

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**

**BRIEF OF *AMICI CURIAE* COALITION OF
VIRTUE AND AMERICAN HINDU JEWISH
CONGRESS IN SUPPORT OF PETITIONER**

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INTERESTS OF *AMICI CURIAE*¹

Coalition of Virtue (COV) is a non-profit association of Muslim individuals whose mission is to promote virtue in society, grounded in divine guidance as embodied in the Islamic tradition. COV encourages citizens to become civically engaged, pushing for legislative changes that represent the highest values of faith and reason.

The American Hindu Jewish Congress (AHJC) is a national, non-partisan coalition representing the shared interests and concerns of Hindu Americans and Jewish Americans. Founded in 2025, AHJC unites two vibrant, millennia-old faith communities to advocate for religious liberty, mutual respect, and interfaith solidarity. The AHJC membership encompasses community leaders, houses of worship, cultural associations, student fellowships, and civil-rights advocates across all fifty States.

Amici and their members hold sincere religious convictions regarding the expression of their faiths publicly. The decision below risks preventing them—and other Americans with similar religious convictions—from challenging state action that unconstitutionally limits their right to profess their faiths publicly.

¹ Pursuant to this Court's Rule 37.6, counsel for amici curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, amici notified all counsel of their intention to file this brief at least 10 days before the date of filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a straightforward and exceptionally important question: whether qualified immunity forecloses relief where state officials violate citizens' constitutional rights in ways that are so obvious that courts have never had occasion to declare the conduct unlawful. Under the common law, this Court's precedents, and plain common sense, the answer is no. Below, however, the Fifth Circuit granted Respondents qualified immunity in the face of an obvious violation of the First Amendment right to engage in religious speech.

In this case, police officers allegedly prevented Petitioner from peacefully distributing religious literature on a public sidewalk—even as the officers simultaneously allowed another individual to distribute non-religious flyers at the same location. The Fifth Circuit held—at the motion-to-dismiss stage—that these facts cannot overcome qualified immunity. As Judge Ho explained in his concurring opinion, the panel's decision followed from longstanding Fifth Circuit precedent holding that, outside of the Eighth Amendment context, qualified immunity protects officials who commit even the most obvious constitutional violations unless a court had previously found identical conduct unlawful.

The Fifth Circuit's decision has no basis in Section 1983, this Court's precedents, or the common-law principles that inform courts' interpretation of the scope of qualified immunity. To the contrary, all three considerations cut in exactly the opposite direction. Neither the text of Section 1983 nor the common-law immunity principles that inform that text requires a prior judicial decision holding conduct unlawful if the

conduct obviously violates a constitutional right. Nor do this Court's precedents support the Fifth Circuit's rule. This Court has instead repeatedly concluded that "general statements of the law * * * may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quotation marks, citation, and brackets omitted). While *Hope* arose in the context of an Eighth Amendment claim, nothing about the decision turned on any distinction between the Eighth Amendment and other constitutional provisions. Instead, it turned on the fact that qualified immunity is designed to protect officers who lacked "fair notice" that their conduct was unlawful, *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (per curiam) (citation omitted), but all reasonable officials are on notice that obvious constitutional violations are unlawful.

The Fifth Circuit's rule extends qualified immunity to shield constitutional violations so egregious that no court has previously had occasion to hold the conduct unlawful. That rule—protecting the most egregious conduct—endangers all constitutional rights, but perhaps none more than the core First Amendment rights of freedom of speech and the free exercise of religion. This case exemplifies that concern. Respondents allegedly engaged in flagrant viewpoint discrimination by prohibiting Petitioner from engaging in religious speech even as they permitted non-religious speech to occur a few feet away. The Fifth Circuit granted Respondents qualified immunity anyway. That decision is patently incorrect. This Court should grant the petition and reverse.

ARGUMENT

I. PUBLIC RELIGIOUS EXPRESSION IS A FUNDAMENTAL LIBERTY IN THE UNITED STATES.

Religious people have shared their faith publicly from time immemorial. The foundational texts of many religions feature prophets and other similar figures who disseminate religious teachings to the public, and many religions encourage believers to share their faith publicly. The United States has a rich tradition of public religious expression, which lies at the core of the First Amendment's protections.

A. Sharing Religious Convictions Is Imperative For Adherents Of Many Faiths.

Publicly sharing religious beliefs is an important aspect of each of the faith traditions that *amici* represent—Judaism, Islam, and Hinduism. Evangelizing features prominently in the New and Old Testaments of the Bible and the Quran, and many Hindus believe it is essential to disseminate religious teachings, such as non-violence. Other faiths, too, emphasize public religious expression, including Buddhism, Jehovah's Witnesses, and Mormonism.

1. In the Judeo-Christian tradition, it is a divine command to go forth and share God's word, exactly as Petitioner sought to do. The Old Testament contains numerous accounts of prophets who were commanded to preach in the public square. See, *e.g.*, *Isaiah* 6:8-13, Bible (Eng. Standard). In many instances, these public calls to repentance are met with unwelcoming, or even hostile, audiences. The Bible describes how Jeremiah was arrested for sharing his faith because political leaders did not want his message to proliferate among the public. *Jeremiah*

20:1-2, 43:1-7, *id.* The prophetic message of the Old Testament—that Israel and Judah would be invaded and their people exiled, but that a loving God would enable the people to return, *Hosea* chs. 6-9, 14, *id.*—was unpopular at the time and constitutes a foundational example of both religious exercise and dissent. And while Jewish adherents do not interpret these passages to require evangelizing, other public expressions of faith—such as lighting a menorah for all to see—remain important to many Jews.

The New Testament, too, contains many passages that command or encourage evangelizing. Jesus, himself an itinerant preacher, commissioned his followers with an unambiguous directive to proclaim their faith: “Go therefore and make disciples of all nations * * * teaching them to observe all that I have commanded you.” *Matthew* 28:19-20, Bible (Eng. Standard). Luke quotes Jesus’ very last words to His disciples: “[Y]ou will be my witnesses in Jerusalem and in all Judea and Samaria, and to the end of the earth.” *Acts* 1:8, *id.* The Apostle Paul enjoins a disciple to “preach the word; be ready in season and out of season; reprove, rebuke, and exhort, with complete patience and teaching” and “always be sober-minded, endure suffering, do the work of an evangelist, fulfill your ministry.” *2 Timothy* 4:2-5, *id.* Many Christians understand these passages as a call to share their faith publicly.

2. Sharing and spreading one’s faith is also a fundamental tenet for followers of Islam. The concept of *da‘wah*—literally meaning “call” and rooted in passages of the Quran—directs Muslims to share their beliefs outwardly and to spread the word of Allah. The Quran emphasizes the importance of *da‘wah* to Islam, entreating adherents to “call to the way of your Lord

with wisdom and goodly exhortation.” *Surah An-Nahl* 16:125, Quran (Abul Ala Maududi ed.). And it admonishes, “who is fairer in speech than he who calls to Allah and acts righteously and says: ‘I am a Muslim?’” *Surah Fussilat* 41:33, *id.* Accordingly, many Muslims hold the sincere religious belief that sharing their faith publicly is a vital component of Islam.

3. Many Hindus recognize the importance of sharing one’s faith with others. Foundational texts emphasize the importance of sharing tenets of Hinduism publicly, as the sage Vasistha preached “anybody who will recite or cause it to be recited * * * shall have his ample recompense.” VII *Yoga Vasishtha of Valmiki* 215:12 (Ravi Prakash Arya ed.). While “Hinduism is * * * known for its spectrum of religious practices,” some Hindus believe that key teachings, such as non-violence, must be spread to others and that failing to share this belief can itself constitute violence. Br. of *Amicus Curiae* Hindu Am. Found. at 4, 7, *Dubash v. City of Houston*, No. 24-20485 (5th Cir. Mar. 4, 2025), Dkt. No 54.

4. Public preaching is also central to Buddhists. The Buddha sent his disciples to preach the *dharmadāna*—the gift of the Dharma—charging his followers to “[p]reach * * * the Dhamma, excellent in the beginning, excellent in the middle, excellent in the end, both in the spirit and in the letter. Proclaim the holy life, altogether perfect and pure.” Nārada Mahāthera, *The Buddha and His Teachings* 108 (4th ed. 1988) (footnote omitted). Thus, Buddhists believe that publicly preaching and spreading the Buddhist faith is a divine command in keeping with the Buddha’s directive: “Preach the Sublime Dhamma,

Work for the good of others, you who have done your duties.” *Ibid.* (citation omitted).

5. Evangelizing is central to many other faiths. Jehovah’s Witnesses believe that evangelizing is a fundamental religious obligation. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (“Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. * * * In doing so they believe that they are obeying a commandment of God.”). Latter-day Saints, too, are charged to share their message and believe everyone is “responsible to teach the gospel by word and deed to all of our Heavenly Father’s children.”² And Seventh-day Adventists likewise consider evangelizing a religious obligation, believing that “the dissemination of religion is not only a right, but a joyful responsibility based on a divine mandate to witness.”³

* * *

Many religious adherents, including *amici*, value free, open religious expression not just for themselves, but for members of all faiths. Indeed, for *amici*, it is a religious command itself to promote the prosperity of others irrespective of faith. *E.g.*, *Philippians* 2:3-4, Bible (Eng. Standard) (“Do nothing from selfish ambition or conceit, but in humility count others more significant than yourselves. Let each of you look not only to his own interests, but also to the interests of others.”).

² Church of Jesus Christ of Latter-day Saints, *Gospel Principles* ch. 33, <https://perma.cc/43XP-TY2B>.

³ Seventh-day Adventist Church Gen. Conf., *Religious Liberty, Evangelism, and Proselytism* (June 29, 2000), <https://perma.cc/G6GC-X9QZ>.

B. There Is A Rich Tradition Of Public Preaching In America.

There is and always has been a wide array of religions in the United States. So it is no surprise that adherents of many faiths express their messages publicly. Indeed, public preaching and evangelizing historically served as one of the primary means of church growth, as well as of voicing dissent and criticizing religious orthodoxy. Such religious expression has a deep historical pedigree in America. Pet. App. 83 (Ho, J., concurring in denial of rehearing en banc) (“Street preaching is not some infinitesimally rare and obscure practice. Nor is it one that municipalities never bother with. People of faith have long sought opportunities to spread the gospel in the public square.”).

Even before the American Revolution and the ratification of the Bill of Rights, public preaching and evangelizing was a meaningful part of American colonial life. Much public discourse was attributable to vigorous religious dissent, itself a deeply rooted characteristic of faith in America and a key reason that many colonists fled Europe. Prominent religious figures like Jonathan Edwards, John Wesley, and George Whitefield challenged religious orthodoxy in the colonies through public sermons and “revivalist preaching” during the First Great Awakening. Michael W. McConnell, *Religion and Republicanism in the American Revolution*, in *Religion and the American Revolution: America at 250*, at 18 (Yuval Levin et al. eds., 2025).

When the Framers ratified the Constitution, they enshrined protections for exactly this kind of public religious speech in the First Amendment. *Murdock*, 319 U.S. at 109 (“This form of religious activity

occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. * * * It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.”). The public expression of religious convictions is therefore a common feature of life in the United States, “where the spirit of religion and the spirit of freedom are productively united, reigning together but in separate spheres on the same soil.” *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment) (quotation marks, citation, and brackets omitted).

II. OBVIOUS CONSTITUTIONAL VIOLATIONS ARE NOT PROTECTED BY QUALIFIED IMMUNITY EVEN OUTSIDE OF THE EIGHTH AMENDMENT CONTEXT.

This case presents the question whether obvious infringements of the right to engage in public religious speech are nonetheless protected by qualified immunity. As the petition explains, the answer is no. This Court interprets Section 1983 by reference to the common law at the time of the statute’s enactment. See *Nieves v. Bartlett*, 587 U.S. 391, 405 (2019); *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017). Under well-settled common-law principles, qualified immunity cannot serve as a shield from liability under Section 1983 when the official conduct at issue is patently and obviously unlawful. That is true irrespective of which constitutional right is violated.

A. Section 1983 Draws From The Common Law Of Torts And Incorporates Historical Immunity Defenses—And Limitations.

Section 1983 was enacted as part of the Civil Rights Act of 1871 and “creates a private right of

action to vindicate violations of ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States” by persons acting under color of state law. *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting 42 U.S.C. 1983). As this Court has recognized, Section 1983 was “a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century” and “interpose[d] the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’” *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

This Court has consistently looked to the common law of torts to define Section 1983’s contours, as Congress “intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment.” *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Defenses and immunities form an important feature of that common-law history. “Despite the broad terms of § 1983, this Court has long recognized that the statute was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits.” *Rehberg*, 566 U.S. at 361. Rather, the Reconstruction Congress that enacted Section 1983 “w[as] familiar with common-law principles, including defenses previously recognized in ordinary tort litigation,” and it “likely intended these common-law principles to obtain, absent specific provisions to the contrary.” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). This Court has recognized that such common-law immunities are “well grounded in history

and reason” because “the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions.” *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (citations omitted).

This Court has held that one immunity “incorporated” in Section 1983 is qualified immunity. *Filarsky*, 566 U.S. at 389 (quoting *Pulliam v. Allen*, 466 U.S. 522, 529 (1984)). Qualified immunity derives from “the background of tort liability that makes a man responsible for the natural consequences of his actions,” “[p]art of th[at] background” being “the defense of good faith and probable cause.” *Pierson v. Ray*, 386 U.S. 547, 556-557 (1967) (quotation marks and citation omitted). Thus, government officials generally are shielded “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Whether a government official may successfully invoke qualified immunity “turns on the ‘objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.’” *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)). An objective test comports with the common-law test for torts committed by officials in good faith or with probable cause, “ensur[ing] that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Thus, Section 1983 ensures that state officials are liable only for violations of clearly established law.

One way to prove the “clearly established” prong of the qualified immunity test is to show that the constitutional violation was so “obvious” that any reasonable official should have known his conduct was unlawful. *Hope*, 536 U.S. at 738. In such cases, where “‘a general constitutional rule already identified in the decisional law * * * appl[ies] with obvious clarity to the specific conduct in question,’” “officials can still be on notice that their conduct violates established law” and thereby be exposed to liability under Section 1983. *Id.* at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)); *accord Taylor v. Riojas*, 592 U.S. 7, 8-9 (2020) (per curiam) (“no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time.” (citing *Hope*, 536 U.S. at 741)); *District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) (“Of course, there can be the rare ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam))).

**B. Section 1983, Qualified Immunity, And
The Obviousness Principle Apply To All
Constitutional Torts.**

The plain text of Section 1983 draws no distinction among federal rights. It provides a cause of action against anyone who, under color of state law, causes “the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. 1983 (emphasis added). The operative word is “any.” The statute does not limit its scope to certain favored constitutional provisions. Section 1983

speaks to constitutional violations of every description, and it promises the same remedy to each. A prisoner mistreated by corrections officials and a leafleteer silenced on a public sidewalk stand on identical footing. See *Browder v. City of Albuquerque*, 787 F.3d 1076, 1077 (10th Cir. 2015) (Gorsuch, J.) (“Section 1983 permits citizens to sue for *any* assault on their constitutional rights that occurs ‘under color of’ state law.” (emphasis added)). Congress wrote a single cause of action to redress both; Congress “could have chosen different language in [the statute],” but “[i]t did not.” *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 823 (2024).

The immunity doctrines encompassed in Section 1983 likewise apply evenhandedly. Qualified immunity shields an official whose conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson*, 555 U.S. at 231 (quoting *Harlow*, 457 U.S. at 818). That standard governs every constitutional tort alike. The Court has never suggested that “clearly established” bears one meaning when a prisoner sues and another when the plaintiff is a preacher. The question is, and always is, what a reasonable official should have understood the law to be at the time of his conduct, not which clause of the Constitution he happened to transgress. The immunity, like the statute that houses it, plays no favorites among constitutional rights.

Nor do limits on qualified immunity vary with the constitutional violation alleged. The obviousness principle is *always* part of what rights are “clearly established.” A Section 1983 plaintiff may prove that a right is clearly established *either* by pointing to a sufficiently analogous case *or* by showing that the

unlawfulness of the officer's conduct was apparent from settled principles even absent such a case. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

C. The Fifth Circuit Arbitrarily Limits Liability Under Section 1983.

The Fifth Circuit arbitrarily rejects half the test for overcoming qualified immunity in every context outside of the Eighth Amendment. In the Fifth Circuit's view, only obvious violations of the Eighth Amendment can overcome qualified immunity. All other obvious constitutional violations—including the obvious violation of the right to engage in religious speech at issue in this case—are shielded unless a court previously held nearly identical conduct unlawful.

The Fifth Circuit's rule cannot withstand even cursory scrutiny. Courts cannot—and, indeed, every circuit outside the Fifth Circuit has recognized they cannot—embrace the whole of the “clearly established” standard while withholding one means of establishing a violation of clearly established law for a disfavored class of claims. Because immunity applies to all constitutional torts alike, so must each of the ways of defeating it.

This Court's precedents refute the Fifth Circuit's approach to qualified immunity. In *Hope v. Pelzer*, the Court rejected the notion that a plaintiff must identify a “materially” or “fundamentally similar” precedent, holding that “general statements of the law * * * may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” 536 U.S. at 741 (quotation marks, citation, and brackets omitted).

The Court grounded that holding in a general theory of fair notice that derived from *United States v. Lanier*, a criminal case, reasoning that officers sued under Section 1983 “have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242.” *Id.* at 739 (citing *Lanier*, 520 U.S. at 269-271).

While *Hope* was an Eighth Amendment case, nothing about its reasoning turned on that fact or suggested that immunity should be narrower in Eighth Amendment cases than cases involving other alleged violations. Indeed, *Hope*’s fair-warning inquiry was expressly drawn from a non-Eighth Amendment context. A rule whose source is a generally applicable notice principle cannot logically be cabined to a single class of constitutional claims.

Taylor v. Riojas confirms the point. There, applying *Hope*, the Court summarily reversed the lower court, holding that “no reasonable correctional officer could have concluded” that the challenged conduct was permissible and that “any reasonable officer should have realized” the violation, notwithstanding “ambiguity in the caselaw.” 592 U.S. at 8-9 & n.2 (quotation marks and citation omitted). *Taylor* reiterated *Hope*’s holding that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.” *Id.* at 9 (quoting *Hope*, 536 U.S. at 741). Nothing in that formulation is Eighth Amendment-specific.

Moreover, this Court has acknowledged the obviousness principle outside the Eighth Amendment context—including to a claim under the First Amendment. In *Brosseau v. Haugen*, this Court recognized that an obvious, general constitutional

standard “can ‘clearly establish’ the answer, even without a body of relevant case law,” in the Fourth Amendment setting. 543 U.S. at 199 (citing *Hope*, 536 U.S. at 738). And in *Sause v. Bauer*, the Court reversed a grant of qualified immunity to officers who ordered a woman to stop praying without any legitimate law-enforcement justification, recognizing that the First Amendment “protects the right to pray” and that interference with that right is not shielded by immunity even absent a “prior case involving th[at] unusual situation.” 585 U.S. 957, 959 (2018) (per curiam). The upshot of these cases, as Petitioner explains, is that the obviousness principle “is a fundamental transsubstantive component of this Court’s §1983 jurisprudence,” “not limited to the Eighth Amendment.” Pet. 19.

III. THE FIFTH CIRCUIT’S OUTLIER RULE WARRANTS THIS COURT’S REVIEW.

No other circuit applies the Fifth Circuit’s distinction between Eighth Amendment violations and other constitutional violations in qualified-immunity cases. This Court should grant review to restore uniformity on this important question.

A. The Fifth Circuit Licenses Obvious Constitutional Violations.

Applying its rule distinguishing between Eighth Amendment violations and all other constitutional violations, the Fifth Circuit below granted qualified immunity to police officers who allegedly threatened Petitioner with arrest while he “distributed free pamphlets about Christian vegetarianism on the public sidewalks” that “are part of a public park, open and unrestricted to the public,” all the while “another person handed out commercial advertisement cards”

without being similarly targeted by police. Pet. App. 14. That conduct plainly violates the Constitution, and the violation is as “apparent” as any. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, the officers’ conduct here not only suppressed speech that is “doubly protect[ed],” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022), but did so by engaging in viewpoint discrimination, which “represents ‘an egregious form’ of content regulation” from which “governments in this country must nearly always ‘abstain,’” *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Nonetheless, the Fifth Circuit shielded officers from liability.

The Fifth Circuit has applied similar logic to license other obvious constitutional violations as well. See *Cope v. Cogdill*, 3 F.4th 198, 209 (5th Cir. 2021) (granting qualified immunity to a jailer who “watch[ed] an inmate attempt suicide and fail[ed] to call for emergency medical assistance” despite holding that the “unconstitutional conduct” “was both unreasonable and an effective disregard for the risk to [the inmate’s] life”); *Ramirez v. Guadarrama*, 3 F.4th 129, 132 (5th Cir. 2021) (per curiam) (granting qualified immunity to officers who “fired [their] taser[s] at [a] gasoline-soaked man, causing him to burst into flames”).

Courts within the Fifth Circuit are bound by its “(mistaken) circuit precedent,” Pet. App. 4, and have likewise rejected Section 1983 claims premised on egregious constitutional violations, see *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391, 416-418, 423-424 (S.D. Miss. 2020) (granting qualified immunity to an officer who “subjected [a Black driver] to one hundred and ten minutes of an armed police officer

badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs[,] * * * brought out a canine to sniff the car[,] * * * found nothing[,] * * * [and then] left [the plaintiff] by the side of the road to put his car back together”); *Singleton v. Cannizzaro*, 372 F. Supp. 3d 389, 401-403, 413-416 (E.D. La. 2019) (granting qualified immunity when prosecutors “allegedly threatened, harassed, and, in some cases, jailed” plaintiffs after “manufactur[ing] ‘subpoenas,’ deliberately side-stepping judicial oversight of the subpoena process” in “a breed of official misconduct * * * not only condoned but directed by top prosecutors and the DA himself,” “shock[ing] the conscience”), *aff’d in part, appeal dismissed in part*, 956 F.3d 773 (5th Cir. 2020).

B. No Other Circuit Cabins the Obviousness Principle To Eighth Amendment Claims.

Other circuits are unanimous in rejecting the Fifth Circuit’s artificial limit on the scope of Section 1983. Indeed, every other circuit has relied on the obviousness principle to rectify egregious First Amendment violations.

For example, in *Janny v. Gamez*, a state parole officer directed a parolee to live at the Fort Collins Rescue Mission and abide by its “house rules,” which included participating in a Christian transitional program involving mandatory prayer, Bible study, and church attendance. 8 F.4th 883, 895 (10th Cir. 2021). When the parolee objected based on his atheist beliefs, the parole officer told him that he could choose between participating in the Christian programming or returning to jail. *Id.* at 896. The Tenth Circuit denied qualified immunity, holding that, even though no prior case addressed identical facts, “the Free Exercise Clause’s general prohibition of religious

coercion applied ‘with obvious clarity to the specific conduct in question.’” *Id.* at 917 (quoting *Hope*, 536 U.S. at 741).

Similarly, in *Williams v. Bitner*, the Third Circuit denied qualified immunity to prison officials who ordered a Muslim prisoner to handle pork in the prison kitchen even though doing so would violate his religious beliefs. 455 F.3d 186, 188 (3d Cir. 2006). The court held that those officials had “fair warning” that their conduct was unlawful because, although the Third Circuit “ha[d] not ruled on the specific right asserted,” prior decisions “support[ed] the principles underlying the right asserted by” the prisoner. *Id.* at 192-194 (first quoting *Hope*, 536 U.S. at 741).

Courts deny qualified immunity for obvious constitutional violations in other contexts too. In *Oliver v. Fiorino*, officers “[t]aser[ed] the plaintiff at least eight and as many as eleven or twelve times over a two-minute span without attempting to arrest or otherwise subdue the plaintiff * * * while he was writhing in pain on the hot pavement and after he had gone limp and immobilized.” 586 F.3d 898, 908 (11th Cir. 2009). The Eleventh Circuit applied the obviousness principle to reject qualified immunity for the officers because, “even in the absence of case law,” the act “was so plainly unnecessary and disproportionate that no reasonable officer could have thought that this amount of force was legal under the circumstances.” *Id.* at 907-908.

Likewise, in *Gray ex rel. Alexander v. Bostic*, a school resource officer put handcuffs on a nine-year-old girl and tightened them until they caused pain, detaining the student in handcuffs for at least five minutes. 458 F.3d 1295, 1301 (11th Cir. 2006). The Eleventh Circuit recognized that “[e]ven in the

absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious,” and rejected the officer’s qualified immunity defense because handcuffing “a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of [her] Fourth Amendment rights.” *Id.* at 1306-07.

Petitioner catalogues numerous other examples of courts of appeals applying the obviousness principle to overcome a qualified immunity defense. See Pet. 29-32. But for application of the obviousness principle, state officials in these cases would escape liability for the most blatant First Amendment violations. Nothing in Section 1983 demands that perverse result.

The Fifth Circuit’s rule, on the other hand, tolerates the most egregious invasions of constitutional rights no matter how plainly unlawful the official conduct is. That rule has insulated, and will continue to insulate, officials from accountability for constitutional violations that are so “beyond debate” that no court has needed to recognize as much before. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This Court should correct that error and ensure Section 1983 serves to vindicate flagrant violations of constitutional rights, not cloak them in immunity.

CONCLUSION

For the foregoing reasons, as well as those provided by Petitioner, the Court should grant the petition.

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Respectfully submitted,

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July 16, 2026