

No. 25-1389

In the Supreme Court of the United States

RICHARD HERSHEY,

Petitioner,

v.

CITY OF BOSSIER CITY; BOBBY GILBERT, individually and
in his capacity as Deputy Marshal; DANIEL STOLL;
DAVID SMITH; TYSHON HARVEY; EUGENE TUCKER,

Respondents.

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

**BRIEF OF YOUNG AMERICA'S
FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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July 16, 2026

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INTEREST OF *AMICUS CURIAE*¹

Young America’s Foundation (“YAF”) is a national nonprofit organization committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF’s National Journalism Center trains budding journalists to be truth-seekers who are ethical and bold in exercising their First Amendment rights. YAF has a significant interest in protecting those journalists’ First Amendment rights.

YAF leads the Conservative Movement on campuses throughout the country by sponsoring campus lectures and other activities, which often results in conflict with university leaders who disagree with YAF’s messages and ideas. Often, these conflicts result in First Amendment litigation in which qualified immunity plays a major role. *E.g.*, *Young America’s Found. v. Kaler*, 482 F. Supp. 3d 829, 856–66 (D. Minn. 2020), *vacated by Young America’s Found. v. Kaler*, 14 F.4th 879 (8th Cir. 2021). YAF has

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

a significant interest in ensuring that officials who commit clear, obvious violations of the First Amendment do not obtain qualified immunity.

YAF is concerned by the substantial obstacles its members face in vindicating their First Amendment rights—particularly in the Fifth Circuit, as a result of the circuit’s widening application of qualified immunity. The Fifth Circuit’s decision in this case exacerbates the underlying problem by reducing accountability for government actors who suppress protected speech. YAF has a particular interest in ensuring university administrators who act under color of law are sufficiently motivated to err on the side of protecting free speech rights instead of relying on qualified immunity after hindering speech that was obviously protected.

YAF submits this brief to emphasize that, regardless of where anyone stands on the larger debate over qualified immunity, this doctrine was never intended to shield government officials who violate clear-cut First Amendment rights.

SUMMARY OF THE ARGUMENT

In categorically refusing to apply the “obviousness” exception to qualified immunity outside the Eighth Amendment context, the Fifth Circuit embraces an outlier rule that distorts this Court’s precedent, shields officials from liability for clear, egregious First Amendment violations, and invites further violations by government actors. This rule conflicts with this Court’s fair-warning cases, finds no support in the text of 42 U.S.C. § 1983, and produces systemic consequences by shielding clear but factually novel constitutional violations from damages liability.

Petitioner’s case presents an ideal vehicle to clarify the correct analysis for obvious First Amendment violations that occur in deliberative, non-exigent decision-making. This Court’s intervention is necessary to ensure that officials cannot evade accountability for obvious violations of clearly established First Amendment rights.

ARGUMENT

I. The Fifth Circuit has entrenched an outlier rule on qualified immunity.

A majority of the Fifth Circuit panel decided that Petitioner plausibly alleged First Amendment violations by government actors. App.5, 19. However, in response to the officers’ motion to dismiss on

qualified immunity grounds, Petitioner could not point to another Fifth Circuit case with nearly identical facts—because officers do not typically threaten to arrest a peaceful, religious leafleteer from a public sidewalk, on pretext of a policy requiring preapproval of speech, at a venue that has no time-place-manner restriction, while allowing a commercial leafleteer to speak in the same manner, at the same time and place. App. 9, 153–57. Despite the absence of a parallel case, a majority of the panel still would have held the officers accountable for this clear violation—but for the Fifth Circuit’s precedent that, outside an Eighth Amendment context, the obviousness of a constitutional violation carries no weight. App. 7–8, 15–16. However, concluding it was bound by precedent, the panel cloaked the officers with immunity. App. 8, 13.

This result does not comport with this Court’s stated purpose behind qualified immunity: to provide fair notice to officials while still safeguarding important rights. The Fifth Circuit’s expansive use of qualified immunity exacerbates the harm to those rights and warrants this Court’s intervention.

A. The Fifth Circuit’s broad, categorical limitation of the obviousness exception conflicts with this Court’s precedent.

Qualified immunity is meant to protect “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, (1986). This Court has justified qualified immunity as a relief valve for Section 1983 defendants who did not violate a clearly established right of which an official “reasonably should have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). But in *Hope v. Pelzer*, 536 U.S. 730, 740–41 (2002), this Court squarely rejected the notion that clearly established law demands a case precisely on point or “fundamentally similar” in its facts. Instead, it confirmed that the key question is whether the law provided “fair warning” that the official’s conduct was unlawful—the same standard courts traditionally apply to “individuals . . . in the face of vague criminal statutes.” *Id.* at 740 n. 10. And this Court recognized that some violations are sufficiently obvious even in the absence of a prior decision analyzing nearly identical facts. *Id.* at 741.

The Fifth Circuit has reasoned that because *Hope v. Pelzer* arose in the Eighth Amendment context, the obviousness exception is categorically limited to that context. App.8; *see also Morgan v. Swanson*, 659 F.3d 359, 372–73 (5th Cir. 2011) (noting *Hope*’s Eighth

Amendment context). The court relies on *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), to require a high degree of factual particularity in clearly established law, effectively subordinating *Hope* to *al-Kidd*. *Morgan*, 659 F.3d at 373. But that reasoning is flawed. *Al-Kidd* itself arose under the Fourth Amendment, and this Court’s emphasis on particularity was tailored to that context, where officers must often make rapid decisions under uncertain conditions. *Al-Kidd*, 563 U.S. at 741 (holding, still, that a case on point is not always required). In contrast, *Hope* states the obviousness exception as a general rule, without cabining its application to Eighth Amendment prisoner claims. *Hope*, 536 U.S. at 741.

The Fifth Circuit thus applies asymmetrical reasoning: it confines *Hope* to its Eighth Amendment facts while extending *al-Kidd* beyond its Fourth Amendment setting. The result is a doctrine that maximizes immunity across contexts, untethered from the underlying rationale of either decision.

Nothing in § 1983’s text supports this restrictive overlay. Congress provided a federal damages remedy for “**any** . . . person” deprived of “**any** rights, privileges, or immunities secured by the Constitution and laws” under color of state law. 42 U.S.C. § 1983 (emphasis added). The statute does not condition relief on the existence of a prior case with nearly identical facts. *Id.* Nor does it limit damages to

repeated misconduct that has already generated published decisions. *Id.* Yet under the Fifth Circuit’s approach, § 1983 effectively reserves relief for familiar, repeatedly litigated violations and insulates clear constitutional misconduct when the details are novel.

“Fair notice” does not demand a case precisely on point when clear statements of law, combined with a defendant’s blatant acts, clearly show a reasonable person would have understood the violation. For this reason, every other circuit has incorporated *Hope*’s obviousness principle in some form. *See* Petitioner’s brief at 29–32 (discussing cases). Yet the Fifth Circuit has categorically refused to apply the exception outside the Eighth Amendment context. That divergence from this Court’s precedent, without statutory support, is central to why this petition warrants review.

B. The Fifth Circuit’s approach produces systemic, cert-worthy consequences for First Amendment § 1983 cases.

1. The Fifth Circuit’s insistence on maintaining a restrictive approach produces systemic, compounding effects that inappropriately narrow § 1983’s remedial reach. This circuit demands particularly high factual specificity in clearly established law, has refused to recognize obvious violations, and has not readjusted

its course despite multiple recent reversals. *See, e.g., Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (disapproving Fifth Circuit view on qualified immunity); *Villarreal v. Alaniz*, 145 S. Ct. 368 (2024) (vacating Fifth Circuit’s grant of qualified immunity); *Villarreal v. City of Laredo, Tex.*, 134 F.4th 273, 276 (5th Cir. 2025), cert. denied sub nom. *Villarreal v. Alaniz*, 146 S. Ct. 939 (2026) (reinstating qualified immunity); *Henderson v. Harris Cnty.*, 51 F.4th 125, 133 (5th Cir. 2022) (rejecting obviousness exception); *McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020) (rejecting obviousness exception, vacated by *McCoy v. Alamu*, 141 S. Ct. 1364 (2021)).

By insisting on near-duplicate precedent to find “clearly established” law, while also relying on *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) to grant immunity without deciding the underlying constitutional question, the circuit permits itself to create what is, in practical effect, a self-sealing system. Each time a court grants immunity on the ground that no case on point exists—and declines to reach the merits—it both shields the defendant and prevents the creation of precedent that could clearly establish the right for future plaintiffs. The predictable result is fewer merits rulings, less constitutional clarification, narrower clearly established law, and continued immunity in the next similar case.

The pattern has manifested across multiple Fifth Circuit decisions and has already drawn this Court’s attention. In *Gonzalez v. Trevino*, this Court held that the Fifth Circuit had taken “an overly cramped view” in granting qualified immunity. 602 U.S. at 655. This Court has repeatedly reversed the Fifth Circuit’s qualified-immunity grants. *See, e.g., Villarreal*, 145 S. Ct. 368 (vacating Fifth Circuit’s grant of qualified immunity); *McCoy*, 950 F.3d at 233 (5th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1364 (2021) (granting qualified immunity, subsequently reversed by this Court). Petitioner’s case fits squarely within the Fifth Circuit’s pattern: the panel majority felt bound to ignore obviousness and grant immunity because no prior case mirrored the precise facts. That entrenched methodology, its practical narrowing of § 1983, and the repeated need for this Court’s corrective intervention together present the kind of systemic, cert-worthy problem that warrants review.

II. Petitioner’s First Amendment claim presents an ideal setting to clarify application of the obviousness exception.

A. The First Amendment is well-suited to an obviousness exception.

The First Amendment context offers particularly strong grounds for applying *Hope*’s obviousness principle beyond the Eighth Amendment setting in

which it arose. Public-forum doctrine, viewpoint-discrimination rules, and standards governing licensing and permit schemes have been developed over decades of decisions from this Court and the courts of appeals. Public sidewalks are paradigmatic public forums. *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 11 (2018). The government may not discriminate based on viewpoint or content in any forum. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350–51 (5th Cir. 2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 829 (1995)). And any permitting or preapproval scheme for speech must satisfy stringent constitutional safeguards. *Freedman v. State of Md.*, 380 U.S. 51, 56–58 (1965) (finding inherent danger in such a scheme). These doctrines provide officials robust guidance and fair warning about core First Amendment constraints.

The context that prompted this Court’s emphasis on particularity in *al-Kidd*—namely, Fourth Amendment seizures and related national security concerns—often involves split-second, high-risk snap judgments under volatile conditions. *See, e.g., Harmon v. City of Arlington*, 16 F.4th 1159, 1166 (5th Cir. 2021) (“specificity requirement assumes special significance in excessive force cases, where officers must make split-second decisions to use force.”). First Amendment disputes are distinguishable—as shown

in Petitioner's case and in Amicus's experiences with campus speech. These disputes typically involve deliberative choices made before the speech occurs under calm, non-exigent circumstances. Extending *al-Kidd*'s particularity requirement to such settings, while cabining *Hope* to prisoner cases, disrespects the distinct considerations that have historically justified qualified immunity and ignores the rich doctrinal backdrop of First Amendment law.

The Fifth Circuit's refusal to consider obviousness in this First Amendment setting thus misapplies qualified immunity in the very domain where clear guidance and low exigency make the doctrine's protective rationale weakest. This petition presents an ideal opportunity to clarify that *Hope*'s obviousness principle applies in the First Amendment context and may inform the clearly-established inquiry even outside the Eighth Amendment.

B. Amicus's experiences with public university events illustrate why this matter merits this Court's attention.

Amicus's interest in this question does not arise in the abstract. Amicus regularly sponsors lectures, tabling efforts, and other expressive activities on public university campuses, where student groups and administrators must navigate policies governing event approval, room reservations, funding,

promotion, security, and access to campus spaces. Those interactions place Amicus and its student members in repeated contact with public officials acting under color of state law in settings where First Amendment constraints should be familiar and where decisions affecting speech seldom arise in exigent circumstances. Amicus's experience thus confirms that the issue presented here extends beyond Petitioner's facts and bears directly on a recurring category of speech disputes in which qualified immunity carries substantial practical consequences.

Public university events typically unfold through a methodical process, not in the midst of fast-moving or dangerous encounters. For example, before holding a campus event, a student organization or sponsoring organization ordinarily must submit an event proposal and secure approval weeks or months in advance. The organizer often engages in protracted dialogue with the university administration to facilitate and confirm the event logistics, including room reservations, venue setup, security policies and plans, and on-campus promotions. This dialogue typically occurs in written format including through emails or within online portals. Amicus's encounters with free speech violations almost invariably consist of predetermined, thought-out decisions by university administrators responding in this format in the days, weeks, or months leading up to a proposed event.

Thus, in Amicus’s experience, administrators are not required to make snap judgments or provide real-time, contemporaneous responses to students’ or organizers’ inquiries. University officials and staff commonly have time to consult written policies, seek legal advice, deliberate, and make executive-level decisions on any questionable issues before restricting or burdening speech. These features make the public-university setting a poor candidate for the rigid, fact-specific qualified-immunity analysis the Fifth Circuit requires.

Also, public universities generally do not operate without notice of their constitutional obligations. Many public institutions publish policies affirming commitments to free expression, viewpoint neutrality, academic freedom, and the open exchange of ideas.²

² See, e.g., *Permanent Memorandum 79 Freedom of Speech and Expression*, LA. ST. UNIV. (February 21, 2025) <https://www.lsu.edu/administration/policies/pmfiles/pm-79.pdf> (last visited July 14, 2026) (asserting university “is fully committed to free speech” and expressly affirming First Amendment rights); *Free Speech*, UNIV. OF MISS., <https://olemiss.edu/union/free-speech/> (last visited July 14, 2026) (stating freedom of expression as guaranteed by the First Amendment is fundamental to university’s mission, providing explanations of protected speech including expressive activity such as leafleting, and showcasing two “First Amendment Experts” available on campus); *Appendix XI: Texas A&M Rules on Freedom of Expression*, TEX. A&M UNIV., <https://student-rules.tamu.edu/appendix-xi/> (last visited July 14, 2026) (affirming that university “encourages the free exchange of ideas” and “will protect the rights of freedom of speech,

When officials act against that background to reject an event, impose extra conditions, revoke approval, relocate an event, or suppress leafleting or demonstrations in response to an event, they do so against a backdrop of established constitutional principles and institutional notice—not under conditions of uncertainty that justify reflexive resort to qualified immunity.

That practical reality bears directly on the question presented. Under the Fifth Circuit’s rule, officials may escape liability so long as their method of suppressing speech is sufficiently novel, even when the constitutional defect is obvious and the officials had ample time to recognize it. From Amicus’s perspective, that incentive structure creates a serious risk that university administrators will adopt new or more elaborate ways to burden disfavored speech while later invoking the absence of near-twin precedent as a defense. Petitioner’s public-forum claim and Amicus’s university-speech experience

expression, petition and peaceful assembly as set forth in the U.S. Constitution”; expressly providing viewpoint-neutral policy); *Institutional Rules on Student Services and Activities: Chapter 13, Speech, Expression, and Assembly*, UNIV. OF TEX., <https://catalog.utexas.edu/general-information/appendices/appendix-c/speech-expression-and-assembly/> (last visited July 14, 2026) (acknowledging university’s rules are “subject to the constitutional right of free speech” and “must be viewpoint neutral”).

together illustrate the same underlying problem: obvious First Amendment violations occur in non-exigent settings yet receive qualified-immunity protection because no prior decision matches the precise factual permutation.

The consequences for Amicus and its student members are substantial. Amicus has student members in forty-seven public colleges and universities across Texas, Louisiana, and Mississippi. Under the Fifth Circuit precedent below, and the predecessor cases on which it relies, Amicus is concerned that university administrators may feel freer to devise new methods of burdening protected speech.

Amicus's experiences with school administration, together with Petitioner's circumstance, illustrate precisely why the obviousness principle should apply in the First Amendment context. This Court should grant cert to avoid the far-reaching ramifications of the Fifth Circuit's erroneous precedent.

CONCLUSION

The holding below represents a line of Fifth Circuit jurisprudence that erroneously construes Section 1983 and improperly widens qualified immunity to protect even incompetent and knowing violators. For all the above reasons and those

presented by Petitioner, the Court should grant the petition.

Respectfully submitted,

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