

No. 25-1389

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IN THE  
**Supreme Court of the United States**

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RICHARD HERSHEY,  
PETITIONER,

*v.*

CITY OF BOSSIER CITY, LOUISIANA, ET AL.,  
RESPONDENTS.

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

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**BRIEF OF U.S. REPRESENTATIVES NATHANIEL  
MORAN AND GLENN GROTHMAN AS *AMICI*  
*CURIAE* IN SUPPORT OF PETITIONER**

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## QUESTION PRESENTED

The Petition presents the following question:

Whether the principles of *Hope v. Pelzer*, 536 U.S. 730 (2002), 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.

The Court should grant the Petition and hold that *Hope's* reasoning applies to claims arising under the First Amendment.

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## INTEREST OF *AMICI CURIAE*\*

*Amici curiae* are U.S. Representatives Nathaniel Moran and Glenn Grothman, who currently serve in the 119th Congress. As members of the federal legislature, amici seek to protect the First Amendment rights of their constituents and to preserve public confidence in those rights and the institutions that uphold them. Likewise, as elected representatives, *amici* have a special interest in promoting both good governance and the free exercise of those rights by holding accountable executive-branch officials who violate the constitutional rights of their constituents and by encouraging the courts to do the same.

*Amici* therefore submit this brief to underscore the importance of this Court's guidance where, as here, a circuit court's decision departs from this Court's teachings and from its sister circuits' holdings on an exceptionally important question affecting those rights.

## SUMMARY OF ARGUMENT

I. The rights to speak freely and to worship according to one's conscience trace back through the Enlightenment, the colonial era, and antiquity. The great thinkers whose work prompted and informed the American Revolution, and the Framers influenced by their works, believed that the exercise of the God-given rights to speak freely and to practice one's faith according to the dictates of one's conscience were preconditions to a just society and inalienable to a virtuous polity. The experiments in religious pluralism and tolerance for varying political

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\* Rule 37 statement: All counsel of record were timely notified of the intent to file this brief. No counsel for any party authored any part of this brief, and nobody other than *amici* and counsel for *amici* contributed monetarily to this brief's preparation or submission.

beliefs that gestated in the colonies gave birth to the First Amendment's double protection for religious speech. What's more, the Founders recognized that religious speech in the form of public evangelism and pamphleteering was a time-honored and uniquely American mode of expression with a high claim to constitutional protection. Congress and the courts must work together to preserve and promote that claim.

**II.** Section 1983, enacted in part to combat the rampant suppression of speech and religious liberty rights alike among black Americans in the Reconstruction South, remains a bulwark against the infringement of constitutional liberties. In that role, section 1983 altered the relationship between the states and the federal government with respect to those rights. Qualified immunity ensures that alteration does not unduly infringe on state officials' capacity to execute their lawful duties. But that rationale gives way where an official commits a brazen or obviously unconstitutional act—hence why this Court has explained that officials who commit such violations are not entitled to immunity, even when such violations arise in novel factual circumstances. This rule has come to be called the obviousness exception to qualified immunity.

**III.** The Court should grant certiorari to resolve the circuit split, to bring the law in the Fifth Circuit into accord with this Court's decisions, and to preserve the proper role and purpose of qualified immunity.

**A.** The en banc Fifth Circuit has expressly declined to apply the obviousness exception to claims outside of the Eighth Amendment context. In doing so, that court has departed from its sister circuits' holdings and has disregarded this Court's repeated indication that the exception applies generally. What's more, the Fifth Circuit's decision is untethered to qualified immunity's core purpose, contravenes Congress's intent as expressed in

section 1983, and undermines core First Amendment rights. It is axiomatic to First Amendment rights' inalienability that an official should not escape liability for a violation that any reasonable official would have understood was obvious at that time.

**B.** This case is appropriate for the Court's review. These issues are of exceptional, nationwide importance. The public exercise of First Amendment rights has long been recognized as essential to the American experiment and to the sustainment of a free society governed by laws. Our collective understanding frames pluralism in faith and in thought as far preferable to the suppression of beliefs and ideas. Put simply, more speech is the favored cure for "bad" speech, and more religious practice safeguards everyone's religious practices. Moreover, the Framers believed and this Court has acknowledged that free speech and free exercise are necessary to our form of government and promote confidence in our institutions. Thus, again, Congress and the courts have a duty to promote those rights and thus preserve American democracy.

**C.** Finally, this Case presents an ideal vehicle to resolve the issues presented independently of the competing petition, which raises questions about vicarious liability for municipalities. Addressing those questions will, by comparison, have no impact on the chill Americans experience when their First Amendment liberties are threatened by individual officers.

### **ARGUMENT**

The Court should grant certiorari because this case presents a direct split among the circuits on a question of nationwide importance: the availability of qualified immunity to officers who obviously violate First Amendment rights. *See* S. Ct. R. 10. Those rights are of

paramount concern, and their vindication requires this Court’s review.

**I. The First Amendment Enshrines Ancient, “Doubly Protected” Rights to Publicly Evangelize.**

Local officials threatened Richard Hershey with arrest because he pamphleteered in support of his faith, Christian vegetarianism. In doing so, they violated his “doubly protect[ed],” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022), right to speak publicly in accordance with his religious exercise, *Murdock v. Pennsylvania*, 319 U.S. 105, 108–10 (1943). These oft-intertwined freedoms—the rights to speak and to promote one’s religious worship through that speech—have been central to American life since the Founding, and date back to centuries before it. Indeed, the “freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969). And in the “realm of religious faith,” the right to “persuade others to [one’s] point of view” is “essential to enlightened opinion and right conduct on the part of the citizens of a democracy.” *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

A. The idea that the individual should be free to think and speak publicly extends back at least as far as ancient Athens, where citizens counted the right as “most treasured” and “a cornerstone of their democracy.” Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293, 296 (cleaned up). The Framers were familiar with the rights of citizens in antiquity. *See generally* John P. Murphy, *Rome at the Constitutional Convention*, 51 CLASSICAL OUTLOOK 112 (1974); *see also* Arthur Schlesinger, *America:*

*Experiment or Destiny?*, 82 AM. HIST. REV. 505, 507–08 (1977); THE FEDERALIST NO. 34, at 206 (A. Hamilton) (Clinton Rossiter ed., 1961). After all, “[k]nowledge of classical authors was universal among colonists with any degree of education.” BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23 (enl. ed. 1992).

This notion carried forward through the Enlightenment’s thought leaders, who informed and invigorated the Framers. Schlesinger, *supra*, at 507–08; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1095–1101 (2004). Seventeenth-century authors believed that free men had the right to “speak their minds” and that a just government would recognize that man possessed the “liberty to speak forth his mind and judgment.” CLARK W. GILPEN, THE MILLENARIAN PIETY OF ROGER WILLIAMS 55 (1979). As Immanuel Kant believed, freedom to speak and write ensured two objectives of a free society: the search for greater and more perfect justice, and the enlightenment of the populace. Kristi Sweet, *Kant on Free Speech: Criticism, Enlightenment, and the Exercise of Judgment in the Public Sphere*, 29 KANTIAN REV. 61, 61–62 (2024).

Even Sir William Blackstone said “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, \*152. And George Mason’s Virginia Declaration of Rights would later hold that “the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.” Va. Declaration of Rights art. XII, available at [https://avalon.law.yale.edu/18th\\_century/virginia.asp](https://avalon.law.yale.edu/18th_century/virginia.asp).

**B.** Similarly, the freedoms to worship, to engage in religious expression, and to proselytize unaccosted were foundational ideas and instigating principles of the

American experiment. After all, with respect to religious pluralism, “[t]he English legacy was not a happy one.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990). Thus, according to one commentator, “different approaches to church-state relations developed” in the American colonies. *Id.* at 1422. One ultimately prevailed.

Rhode Island, Delaware, and Pennsylvania would incubate the “free exercise of religion” as “an articulated legal principle.” *Id.* at 1424–25. Rhode Island’s royal charter, for example, recognized that some Rhode Islanders could not “in their private opinions, conform[] to the publique exercise of religion, according to . . . the Church of England.” Charter of Rhode Island and Providence Plantations of July 15, 1663, available at [https://avalon.law.yale.edu/17th\\_century/ri04.asp](https://avalon.law.yale.edu/17th_century/ri04.asp).

The Founders—despite their deep differences and varying schools of thought—“adopted and advocated” “common principles of religious freedom” with roots in the Rhode Island and Pennsylvanian experiments. John Witte, Jr., *Back to the Sources? What’s Clear and Not So Clear About the Original Intent of the First Amendment*, 47 BYU L. REV. 1303, 1308 (2022). Those principles included securing each individual’s “liberty of conscience,” the “free exercise of religion,” as well as the twin guarantees of “religious pluralism” and “religious equality.” *Id.*

C. As a result of these histories, the Constitution and this Court’s precedents “doubly protect” religious speech. The Framers believed that the Bill of Rights would protect the new Nation from unjust popular majorities and would “substitute for several features of government” that were not included in the original text of the Constitution. Stuart Leibiger, *James Madison and Amendments to the Constitution, 1787-1789*:

*“Parchment Barriers,”* 59 J.S. HIST. 441, 442 (1993). The founders believed that free expression and free exercise were core to their shared project, so much that they hardly debated those principles when drafting the First Amendment. 1 ANNALS OF CONG. 757–78 (Aug. 15, 1789) (Joseph Gales ed., 1834); Witte, *supra*, at 1308; McConnell, *supra*, at 1481.

Thus, the First Amendment provides that “Congress shall make no law . . . prohibiting the free exercise [of religion] or abridging the freedom of speech.” U.S. Const. amend. I. The Framers included that, and the other early Amendments, “in order to prevent misconstruction or abuse of [the Constitution’s] powers” and to “extend[] the ground of public confidence in the Government.” Resolution of the First Congress Submitting Twelve Amendments to the Constitution, available at [https://avalon.law.yale.edu/18th\\_century/resolu02.asp](https://avalon.law.yale.edu/18th_century/resolu02.asp). Madison expected that the nation’s “independent tribunals of justice” would be “an impenetrable bulwark against” violations of those rights. 1 ANNALS OF CONG. 457 (June 8, 1789) (Joseph Gales ed., 1834).

The Court has long described both political and religious speech as “essential to enlightened opinion and right conduct.” *Cantwell*, 310 U.S. at 310. The Court continues to recognize that the Free Exercise and Free Speech Clauses “work in tandem” such that “the First Amendment doubly protects religious speech.” *Kennedy*, 597 U.S. at 523.

That double protection is perhaps at its strongest when applied to public evangelizing. The Founders were no strangers to religious pamphleteering: more than 400 pamphlets were widely distributed in the colonies before 1776, including writings on political theory and history, as well as sermons. BAILYN, *supra*, at ix. That tradition of explaining “the [authors’] assumptions, beliefs, and ideas” “endowed the Revolution with its peculiar force.”

*Id.* at x–xi. And scholars likewise connect figures like George Whitefield and the Great Awakening directly to the American Revolution. *See, e.g.*, FRANK LAMBERT, “PEDLAR IN DIVINITY”: GEORGE WHITEFIELD AND THE TRANSATLANTIC REVIVALS 10 (1994).

Evangelism through print made founding-era Calvinist New England “perhaps the most literate place on earth,” and those publishers were leading innovators of the American noncommercial sector and the very concept of mass media. DAVID PAUL NORD, FAITH IN READING: RELIGIOUS PUBLISHING AND THE BIRTH OF MASS MEDIA IN AMERICA 7, 14 (2004). This Court has long recognized this tradition.

As this Court has held, religious pamphleteering is “an age-old form of missionary evangelism—as old as the history of the printing presses.” *Murdock*, 319 U.S. at 108. It is no surprise, then, that the Court has held unconstitutional laws that restrict “door-to-door canvassing and pamphleteering.” *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Straton*, 536 U.S. 150, 160 & n.10 (2002) (collecting cases). Those protections are all the stronger when the pamphleteering enjoys the special status the First Amendment guarantees to religious exercise.

**D.** Congress and this Court work in tandem to promote civil liberties, each occupying a special role to that end. Congress has engaged in legislative efforts to further protections for religious liberties. These efforts include protections under the Equal Access Act, 20 U.S.C. § 4071, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, and the Americans with Disabilities Act, 42 U.S.C. § 12113(d). *See generally Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Congress also enacted the Religious Freedom Restoration Act of 1993 as a direct response to *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court held that the

Free Exercise Clause is not offended by enforcement of neutral, generally applicable laws that incidentally burden religious conduct. In fact, Congress “provided even broader protection for religious liberty than was available” under the pre-*Smith* case law. *Burwell*, 573 U.S. at 695 n.3.

Similarly, this Court has regularly taken up cases to clarify and enforce religious liberties. *See, e.g., Ramirez v. Collier*, 595 U.S. 411 (2022); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657 (2020); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell*, 573 U.S. 682; *Cutter v. Wilkinson*, 544 U.S. 709 (2005). Indeed, one of the Court’s most recent cases, *Kennedy*, addressed the kind of public religious exercise at issue here. 597 U.S. at 514–15. The Court emphasized that the Free Exercise Clause “does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.” *Id.* at 524 (cleaned up). The Court should take up this case to reemphasize that the First Amendment strongly protects the right to practice one’s religion in public through physical acts and expression like evangelical pamphleteering.

Thus, both legislative and judicial action are essential to preserve First Amendment rights and promote civic engagement through religious expression. Another way Congress has succeeded in promoting civil liberties is, of course, by enacting 28 U.S.C. section 1983, which provides a private right of action to recover damages from state actors who violate constitutional rights. And the Court has helped enforce that provision and properly restrain its application by developing and applying the qualified immunity doctrine.

## II. The Obviousness Exception Is Consistent with Qualified Immunity’s Purposes.

Congress, through section 1983, and the Court, through the qualified immunity doctrine, have crafted a carefully balanced regime of accountability and protection for executive and state actors.

A. Congress enacted section 1983, among other reasons, to protect the civil liberties of black southerners during the Reconstruction era. *Monroe v. Pape*, 365 U.S. 167, 172-78 (1961); Tiffany R. Wright et al., *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 686, 703 (2022). The “brutality of Southern law enforcement” and state institutions’ purposeful blindness to that brutality were the impetus for a law that opened federal courts as the primary guarantor of the Fourteenth Amendment’s promises. Wright, *supra*, at 703; *see also* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484–86 (1982).

Protecting black southerners’ free exercise of religion—and in particular their right to practice their religion without state harassment—was a core concern in enacting section 1983. The Congressional hearings surrounding section 1983 revealed that black churches were under constant attack. Wright, *supra*, at 699–700, 708. These attacks occurred in part because, like the religious movements and organizations that wrote about and promoted revolutionary ideas a century before, black churches were central to black community and the promotion of civil rights in the Reconstruction era. *See generally* Nicole Turner, *Beyond Speeches and Leaders: The Role of Black Churches in the Reconstruction of the United States*, J. OF THE CIVIL WAR ERA: MUSTER (Aug. 14, 2020),

<https://www.journalofthecivilwarera.org/2020/08/beyond-speeches-and-leaders-the-role-of-black-churches-in-the-reconstruction-of-the-united-states/>. Thus, those who would see black southerners politically disenfranchised targeted churches as “embodiments of [B]lack autonomy.” Wright, *supra*, at 701 (alteration in original) (citation omitted).

Congress’s intent to protect black southerners who organized around their churches and through their religious expressions aligns with and promotes the Constitution’s double protection for religious speech.

**B.** Though the Reconstruction-era suppression of black religious exercise by southern law enforcement has ended, section 1983 remains an important bulwark against the deprivation of religious and speech rights. In that role, section 1983 “alter[ed] the relationship between the States and the Nation with respect to federally created rights.” *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Qualified immunity tempers that alteration by balancing “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The core purpose of qualified immunity is to ensure defendants have some notice that certain conduct may subject them to punishment. The Court has long said that section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” *Pierson v. Ray*, 386 U.S. 547, 556 (1967) (quoting *Monroe*, 365 U.S. at 187). Thus, officers are “not charged with predicting the future course of constitutional law.” *Id.* at 557. Qualified immunity balances officials’ exercise of discretion and “encourage[s] the vigorous exercise of official authority”

by preventing “insubstantial” and “frivolous” lawsuits.” *Harlow v. Fitzgerald*, 457 U.S. 800, 807–08 (1982).

And qualified immunity also, at least in part, promotes the ends section 1983 itself pursues; “the danger of being sued might dampen the ardor of all but the most irresponsible public officials in the unflinching discharge of their duties.” *Id.* at 814 (cleaned up). Interpreting section 1983’s companion criminal statute, 18 U.S.C. § 242, the Court explained that due process requires that a criminal defendant have “fair warning” such that he can “reasonably understand [his conduct] to be proscribed.” *United States v. Lanier*, 520 U.S. 259, 265 (1997) (citations omitted). When “the express terms of the Constitution or . . . decisions interpreting them” make a right “specific,” a defendant may be held criminally liable under section 242 for violating that right. *Id.* at 267.

Thus, the Court specifically disavowed the notion that a precedent involving “fundamentally similar” facts is required in every case to show a clearly established right. *Id.* at 270. And it has explicitly extended that holding to qualified immunity in the section 1983 context. *Hope v. Pelzer*, 536 U.S. 730 740–41 (2002). Therefore, it is not necessary that “the very action in question has previously been held unlawful,” but rather that “in light of pre-existing law the unlawfulness [was] apparent” and “sufficiently clear [to] a reasonable officer.” *Id.* at 739.

Against this backdrop, the Court has explained that “general statements of the law are not inherently incapable of giving fair and clear warning.” *Id.* at 741 (quoting *Lanier*, 520 U.S. at 271). In some cases, “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.” *Id.* (quoting *Lanier*, 520 U.S. at 271). Thus, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Id.*

C. The Court has reinforced this “obviousness exception” and courts have applied it widely. As the Court’s discussion in *Hope* and *Lanier* make clear, it is not inherently limited to the Eighth Amendment context. Indeed, *Lanier* was, itself, a Fourteenth Amendment due-process case. 520 U.S. at 261–62. In the years after *Hope*, the Court has strongly indicated that *Hope*’s reasoning was equally applicable to the Fourth Amendment, though those cases did not find “obvious” violations. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018).

What’s more, the Court has recently reaffirmed *Hope*. *See generally Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). There, a Texas prisoner, was confined “in a pair of shockingly unsanitary cells” for six days. *Id.* The Court quoted *Hope*’s holding that a general rule “may apply with obvious clarity to the specific conduct in question” and said that “the obvious cruelty inherent” in “degrading and dangerous situations provides officers with some notice.” *Id.* at 9 (cleaned up). “[A]ny reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.” *Id.* The Court cited no Eighth Amendment cases other than *Hope* (a factually dissimilar case) in concluding the violation was obvious.

Since *Hope*, the Court has not questioned its reasoning, cabined it to any one context, or held it does not apply in any context. Indeed, the Court has reaffirmed *Hope*’s reasoning time and again.

### **III. This Case Is an Ideal Vehicle to Resolve a Circuit Split on Issues of Exceptional Importance.**

A. Following this Court’s direction, the Courts of Appeals—aside from the Fifth Circuit—have uniformly recognized that the obviousness exception applies with equal force to claims premised on the violation of First

Amendment rights. *See, e.g., Berge v. Sch. Comm. of Gloucester*, 107 F.4th 33, 39 (1st Cir. 2024); *Nagle v. Marron*, 663 F.3d 100, 115–16 (2d Cir. 2011); *McGreevy v. Stroup*, 413 F.3d 359, 366 (3d Cir. 2005); *Booker v. S.C. Dep’t of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017); *MacIntosh v. Clous*, 69 F.4th 309, 319 (6th Cir. 2023); *McGreal v. Ostrov*, 368 F.3d 657, 683 (7th Cir. 2004); *Mayfield v. Mo. House of Representatives*, 122 F.4th 1046, 1057 (8th Cir. 2024); *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 454–55 (9th Cir. 2013); *Janny v. Gamez*, 8 F.4th 883, 913, 917 (10th Cir. 2021); *Akins v. Fulton County*, 420 F.3d 1293, 1305–08 (11th Cir. 2005); *Moore v. Hartman*, 388 F.3d 871, 877, 886 (D.C. Cir. 2004), *rev’d and remanded on other grounds*, 547 U.S. 250 (2006).

Notwithstanding its sister circuits’ unanimous approach, the Fifth Circuit has stood alone in its express refusal to extend the obviousness exception to First Amendment rights. *See Villarreal v. City of Laredo*, 94 F.4th 374, 394–95 (5th Cir. 2024) (*Villarreal I*), *cert. granted, judgment vacated sub nom. Villarreal v. Alaniz*, 145 S. Ct. 368 (2024); *Villarreal v. City of Laredo*, 134 F.4th 273, 276 (5th Cir. 2025) (*Villarreal II*) (effectively reinstating much of *Villarreal I*), *cert. denied sub nom. Villarreal v. Alaniz*, 146 S. Ct. 939 (2026).

In *Villarreal I*, a nine-to-seven majority of the en banc Fifth Circuit expressly refused to apply *Hope* or its reasoning to the First Amendment context. 94 F.4th at 395. That majority explained that the plaintiff “relie[d] on Eighth Amendment cases where [this Court] . . . declined to scrutinize the cases fact-specifically.” *Id.* (citing *Hope*, 536 U.S. at 730, 738–39, and *Taylor*, 592 U.S. at 7). The Fifth Circuit read *Hope* to “express a general, but decidedly narrow, obviousness exception to the requirement that ‘clearly established law’ be founded on materially identical facts.” *Id.*

Among other things, *Villarreal I* relied on this Court’s holding in *Sause v. Bauer*, 585 U.S. 957, 959–60 (2018). But *Sause* does not bear on *Hope*’s applicability. In *Sause*, the petitioner claimed that officers violated her free-exercise rights. 585 U.S. at 958. This Court explained that “there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place.” *Id.* at 959. Important questions regarding the propriety of the officers’ actions under the Fourth Amendment had to be answered in order to “analyze [the] petitioner’s free exercise claim.” *Id.* at 960. On remand, the Tenth Circuit vacated the district court’s order of dismissal. *Sause v. Bauer*, 733 F. App’x 456, 457 (10th Cir. 2018). This Court said nothing of the contours of the clearly established prong of the qualified immunity doctrine; certainly nothing that questioned *Hope* and nothing that required a “close[] analy[sis]” different from the one *Hope*, *Lanier*, and *Taylor* still require. *Contra Villarreal I*, 94 F.4th at 395.

Another point, as well, bears on *Villarreal I*’s reliance on *Sause*. When this Court has not expressly overruled a previous case, the lower courts must seek to harmonize it with this Court’s later pronouncements. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). The Fifth Circuit acknowledges as much. *See, e.g., Cochran v. U.S. Sec. & Exch. Comm’n*, 20 F.4th 194, 206 n.11 (5th Cir. 2021), *aff’d and remanded sub nom. Axon Enter., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175 (2023). Therefore, *Villarreal I* should have harmonized *Sause*. That would have been a simple task in light of *Taylor*’s unambiguity and *Sause*’s plain inapplicability.

*Villarreal I*’s rejection of *Hope* is also untethered to qualified immunity’s core purpose: to put reasonable officers on notice that certain conduct is proscribed. And it undermines both the Constitution’s double protection for religious speech and Congress’s intention for section

1983, both of which demand accountability for public officials.

It matters naught under which amendment the right in question arises. As this Court has noted, even in the Fourth Amendment context—in which “specificity of the controlling rule is especially important,” *Wesby*, 583 U.S. at 64 (cleaned up)—an obvious violation is still obvious, *id.* (“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.” (citing *Brosseau*, 543 U.S. at 199, which cited, in turn, *Hope*, 536 U.S. at 738)). A violation arising under the First Amendment, like one arising under the Eighth or even the Fourth, might be so obvious as to not require any factually analogous precedent. *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.) (“[S]ome things are so obviously unlawful that they don’t require detailed explanation . . .”).

Thus, letting officers escape liability for First Amendment violations simply because no other officer has dared violate the constitution in quite the same egregious way undermines accountability and Congress’s intent in enacting section 1983 as protecting speech and religious rights.

*Villarreal I* further denigrates the double protection for religious speech by insulating the most egregious violations of that protection. As then-Judge Gorsuch said, “it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.” *Id.* at 1082–83. Review is needed to avoid this result in the Fifth Circuit.

**B.** Public participation in religion and freedom from state interference in doing so are essential. This Court’s precedents have insisted upon looking to the “specific

practice[s]” of history. *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). The “idea of public religion that participates in America’s public life and influences the direction our nation takes, even politically, has been the model for most of our nation’s history.” Mark W. Cordes, *Religion As Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 SW. L. REV. 235, 276 (2008). Popular invocation of religion in the civil sphere had a great impact on the founding generation and the Revolution, which framed resistance to Britain as a religious and moral imperative. JAMES H. HUTTON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 42 (1998). Thomas Paine, for example, famously urged his fellow colonists to reject the British Crown as illegitimate and contrary to “the authority of Scripture.” THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE, RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 12 (2003).

The role of religion in public life was at the forefront as the new Republic faced threats of division. In Federalist Number 10, Madison listed religious division as one source of political factions that could foment tyranny. He famously argued that the problem of factions could be addressed either by removing their causes or by controlling their effects—but that the former was a cure worse than the disease. *See* THE FEDERALIST NO. 10, at 77–78 (J. Madison) (Clinton Rossiter ed., 1961). Rather, widespread pluralism provided the answer. *Id.*

John Adams, though undoubtedly pluralist, was a noted proponent of public worship and of the importance of religion in society and public life. *See* John Witte, Jr., “A Most Mild and Equitable Establishment of Religion”: John Adams and the Massachusetts Experiment, 41 J. OF CHURCH & STATE 213, 217–19 (1999); “From John Adams to Massachusetts Militia, 11 October 1798,” *Founders Online*, National Archives, available at

<https://founders.archives.gov/documents/Adams/99-02-02-3102>.

John Jay said that it was “the duty of all wise, free, and virtuous governments to countenance and encourage virtue and religion.” Speech of Governor John Jay (Nov. 4, 1800), *in* THE SPEECHES OF THE DIFFERENT GOVERNORS TO THE LEGISLATURE OF THE STATE OF NEW YORK 66 (J. B. Van Steenbergh, ed. 1825). Abraham Baldwin, signer of the Constitution and a Framers of the Bill of Rights, wrote that a “free government . . . can only be happy when the public principles and opinions are properly directed . . . by religion and education.” CHARLES C. JONES, JR., BIOGRAPHICAL SKETCHES OF THE DELEGATES FROM GEORGIA TO THE CONTINENTAL CONGRESS 6-7 (1891). Even Thomas Jefferson held the “liberty to worship our Creator in the way we think most agreeable to His will [is] a liberty deemed in other countries incompatible with good government and yet proved by our experience to be its best support.” “From Thomas Jefferson to John Thomas, 11 October 1798,” *Founders Online*, National Archives, available at <https://founders.archives.gov/documents/Jefferson/99-01-02-6807>.

Correcting the Fifth Circuit’s errors will promote a society that is free to debate and further refine the ideals of American democracy. As Alexis de Tocqueville remarked upon his 1831 visit, “Religion in America takes no direct part in the government of society, but it must be regarded as the foremost of the political institutions . . . I am certain that they hold it to be indispensable to the maintenance of republican institutions.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 286 (Henry Reeve trans., Digireads.com Publishing 2016) (1831).

The Framers also put forward the First Amendment and the whole Bill of Rights expressly to “extend[] the ground of public confidence in the Government,” Resolution of the First Congress Submitting Twelve

Amendments to the Constitution, available at [https://avalon.law.yale.edu/18th\\_century/resolu02.asp](https://avalon.law.yale.edu/18th_century/resolu02.asp).

Ongoing shared confidence in civil liberties and the institutions that protect them are necessary to our form of government. *See* James L. Gibson, *Losing Legitimacy: The Challenges of the Dobbs Ruling to Conventional Legitimacy Theory*, 68 AM. J. OF POL. SCI. 1041, 1042 (2024). “Respect for religious expressions is indispensable to life in a free and diverse Republic.” *Kennedy*, 597 U.S. at 543. Indeed, the Framers were so “distrust[ful] of government attempts to regulate religion” that they ensured “the First Amendment doubly protects religious speech.” *Id.* at 523–24. “Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate” the religious expressions of others. *Town of Greece*, 572 U.S. at 584.

This Court’s precedents ensure that speech and religious expression will not be stifled because officials disfavor the public voicing of religious beliefs. When individuals lack clarity on where they may speak religious messages and what they can say, that uncertainty discourages them from speaking and subjects people of faith to arbitrary enforcement. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987). This Court guards against “arbitrary discretion . . . vested in some governmental authority,” which “has the potential for becoming a means of suppressing a particular point of view.” *Hefron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

The legislative branch has its own acute interest in preserving public confidence in institutions and in promoting good citizenship and civic responsibility. Madison, for example, argued that the answer to political factions (including religious division) was found not in removing the cause but in tempering effects through a

representative form of government. *See* THE FEDERALIST NO. 10, *supra*, at 80–84. Congress forms the bulwark of representative government, and “the American experiment itself has proved to be one that has permitted religion’s participation in America’s public life without the threat of political instability and even war.” Cordes, *supra*, at 277. The threat of religious division “was a very real danger in the minds of the Founders, in particular because the religious wars that plagued Europe in the sixteenth and seventeenth-centuries were still a relatively recent event, and one that demonstrated the painful consequences that religious conflict is capable of producing.” *Id.*

American federalism tempers this threat. As Madison explained, protections for civil liberties and religion would “depend on the number of interests and sects,” in turn dependent on the “extent of country and number of people comprehended under the same government.” THE FEDERALIST NO. 51, at 324 (J. Madison) (Clinton Rossiter ed., 1961). Differences “would be addressed through the structure of our representative government.” Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 141 (2000). And “the variety of sects dispersed over the entire face of” the Nation would “secure the national councils against any danger from” any one religious sect. THE FEDERALIST NO. 10, *supra*, at 84.

For this check to function, however, government officials must obey the law. Immunity from suit for obvious constitutional violations creates the appearance that officials are above the law. That perception erodes confidence in public institutions, including the courts. And the Madisonian view that factions would be tempered though our constitutional system is undermined. *See id.* at 77–84.

The religious speech and evangelism occurring in this case typify this mechanism in practice. “Religion’s involvement in American politics has remained strong ever since” the early days of the Nation, including many “high visibility social movements, such as abolition, temperance, and civil rights, all of which had strong religious dimensions.” Cordes, *supra*, at 141. Yet a rule that undermines a speaker’s confidence in those sworn to protect constitutional rights undermines the civil liberties of all Americans. A rule that “doubly protects” religion only at the whims of unchecked officials protects nothing at all. *Kennedy*, 597 U.S. at 523; *Heffron*, 452 U.S. at 649.

C. This case presents an ideal vehicle to answer this important question on the scope of the qualified immunity doctrine. There is a clean circuit split and the qualified immunity question presented is separate and independent from the *Monell* issue the Fifth Circuit allowed to proceed against the City of Bossier City. *See* Petition for Writ of Certiorari, *City of Bossier City v. Hershey*, No. 25-1323 (May 13, 2026) (“City’s Pet.”).

Under *Monell*, liability attaches only when “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.” *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 694 (1978). The *Monell* issue here concerns the narrow scenario in which officers receive no training whatsoever concerning First Amendment protections. *See* City’s Pet. at 1–2. That issue touches on whether the governmental employer may be sued at all consistent with Section 1983. *See Monell*, 436 U.S. at 690–91. It has no bearing on whether individual officers will continue to claim immunity for obvious constitutional violations in the absence of an identical prior fact pattern. The Court need not grant the City’s petition to reach the question presented here.

**CONCLUSION**

The Court should grant the Petition.

Respectfully submitted.

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JULY 2026