held that officials may be denied qualified immunity when their conduct is so obviously unconstitutional that “a general constitutional rule already identified in the decisional law” applies “with obvious clarity to the specific conduct in question,” even absent a factually identical case. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); see *Taylor v. Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam). But the Fifth Circuit alone has arbitrarily confined that obviousness exception to Eighth Amendment claims, holding that no matter “how obvious a First Amendment violation might be demonstrated at trial,” a plaintiff must still identify “clearly established law” that is “founded on materially identical facts.” *Hershey*, 156 F.4th at 560 (Ho, J., concurring) (quoting *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024)).

In a concurring opinion, Judge Ho noted the Catch-22 that Petitioner faced. On one hand, the First Amendment “plainly encompasses the distribution of religious pamphlets—the activity at issue in this case,” and yet, because identical precedent is required to overcome qualified immunity in all but Eighth Amendment contexts, it did not “matter how obvious” the constitutional violation had been. *Hershey*, 156 F.4th at 557, 559 (Ho, J., concurring). Judge Ho further opined that it “make[s] a mockery” of the First Amendment “to grant qualified immunity just because no one in government has yet to be abusive enough to commit that particular violation.” *Id.* at 559 (Ho J., concurring) (quoting *McMurry v. Weaver*, 142 F.4th 292, 304 (5th Cir. 2025)).

As Judge Ho rightly suggested, qualified immunity imposes a regime of structural vagueness on the exercise of First Amendment expression. Under the governing regime, citizens have no guarantee whether an officer who violates their First Amendment rights will face consequences because consequences require identical precedent. *Hershey*, 156 F.4th at 557–59 (Ho J., concurring). That is the very uncertainty the chilling effect doctrine has long treated as problematic: speakers must decide whether to risk arrest (with no repercussions on the arrestor for a wrongful arrest) or remain silent. *See Speiser*, 357 U.S. at 526.

Hershey is not an anomaly—and the Fifth Circuit’s refusal to apply the obviousness principle outside the Eighth Amendment leaves it a lone outlier among the courts of appeals. Other circuits have recognized that *Hope*’s principle reaches beyond the Eighth Amendment, and several have invoked it to deny qualified immunity for obvious First Amendment violations. *See, e.g., Bailey v. Wheeler*, 843 F.3d 473, 484 (11th Cir. 2016); *Booker v. S.C. Dep’t of Corr.*, 855 F.3d 533, 543–46 (4th Cir. 2017). Even so, qualified immunity has repeatedly chilled the exercise of First Amendment activity. For instance, in *Trewhella v. City of Findlay*, the court held that a municipal permit requirement operated as an unlawful prior restraint, empowering the city to deny permits based on the content of an applicant’s speech. 592 F. Supp. 2d 998, 1006 (N.D. Ohio 2008). Yet the court shielded from liability the same official vested with sole discretion to deny a permit based on the content of the applicant’s speech, applying qualified immunity because the plaintiff failed to demonstrate that the violated right was clearly established. *Id.* at 1009.

Though extending *Hope* beyond the Eighth Amendment, other circuits have shielded officials from liability because the plaintiffs failed to demonstrate that the violation of their First Amendment right was clearly established. In *Sharpe v. Winterville Police Dep't.*, 59 F.4th 674, 680–81 (4th Cir. 2023), the Fourth Circuit deemed unconstitutional a town's policy prohibiting civilians from livestreaming police encounters. The town's officials faced no liability because the Fourth Circuit had yet to clearly establish that the specific factual scenario of livestreaming a traffic stop was constitutionally protected. *Id.* at 683–84. Similarly, the Third Circuit held that park rangers were entitled to qualified immunity when they wrongly stopped protestors from demonstrating on a public sidewalk. *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856 (3d Cir. 2012). Because the court found the rangers' mistaken belief that the sidewalk was a nonpublic forum to be reasonable, it held the protestors' First Amendment right to demonstrate on the sidewalk was not clearly established. *Id.* at 859. These decisions demonstrate a troubling pattern created by qualified immunity: courts may acknowledge clear violations of First Amendment rights and still deny redress because the judiciary had not yet delineated the precise contours of those freedoms.

III. Several States Have Recognized The Conflict Between The Chilling Effect Doctrine And Qualified Immunity And Have Moved To Fix It.

Though state law cannot define the scope of federal constitutional rights, this Court has often treated state practice as a useful source of guidance when resolving federal constitutional questions. *See Roth v. United States*, 354 U.S. 476, 482–93 (1957) (citing state obscenity laws as

instructive to the scope of First Amendment’s protection of free speech); *see also Beauharnais v. People of State of Ill.*, 343 U.S. 250 (1952) (relying on state and common-law traditions regulating libel as instructive to determining the limits of free speech under the First Amendment). The States’ varied approaches provide evidence of historical practice, contemporary judgment, administrability, and the practical consequences of competing legal rules. In the context of qualified immunity and the chilling effect doctrine, States have acknowledged the structural tension between the chilling effect doctrine and qualified immunity and have chosen alternative approaches.

Start with Colorado. Colorado has elected to deny qualified immunity as a defense to claims alleging deprivation of rights secured under the Colorado Constitution. *See* C.R.S.A. § 13-21-131(2)(b). Any peace officer who, acting under color of law, deprives an individual of a right protected under the Centennial State’s Constitution “is liable to the injured party for legal or equitable relief or any other appropriate relief.” C.R.S.A. § 13-21-131(1). As Article II of Colorado’s Constitution encompasses all rights guaranteed by the United States Constitution, § 13-21-131 and the State’s Constitution enable plaintiffs to litigate violations of their rights without concern that qualified immunity will shield all but “the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Bullock v. Brooks*, 565 P.3d 1091, *cert. denied*, No. 25SC212, 2025 WL 2964505 (Colo. Oct. 20, 2025). In effect, the State’s legislature has decided, in lawsuits alleging violations of constitutional rights, to remove the “clearly established” prong that often prevents cases from surviving summary judgment.

Consider next New Mexico. New Mexico has rejected qualified immunity as a defense to vindicating state constitutional rights. N.M. Stat. Ann. § 41-4A-4 (“In any claim for damages or relief under the New Mexico Civil Rights Act, no public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall enjoy the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the bill of rights of the constitution of New Mexico.”). However, New Mexico law enables a claimant to seek relief against a public body rather than against a wrongdoing government actor, shifting the focus away from the personal blameworthiness of an individual employee and toward whether government action caused a state-constitutional violation. N.M. Stat. Ann. § 41-4A-3. By abolishing qualified immunity for public bodies, New Mexico’s statute achieves the policy aims of the qualified immunity doctrine. *See Pearson*, 555 U.S. at 231 (stating “[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably”); *see also Lowrey v. Mosley*, No. 2:23-cv-00893, 2024 WL 4349407 (D.N.M. Sept. 30, 2024) (analyzing the plaintiff’s federal and state constitutional challenges independently of one another).

California has taken an alternative approach, too. Rather than abolishing qualified immunity entirely, California courts have barred defendants from exercising the federal qualified immunity defense for state civil rights claims under the Bane Act. Cal. Civ. Code § 52.1; *see Venegas v. Cnty. of Los Angeles*, 153 Cal. App. 4th

1230, 1246 (2007) (holding “qualified immunity of the kind applied to actions brought under 42 United States Code section 1983 does not apply to actions brought under section 52.1.”). Though California’s Bane Act provides a more limited cause of action than that accessible under Section 1983, the State judiciary’s decision to bar qualified immunity as a defense for Bane Act claims permits plaintiffs to prove just the statutory elements of the Act without also having to surmount the high bar imposed by the clearly established prong of qualified immunity.

The approaches of States like Colorado, New Mexico, and California prove the possibility of protecting constitutional rights while preserving officers’ ability to act with reasonable discretion. Colorado has made qualified immunity unavailable for claims against officers alleging violations of the Colorado Constitution, while preserving plaintiffs’ burden to prove an actual constitutional deprivation. New Mexico has barred qualified immunity under its law, while channeling liability to public bodies rather than to individual officers. And California courts have refused to invoke federal qualified immunity in cases involving State claims under the Bane Act, leaving plaintiffs with the burden of satisfying that statute’s requirements alone. These varied approaches illustrate that the interests undergirding the doctrine of qualified immunity may be preserved through alternative measures without imposing a requirement for “clearly established” precedent. In assessing the scope of qualified immunity, this Court should consider State measures, which demonstrate that robust constitutional enforcement and appropriate protection for public officers are not mutually exclusive.

IV. This Court Should Grant Certiorari Because Permitting The Decision Below To Stand Will Result In People Electing To Forgo Exercising Their Constitutional Rights, And It Will Chill Expression In The Broadcasting Community In Particular.

This Court’s review is warranted because leaving the decision below intact will result in individuals electing to forgo exercising their fundamental constitutional rights, expecting that similarly obvious First Amendment violations will likewise go unremedied. Allowing the lower court’s error to stand would entrench a precedent which burdens protected expression and leaves those whose rights are infringed without recourse. *See* Sup. Ct. R. 10(a) and (c).

That danger carries heightened importance for the faith communities NRB represents. The hand distribution of religious leaflets in which Petitioner engaged is, as this Court recognized nearly a century ago, “an age-old form of missionary evangelism—as old as the history of printing presses.” *Murdock*, 319 U.S. at 108. Today, that same evangelism increasingly reaches its audience through broadcast, livestream, and other electronic media. Since the COVID-19 pandemic, many Americans have turned to religious instruction delivered online rather than in person. *Decline of Christianity in the U.S. Has Slowed, May Have Leveled Off*, Pew Rsch. Ctr. (Feb. 26, 2025) (documenting that about 23 percent of U.S. adults watch religious services online or on television at least monthly). Americans increasingly consume news the same way: the share of people watching news videos at least weekly, predominantly on social platforms, rose from 55 percent in 2021 to 72 percent in 2025. *Social Media Overtakes*

TV as Americans' Top News Source, Nieman Found. for Journalism at Harvard Univ. (June 16, 2025), <https://tinyurl.com/ykyx2c8r>.

For NRB's members and the audiences they reach, the rule below is anything but abstract. A street evangelist threatened with arrest for distributing literature, a faith-based broadcaster uncertain whether officials may shut down a religious gathering or interview, and a citizen livestreaming a protest all confront the same Catch-22 that Petitioner faced: abandon the protected expression, or risk a sanction which—under the decision below—no court will ever remedy. Faced with that choice, many will simply fall silent. The stakes are especially acute in times of civil disruption, when documenting government conduct is most valuable and most likely to provoke official reprisal. See David R. Dewberry, *Shooting Bullets and Frames per Second: Recording the Police as Whistleblowing*, in FROM A WHISPER TO A MOVEMENT: INVESTIGATING THE SHARED RHETORICAL SPACES OF WHISTLEBLOWING AND SOCIAL PROTEST 61, 68–69 (Joshua Guitar & Alan Chu eds., 2025). Of the journalists arrested since 2017, approximately 84 percent were arrested at protests. *Arrest/Criminal Charge*, U.S. Press Freedom Tracker (last visited June 25, 2026). Recognizing the importance of such newsgathering as a check on government, several circuits have held that the freedom of the press protects ordinary citizens, not only professional journalists. See Carly LaForge, *Qualified Knowledge: The Case for Considering Actual Knowledge in Qualified Immunity Jurisprudence as It Relates to the First Amendment Right to Record*, 64 Wm. & Mary L. Rev. 851, 853 (2023) (noting that the Third, Fifth, and Seventh Circuits are among those holding that the freedom of the press protects more than professional journalists).

As broadcasting, livestreaming, and recording become central to how Americans worship, gather news, and observe their government, safeguarding those activities is inseparable from preserving the freedom of speech, the freedom of the press, and the free exercise of religion. The decision below leaves each of them exposed, permitting officials to suppress even obvious First Amendment violations so long as no prior case shares the same facts. That is precisely the regime the petition asks this Court to correct.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL P. FARRIS
SARAH SIU
NATIONAL RELIGIOUS
BROADCASTERS
800 Maryland Avenue NE
Washington, DC 20002

JUSTIN W. AIMONETTI
VINSON & ELKINS LLP
2001 Ross Avenue,
Suite 3900
Dallas, TX 75201

MICHAEL A. HEIDLER
Counsel of Record
VINSON & ELKINS LLP
200 W 6th Street,
Suite 2500
Austin, TX 78701
(512) 542-8400
mheidler@velaw.com

ALEX RANT
VINSON & ELKINS LLP
2200 Pennsylvania Avenue
NW, Suite 500 West
Washington, DC 20037

Counsel for Amicus Curiae