

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
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF THE CATO INSTITUTE
AND THE LAW ENFORCEMENT ACTION
PARTNERSHIP AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*¹

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials who advocate criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speaker's bureau numbers more than 275 criminal justice professionals advising on police community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Petitioner Richard Hershey tried to hand out leaflets promoting religious vegetarianism on the public sidewalk outside a public arena hosting a Christian concert, police officers and security officers threatened to arrest him and forced him to leave. Pet. at *i*. They left unbothered another person nearby leafletting for a commercial radio station. *Id.* This discriminatory treatment blatantly violated Mr. Hershey’s rights under the First Amendment’s Free Speech and Free Exercise Clauses. *Id.* at *i*, 1.

When Mr. Hershey brought suit under 42 U.S.C. § 1983, the district court granted the officers qualified immunity, a decision affirmed by the Fifth Circuit. Pet. App’x at 104–05, 133–37, 147–48; *Hershey v. City of Bossier City*, 156 F.4th 555, 557 (5th Cir. 2025). Mr. Hershey now asks this Court to reverse. *See generally* Pet. Doing so would help bring the Fifth Circuit’s overreaching qualified immunity jurisprudence in line with this Court’s precedent and that of other circuits.

This Court clarified the limited scope of qualified immunity in *Hope v. Peltzer*, 536 U.S. 730, 741 (2002), holding that officials “can still be on notice that their conduct violates established law even in novel factual circumstances.” *See also id.* at 753 (Thomas, J., dissenting) (“Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address ‘materially similar’ conduct.”); accord *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam).

But *Hope* does not hold good in the Fifth Circuit. That court has effectively limited that case to Eighth

Amendment claims like the one it directly addressed. *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024) (en banc), *cert. den'd sub nom. Villarreal v. Alaniz*, 146 S. Ct. 939 (2026). This is not a plausible reading of *Hope*. *Id.* at 413 (Ho, J., dissenting) (“Nothing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens. Nothing in *Hope* or *Taylor* indicates that those decisions apply only to prison conditions. And no other circuit takes the approach urged by our colleagues in the majority.”). Yet the Fifth Circuit’s crabbed take on *Hope* is why it denied Mr. Hershey relief. *Hershey*, 156 F.4th at 557 (Ho, J., concurring) (“. . . I reluctantly concur in affirming the grant of qualified immunity, as compelled by our (mistaken) circuit precedent.”).

This Court’s recent decisions have repeatedly rejected doctrines invented by appellate courts seeking to limit the application of its precedent. *See Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 306 (2025); *Seven Cty. Infrastructure Coal. v. Eagle Cty.*, 605 U.S. 168, 183 (2025); *Barnes v. Felix*, 605 U.S. 73, 81–82 (2025). We respectfully urge the Court to do the same here and correct the Fifth Circuit’s jurisprudence.

ARGUMENT

I. *HOPE* REFLECTS § 1983’s BREADTH.

Hope represents a correction of qualified immunity doctrine back toward the broad reach Congress intended for § 1983 to have. During Reconstruction, President Grant urged Congress to enact legislation to “effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.” Gene R. Nichol, *Federalism, State Courts, and Section*

1983, 73 VA. L. REV. 959, 973 (1987) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 653, app. at 244 (1871)). The Civil Rights Act of 1871 (now codified at § 1983) was Congress’s response. Introducing the Act, Representative Shellabarger described it as a measure “which does affect the foundations of the Government itself, which goes to every part of it, and touches the liberties and the rights of all the people,” describing it as “remedial, and in aid of the preservation of human liberty and human rights.” CONG. GLOBE, 42d Cong., 1st Sess., app. 67, 68 (1871). He explained that it should be “liberally and beneficently construed,” read with “the largest latitude consistent with the words employed.” *Id.* at 68. Section 1983 promised relief for all violations of federally protected rights committed by state and local officials.

The Act empowered federal courts in part because state courts failed to hold officials liable. Congressmen observed that state tribunals were “under the control of conspirators, and unable or unwilling to check the evil,” “notoriously powerless to protect life, person and liberty,” and themselves guilty of denying “the rights and privileges due an American citizen.” Nichol, 73 VA. L. REV. at 975 (citations and quotation marks omitted). Section 1983’s framers “believed that local judges had abdicated their responsibility to ensure evenhanded enforcement of the law.” *Id.*

Lamentably, judicial unwillingness to vindicate rights has returned in the form of recent § 1983 jurisprudence. Qualified immunity in particular rewards state actors who devise novel ways to violate the Constitution, as *amici*’s briefs before this Court regularly insist. *See, e.g., Smith v. Kind*, No. 25-943, 2026 U.S. LEXIS 2875, at *10 (June 29, 2026) (Sotomayor, J.,

dissenting from denial of cert.) (criticizing a grant of qualified immunity for “embolden[ing] government officials . . . to act with impunity”); Br. of Cato Inst. et al. as Amici Curiae, *Smith*, 2026 U.S. LEXIS 2875.

Despite this pernicious doctrine, *Hope* confirmed the existence of at least a narrow safety valve, ensuring that § 1983 relief remains available where “a general constitutional rule” applies “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. While *Hope* did not restore the broad protection Congress meant for § 1983 to have, it did ensure that the federal courts can grant relief to people who suffer the most obvious violations of their constitutional rights.

Mr. Hershey should be among them. *Hershey*, 156 F.4th at 557 (Ho, J., concurring). But over the persistent protests of several of its judges, the Fifth Circuit has carved out a sub-exception to the *Hope* exception, misreading that case as applying only to Eighth Amendment claims. This outlying error needs correction.

II. THE FIFTH CIRCUIT ALONE LIMITS *HOPE* TO EIGHTH AMENDMENT CLAIMS.

Though *Hope* concerned an Eighth Amendment claim, its holding applies generally to qualified immunity. In *Hope*, Alabama corrections officers chained an inmate to a hitching post for hours without a shirt, adequate water, or the chance to use the restroom. 536 U.S. at 735. The district court granted them qualified immunity. The Eleventh Circuit affirmed, holding that even though the inmate suffered unconstitutional cruel and unusual punishment and there was “analo-

gous” precedent to guide officials, the nature of the rights violation at hand was not materially similar enough to surmount qualified immunity. *Id.* at 736 (citation omitted). This Court reversed. *Id.* at 748. It described the Eighth Amendment violation as so “obvious” that qualified immunity did not apply “even though the very action in question has not previously been held unlawful.” *Id.* at 738, 741.

Hope’s holding is not a nuance of Eighth Amendment law. It is a general principle. As then-Judge Gorsuch noted, it reflects the simple truth that “some things are so obviously unlawful that they don’t require detailed explanation.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). In the words of Judge Ho:

It seems absurd to suggest that the most egregious constitutional violations imaginable are somehow immune from liability precisely because they’re so egregious. It would make a mockery of our rights to grant qualified immunity just because no one in government has yet to be abusive enough to commit that particular violation—and then stubborn enough to litigate it

McMurry v. Weaver, 142 F.4th 292, 304 (5th Cir. 2025) (Ho, J. concurring).

Hope is common sense, but the Fifth Circuit has proven uncommonly resistant to it. This Court summarily reversed a Fifth Circuit decision granting qualified immunity to corrections officers who confined an inmate in a cell that was “covered in feces,” then relocating him to another “frigidly cold cell, which was

equipped with only a clogged drain in the floor to dispose of bodily wastes”—leading him to “hold his bladder for 24 hours” and “sleep naked in sewage.” *Taylor*, 592 U.S. at 8. This Court reversed, holding that “no reasonable correctional officer could have concluded” that the inmate’s treatment comported with the Constitution. *Id.*

Thus put on notice that it interpreted *Hope* too narrowly, the Fifth Circuit responded by limiting that decision and *Taylor* to Eighth Amendment violations. As a result, Respondents’ obvious violation of Mr. Hershey’s First Amendment rights goes unredressed because he was threatened with an unconstitutional arrest rather than being unconstitutionally abused after one. Government officials “are free to plead (or feign) ignorance of bedrock constitutional guarantees”—unless they happen to oppress an inmate. *Villarreal*, 94 F.4th at 407 (Willett, J., dissenting). “Turns out, ignorance of the law *is* an excuse—for government officials” who violate First Amendment rights rather than Eighth Amendment ones. *Id.* (emphasis in original).

This is intransigence. The First Amendment is not “a second-class right.” *Id.* at 413 (Ho, J., dissenting); see also *Villarreal v. Alaniz*, 146 S. Ct. 939, 942 (2026) (Sotomayor, J., dissenting from denial of cert.) (“Even absent a factually similar precedent, the contours of Villarreal’s First Amendment rights were sufficiently clear to place the unlawfulness of the officials’ alleged conduct ‘beyond debate.’”) (citation omitted). “Nothing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens. Nothing in *Hope* or *Taylor* indicates that those decisions ap-

ply only to prison conditions.” *Villarreal*, 94 F.4th at 413 (Ho, J., dissenting).

“And no other circuit takes the approach” of the Fifth Circuit. *Id.* “Blatant violations of basic constitutional guarantees do not require a dead ringer in the Federal Reporter to merit relief” in other circuits. Pet. at 2; *see also Diaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle v. Marron*, 663 F.3d 100, 115–16 (2d Cir. 2011); *McGreevy v. Stroup*, 413 F.3d 359, 366 (3d Cir. 2005); *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2012); *MacIntosh v. Clous*, 69 F.4th 309, 319 (6th Cir. 2023); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013). As the Sixth Circuit has readily recognized, “articulating the right at issue . . . too specifically risks shielding obvious and egregious constitutional violations from liability.” *MacIntosh*, 69 F.4th at 319.

Hope is not stingy. No other circuit treats it as such. The Fifth Circuit’s novel distortion merits reversal.

III. THIS COURT HAS CONSISTENTLY REJECTED ARTIFICIAL LIMITS ON THE APPLICATION OF ITS PRECEDENT.

Reversal here would follow three of this Court’s recent decisions unwinding doctrines invented by lower courts that limit the effect of its precedent. First, consider *Ames*, 605 U.S. 303. There, this Court unanimously discarded a Sixth Circuit antidiscrimination rule requiring a “plaintiff who is a member of a majority group” to “show background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.” *Id.*

at 305 (citation and quotation marks omitted). This “additional” requirement “to satisfy a heightened evidentiary standard,” not found in the relevant statute or this Court’s precedent, was “implemented” at the whim of a federal appellate court. *Id.* at 305–06, 313.

Justice Thomas went further in a concurrence, criticizing courts that “create atextual rules and frameworks” for engaging in “improper judicial lawmaking.” *Id.* at 313 (Thomas, J., concurring). He noted that when “courts lack an underlying legal authority on which to ground their analysis, there is no principled way to resolve doctrinal ambiguities.” *Id.* at 315. “Atextual, judge-created legal rules have a tendency to generate complexity, confusion, and erroneous results,” he concluded. *Id.* at 326.

The same is true here. Nothing in § 1983 or *Hope* limits the obviousness exception to qualified immunity to the Eighth Amendment context. *Villarreal*, 94 F.4th at 413 (Ho, J., dissenting). Lacking a legal foundation, the Fifth Circuit’s rule is arbitrary and leads to unjust results. *Id.* (“Nothing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens.”).

Second, in *Seven Cty. Infrastructure Coal. v. Eagle County*, 605 U.S. 168 (2025), this Court rejected a lower-court doctrine turning a procedural agency requirement into a substantive one. It held that courts cannot use “the guise of judicial review” to replace “clarity and predictability” with self-concocted rules. *Id.* at 192 (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978)). The Fifth Circuit does not have the authority to evade *Hope* through creative misinterpretation.

Lastly, a year ago, this Court unanimously reversed the Fifth Circuit for imposing an arbitrary limiting rule. In *Barnes*, 605 U.S. at 76, it struck down the circuit’s “moment of threat test” for excessive force under the Fourth Amendment. This Court’s precedent has long directed courts to consider the “totality of the circumstances” surrounding the use of force. *Id.* Yet the Fifth Circuit limited its consideration to only “the circumstances existing at the precise time an officer perceived the threat inducing him to shoot.” *Id.* The Court deemed this rule incompatible with its “fact-dependent and context-sensitive approach.” *Id.* at 82.

Hope, too, calls for attention to the facts. Yet, as with the moment of threat rule, the Fifth Circuit has created “an impermissible gloss” that “stifles a robust examination of the [Constitution’s] protections for the American public.” *Barnes v. Felix*, 91 F.4th 393, 401 (5th Cir. 2024) (Higginbotham, J., concurring).

The Fifth Circuit again imposes exactly the sort of restrictive sub-doctrine this Court uprooted in *Ames*, *Seven County Infrastructure Coalition*, and *Barnes*. This Court should ready its shovel once more.

CONCLUSION

Section 1983 promises a remedy for Americans whose rights are violated by state and local officials. While qualified immunity regrettably impairs it, *Hope* at least confirms that the doctrine yields before obvious violations like the one Mr. Hershey suffered. Yet the Fifth Circuit has thwarted *Hope* by confining it only to Eighth Amendment claims—a reading so implausible no other circuit has adopted it.

This Court has recently, and unanimously, excised errors like this. It should do so again. Mr. Hershey de-

serves the relief he would have received had he been mistreated after arrest rather than unlawfully threatened with it.

Respectfully submitted,

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