

No. 25-1389

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 *AMICUS CURIAE*
HEARTBEAT INTERNATIONAL IN SUPPORT
OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Heartbeat International, Inc. is a § 501(c)(3) non-profit, interdenominational Christian organization whose mission is to support the pro-life cause through an effective network of affiliated pregnancy resource centers. Heartbeat serves approximately 3,030 pro-life centers, maternity homes, and non-profit adoption agencies in over 79 countries, including more than 1,857 in the United States—making Heartbeat the world’s largest such affiliate network.

Heartbeat is gravely concerned by recent efforts to suppress religious speech. If officials can silence a peaceful leafleteer or sidewalk counselor and avoid all liability merely because no prior case shares identical facts, as they did here, the burden will predictably fall on the network of organizations that work alongside Heartbeat. These pro-life advocacy groups do much of their work in exactly the kind of brief, factually varied public encounters the rule below leaves without a remedy.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From nearly its inception, this Court has recognized that our “government of laws ... will certainly cease to deserve this high appellation, if the

¹ Pursuant to this Court’s Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

laws furnish no remedy for the violation of a vested legal right.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The decision below furnishes no remedy for one of the most fundamental rights we possess as citizens, the right to religious speech. Richard Hershey handed out religious leaflets on a public sidewalk until five officers² threatened him with arrest and forced him to leave. Meanwhile, a commercial leafleteer worked the same crowd undisturbed. Everyone agrees this was an obvious violation of Mr. Hershey’s rights. But because his encounter occurred next to an arena rather than in a previously adjudicated setting, he recovered nothing. The right was real, but the remedy vanished.

The First Amendment is “doubly” protective of religious expression. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). The decision below subordinates religious speech and exercise beneath other constitutional rights even when the violation is obvious. By cabining *Hope v. Pelzer*, 536 U.S. 730 (2002) to the Eighth Amendment, the Fifth Circuit offers less protection to religious speakers than is afforded others.

The only remedy for speech that has already been silenced is damages. “Time is like a river made up of the events which happen, and a violent stream; for as soon as a thing has been seen, it is carried

² The fact that it was a mix of police and private security is immaterial in this context as joint action was clear. See *United States v. Price*, 383 U.S. 787, 794 (1966).

away....”³ Once silenced, religious speakers cannot have their voices restored. By foreclosing damages for anything “novel,” the decision below leaves a remedy unavailable in precisely the scenarios where religious expression most often occurs.

The problem is structural and will not correct itself. The legal doctrines of immunity, municipal liability, standing, and mootness interlock to form a dead zone where the most obvious violations are also the least likely to be remedied. Only this Court can revive the dead zone by giving the speakers the remedy they deserve while deterring future overzealous government action.

ARGUMENT

I. The Decision Below Subordinates Religious Speech and Exercise Even When the Violation Is Obvious.

A. The current rule falls as a penalty on religious expression.

The Fifth Circuit’s cabining of *Hope*, 536 U.S. 730 to only claims under the Eighth Amendment improperly subordinates First Amendment protections—particularly those for religious speech and exercise—beneath other constitutional protections. Here, Richard Hershey exercised his speech and religious rights by distributing religious tracts by hand, “an age-old form of missionary

³ Marcus Aurelius (Long, George trans.), *Meditations*, Book 4 (available at <https://classics.mit.edu/Antoninus/meditations.4.four.html>).

evangelism as old as the history of the printing presses,” which “occupies the same high estate under the First Amendment as do worship in ... churches and preaching from ... pulpits.” *Murdock v. Pennsylvania*, 319 U.S. 105, 108–09 (1943).

Hershey, unfortunately, is not alone in his experience of suppressed free-exercise and free-speech rights. Street evangelism is notoriously vulnerable to suppression by hostile or overzealous government officials. “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.” *Hershey*, 165 F.4th at 302 (Ho, J., concurring in the denial of rehearing en banc). In the Fifth Circuit alone, examples of unconstitutional suppression of religious speech and exercise abound. There is the case of Joshua Herridge, who sought to leaflet and preach, but was prevented from doing so at a pavilion in *Texas*. *Herridge v. Montgomery Cnty.*, No. 21-20264, 2022 WL 989421 (5th Cir. Apr. 1, 2022) (per curiam). Gabriel Olivier, an Evangelical Christian who often preaches in public using signs and a loudspeaker, was prevented from doing so at an outdoor amphitheater in Mississippi. *Olivier v. City of Brandon*, 2023 WL 5500223 (5th Cir. 2023), rev’d, 607 U.S. 552 (2026) (considering application of *Heck v. Humphrey*, 512 U.S. 477 (1994) to prior convictions). And Spring Siders, “a Christian who seeks to evangelize and share the gospel with others,” sought to do so “on public ways near and outside public events” because in these venues she has the “opportunity to reach a meaningful number of people with her message.” *Siders v. City of Brandon*, 123 F.4th 293, 298 (5th Cir. 2024). But she was

prevented from doing so outside a Mississippi amphitheater when police threatened to arrest her. *Id.* at 298–99.

Similarly, Ryan Denton, who proselytizes through literature distribution, conversation, and unamplified preaching, was prevented from doing so in an outdoor farmer’s market in Texas. *Denton v. City of El Paso*, 861 F. App’x 836 (5th Cir. 2021) (vacating, remanding, and holding policy prohibited religious proselytizing and content based pro-religious speech). David Grisham, who passed out Gospel tracts with his wife and daughter at a festival in Texas, was told under threat of arrest that he must leave the park and was physically escorted from the sidewalk. *Grisham v. City of Fort Worth*, 837 F.3d 564, 566 (5th Cir. 2016) (consent decree entered, Grisham prevailing party, remanded for attorneys’ fees and costs award). Finally, children at a public school were prohibited from distributing religious materials such as pencils, candy canes, and musical theater tickets. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009) (mooted by subsequent policy, remanded for review of damages). Each of these stories is a unique example of religious speech being suppressed without a meaningful or expedient judicial remedy.

Heartbeat International and its affiliates rely heavily on the First Amendment’s guarantee of religious and speech rights, particularly in public forums like sidewalks and street corners—a guarantee that is effective only with robust judicial protection. Much of the pro-life community disseminates their message of life on sidewalks and in other public spaces—a message that says “every new

life is welcomed and children are nurtured within strong families, according to God’s Plan, so that abortion is unthinkable.” Heartbeat International, About Us, <https://www.heartbeat.services.org/about-us> (last visited July 6, 2026). Such messages often arouse controversy and face political attacks, disproportionate scrutiny, and harassment. See Heartbeat International Amicus, *A Woman’s Concern, Inc. v. Healey*, 26-1264 (1st Cir. 2026). Heartbeat and similar “[p]regnancy centers rightly could be called the service arm of the pro-life movement.” Heartbeat International Amicus at 17 in *Nat’l Inst. of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018).

“[I]t should be obvious that believers have the right to share the good news with others.” *Hershey v. City of Bossier City*, 165 F.4th 292, 293 (5th Cir. 2025) (Ho, J., concurring). This is especially crucial in areas like pro-life advocacy where speech concerns controversial and sensitive topics. After all, “[p]opular speech doesn’t need protection. It’s only when speech is unpopular that you need the First Amendment.” *Id.* Cabining *Hope* the way the Fifth Circuit has done penalizes Heartbeat International and others whose work involves public advocacy of religious messages.

B. The most obvious religious-liberty violations are often the ones that go unanswered.

The restriction of Petitioner’s speech rights was obvious—Hershey, a leafleteer, was exercising his First Amendment rights in a public forum in compliance with the law. *Hershey v. City of Bossier City*, 2021 WL 4395056, at *1 (W.D. La. Aug. 23, 2021). Yet officers approached him, “waved a pair of

handcuffs,” and told him to leave. *Id.* at *2. Officers allowed other speakers to remain and continue their speech. *Id.* Hershey “attempt[ed] to explain that he had a legal right to pass out his literature,” but an officer “cut him off and told him that he was on private property and had to leave or be arrested.” *Id.* Hershey knew this order was unlawful but “fearing arrest, he agreed to leave.” An officer threatened Hershey with jail if he returned. *Id.*

When Hershey pointed out the viewpoint discrimination, “ask[ing] about the radio station cards that were being distributed,” the officer retorted that the radio station had permission, and Hershey did not. *Id.* But the officer was wrong; there was no “written or official policy regarding leaflet distribution” by which Hershey could have been excluded. *Id.* at *1. Still, the trial court held that an officer could be reasonably mistaken about whether the property was public or private, whether prior permission was required, and whether Hershey’s evangelism could be prevented even while allowing the speech of the radio station.

Following Fifth Circuit precedent, the court required Hershey to “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.” *Id.* at *5. The trial court determined Hershey had “not pointed to any controlling authority or other clearly established law that would have made clear to [the officers], beyond debate, that their prohibition of distributing leaflets on the sidewalks outside the Arena during a concert

event was unconstitutional.” *Id.* at *6. The trial court looked for a “violat[ion of] the rights of a leafleteer who was removed from a *similar* arena premises.” *Id.* at *6 (emphasis added). It also discussed “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.” *Id.* at *6. But, ultimately, for Hershey, and the many similarly situated speakers, courts require an “adequate showing of clearly established law in the context of this case.” *Id.* at *11. The problem is that that “context” varies widely from one case to the next, practically ensuring that many violations will go unremedied, no matter how obvious they are, because they are factually distinguishable from prior cases.

There is no question that the officer was wrong. Hershey was on *public* property, and no formal or official policy prevented his speech. *Id.* at *1. But the damage was done, his speech was chilled, and his First Amendment rights were trampled. Officials should not need a precisely on-point precedent to know that silencing a peaceful evangelist or expelling a counselor from a public sidewalk because of his speech is forbidden.

The ways in which religious faith and advocacy are exercised “at times gives rise to special problems to be addressed by police power.” *Murdock*, 319 U.S. at 109. Religious expression occurs in a variety of public locations: amphitheaters, pavilions, farmer’s markets, bus stops, and busy sidewalks, for example. No two examples are precisely the same, and the variables in such cases range widely: a six-foot cross,

large signs, small signs, literature in various forms, leaflets, and so on. *See supra* § 1.A. Similarly, the venue characteristics vary as to the breadth of the policies and the format of the restrictions. *Id.* For this reason, many such cases are unlikely to involve “materially identical facts” or to fall into “clearly established” law as courts have defined that concept. *Hershey*, 165 F.4th at 295–96.

Hershey’s speech, and that of the many Americans, manifests in a variety of ways: public religious witness, leafleting, preaching, sidewalk counseling, and prayer, to name a few. Such religious speech and exercise often occur in public forums and on sidewalks, sometimes drawing the attention of local law enforcement officials who respond with sudden, ad hoc suppression. *See Hershey*, 165 F.4th at 302 (Ho, J., concurring) (collecting cases). Indeed, the Hershey trial court recognized 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.” *Hershey*, 2021 WL 4395056, at *6.

As the trial court noted, “[v]ery little about this field of law is clearly established.” *Id.* The troubling consequence, given the Fifth Circuit’s cabining of *Hope*, is that obvious constitutional violations go unremedied. Because the context of such religious and free speech cases will repeat with factual variety, such rights will continue to be suppressed and even chilled.

C. Religious speakers end up with less protection than other claimants.

The Petition shows that *Hope*'s obviousness exception is not confined to one amendment or set of constitutional rights. When it comes to issues of "religious speech," the First Amendment is "doubly" protective. *Kennedy*, 597 U.S. at 523. "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Id.* Spreading one's religious beliefs by "[l]eafletting" on a public sidewalk is one of the most "classic forms of speech" and "lie[s] at the heart of the First Amendment[;]" it receives robust constitutional protection. *See Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997); *see also Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 385–86 (1990) ("[S]preading one's religious beliefs ... through distribution of religious literature ... is an age-old type of evangelism with a[] high ... claim to constitutional protection.").

The cabining of *Hope* to exclude such core First Amendment rights (the citizen praying, the counselor ministering, or the leafleteers handing out tracts) is deeply troubling. Under the Fifth Circuit's approach, it is not enough that "[t]he First Amendment reflects a profound national commitment to the principle that debate on public issues," including religion, "should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). It is not enough that when a person is "rightfully on a street which the state has left open to the public, who expresses his views in an orderly fashion, is protected in his communications of

ideas via handbills and literature.” *Jamison v. Texas*, 318 U.S. 413, 416 (1943). It is not enough that such speech is at “its zenith on public sidewalks” and “occup[ies] a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). None of that is enough for the Fifth Circuit. Because religious speakers often use public forums under highly fact-intensive circumstances, much First Amendment suppression will go unremedied by damages.

II. Damages Are the Only Remedy for Silenced Speech.

Once speech is suppressed, damages are the only remedy. To be sure, damages are not a complete remedy: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Nevertheless, in the First Amendment context—particularly in settings like those Petitioner faced, involving the exercise of First Amendment rights on a public street-corner or a sidewalk—a damages claim is often the *only* route even “to effectuate a partial remedy,” *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021), for the violation of a constitutional right. Declaratory and injunctive relief can never remedy past First Amendment violations, and as a practical matter, such relief is often inadequate to remedy ongoing violations—especially in the context of sidewalk and street-corner speech, where the fact-intensive nature of such violations frequently renders violations “novel” and

thus (under the Fifth Circuit’s rule) non-actionable, even when they are patently obvious.

Once a government official silences a street evangelist, sidewalk counselor, or protester, a court sitting in equity cannot travel back in time and restore that speaker’s voice. The encounter ends long before any court challenge can occur, and any subsequent court order does nothing for the speech that has already been suppressed.

Moreover, while injunctive and declaratory relief can sometimes prevent a recurrence of similar violations in the future, such forward-looking relief is necessarily circumscribed and incapable of remedying most violations. This is particularly true in the free speech context, especially in the settings that the pro-life movement finds so essential to its advocacy efforts: face-to-face, extemporaneous interactions in public places like sidewalks and street corners. *See Hill v. Colorado*, 530 U.S. 703, 780 (2000) (Kennedy, J., dissenting) (noting that denying sidewalk counselors “the ability to interact in person” and “engage in peaceful face-to-face communication” “strips petitioners of using speech in the time, place, and manner most vital to the protected expression”).

Recent cases before this Court illustrate just how hard it can be to effectuate meaningful relief *without* the possibility of a damages remedy, given the limitations of prospective relief. Challengers seeking prospective relief must clear the gauntlet of standing and justiciability requirements. Challengers who have not yet actually been punished for their speech or censored must satisfy standing requirements to bring pre-enforcement challenges. *See 303 Creative LLC v.*

Elenis, 600 U.S. 570, 580–81 (2023). The government can change problematic policies after the fact, potentially rendering claims for equitable relief moot. *See Uzuegbunam*, 592 U.S. at 284. Students graduate; employees change jobs; people move; all potentially moot prospective claims for relief against government suppression of their First Amendment rights. *See id.* Moreover, even where an injunction is appropriate, it must be tailored to the specific parties before the court, and should be no “broader than necessary to provide complete relief to each plaintiff with standing to sue.” *See Trump v. CASA, Inc.*, 606 U.S. 831, 861–62 (2025).

A further complication is that not all sidewalks and street corners are created equal. Speakers tend to prefer public spaces near major events: Petitioner presumably chose to distribute leaflets outside a Christian rock concert, rather than on a quiet neighborhood street corner, because he wanted his message to reach more of his fellow citizens. But major events are temporary. Once the event is over, any potential court challenge will likely be moot. *Cf. McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010) (noting that if “protesters seek an injunction to exercise their First Amendment rights at a specific time and place—say to demonstrate at a Saturday parade,” “the end of the parade will moot the case”). And practically speaking, even if a challenger can overcome mootness, the prime opportunity for speech will have already passed. As a result, it can be extremely difficult, if not impossible, to obtain meaningful injunctive relief during the narrow window between the time when a challenger identifies

a potential First Amendment violation and the time when the event concludes.

This is not to quibble with any of these standards for equitable relief. Injunctions are rightly circumscribed. “An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Indeed, injunctions are the exception, not the rule, because forward-looking remedies are generally the province of legislatures rather than the judiciary. *Cf. Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764 (1994) (explaining that statutes and ordinances “represent a legislative choice regarding the promotion of particular societal interests,” while injunctions “are remedies imposed for violations (or threatened violations) of a legislative or judicial decree”). Because an injunction is the product of prospective judicial rule-making—without the benefits of extensive fact-finding, broad input from stakeholders, public debate, or direct democratic accountability, which are characteristic of the legislative process—it is impractical to craft injunctive remedies to fully protect citizens’ rights outside the narrow, fact-bound circumstances of a particular case.

Another reason injunctive relief offers limited protection for First Amendment rights, particularly in the sidewalk and street-corner context, is because violations tend to be highly fact-intensive. *See supra* § 1. Every encounter between a sidewalk counselor and police officer has the potential to present novel factual circumstances, even when the legal principles are obvious. For example, in this case, the location of

the sidewalk in relation to a city-owned stadium raised the issue of whether the police officers believed the spot was a public forum. Likewise, the presence of other speakers in the vicinity raises a host of potentially relevant facts: how close the other speakers were; whether they were creating a disruption; how the police interacted with them; and so on.

Even the width of the sidewalk, the density of crowds, the size of a protester's sign, various visual factors, the location of the sidewalk in relation to other public forums, and countless other factors might prevent the application of an injunction in one case to future circumstances. For example, in *United States v. Grace*, the Court analyzed speech restrictions on sidewalks surrounding the Supreme Court building and emphasized that there was "no separation, no fence, and no indication whatsoever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." 461 U.S. 171, 180 (1983); *see also, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 641 (9th Cir. 1998) (evaluating sign restrictions and explaining that "[a] fifteen square foot sign carried by a protester on a public sidewalk, when compared to a three square foot sign, may block drivers' views of road signs and traffic conditions, intimidate pedestrians, and obstruct the safe and convenient circulation of pedestrians on the sidewalk").

Even obvious violations tend to be highly fact-intensive, so as a practical matter injunctions (1) are of limited value as they have to target facts that might

not ever precisely recur, and (2) put courts in the awkward position of trying to craft prospective rules to prudently and equitably guard everybody's interests (typically a legislative function, not a judicial one), instead of remedying concrete past harms.

A damages action against the offending government official is the only remedy that fits this type of violation. But because the endless permutations of fact patterns mean that most First Amendment violations will be “novel,” the decision below forecloses that remedy in precisely the kinds of encounters where religious expression and other core First Amendment activity frequently occur. At best, the speaker's only remedy is a costly, never-ending game of whack-a-mole: a situation where the only speakers whose constitutional rights are vindicated are those with sufficient means (and luck) to hire lawyers, rush to court, obtain an injunction, and then hope the ruling will deter obvious constitutional violations the next time they encounter overzealous authorities under new facts.

The upshot is that for many Americans, First Amendment rights in the public square exist in name only. Whenever overzealous or hostile government officials violate their rights in some novel way, even if the violation is obvious and egregious, there is no remedy. Without the security of a judicial remedy, many will simply “self-censor, fearing the consequences” of an arrest or other run-in with censorious officials. *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 677 (2024) (Thomas, J., dissenting) (quoting *Speech First, Inc. v. Sands*, 69 F.4th 184, 204 (4th Cir. 2023) (Wilkinson, J., dissenting)). “This seems

particularly true regarding controversial issues,” like those on which Heartbeat International and others in the pro-life movement advocate. *Id.*

III. The Decision Below Creates Constitutional Dead Zones Where the First Amendment Becomes Illusory in Practice.

A. For religious ministries, the remedial gaps do not appear one at a time; they converge.

“The First Amendment protects not just the right to pray, but to preach. To not only worship, but to witness.” *Hershey*, 156 F.4th at 557 (Ho, J., concurring); *see also* *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (“[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions.”). The fundamental rights to speak, preach, and bear witness are illusory if they are subject to governmental suppression in novel situations *merely* because a law enforcement officer simply hasn’t encountered the speech in that means, method, place, or circumstance before. Under the Fifth Circuit’s rule, the doctrines designed as *limited* exceptions to government accountability converge into a web of perverse incentives. Qualified immunity forecloses damages against the individual officers, while *Monell*’s policy requirement forecloses recovery against the municipality; *Lyons* denies injunctive relief against encounters already over, and mootness extinguishes whatever remains once the government rescinds its policy. The result is a dead zone in which a religious minister or any other speaker may suffer

an obvious constitutional violation that teaches officials that unprecedented censorship is the safest kind of censorship.

Judge Ho identified the problem in his concurrence, but its logical conclusion is even worse than that. *Hershey*, 156 F.4th at 557 (Ho, J., concurring). Suppose you are a religious speaker whose protected speech was wrongly silenced because of the novel method or means by which it was conducted. You couldn't have sought declaratory (or prospective injunctive) relief based on a simple fear or suspicion that you will be silenced. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983). Injunctive relief for future occurrences is insufficient to remedy the speech that has already been silenced. And if the method or means was novel, then no clearly established law put the officer on notice, so he cannot be held liable and you cannot recover for the harm already suffered.⁴ This is the very real consequence of the Fifth Circuit's wayward ruling.

B. The dead zone forms exactly where faith-based work is expanding.

Religious outreach and expression supplies an endless stream of factual novelty that places organizations affiliated with Heartbeat International at particular risk. Petitioner handed out leaflets on a public sidewalk outside of a Christian rock concert.

⁴ The problem isn't limited to novel interactions with law enforcement. If one were silenced by government policy rather than individual officer actions, then the government can moot the case by amending the policy. See *N.Y. St. Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 337 (2020) (per curiam); *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677-78 (2023).

The right to distribute religious literature on public streets has been settled law for decades at least. See *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (declaring unconstitutional an ordinance that prevented the distribution of religious leaflets because they included a call to donate money); cf. *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (declaring unconstitutional ordinance that prevented the distribution of leaflets generally). This would seem a simple and obvious matter of overly aggressive officers silencing protected speech. Not so, says the Fifth Circuit. Here, the public sidewalk was next to a privately owned arena. This incidental fact created a “novel” setting that somehow grants the officers here immunity.⁵

Since *Dobbs*, these kinds of situations have multiplied. Crisis pregnancy organizations and faith-based counselors are beset on all sides from enforcement targeted to silence their speech. From overly aggressive FACE Act enforcement to compelled-speech statutes, to the counseling ban this Court reviewed in *Chiles v. Salazar*, 146 S. Ct. 1010 (2026), religiously motivated speakers generally and pregnancy resource centers specifically are facing mounting threats to their speech rights. See, e.g., *NIFLA*, 585 U.S. at 761–65 (outlining the extensive compelled speech scheme the State of California

⁵ The “novelty” here is particularly problematic. In the Fifth Circuit’s reasoning, a mere change in the character of the private building next to the street could confer another “novel” setting. If a street next to an arena is no longer novel, then a street next to a waterpark is novel because it is not an arena. If a waterpark becomes no longer novel, then some other form of building, space, or venue may be. These absurd examples need to be put forth because the factual scenario that the Fifth Circuit protects is likewise untenable.

implemented for pregnancy resource centers). The pattern is part of the problem, and the goalposts keep moving as unfriendly jurisdictions adapt their methods. When the violation is presented through a statute or government policy, ministries obtained injunctions. *See, e.g., Herridge v. Montgomery County Tex.*, 2023 WL 5939888 (S.D. Tex. Sept. 12, 2023) (plaintiff prevailing as to leaflets and signs against unwritten governmental policy). But when it arrives as a sudden police encounter, like in this case, they can obtain no remedy. The rights are the same; the ability to secure relief is not.

Heartbeat writes because its affiliates and other pro-life organizations use speech as a means of persuasion in factually novel settings and in places where that speech may not be welcome. The sidewalk counselors, pregnancy resource centers, and public witnesses it trains and supports do their work in brief, factually novel public encounters, the one category where relief is systematically unavailable. Each new encounter is, in its own way, *sui generis*. Once lost, the harm is done; that moment is forever silenced. And when an encounter is deemed “novel” enough, relief is denied and no mechanism of accountability remains. “In this Nation, no official—‘high or petty’—may command our tongues or silence our voices.” *Chiles*, 146 S. Ct. at 1021 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)). The Fifth Circuit rule permits just that.

C. A rule that immunizes novel violations teaches officials that novel suppression is cost-free.

The Fifth Circuit’s rule turns the concept of fair warning upside-down. The more novel and obvious a constitutional violation, the less likely a court has confronted identical conduct before. The less likely an identical precedent exists, the more certain qualified immunity becomes. The result is a perverse incentive: government officials are safest when they either find new ways to violate the Constitution or attribute the violation to a mere mistake.

This is not a new problem. This Court has repeatedly warned that requiring a factual twin is neither necessary nor appropriate. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Requiring nearly identical facts in the context of qualified immunity turns it from an exception to liability into the default in factually novel cases. Qualified immunity does not require courts to “imagine some previous case with materially similar facts” when the constitutional violation is otherwise obvious. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.). After this Court summarily reversed the Fifth Circuit in *Taylor v. Riojas*, Judge Willett warned against remaining “reflexive in granting qualified immunity” for obvious constitutional violations merely because the “precise fact pattern is novel.” *Ramirez v. Guadarrama*, 2 F.4th 506, 519–20 (5th Cir. 2021) (Willett, J., dissenting from denial of rehearing en banc). The warning remains the same: courts need not be “oblivious to the obvious” simply because an official

devises a new way to violate the Constitution. *Id.* at 523.

The First Amendment cases show the cost of that approach. For nearly a decade, courts of appeals have addressed constitutional violations and then immunized officials because no prior case involved sufficiently similar facts. See *Fields v. City of Philadelphia*, 862 F.3d 353, 361 (3d Cir. 2017) (finding qualified immunity because the Circuit had yet to find a constitutional right to record police officers); *Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022) (finding qualified immunity where individual was arrested for a parody Facebook page because it was not clearly established that his Facebook page was parody); *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 F.4th 376 (2d Cir. 2025) (finding qualified immunity because no case had established that exercising regulatory power to pressure regulated entities into disassociating with the NRA). Each case adds another example of unconstitutional suppression without a remedy. However, each case also presents a new form of suppression that can be distinguished from the last. Indeed, the factual gap narrows, but never closes.

That incentive runs in precisely the wrong direction. An official confronting familiar conduct has precedent to consult. But when the circumstances are new, suppression becomes a safe legal choice. Novelty means fewer cases and no factual twin. Under the Fifth Circuit's rule, no factual twin equals immunity. The doctrine thus does more than fail to deter novel constitutional violations—it affirmatively underwrites them.

The problem will not correct itself. The Fifth Circuit's error is structural and not a singular misreading of precedent. This Court has long held that an official need not have previously committed the "very action in question" for its unlawfulness to be apparent. *Anderson*, 483 U.S. at 640. This Court subsequently explained why: a general constitutional rule may apply "with obvious clarity to the specific conduct in question," even when "the very action in question has [not] previously been held unlawful." *United States v. Lanier*, 520 U.S. 259, 271 (1997). *Hope* and *Taylor* applied that principle to obvious constitutional violations involving prisoners. Yet the Fifth Circuit has turned that incidental fact into the boundary of the rule, confining obviousness to a possible exception. *Villarreal v. City of Laredo*, 134 F.4th 273, 284 n.6 (5th Cir. 2025) (Oldham, J., concurring). That repeats the very mistake that *Hope* rejected: treating factual distinctions as dispositive instead of asking whether existing law gave officials fair warning. 536 U.S. at 741. A court committed to that method can distinguish any future precedent the same way.

A fact-matching approach can evade the rule indefinitely. Every case has unique facts. An official suppressing a parody can distinguish a case about recording police. An official pressuring a private intermediary can distinguish a case involving direct censorship. The next official can distinguish both. If factual novelty itself defeats clearly established law, the first official to devise each new form of suppression receives immunity by definition.

This Court has already summarily rejected the Fifth Circuit's cramped approach. *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). Yet the Fifth Circuit reaffirmed its rule after remand in *Villarreal v. City of Laredo*, 134 F.4th 273 (5th Cir. 2025), applied it again below despite an express finding that the violation was obvious, and denied rehearing en banc. A rule that survives summary reversal is unlikely to yield to another reminder.

CONCLUSION

The Fifth Circuit improperly cabined the obviousness principle of *Hope v. Pelzer* to the Eighth Amendment, and the practical consequence of that confinement is that the most flagrant violations of religious speech and free exercise escape any remedy. That is a perverse result as it rewards the official who either devises or happens upon a form of censorship no court has yet catalogued. This leaves the peaceful leafleteer, the sidewalk counselor, and the public witness with a right that exists on paper and nowhere else. Frankly, a rule under which novelty itself defeats liability is not a limitation on damages so much as an open invitation to suppress speech in unfamiliar ways.

Only this Court can restore the fair-warning principle that its own precedents require, and this case, in which the constitutional violation is conceded to be obvious, and the officers were nonetheless immunized, presents a clean occasion to do so. Given the great societal import and the perverse incentives the Fifth Circuit rule invites, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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