

No. 25-1389

In the Supreme Court of the United States

RICHARD HERSHEY, PETITIONER,

v.

CITY OF BOSSIER CITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court stated that “officials can still be on notice that their conduct violates established law even in novel factual circumstances” when “a general constitutional rule” applies with “obvious clarity to the specific conduct in question.” *Id.* at 741 (citation omitted). The question presented, which a lone judge raised sua sponte below, is:

Whether the Fifth Circuit has limited the principles of *Hope* to Eighth Amendment claims, to the exclusion of First Amendment claims.

RULE 29.6 DISCLOSURE STATEMENT

No party to the proceedings is a nongovernmental corporation.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Richard Hershey seeks review of a question that no one disputes, that the court below did not decide, and that will not affect any cases, including his own. He crafts his petition around this Court’s unobjectionable statement in *Hope v. Pelzer*, 536 U.S. 730 (2002), that qualified immunity does not bar a claim when “a general constitutional rule” applies with “obvious clarity to the specific conduct in question.” *Id.* at 741 (citation omitted). According to Hershey and his army of amici, the Fifth Circuit refuses to follow *Hope* except when reviewing prisoners’ Eighth Amendment

claims. Pet. 2. They tout this petition as an opportunity to restore *Hope*'s obviousness principle and to vindicate the First Amendment.

The problem is that nobody has argued, and the Fifth Circuit has never held, that qualified immunity shields obvious First Amendment violations. Bossier City has never said anything of the sort. Every judge who addressed the question below agreed that the same test should apply to all constitutional claims. Pet. App. 7a (Ho, J., concurring); *id.* at 98a-99a (Oldham, J., dissenting from denial of rehearing en banc). And the Fifth Circuit has repeatedly applied *Hope*'s obviousness framework across constitutional contexts, including to First Amendment claims. *E.g.*, *Wetherbe v. Texas Tech Univ. Sys.*, 138 F.4th 296, 305-306 (2025), *cert. denied*, 146 S. Ct. 1492 (2026) (No. 25-530); *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (2024) (en banc), *reinstated*, 134 F.4th 273, 276 (2025) (en banc), *cert. denied sub nom. Villarreal v. Alaniz*, 146 S. Ct. 939 (2026) (No. 25-29). Like every other court of appeals, the Fifth Circuit thus applies the "principles of *Hope*" beyond the Eighth Amendment. Pet. i. So concludes Hershey's question presented.

Even though everyone here agrees on the answer to that question, Hershey attempts to construct a conflict worthy of this Court's review. He invokes the outlier views of Judge Ho, who wrote alone to assert that the Fifth Circuit in *Villarreal* had previously rejected the obviousness framework for First Amendment claims. Pet. App. 8a-9a. Judge Ho had made that same claim when dissenting in *Villarreal* itself. 94 F.4th at 413. But "comments in a dissenting opinion about legal principles and precedents are just that: comments in a dissenting opinion." *Georgia v. Public.Resource.Org*,

Inc., 590 U.S. 255, 273 (2020) (brackets, citation, and quotation marks omitted). As the *majority* opinion in *Villarreal* reflects, the Fifth Circuit granted qualified immunity not because of some cramped view of *Hope* but because the plaintiff had not established that the defendants “obviously” violated the First Amendment. 94 F.4th at 397. Judge Oldham accordingly explained for seven judges at the en banc stage here that *Villarreal*’s holding that a plaintiff “failed to show an ‘obvious’ constitutional violation” is an example of *applying* the obviousness framework from *Hope* rather than *rejecting* it. App., *infra*, 98a (opinion of Oldham, J.). No other judge in this case read *Villarreal* the way that Judge Ho does.

This would be an exceptionally odd vehicle for the Court to relitigate what the Fifth Circuit meant in *Villarreal*. The parties here did not and do not dispute the question presented, which entered the case sideways in Judge Ho’s concurrence at the panel stage. In the district court and on appeal, Hershey never even invoked *Hope*. Nor did the Bossier City officers ever argue that *Hope* does not apply to First Amendment claims. Even after Judge Ho raised the issue sua sponte at the panel stage, Hershey still said nothing. Bossier City filed an en banc petition challenging a municipal-liability question, which is the subject of its separate petition for certiorari in No. 25-1323. Hershey, meanwhile, did not act until Judge Ho “welcome[d] an en banc petition from Hershey.” Pet. App. 78a (Ho, J., concurring in denial of rehearing en banc). When Hershey then sought leave to file an out-of-time rehearing petition, the Fifth Circuit denied that attempt to resurrect a forfeited *Hope* issue.

Even if the question presented were genuinely disputed and preserved, the answer would still make no difference to this case, which does not concern obvious First Amendment violations. Hershey's claims arise from handing out pamphlets on the grounds of a local arena that was publicly owned, privately operated, and at the relevant time being used for a ticketed event. Police officers and private security guards told Hershey to leave, which he did without incident. Later, Hershey claimed that he was denied his right to distribute literature in a traditional public forum and subjected to viewpoint discrimination. But neither supposed violation was obvious here. How to characterize property with a partially public, partially private character is a hotly debated issue whose resolution may vary based on how the particular land is used at the relevant time. And an allegation that officers asked Hershey but not another leafleteer to leave—without any allegation that the officers ever saw either leaflet's contents—is not enough to make out a plausible claim of viewpoint discrimination, much less an obvious one. Pet. App. 39a (Richman, J., concurring in relevant part).

Saying the Fifth Circuit has limited *Hope* to Eighth Amendment claims makes for a catchy question presented. But it would make for a mess of a merits case: who would defend a cramped reading of *Hope* that no party has advocated and no court has adopted? Put simply, Hershey's account does not reflect the body of Fifth Circuit precedent, the opinions below, or the arguments made by Bossier City. If Hershey had invoked the obviousness framework or argued that it was being uncharitably applied to First Amendment claims, then the parties could have debated those

points and the Fifth Circuit could have decided them. But he did not—not until after rejection of *the City’s* en banc petition, at which point the court denied his untimely attempt to inject *Hope* issues into the case. Because the question presented is contrived, undisputed, and academic, this Court should deny Hershey’s petition.

Notably, the decision below does warrant review—just not on the grounds Hershey raises. In *City of Bossier City v. Hershey*, No. 25-1323, the City has presented two questions concerning municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). Those questions were raised and decided below, and they have genuinely divided the courts of appeals over how to assess failure-to-train claims arising from a single allegedly unconstitutional incident. This Court’s resolution of those *Monell* issues would matter; resolution of Hershey’s petition would not. Simply put, Hershey’s meritless petition should not detract from the City’s meritorious one. The Court should grant the City’s petition and deny Hershey’s.

STATEMENT OF THE CASE

A. Legal Background

Section 1983 imposes liability on any “person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. § 1983. Because Congress enacted Section 1983 against the backdrop of a “common-law tradition” of official immunities against tort liability,

officers enjoy qualified immunity from suit under Section 1983 unless their conduct violated a constitutional right that was clearly established when the relevant events occurred. *Malley v. Briggs*, 475 U.S. 335, 342 (1986); see *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

A plaintiff cannot overcome qualified immunity merely by articulating a “legal principle” with a “sufficiently clear foundation in then-existing precedent.” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). “The ‘clearly established’ standard also requires that the legal principle clearly prohibit the officer’s conduct in the particular circumstances before him.” *Ibid.* After all, as Justice Scalia explained 40 years ago, if plaintiffs could pitch clearly established law at too high a level of generality, they “would be able to convert the rule of qualified immunity that [the Court’s] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The Court has since “repeatedly stressed that courts must not ‘define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.’” *Wesby*, 583 U.S. at 63-64 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)).

A plaintiff has two ways to show that an asserted constitutional right was clearly established on the particular facts of his case. First, a plaintiff typically must “‘identify a case where an officer acting under similar circumstances was held to have violated’ the Constitution.” *Zorn v. Linton*, 607 U.S. 568, 572 (2026) (per curiam) (quoting *Escondido v. Emmons*, 586 U.S. 38, 43

(2019) (per curiam)) (alteration omitted). While the plaintiff need not unearth “a case directly on point,” precedent must establish the constitutional violation “beyond debate.” *Wesby*, 583 U.S. at 64 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Second, qualified immunity may be overcome in the “rare ‘obvious case’” in which “the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” *Wesby*, 583 U.S. at 63 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)). The leading example is *Hope*, in which this Court held that the constitutional violation—one State’s practice of chaining inmates to “hitching posts” as punishment—was “so obvious[ly]” the cruel and unusual infliction of unnecessary pain that the plaintiff “[a]rguably” did not need analogous cases to overcome qualified immunity. 536 U.S. at 733-734, 741. Since *Hope*, this Court has recognized across constitutional contexts that obvious constitutional violations may overcome qualified immunity even in the absence of cases involving materially similar facts. *See, e.g., Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (per curiam) (Fourth Amendment excessive-force claim); *Sause v. Bauer*, 585 U.S. 957, 959 (2018) (per curiam) (noting petitioner’s invocation of obviousness exception for free-exercise claim); *Wesby*, 583 U.S. at 63 (Fourth Amendment unlawful-arrest claim).

Recognizing that qualified immunity does not shield obvious constitutional violations is different from holding that a constitutional violation actually was obvious. The obviousness exception exists as a safety valve because “the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing.”

Browder v. City of Albuquerque, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.). This Court has held only once since *Hope* that a plaintiff satisfied that demanding standard after being held in “deplorably unsanitary conditions for such an extended period of time” that “no reasonable correctional officer could have concluded that, under the extreme circumstances,” the inmate’s treatment complied with the Eighth Amendment. *Taylor v. Riojas*, 592 U.S. 7, 8-9 (2020) (per curiam). By contrast, the Court has held many more times that claimed violations were not obvious. *E.g.*, *Zorn*, 607 U.S. at 574; *Rivas-Villegas*, 595 U.S. at 6; *White v. Pauly*, 580 U.S. 73, 80 (2017) (per curiam); *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 377-379 (2009); *Brosseau*, 543 U.S. at 199.

B. Factual Background

Hershey is a professional pamphleteer paid by “various nonprofit organizations” to approach members of the public and distribute leaflets. Pet. App. 29a, 153a. He is also a serial plaintiff who has filed more than a dozen federal civil-rights lawsuits against state and local governments and officials across six States since 2010. *See id.* at 32a-33a.

In February 2020, Hershey entered the grounds of the CenturyLink Center in Bossier City, Louisiana to hand out literature about Christian vegetarianism to attendees of the “Winter Jam” Christian rock concert being held there. Pet. App. 29a, 154a-155a. The CenturyLink Center (since renamed) is a multi-purpose arena owned by Bossier City and operated by a private company called ASM Global. *Id.* at 28a-29a. The Center’s grounds include several grassy areas and parking lots crisscrossed by internal sidewalks and driveways. *See*

id. at 154a-155a. The Center’s operator “lease[s] both the interior space and outdoor areas of the Center for [private] events,” such as the rock concert that prompted Hershey’s visit. *Id.* at 29a; *see id.* at 166a. The concert was a paid, ticketed event; Hershey did not have a ticket. *See id.* at 27a, 29a.

Two Bossier City police officers, accompanied by three private security guards employed by ASM Global, approached Hershey as he stood on one of the sidewalks on the CenturyLink Center grounds handing out leaflets to concertgoers. Pet. App. 29a, 155a. One of the officers informed Hershey that the Center was private property and told him that he “had to leave” or “be arrested.” *Id.* at 29a, 156a. Hershey complied and headed for the exit. *Id.* at 156a. As he was leaving, he asked the officers about another leafleteer who had been “handing out cards for a radio station” on Center grounds that day. *Id.* at 29a, 157a. The officer told Hershey that he needed the Center’s permission to hand out leaflets and had to submit his literature in advance for approval. *Id.* at 30a, 157a. When Hershey asked whether the other leafleteer had permission to hand out his literature, one of the officers answered that “he didn’t know if the other literature had been approved, but that Hershey’s literature was not approved so he had to leave.” *Ibid.* Hershey left the Center grounds without being arrested. *Ibid.*

The CenturyLink Center logged a single “incident report” that day involving pamphleteers. According to the report, the Center’s security guards observed “two individuals handing out pamphlets.” Pet. App. 31a. When the pamphleteers “became argumentative” with concertgoers, the security guards “called Bossier City

Police for assistance.” *Ibid.* The pamphleteers ultimately left the property. *Id.* at 32a. The incident report does not name Hershey. *Id.* at 31a-32a; *see id.* at 167a.

C. Proceedings Below

1. Hershey sued the officers, security guards, and Bossier City under Section 1983, claiming violations of his free-speech rights under the First Amendment. Pet. App. 158a-164a. His complaint described the Century-Link Center as “a public park” and alleged that the Center’s outdoor spaces were a “traditional public forum,” or at least a “designated public forum,” for First Amendment purposes. *Id.* at 154a, 158a. Based on his characterization of CenturyLink Center as a public forum, Hershey alleged that he “had a right . . . to distribute literature” outside the Center. *Id.* at 158a. Hershey further alleged that the officers and security guards had treated him less favorably than the radio-station leafleteer. *Id.* at 157a. He did not allege, however, that they were aware of the contents of either his or the other leafleteer’s pamphlets. *Id.* at 92a; *see id.* at 155a-157a.

Hershey sought damages from both the individual defendants and the City. He alleged that the officers and security guards “are not entitled to qualified immunity because Hershey’s right to free speech by his advocacy and distribution of literature ha[s] been established by binding precedent long before the events” in this case. Pet. App. 162a-163a. And he asserted that the City is liable based on its failure to adequately train the officers and security guards that the sidewalks on

the grounds of the CenturyLink Center are a public forum in which only “reasonable time place and manner restrictions” could be enforced. *Id.* at 163a-164a.

2. All defendants moved to dismiss the complaint for failure to state a claim. Pet. App. 107a, 123a. The magistrate judge—whose opinions the district court adopted in full, *id.* at 104a, 120a—recommended dismissal of the claims against the officers based on qualified immunity, *id.* at 133a-137a; of the claims against the City because Hershey failed to state a viable *Monell* claim, *id.* at 137a-147a; and of the claims against the private security guards because they were not state actors, *see id.* at 111a-118a.

In addressing qualified immunity, the magistrate judge concluded that no “controlling authority . . . made clear” that the officers’ “prohibition of distributing leaflets on the sidewalks outside the [CenturyLink Center] during a concert event was unconstitutional.” Pet. App. 137a. Critically, nobody disputed that Hershey would have been entitled to pamphlet on a standard sidewalk or any other public forum. But as the magistrate judge explained, “there are many nuances to First Amendment claims” like Hershey’s involving property with a dual public-private nature, “beginning with questions about the category of the forum and continuing through the reasonableness of various regulations and restrictions.” *Id.* at 136a.

The magistrate judge observed that courts have divided on how to classify similar areas surrounding public arenas during private events. Pet. App. 136a. Several courts had deemed such areas “either nonpublic or limited forums,” whereas others had said the opposite. *Id.* at 129a-130a. Indeed, at least one precedent unfavorable to Hershey was quite familiar. A district court

in Arkansas had granted summary judgment against Hershey just a year earlier on virtually identical First Amendment claims arising from his attempts to hand out leaflets on the grounds of the Verizon Center in North Little Rock during another stop of the same “Winter Jam” concert series. *Id.* at 130a; *see Hershey v. Multi-Purpose Civic Ctr. Facility Bd.*, 2020 WL 4741900, at *2-3 (E.D. Ark. Aug. 14, 2020).

The magistrate judge recognized that, under Fifth Circuit precedent, the officers’ conduct could be “objectively unreasonable in light of clearly established law” even without “a case directly on point.” Pet. App. 135a (quoting *Tucker v. City of Shreveport*, 998 F.3d 165, 173-174 (5th Cir. 2021)). But the magistrate judge found that no constitutional violation was sufficiently clear in this “particular setting,” and that Hershey had defined clearly established law at a “far too general” level of the First Amendment’s prohibition on “viewpoint discrimination.” *Id.* at 137a (quoting *Morgan v. Swanson*, 755 F.3d 757, 761 (5th Cir. 2014) (*per curiam*)). Because Hershey had “not pointed to any controlling authority or other clearly established law that would have made clear to [the officers], beyond debate, that their prohibition of distributing leaflets on the sidewalks outside the Arena during a concert event was unconstitutional,” the magistrate judge concluded that qualified immunity protected the officers. *Ibid.*

3. Hershey appealed. A splintered panel affirmed 2-1 the district court’s grant of qualified immunity to the officers and dismissal of the claims against the security guards but, by a different 2-1 majority, reversed the district court’s dismissal of Hershey’s *Monell* claim against the City. Pet. App. 1a-2a (*per curiam*).

a. Judge Ho (the only judge in the majority on both issues) voted to affirm the district court’s decision as to the officers and security guards, and reverse as to the City. Pet. App. 3a-4a.

Judge Ho concluded that qualified immunity protected the officers. Pet. App. 7a-11a. As he read Fifth Circuit precedent, qualified immunity shields even “obvious violations of the First Amendment” unless the plaintiff can identify an on-point precedent with “materially identical facts.” *Id.* at 8a-9a (quoting *Villarreal*, 94 F.4th at 395). He determined that Hershey could not satisfy that standard. In fact, Judge Ho observed that the Fifth Circuit had recently rejected a “similar claim” challenging a municipal ordinance that prohibited leafleting “on a sidewalk outside a public amphitheater.” *Id.* at 10a-11a (citing *Siders v. City of Brandon*, 123 F.4th 293 (2024)). Given *Siders*, Judge Ho found it “difficult to see how Hershey” could have “stated a ‘clearly established’ violation in our circuit.” *Id.* at 10a.

Despite holding that Hershey had not alleged a clearly established violation, Judge Ho determined that Hershey had plausibly alleged a *Monell* claim that the City had been deliberately indifferent to the risk that its officers might violate the First Amendment at CenturyLink Center. Pet. App. 11a-13a. He relied on the complaint’s allegations that “Bossier City did not train its police officers and private security personnel that the park surrounding the [CenturyLink Center] is public property, or that citizens are entitled to exercise their First Amendment rights there.” *Id.* at 12a.

b. Judge Dennis would have reversed the district court across the board. Pet. App. 15a-16a (Dennis, J.,

concurring in part and dissenting in part). Judge Dennis concluded that Hershey had adequately alleged that the sidewalks on the grounds of the CenturyLink Center are a traditional public forum and that the officers lacked qualified immunity from Hershey's "straightforward claim of viewpoint discrimination in a traditional public forum," a "public sidewalk." *Id.* at 20a-22a. Judge Dennis also concluded that Hershey had alleged deliberate indifference for his *Monell* claim based on a failure to train that the sidewalks on the CenturyLink Center grounds are a public forum. *Id.* at 17a-18a.

c. Judge Richman, in contrast, would have affirmed the district court's dismissal of all of Hershey's claims in this area of "nuanced First Amendment law." Pet. App. 26a-28a (Richman, J., concurring in part and dissenting in part).

Starting with the officers, Judge Richman agreed with Judge Ho, though for different reasons, that Hershey had not alleged a clearly established violation. Pet. App. 28a. She first determined that the law did not clearly establish that the area surrounding the CenturyLink Center is a public forum, at least during private events. *Id.* at 36a-37a. As she emphasized, "public property may change its character for purposes of First Amendment forum analysis based on temporary uses," which makes establishing clear law particularly challenging. *Id.* at 37a. She also concluded that Hershey had not "sufficiently allege[d] content or viewpoint discrimination." *Id.* at 39a. Any "inference that Hershey was singled out based on the content of his literature," she explained, was too "speculati[ve]" because Hershey had not alleged that the officers were

aware of the content of his leaflets or of the other leafleteer's radio-station cards. *Ibid.* She added that Hershey had framed the prohibition against viewpoint discrimination at a "very general" level that "does not clearly establish what the First Amendment prohibits" in the particular circumstances of this case. *Id.* at 41a.

Turning to Hershey's single-incident *Monell* claim, Judge Richman warned that allowing such a claim to move forward would "substantially erode and trivialize" the deliberate-indifference standard. Pet. App. 46a. She would have affirmed because "[i]t is not highly predictable that law enforcement officers would have recurring encounters with individuals paid to distribute literature outside a large, pay-to-attend event," and thus would need to confront the specific First Amendment issues on which Hershey alleges the City failed to provide adequate training. *Id.* at 50a. As she cautioned, endorsing Hershey's failure-to-train allegations would turn a narrow exception for the most extreme cases into a virtual "strict liability" regime for municipalities. *Id.* at 51a.

4. Only Bossier City sought rehearing en banc, arguing that the panel had departed from this Court's decisions restricting single-incident *Monell* liability. C.A. Pet. for Reh'g 8-15; see 25-1323 Pet. 18-25. By a 10-7 vote, the Fifth Circuit denied the City's petition. Pet. App. 64a-65a. Judge Oldham, writing for himself and six other judges, explained why the panel's resuscitation of Hershey's *Monell* claim conflicts with this Court's decisions and warrants further review. *Id.* at 94a-97a.

Judge Ho wrote a solo concurrence raising arguments against qualified immunity that Hershey had not pressed. Judge Ho reiterated his view that the Fifth

Circuit's earlier decision in *Villarreal* had limited *Hope*'s "obviousness exception" to the Eighth Amendment context. Pet. App. 75a. Although Judge Ho acknowledged that "Hershey himself did not file an en banc rehearing petition asking us to overturn *Villarreal*," he stated that he would "welcome an en banc petition from Hershey" raising that issue. *Id.* at 78a.

Judge Oldham responded to this detour into qualified immunity. He rejected Judge Ho's view that the Fifth Circuit had held in *Villarreal* that "the obviousness exception does not apply in First Amendment cases." Pet. App. 97a. He explained that *Villarreal* had instead affirmed a grant of qualified immunity for a more prosaic reason: "in the context of the particular circumstances" of the case, "the officers did not obviously violate the Constitution." *Id.* at 98a (citing *Villarreal*, 94 F.4th at 397). Because holding that a party had "failed to show an 'obvious' constitutional violation" is not the same as holding "that 'obviousness' is no longer a cognizable claim," Judge Oldham disagreed with Judge Ho's outlier reading of Fifth Circuit precedent. *Ibid.* (citation omitted). Judge Oldham also would have abstained from reinventing Hershey's claims under principles of "party presentation." *Id.* at 100a-102a.

5. A few weeks after the full Fifth Circuit denied rehearing en banc, the panel sua sponte declined to rehear the case. Pet. App. 62a. This time, Judge Ho dissented. He would have allowed Hershey to present new "qualified immunity issues that [Judge Oldham's en banc dissent] purportedly welcomed him to present." *Id.* at 63a. After Judge Ho's two separate prompts, Hershey obtained new counsel and moved for leave to file an out-of-time petition for rehearing en

banc to relitigate *Villarreal* and its meaning. C.A. Doc. 121, at 5-6 (Jan. 16, 2026). The panel denied that motion. C.A. Doc. 136-2, at 1 (Feb. 5, 2026).

REASONS FOR DENYING THE PETITION

Hershey’s question presented is not actually presented here. Hershey contends that the Fifth Circuit has cabined *Hope* to Eighth Amendment cases. The First Amendment, he says (at 28), gets “second class treatment” under which qualified immunity bars even obvious violations unless the plaintiff can come forward with perfectly on-point precedent. If the Fifth Circuit really had erected a two-track system in which Eighth Amendment claims alone ride in the fast lane, then the question presented might warrant review in an appropriate case. But the Fifth Circuit has done no such thing.

In this case, all but one of the Fifth Circuit judges who wrote or joined panel or en banc opinions agreed that *Hope*’s obviousness framework applies to First Amendment claims. Only one judge insisted that *Villarreal*—a prior circuit decision from which he had dissented—had wrongly relegated First Amendment claims to disfavored status. But as seven judges explained in response, *Villarreal* (like many other decisions from the Fifth Circuit) merely held that a violation was not obvious. Pet. App. 98a (Oldham, J., dissenting from denial of rehearing en banc) (citing *Villarreal*, 94 F.4th at 397). *Villarreal* and decisions like it apply rather than reject “the principles of *Hope*.” Pet. i.

Even if the Fifth Circuit had limited *Hope* to Eighth Amendment claims, this would be a uniquely poor vehicle to address that issue. The question presented is

forfeited: Hershey did not raise *Hope* until his unsuccessful motion for leave to file an out-of-time petition, after two nudges from Judge Ho. Bossier City has never joined issue on the question. In addition, the resolution of Hershey’s question presented would make no difference to the outcome in this case because Hershey does not allege obvious First Amendment violations. Hershey thus seeks review of an undisputed question that he did not present below and that his claims do not even implicate. This Court should deny his petition.

I. THERE IS NO GENUINE DISPUTE ABOUT THE ANSWER TO HERSHEY’S QUESTION.

The question presented—“[w]hether the principles of *Hope v. Pelzer* are limited to Eighth Amendment claims or extend to Free Speech and Free Exercise claims,” Pet. i—was raised by one judge and zero parties below. Across the panel and rehearing opinions, only Judge Ho understood the Fifth Circuit to impose Eighth Amendment limits on “the ‘obviousness’ exception.” Pet. 19. The other eight Fifth Circuit judges who wrote or joined opinions took the opposite view. The City also has never disputed that the principles of *Hope* apply to First Amendment claims. At this stage, the only disputed issue that could have been raised is whether Hershey actually has alleged an obvious violation—a factbound question that would not warrant this Court’s review (which is presumably why Hershey does not raise it).

A. Hershey rests (at 27) his question presented on a shaky foundation: a solo opinion advancing an idiosyncratic view of circuit precedent. In his separate opinion at the panel stage, Judge Ho insisted that Fifth Circuit precedent disfavors the First Amendment and

forecloses plaintiffs from challenging even obvious free-speech violations in the absence of an on-point case with “materially identical facts.” Pet. App. 9a (Ho, J., concurring) (quoting *Villarreal*, 94 F.4th at 395). He fleshed out that argument at the rehearing en banc stage, in response to the City’s petition on other grounds. *Id.* at 69a-81a.

At the panel stage, nobody else engaged. The two other judges on the panel did not even cite *Hope* or *Villarreal*, much less align with Judge Ho’s view that the Fifth Circuit had limited the obviousness principle to the Eighth Amendment.

Judge Richman gave two different reasons supporting her critical vote for qualified immunity. Pet. App. 28a. First, she concluded that courts “cannot expect officers, even those trained in First Amendment law, to know whether a given area near an arena being used in a particular way at a given time is or is not a public forum given the uncertainties of the law in this area.” *Id.* at 36a. She cited several decisions in which “courts have recognized that public property may change its character for purposes of First Amendment forum analysis based on temporary uses.” *Id.* at 37a-38a & nn.18, 24. Those decisions reflected that the “forum status” of the sidewalks surrounding the CenturyLink Center was “not clearly established”—in other words, not obvious. *Id.* at 38a. Second, she determined that Hershey’s allegations that the officers asked him to leave without also asking the radio-station leafleteer to leave did not establish viewpoint discrimination at all, let alone clearly establish viewpoint discrimination. *Id.* at 39a-40a. So her view, again, was that Hershey had not alleged an obvious violation.

Judge Dennis also departed from Judge Ho in methodology and result. First, he would have accepted Hershey's allegations that the sidewalks surrounding the CenturyLink Center are a traditional public forum even during private events. Pet. App. 20a. He posited that courts need not further consider the "factual circumstances" in addressing qualified immunity on a motion to dismiss. *Ibid.* Second, Judge Dennis concluded that Hershey's right to be free from "viewpoint discrimination in a traditional public forum" was likewise clearly established even without a factually similar case. *Id.* at 22a. Overall, he appeared to believe that any violation was obvious enough to overcome qualified immunity.

The gulf between Judge Ho and the rest of the Fifth Circuit further widened at the rehearing stage. Judge Ho reprised his view that *Villarreal* had eliminated the obviousness principle for First Amendment claims. Pet. App. 69a-81a (Ho, J., concurring in denial of rehearing en banc). Judge Oldham, joined by Judges Jones, Smith, Richman, Duncan, Engelhardt, and Wilson, made clear what was already implicit in Judge Richman's panel opinion: the Fifth Circuit has not "reject[ed] obviousness as a ground for denying qualified immunity" in First Amendment cases. *Id.* at 98a (Oldham, J., dissenting from denial of rehearing en banc). In prior decisions, as here, qualified immunity barred plaintiffs' claims because "the officers did not obviously violate the Constitution." *Ibid.*; *see id.* at 37a-40a (Richman, J., concurring in relevant part).

In short, the en banc Fifth Circuit had a lopsided intramural debate about how best to interpret its own *Villarreal* precedent. That debate does not warrant this Court's review, particularly when the Court chose

not to review *Villarreal* itself. 146 S. Ct. 939. There is no reason why this glancing collateral attack should fare better.

B. Hershey’s petition also does not implicate any genuine dispute between the parties. To be sure, the parties disagree about many issues in this case, including whether Hershey has adequately alleged a single-incident *Monell* claim—the subject of the City’s pending petition in No. 25-1323. But Hershey’s question presented is not one of the disputed issues. If a plaintiff pleads an obvious violation of any constitutional right on the particular facts of the case, *Hope* allows the claim to go forward, no matter the constitutional amendment’s number. *See* p. 7, *supra*. The City and its officers have never argued otherwise. It is thus unclear what the merits dispute would even *be* if this Court were to grant review of Hershey’s artificial question presented.

Hershey attempts (at 24) to manufacture a dispute on his question presented by distorting what the officers argued in the Fifth Circuit. Below, the City accepted the principle “that ‘viewpoint discrimination is a clearly established violation of the First Amendment in any forum’” but disputed that Hershey had alleged clear viewpoint discrimination on “the unique facts of his specific case.” Bossier C.A. Br. 13-14. That is a garden-variety (and well-supported) argument that a plaintiff cannot avoid qualified immunity “by alleging violation of extremely abstract rights” and instead must demonstrate that the law’s application to the particular facts is clear. *Anderson*, 483 U.S. at 639; *see* p. 6, *supra*. The City did not argue that qualified immunity shields obvious First Amendment violations or that *Hope* applies only to Eighth Amendment claims.

It had no occasion to do so: Hershey never invoked the “principles of *Hope*” until his unsuccessful motion for leave to file an out-of-time rehearing petition in the Fifth Circuit. Pet. i; *see* C.A. Doc. 121, at 3-5; *see also* pp. 26-28, *infra*.

Of course, the City and its officers very much dispute that Hershey *has* alleged an obvious First Amendment violation. But Hershey, despite briefing the purported obviousness of his asserted violations, Pet. 19-24, does not seek review of that question. He has made the calculated decision to try to gin up an interesting, legal-sounding question presented, at the expense of briefing the parties’ actual factbound dispute. Merely “discuss[ing] this issue in the text of his petition” is not enough under this Court’s Rule 14.1 to present the “subsidiary question” whether Hershey’s alleged violations are obvious. *Wood v. Allen*, 558 U.S. 290, 304 (2010) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)) (brackets altered). Because his question presented ignores the crux of the parties’ actual dispute, this Court should deny review.

II. THERE IS NO CIRCUIT SPLIT ON HERSHEY’S QUESTION.

Hershey insists (at 29) that the Fifth Circuit stands alone in applying *Hope*’s obviousness analysis only to Eighth Amendment claims. In reality, the Fifth Circuit has repeatedly applied the same analysis to claims invoking other constitutional rights. Hershey attempts to manufacture a conflict by pointing to Fifth Circuit decisions holding that alleged violations were not obvious. But such decisions apply *Hope*; they do not reject it.

A. The Fifth Circuit got the message of *Hope* right away. A few months after this Court’s decision, the en banc court reasoned that qualified immunity would be inappropriate if general Fourteenth Amendment principles of state-created danger “applied with obvious clarity to the specific conduct in question,” though it determined that the violation there was not so obvious. *McClendon v. City of Columbia*, 305 F.3d 314, 332 (2002) (en banc) (per curiam) (quoting *Hope*, 536 U.S. at 741) (brackets omitted). The court has since recognized that plaintiffs did not need on-point precedent to overcome qualified immunity for obvious violations of the right to free speech, *e.g.*, *Kinney v. Weaver*, 367 F.3d 337, 371 (2004) (en banc), and obvious violations of the substantive-due-process right to bodily integrity, *Hernandez v. Texas Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (2004).

Hershey wrongly claims (at 25) that the Fifth Circuit took a turn in 2011. He points to *Morgan v. Swanson*, 659 F.3d 359 (2011) (en banc), in which the Fifth Circuit accurately noted that the obviousness analysis was dicta in *Hope*. After all, this Court in *Hope* had relied on analogous handcuffing cases in determining that the defendants were on notice of the Eighth Amendment violation. *Id.* at 373 (citing *Hope*, 536 U.S. at 742). But the Fifth Circuit’s dicta about dicta was of no moment: the Fifth Circuit had no need to opine on *Hope*’s obviousness principle because the free-speech claim in *Morgan* was “far from ‘beyond debate.’” *Ibid.* The en banc court did not purport to overturn any of its earlier cases that had applied *Hope*. *See id.* at 372 nn.26, 35 (discussing *McClendon*).

Hershey fares no better in pinpointing (at 25-26) *Villarreal* as the moment the Fifth Circuit supposedly

cut its precedent loose from *Hope*. In that case, the plaintiff challenged the constitutionality of her arrest under a statute that prohibited soliciting nonpublic information from government officials. 94 F.4th at 384. An en banc majority first held that the officers had qualified immunity from her Fourth Amendment claim because “there was certainly no ‘obvious’ constitutional violation.” *Id.* at 393. Turning to her First Amendment claim, the majority explained that “*Hope* does not excuse plaintiffs from proving that every reasonable official would know the conduct at issue violates the Constitution.” *Id.* at 395. The majority then determined that the plaintiff’s invocation of general First Amendment principles did not establish that “Texas ‘obviously’ had no authority to outlaw disclosure.” *Id.* at 397. As seven judges explained below, the *Villarreal* majority *applied* the obviousness principle in holding that “the officers did not obviously violate the Constitution.” Pet. App. 98a (opinion of Oldham, J.).

Hershey’s collateral attack on *Villarreal* rewrites that case, too. After this Court vacated the Fifth Circuit’s opinion in *Villarreal* for further consideration in light of an intervening First Amendment decision, the Fifth Circuit reinstated its earlier opinion on qualified immunity. *Villarreal*, 134 F.4th at 276. The plaintiff sought review in this Court, arguing not that the Fifth Circuit had put *Hope* off-limits in the First Amendment context, but that the Fifth Circuit had misapplied *Hope* because the particular violation alleged was obvious. Pet. at 23-27, *Villarreal*, *supra* (No. 25-29). In dissenting from the denial of certiorari, Justice Sotomayor agreed: she criticized the Fifth Circuit for holding that a state statute authorizing the arrest made the violation less obvious. 146 S. Ct. at 943-945.

But she never suggested that the Fifth Circuit had bypassed *Hope*'s obviousness analysis entirely.

Subsequent decisions further undermine Hershey's narrative. Since *Villarreal*, the Fifth Circuit has continued to apply *Hope*'s obviousness principle outside the Eighth Amendment context, including to First Amendment claims. See, e.g., *Wetherbe*, 138 F.4th at 305-306 (First Amendment); *Degenhardt v. Bintliff*, 117 F.4th 747, 759-760 (2024) (First Amendment); *Ramirez v. Killian*, 113 F.4th 415, 422 (2024) (Fourth Amendment). Such decisions have kept piling up even since Judge Ho's en banc concurrence below. See, e.g., *Thorpe v. Weaver*, 180 F.4th 834, 841 n.3 (2026) (Fourteenth Amendment); *Dilworth v. Tucker*, 179 F.4th 992, 997 (2026) (Fourth Amendment). Hershey and other Section 1983 plaintiffs may not agree with each panel's analysis, but there is no categorical anti-*Hope* rule to speak of.

In short, Hershey's accusation (at 25) that the Fifth Circuit has "recast *Hope* as a ticket good for one Amendment only" is all rhetoric, no substance. The Fifth Circuit has repeatedly applied *Hope*'s obviousness analysis outside the Eighth Amendment context, and this case is no different.

B. To be clear, *Hope* does not compel courts to hold that any particular alleged constitutional violation *is* obvious. The Fifth Circuit at times has determined that a general principle was "sufficient in obvious cases" even without precisely on-point precedent. *Cole v. Carson*, 935 F.3d 444, 453 (2019) (en banc); see, e.g., *Tyson v. Sabine*, 42 F.4th 508, 520 (2022). But the court has held many more times (*Morgan* and *Villarreal* included) that alleged violations were not obvious. See, e.g., *Wetherbe*, 138 F.4th at 305-306; *Von Derhaar v.*

Watson, 109 F.4th 817, 827 (2024); *Batyukova v. Doege*, 994 F.3d 717, 726 (2021). In that respect, the Fifth Circuit’s treatment of the obviousness principle looks just like this Court’s, *see* p. 8, *supra*, as well as other courts of appeals’, *see* Pet. 32.

So too Fifth Circuit judges have sometimes disagreed about whether an alleged violation was in fact obvious. *Compare Ramirez v. Guadarrama*, 2 F.4th 506, 509 (2021) (Jolly, J., concurring in denial of rehearing en banc), *id.* at 509-510 (Ho, J., concurring), *and id.* at 515 (Oldham, J., concurring), *with id.* at 519 (Willett, J., dissenting); *compare also Morgan*, 659 F.3d at 373, *with id.* at 413-414 (Elrod, J., dissenting). But Hershey has not asked this Court to review the factbound question whether the alleged violation here was obvious enough. Nor has he identified any division among the courts of appeals about the only question that could have been presented here—whether his alleged First Amendment violations were sufficiently obvious.

III. THIS CASE IS AN UNSUITABLE VEHICLE TO DECIDE HERSHEY’S QUESTION.

Even if Hershey had not fundamentally misread Fifth Circuit precedent, he would be the wrong petitioner to relitigate *Villarreal* in this Court. Hershey did not press his current arguments below, which were passed on by a single judge. When Hershey tried to file an out-of-time petition to raise them, the court of appeals rejected that belated attempt. To make matters worse, Hershey’s forfeited question presented does not even matter here because the alleged constitutional violations are anything but obvious.

A. This Court’s “traditional rule” is that review by certiorari is unavailable “when ‘the question presented

was not pressed or passed upon below.’” *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Hershey did not press his current argument below. In fact, Hershey did not once cite *Hope* in his briefing on qualified immunity before either the court of appeals, Hershey C.A. Br. 21-29; Hershey C.A. Reply Br. 3-7, or the district court, C.A. ROA 192-194, 268-272. Neither, for that matter, did the City and its officers. Bossier C.A. Br. 10-17; C.A. ROA 148-150, 220. Instead, Hershey assumed that the relevant sidewalks were a public forum and argued that qualified immunity can bar claims of viewpoint discrimination only in circumstances when “governmental actors attempt[t] to balance competing, significant constitutional interests.” Hershey C.A. Br. 25. The *Hope* issue entered the case only because one member of the panel “transgressed the party-presentation principle.” *Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (per curiam).

This case is an even more ill-suited vehicle because Hershey’s underlying claims are a moving target. Hershey asks (at i) whether *Hope* applies to “Free Exercise claims.” And he weaves (at 21-24) free-exercise doctrine into his descriptions of the purportedly obvious constitutional violations here. But Hershey could not have alleged an *obvious* free-exercise violation for a simple reason: below, he did not assert *any* free-exercise violation at all. As Judge Oldham observed, one would “look in vain for *any* mention in Hershey’s complaint about faith, religiosity, the First Amendment’s Religion Clauses, or evangelism.” Pet. App. 92a. One judge later restyled “the main event” in the case as “religious liberty.” *Id.* at 87a (Ho, J., concurring in denial of rehearing en banc). But Hershey’s complaint says nothing about religious liberty.

Hershey knew about these problems. After Judge Ho's prompting, his new counsel asked the Fifth Circuit for leave to file an untimely rehearing petition, so that he could raise for the first time the question whether *Hope* applies in the First Amendment context. C.A. Doc. 121, at 3-5. The court rejected that belated request without explanation. C.A. Doc. 136-2, at 1. Because the question presented was neither timely pressed by Hershey nor passed upon by the court of appeals, this Court should deny Hershey's petition on that ground alone.

B. Even aside from Hershey's preservation problems, this case would be a poor vehicle to probe *Hope*'s application in the First Amendment context. At best for Hershey, this Court would reiterate the undisputed principle that qualified immunity does not shield violations of First Amendment principles that apply with "obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741 (citation omitted). But that would not help Hershey, who has not alleged an obvious violation on the facts here. Again shifting from his arguments below, Hershey now claims (at 20-24) that *three* different violations are obvious on the alleged facts. None meets *Hope*'s obviousness standard.

1. Hershey starts (at 20) with his "basic free speech right to leaflet in a traditional public forum." Yet again, nobody disagrees with that principle. But he elides the key question: whether the sidewalks on the grounds of the CenturyLink Center obviously were a traditional public forum during the event in question.

Hershey's petition rests (at 20) on the inaccurate premise that sidewalks are always traditional public forums. In the mine-run case, "public places' histori-

cally associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’” *United States v. Grace*, 461 U.S. 171, 177 (1983). Not always though. Just because “members of the public are permitted to come and go at will” does not mean that “the government has opened its property to the use of the people for communicative purposes.” *Ibid.* And the mere “presence of sidewalks and streets” does not alone establish “a public forum.” *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion). Instead, “[t]he government, ‘no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated’” at a particular time. *Grace*, 461 U.S. at 178 (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).

A sidewalk’s forum status can sometimes be uncertain. In *Marcavage v. National Park Service*, 666 F.3d 856 (2012), for example, the Third Circuit held that qualified immunity protected officers who cited a demonstrator for refusing to leave a federally owned sidewalk in front of the Liberty Bell Center in Philadelphia. *Id.* at 859. The officers could reasonably have believed that the sidewalk was a “nonpublic forum” under the “highly fact-specific” standard because the federal government had set aside that part of the sidewalk to facilitate access to the Liberty Bell. *Ibid.* Other courts of appeals have come to different conclusions about whether the spaces surrounding public arenas are public forums (and, if so, what kind) under certain conditions. Pet. App. 72a-73a; see *Siders v. City of Brandon*, 123 F.4th 293, 303 (5th Cir. 2024) (sidewalk outside grounds of public amphitheater was traditional public forum even during events); *Pomictier v. Luzerne*

Cty. Convention Ctr. Auth., 939 F.3d 534, 540-541 (3d Cir. 2019) (concourse outside publicly owned arena was conceded to be a nonpublic forum); *Ball v. City of Lincoln*, 870 F.3d 722, 736 (8th Cir. 2017) (plaza area outside city-owned, privately operated arena was a nonpublic forum); *see also Powell v. Noble*, 798 F.3d 690, 700 (8th Cir. 2015) (sidewalk was a limited public forum during state fair). The “divergent conclusions” that courts of appeals have reached in this constitutional gray area of speech rights on property with a partially public, partially private character (that sometimes can change during events) confirm that reasonable officers would not have been on notice that the sidewalk here was clearly a traditional public forum. *Safford Unified*, 557 U.S. at 378.

Hershey does not show that general forum principles “apply with obvious clarity” to the sidewalks in this case during the relevant events. *Hope*, 536 U.S. at 741 (citation omitted). Unlike the plaintiff in *Siders* (a decision that postdates the events in this case), Hershey was not standing on sidewalks running along the surrounding streets outside the venue. He entered the “outdoor grounds” of a publicly owned, privately managed arena during a private, ticketed concert and occupied an internal sidewalk that crisscrossed the arena’s outdoor areas. Pet. App. 154a-155a. Because the outdoor grounds were privately leased, private security worked that area, with support from Bossier City police officers. *Id.* at 155a. No precedent—general or specific—clearly established that such a leased area leading to a ticketed event, policed by private and public officers, was a traditional public forum during the concert. *Id.* at 37a-38a & nn.18, 24 (Richman, J., concurring in relevant part).

2. Hershey next asserts (at 21) that the Free Exercise Clause secures his “right to distribute his *religious* leaflets.” But his newly introduced free-exercise overlay adds nothing to the qualified-immunity analysis. Because the forum status of the sidewalks on the grounds of the CenturyLink Center was not obvious, Hershey did not have a clearly established right to hand out *any* kind of literature at that location. This Court has rejected the argument that “religious organizations enjoy rights to communicate, distribute, and solicit” in limited public forums or nonpublic forums that are “superior to those of other organizations having social, political, or other ideological messages.” *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981); see *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992). So even if Hershey had raised a timely free-exercise claim, there would be no obvious violation.

3. Hershey last accuses (at 22-23) the officers of “viewpoint discrimination.” But as Judge Richman explained below, Hershey “does not sufficiently allege content or viewpoint discrimination.” Pet. App. 39a. He failed to allege that the officers “looked at the content of his leaflets” or otherwise knew their viewpoint. *Ibid.* Instead, he alleges that the officers asked him to leave because they knew that his “literature was not approved.” *Id.* at 157a. That bare allegation—that the officers enforced a restriction against him but not another leafleteer, whose approval status was uncertain—is not “sufficient factual matter” to draw a plausible inference that the officers acted “for the purpose of discriminating” based on viewpoint. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

Regardless, even if the complaint passes the plausibility threshold, it falls far short of an obvious violation. Hershey condemns (at 22) viewpoint discrimination as the “cardinal First Amendment sin.” But that near-truism “avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.” *Wesby*, 583 U.S. at 63-64 (citation omitted). Here, the “general constitutional rule” against viewpoint discrimination does not “apply with obvious clarity to the specific conduct” of asking one leafleteer to leave when there are no allegations that the officers even knew, much less acted upon, Hershey’s viewpoint. *Hope*, 536 U.S. at 741 (citation omitted). Again, invocation of an obvious legal principle does not avoid the need for a clear violation of that legal principle on the specific facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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