

No. 25-1389

In the Supreme Court of the United States

RICHARD HERSHEY,

Petitioner,

v.

CITY OF BOSSIER CITY, et al.,

Respondents.

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

**AMICUS BRIEF OF THE
AMERICAN CENTER FOR LAW & JUSTICE
IN SUPPORT OF PETITIONER**

JAY ALAN SEKULOW

Counsel of Record

JORDAN A. SEKULOW

STUART J. ROTH

ANDREW J. EKONOMOU

WALTER M. WEBER

NATHAN J. MOELKER

LIAM R. HARRELL

AMERICAN CENTER FOR

LAW & JUSTICE

201 Maryland Ave., NE

Washington, DC 20002

(202) 546-8890

sekulow@aclj.org

Counsel for Amicus Curiae

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INTEREST OF AMICUS¹

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of religious liberty and free speech. The ACLJ has appeared before this Court in many Section 1983 cases, both on behalf of parties and as *amicus*, e.g., *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Olivier v. City of Brandon*, 607 U.S. 552 (2026).

SUMMARY OF ARGUMENT

Qualified immunity exists to shield reasonable officers from liability for reasonable mistakes made in uncertain or rapidly evolving circumstances. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *Malley v. Briggs*, 475 U.S. 335, 341 (1986). This Court has recognized that when official conduct is so obviously unconstitutional that any reasonable officer would have known it violated the Constitution, no prior case with materially identical facts is required to overcome immunity. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (*per curiam*). Without this obviousness exception, Section

¹ Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

1983 becomes a dead letter for the very abuses it was enacted to remedy.

The Fifth Circuit has improperly limited *Hope*'s obviousness principle largely to Eighth Amendment claims. This creates an indefensible inversion: convicted prisoners asserting obvious Eighth Amendment violations receive the benefit of the exception, while law-abiding citizens asserting obvious First and Fourth Amendment violations do not. *See Villarreal v. City of Laredo*, 94 F.4th 374, 413 (5th Cir. 2024) (Ho, J., dissenting). As a result, Mr. Hershey has no remedy for blatant viewpoint discrimination against his religious speech on a public sidewalk, while recovery might still be available in less obvious cases. This Court should grant certiorari to restore uniformity and the proper scope of *Hope*.

ARGUMENT

I. *Hope* Properly Recognizes an Obviousness Exception That Prevents Section 1983 from Becoming a Dead Letter.

42 U.S.C. § 1983 creates a cause of action for the deprivation of federal rights under color of state law. It says nothing about shielding state actors from the consequences of their own unconstitutional conduct. That protection is a judicial invention, born of this Court's effort in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and refined in later cases, to ensure that officials are not held personally liable for reasonable mistakes made in the discharge of their duties. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *Reichle v. Howards*, 566 U.S. 658, 664 (2012). The doctrine's guiding principle has always been fairness to the reasonable officer confronting uncertain or rapidly

evolving circumstances. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (“With respect to a claim brought under 42 USCS 1983 . . . the inquiry as to the officer's “reasonableness” is an objective one . . . [which] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation in circumstances that are tense, uncertain, and rapidly evolving.”).

As Justice White famously put it, “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Most qualified immunity jurisprudence focuses on the second half of the standard, “those who knowingly violate the law,” or, more commonly, the “clearly established law” inquiry. The standard ordinarily requires a plaintiff to identify some precedent that would have given a reasonable official fair notice that his conduct was unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

But this case considers the first half of that famous formulation, the “plainly incompetent.” This basic principle led this Court to recognize a commonsense exception to the “clearly established law” standard in *Hope v. Pelzer*, 536 U.S. 730 (2002). In that case, the constitutional violation, use of a “hitching post” as carceral punishment, was “obvious.” *Id.* at 738. This Court explained that the “clearly established law” standard was meant to put officers on “fair warning” as to what conduct was prohibited, just like a criminal

due process analysis.² *Id.* at 740. And while some notice of the unconstitutionality of the conduct existed, such as a reprobative Department of Justice report on the practice, the “obvious cruelty” of the practice “should have provided [the officers] with some notice that their alleged conduct violated Hope’s constitutional protection against cruel and unusual punishment.” *Id.* at 745.

Put simply, when the violation is so flagrant and so obviously unconstitutional that any reasonable officer would have known it at the time, the absence of a prior case involving identical facts does not supply a defense. To hold otherwise would convert qualified immunity from a shield for reasonable mistakes into a license for the very abuses Section 1983 was enacted to remedy—state actors who trample the constitutional guarantees secured by the Fourteenth Amendment. Nor is this a novel principle; it is well established in this Court’s formulations of qualified immunity inquiries. “The qualified immunity inquiry. . . has a further dimension. The concern of the immunity inquiry is to acknowledge that *reasonable* mistakes can be made as to the legal constraints on particular police conduct.” *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (Kennedy, J.) (emphasis added). “Qualified immunity gives government officials breathing room to make *reasonable* but mistaken judgments about open legal questions.” *See, e.g., Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (Scalia, J.) (emphasis added). “Qualified immunity gives

² “[O]fficers sued in a civil action for damages under 1983 have the same right to fair notice as do criminal defendants charged with the offense defined in 18 USCS 242, which makes it a crime for a state official to act willfully and under color of law to deprive a person of rights protected by the Federal Constitution.” *Hope*, 536 U.S. at 730.

government officials breathing room to make *reasonable* but mistaken judgments about open legal questions.” *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (Alito, J.) (emphasis added). The doctrine of qualified immunity balances accountability with “the need to shield officials from harassment, distraction, and liability when they perform their duties *reasonably*.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (Alito, J.).

Without this caveat, articulated explicitly in *Hope*, the statute becomes a dead letter precisely where its remedy is most needed. An officer who handcuffs a prisoner to a hitching post for seven hours in the sun, as in *Hope*, or who threatens arrest and physically confronts a senior citizen peacefully distributing religious leaflets on a public sidewalk while permitting a commercial leafleteer to continue undisturbed, as here, would escape liability not because their mistake was reasonable, but simply because no prior officer had been so brazen in exactly that manner. That cannot be the law. Section 1983 was designed precisely to provide a federal remedy when state officials deny citizens the rights the Constitution secures. A judge-made doctrine that immunizes the most patent violations because they are unprecedented in their particulars defeats that design.

II. *Hope* and *Brosseau* Apply the Obviousness Principle Across Constitutional Amendments; the Fifth Circuit’s Limitation to Eighth Amendment Claims Creates an Indefensible Inversion That Protects Convicted Criminals While Denying Protection to Law-Abiding Citizens.

Nothing in *Hope* itself limited its obviousness principle to Eighth Amendment claims. The case arose in a prison setting simply because that was the factual context presented. The legal rule announced was broader: officials may be denied qualified immunity when their conduct is “so egregious” that fair notice is supplied by the obviousness of the constitutional violation itself. 536 U.S. at 738. This Court applied that same principle without qualification or caveat in *Brosseau v. Haugen*, 543 U.S. 194 (2004), a Fourth Amendment excessive-force case. There, this Court cited *Hope* for the proposition that, in an obvious case, general constitutional standards can clearly establish the unlawfulness of conduct even without a body of materially similar precedent. *Id.* at 199. The citation was seamless. **No** Justice suggested that the principle was confined to claims brought by convicted prisoners under the Eighth Amendment.³

³ Indeed, *Hope*’s application beyond the Eighth Amendment was so uncontested, it was cited as relevant by both the *per curiam* opinion and Justice Stevens’s dissent. Compare *Brosseau v. Haugen*, 543 U.S. 194, 199 (*per curiam*) (“Of course, in an obvious case, these standards can ‘clearly establish’ the answer, even without a body of relevant case law. See *Hope v. Pelzer*.”) to *Id.* at 205 (Stevens, J., dissenting) (“The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed. See *Hope v. Pelzer*.”).

The vast majority of the circuit courts of appeals have applied the obviousness exception across constitutional provisions, including the First Amendment. In fact, at least nine have explicitly applied *Hope* in this way. See *Hershey v. City of Bossier City*, 165 F.4th 292, 296 (5th Cir. 2025) (Ho, J., concurring) (collecting cases). That consensus is not surprising. The text of Section 1983 draws no distinction between the rights it protects. Nor does the logic of qualified immunity. If an obvious constitutional violation supplies fair notice when the victim is a prisoner, the same obvious violation supplies fair notice when the victim is a law-abiding citizen exercising core liberties on a public sidewalk. An officer who “obviously” cruelly or unusually punishes a prisoner should not be held to a stricter standard than an officer who “obviously” violates freedom of speech, or for that matter an officer who “obviously” quarters soldiers in a house during peacetime or violated any other constitutional right. To hold otherwise is to create a bizarre hierarchy in which the Eighth Amendment rights of convicts receive greater protection than the First, Fourth, or Third Amendment rights of those who have done nothing wrong.

The Fifth Circuit’s cabining of *Hope* produces exactly that oddity. Under its approach, convicted criminals may invoke obviousness to overcome qualified immunity in prison-conditions cases, while law-abiding citizens are told they must produce materially identical precedent even when the violation—such as viewpoint discrimination against religious speech in a traditional public forum—is patent on its face. That result finds no support in the statute, in *Hope*, or in *Brosseau*. It finds support only

in the Fifth Circuit's own restrictive gloss on this Court's precedents.

III. The Fifth Circuit's Error Leaves Mr. Hershey Without a Remedy for an Obvious First Amendment Violation While Potentially Permitting Recovery in Closer Cases; Certiorari Is Required to Restore Uniformity and the Proper Scope of *Hope*.

The consequences of that narrowing are now fully on display. Mr. Hershey was engaged in classic protected speech in a traditional public forum. He was threatened with arrest and physically confronted by officers who simultaneously permitted a commercial speaker to continue the same activity. Any reasonable officer would have known that viewpoint discrimination of this sort violates the First Amendment. The violation was obvious. Yet because the Fifth Circuit confined *Hope*'s obviousness exception to Eighth Amendment claims, Mr. Hershey was told he has no remedy under Section 1983. He must produce precedent involving materially identical facts even though no such precedent is required when the victim is a prisoner asserting an obvious Eighth Amendment violation. Meanwhile, Mr. Hershey's ability to identify comparable cases is handicapped by the complete egregiousness of the violation itself. Plainly, the more flagrant and outrageous the violation, the less likely it will have happened before and produced a published ruling. Thankfully, few law enforcement officers have attempted as obvious a violation as what Mr. Hershey experienced.

That disparity is not merely anomalous; it is intolerable. Under the Fifth Circuit's rule, convicted criminals receive the benefit of *Hope*'s protection

against flagrant abuses, while law-abiding citizens exercising fundamental liberties on public property are left remediless precisely because the violation was so clear that no prior officer had been foolish enough to commit it in exactly the same way. Section 1983 was enacted to prevent state actors from denying citizens the rights secured by the Constitution. A doctrine that immunizes the most obvious denials while permitting recovery only in closer cases makes no sense.

This Court should grant certiorari to correct the Fifth Circuit's error and to confirm that *Hope's* obviousness principle applies with equal force to all constitutional claims, including those arising under the First and Fourth Amendments.

* * *

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari and reverse the judgment below.

Respectfully submitted,

JAY ALAN SEKULOW

Counsel of Record

JORDAN A. SEKULOW

STUART J. ROTH

ANDREW J. EKONOMOU

WALTER M. WEBER

NATHAN J. MOELKER

LIAM R. HARRELL

AMERICAN CENTER FOR

LAW & JUSTICE

201 Maryland Ave., NE

Washington, DC 20002

(202) 546-8890

sekulow@aclj.org

Counsel for Amicus

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