No. 25-

IN THE

Supreme Court of the United States

CITY OF BOSSIER CITY,

Applicant,

v.

RICHARD HERSHEY,

Respondent.

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

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RULE 29.6 DISCLOSURE STATEMENT

No party to the proceedings is a nongovernmental corporation.

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To the Honorable Samuel Alito, Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, applicant Bossier City respectfully requests a 30-day extension of time, to and including April 17, 2026, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case. The court of appeals entered its judgment, App., *infra*, 36a-37a, on October 7, 2025, and denied Bossier City's timely filed petition for rehearing en banc, *id.* 1a, on December 18, 2025. Unless extended, the time within which to file a petition for a writ of certiorari will expire on March 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. Under *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), municipalities may be liable for asserted violations of 42 U.S.C. § 1983 by municipal

employees. To plead a claim under *Monell*, a plaintiff must either (i) identify a municipal policy or custom that violated a constitutional right or (ii) allege that the municipality was deliberately indifferent to constitutional violations. This Court has left open the possibility of an extremely narrow class of "single-incident" claims of deliberate indifference, where "the unconstitutional consequences of failing to train could be so patently obvious" that no "pre-existing pattern of violations" is necessary. *Connick* v. *Thompson*, 563 U.S. 51, 64 (2011).

This case concerns a Section 1983 lawsuit alleging violations of respondent Richard Hershey's First Amendment rights. Hershey is a paid pamphleteer. Hershey alleges that he was distributing pamphlets about vegetarianism on the grounds of the CenturyLink Center in Bossier City, Louisiana, which is publicly owned but was hosting a private ticketed event, when two police officers and three arena security guards instructed him to leave under threat of arrest. The officers and guards apparently did so based on their understanding that the arena was private rather than public property.

Hershey sued under Section 1983, asserting claims against the two police officers, the three private security guards, and Bossier City. The district court dismissed Hershey's claims against the officers on qualified-immunity grounds. The court also dismissed Hershey's claims against Bossier City on the ground that Hershey had failed to plead an actionable policy or custom as required by *Monell*.

In a splintered panel opinion, the Fifth Circuit affirmed the dismissal of claims against the individual defendants on qualified-immunity grounds, but reversed the dismissal of Hershey's *Monell* claim. *See* App., *infra*, 36a-37a. Given the complexities of

the First Amendment's application to a publicly owned but privately operated forum, no precedent clearly established the First Amendment right at issue. But the court nevertheless concluded that Hershey's single-incident *Monell* claim fell within the narrow exception left open by *Connick*. The panel majority deemed it sufficient that Hershey's complaint alleged that Bossier City had failed to train the officers and security guards that the CenturyLink Center was public property where citizens could engage in First Amendment activity.

The Fifth Circuit denied rehearing en banc by a 10-7 vote. Judge Ho—a member of the panel majority—concurred in the denial of rehearing. *See* App., *infra*, 3a-23a. Judge Oldham dissented from the denial of rehearing. Judge Oldham observed that, under the panel's approach, "every political subdivision can always be held liable for any failure to train—even for potentialities that could not reasonably be foreseen." *Id.* at 27a. The consequence of that holding is that "[p]laintiffs need only allege that officers were not trained [for] the specific situation at hand and, *voila*, the plaintiff has a *Monell* claim." *Id.* at 28a. Judge Oldham warned that the panel's *Monell* holding would "saddle political subdivisions in every § 1983 case." *Id.* at 35a.

2. Bossier City intends to file a petition for a writ of certiorari demonstrating that the decision below conflicts with the decisions of this Court and other courts of appeals and creates a dangerous expansion of municipal liability.

If a plaintiff pleads "deliberate indifference" without any history of violations, this Court has frequently cautioned that the standard must be high. The decision below impermissibly lowers that standard. First, the Fifth Circuit erroneously held that a

plaintiff can plead deliberate indifference for purposes of municipal liability even if he cannot plead a violation of a clearly established right for purposes of officer liability. That makes no sense: municipalities cannot be found deliberately indifferent to the risk of constitutional violations unless those constitutional violations are "patently obvious." *Connick*, 563 U.S. at 64. And a right that is not clearly established is not patently obvious, either. Second, the Fifth Circuit erroneously held that single-incident liability for a failure to train does not require a complete lack of training on the right in question. The court allowed a plaintiff to gerrymander the supposed "failure to train" to cover the precise facts of the case—a move that this Court has rejected. *See Connick*, 563 U.S. at 67.

The decision below also creates at least a 3-1 split in the courts of appeals over whether a plaintiff can plead a viable single-incident *Monell* claim in the absence of any clearly established constitutional violations. Most notably, the Fifth Circuit's approach here conflicts with the Second Circuit's decisions in *Townes* v. *City of New York*, 176 F.3d 138 (2d Cir. 1999), and *Young* v. *County of Fulton*, 160 F.3d 899 (2d Cir. 1998), the Sixth Circuit's decision in *Hagans* v. *Franklin County Sheriff's Office*, 695 F.3d 505 (6th Cir. 2012), and the Eighth Circuit's decision in *Szabla* v. *City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007) (en banc). All three courts of appeals have expressly held that a municipality cannot be liable for a failure to train where the right at issue was not clearly established.

3. Undersigned counsel, Jeffrey B. Wall, was not involved in the proceedings below and requires additional time to prepare a petition that thoroughly presents these important questions raised by the decision below in a manner that will be most helpful to the Court. Mr. Wall has substantial briefing deadlines and argument obligations near the

deadline for filing the petition for certiorari in this case. Among other things, counsel has a reply brief in *Comcast Corp.* v. *Department of Labor*, No. 25-2226 (4th Cir.), to be filed on March 20; oral argument in *New York* v. *Citibank, N.A.*, No. 25-2105 (2d Cir.), on April 6; an opening brief in *People* v. *Trump*, APL-2025-00171 (N.Y.), to be filed on April 8; and a reply brief in *FCC* v. *AT&T, Inc.*, No. 25-406 (U.S.), and *Verizon Communications Inc.* v. *FCC*, No. 25-567 (U.S.), consolidated, to be filed on April 10. For these reasons, a 30-day extension of time in which to file a petition for a writ of certiorari in this case is warranted.

Respectfully submitted,

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March 9, 2026

APPENDIX

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 18, 2025
Lyle W. Cayce
Clerk

No. 21-30754

RICHARD HERSHEY,

Plaintiff—Appellant,

versus

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

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:21-CV-460

ON PETITION FOR REHEARING EN BANC

Before DENNIS, RICHMAN, and HO, *Circuit Judges*.

PER CURIAM:

The petition for rehearing en banc is DENIED. At the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 40 and 5TH CIR. R. 40).

In the en banc poll, seven judges voted in favor of rehearing (Judges Jones, Smith, Richman, Duncan, Engelhardt, Oldham, and Wilson), and ten judges voted against rehearing (Chief Judge Elrod, and Judges Stewart, Southwick, Haynes, Graves, Higginson, Willett, Ho, Douglas, and Ramirez).

JAMES C. HO, *Circuit Judge*, concurring in the denial of rehearing en banc:

Popular speech doesn't need protection. It's only when speech is unpopular that you need the First Amendment.

That's why the devout look to the judiciary for protection. Religious speech is often unpopular speech, as people of faith have known for thousands of years. *See*, *e.g.*, JOHN 15:18–19 ("If the world hates you, you know that it has hated Me before it hated you. If you were of the world, the world would love you as its own; but because you are not of the world, but I chose you out of the world, because of this the world hates you.").

It should go without saying, then, that the freedom of speech secured by the First Amendment includes religious speech. It protects not only the right to pray, but to preach—not just to worship, but to witness—to exercise your faith by evangelizing your faith. Our Founders secured these rights even if—indeed, *especially* if—the government doesn't want you to exercise them.

So it should be obvious that believers have the right to share the good news with others. And the obviousness of that right should have been enough to defeat qualified immunity in this case, without the need for a factually identical case saying so.

Our now-Chief Judge made this point in *Morgan v. Swanson*, 659 F.3d 359, 414 n.30 (5th Cir. 2011) (Elrod, J., dissenting in part). But a majority of our en banc court refused that view in *Morgan*. And a majority of our en banc court affirmatively rejected it in *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024). I detailed all of this in my dissent in *Villarreal*, 94 F.4th at 413–14, and again in *McMurry v. Weaver*, 142 F.4th 292, 304–07 (5th Cir. 2025) (Ho, J., concurring), and *Hershey v. City of Bossier City*, 156 F.4th 555, 557, 558–60 (5th Cir. 2025) (Ho, J., concurring). But I'm duty-bound to follow our en banc precedents, whether I agree with them or not.

Governing precedent does not, however, foreclose municipal liability under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). To the contrary, the Supreme Court has unanimously held that "the need to train officers . . . can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989).[1] "[I]n the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training." *Connick v. Thompson*, 563 U.S. 51, 64 (2011).

The petition for rehearing en banc asks us to shield obvious violations of religious liberty under *Monell*. What's more, it would allow municipalities to trample on religious liberty simply by deputizing private actors to do their dirty work. *But see NRA v. Vullo*, 602 U.S. 175, 198 (2024) ("the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries"); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Murthy v. Missouri*, 603 U.S. 43, 79–80, 99 (2024) (Alito, J., dissenting).

That's wrong, and I'm glad we're not going along with it. I concur in the denial of the petition for rehearing en banc.

* * *

My dissenting colleagues would grant the petition for rehearing en banc. In doing so, they claim that I'm wrong on three fronts. I'm wrong about our court's qualified immunity jurisprudence. I'm wrong about our

---

[1] *Harris* refers to "fleeing felons," but nothing in § 1983 suggests that courts should favor the rights of criminals over the rights of law-abiding citizens. We made that mistake as to qualified immunity, *see Villarreal v. City of Laredo*, 94 F.4th 374, 413 (5th Cir. 2024) (Ho, J., dissenting), and I'm grateful that we won't be repeating that mistake here as to municipal liability.

approach to municipal liability under *Monell*. And most importantly, I'm wrong that there's a sincere concern about religious liberty presented here.

I'll begin by responding to the two procedural justifications for shielding even obvious First Amendment violations from judicial review, before addressing my colleagues' curious skepticism about the legitimate religious liberty concerns implicated in this case (which should be resolved in the first instance at trial in any event).

In doing so, I note that it's become a regrettable but unfortunately common practice of judges to invent reasons to avoid addressing sensitive matters of conscience on the merits—whether it's by concocting procedural problems or distorting the facts. I'm not the only one to notice this tactic.[2] But I note it here because this case is Exhibit A in the use of these stratagems.

I.

Let's start with qualified immunity. For any citizen who seeks damages from a public official for violating their rights, it's not enough that their rights have been violated. Their rights must also be "clearly established" at the time of the violation. One way to make this showing is to

---

[2] *See*, *e.g.*, *Christian Legal Society v. Martinez*, 561 U.S. 661, 707–18 (2010) (Alito, J., dissenting) (detailing the numerous ways in which "[t]he Court provides a misleading portrayal of this [religious liberty] case"); *Parents Protecting Our Children v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14–15 (2024) (Alito, J., dissenting from the denial of certiorari) ("I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions."); *see also Tucker v. Gaddis*, 40 F.4th 289, 293–97 (5th Cir. 2022) (Ho, J., concurring) (collecting examples from other circuits about misuse of procedural doctrines to avoid deciding religious liberty claims); *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677–78 (5th Cir. 2023) (Ho, J., dissenting) (misuse of mootness to avoid deciding religious liberty challenge to vaccine mandate); *Neese v. Becerra*, 127 F.4th 601, 603–06 & n.1 (5th Cir. 2025) (Ho, J., dissenting from the denial of rehearing en banc) (misuse of standing and mischaracterization of facts to avoid addressing conscience objections to gender ideology mandate).

identify binding precedent with sufficiently similar facts that the violation should have been clear to the public official at the time of the incident.

But that's not supposed to be the only way to do it. Under *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Taylor v. Riojas*, 592 U.S. 7 (2020), a plaintiff can also overcome qualified immunity if the violation is so egregious that it should've been obvious to the official, without the need for a materially similar case. *See Hope*, 536 U.S. at 741 ("general statements of the law . . . may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful") (cleaned up) (quoting *United States v. Lanier*, 520 U.S. 259, 270–71 (1997), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Taylor*, 592 U.S. at 8–9 & n.2 (summarily reversing our court's grant of qualified immunity due to the "obviousness" of the constitutional violation) (citing *Hope* and *Lanier*).

Unfortunately, we didn't follow this principle in *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024). The en banc majority held that *Hope* and *Taylor* are Eighth Amendment cases that do not apply in other contexts, such as the First Amendment. *Id.* at 395. I dissented, noting the oddity of treating claims from incarcerated criminals more favorably than law-abiding citizens. *Id.* at 413–14 (Ho, J., dissenting).[3]

Naturally, I wish my views had prevailed in *Villarreal*. But they didn't, and I'm bound to acknowledge that fact in all intellectual honesty.

What I could not have fathomed is what my colleagues are saying about *Villarreal* today. Having won in *Villarreal*, they now dispute what it is

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[3] The Supreme Court vacated our en banc decision in *Villarreal*. 145 S. Ct. 368 (2024). But on remand, our court reinstated its earlier en banc decision. *See Villarreal v. City of Laredo*, 134 F.4th 273, 276 (5th Cir. 2025) ("[o]ur previous en banc majority opinion is superseded only to th[e] extent" necessary to respond to the Supreme Court's vacatur regarding the substantive requirements of a First Amendment retaliation claim).

that they won. They deny that they held in *Villarreal* that "the obviousness exception does not apply in First Amendment cases." *Post*, at 6.

So let's just roll the tape. Here's verbatim what the *Villarreal* en banc majority said about qualified immunity, *Hope*, *Taylor*, and obvious violations:

> Villarreal cites no case, nor are we aware of one, where the Supreme Court, or any other court, has held that it is unconstitutional to arrest a person, even a journalist, upon probable cause for violating a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit. Under the normal standards of qualified immunity, no "clearly established law" placed the officers on notice of Villarreal's First Amendment right not to be arrested. Villarreal, however, relies on Eighth Amendment cases where the Supreme Court denied qualified immunity for deliberate indifference to unconstitutional prison conditions and declined to scrutinize the cases fact-specifically. *See Hope v. Pelzer*, 536 U.S. 730, 738–39 (2002) ("[T]he risk of harm [to the prisoners] is obvious."); *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.") (footnote omitted)); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (instructing the court to reconsider an Eighth Amendment case "in light of *Taylor*").
>
> *Hope* and its progeny express a general, but decidedly narrow, obviousness exception to the requirement that "clearly established law" be founded on materially identical facts. In any event, those cases are inappropriate templates for describing "clearly established" law in this context. In *Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (en banc), a case involving First Amendment free exercise rights, this court noted that *Hope* does not stand for the broad proposition that plaintiffs need not offer any similar cases to prove that an

> officer should have been on notice that his conduct violated the Constitution. . . .
>
> Consequently, we adhere to the general rule that for an asserted right to be clearly established for purposes of qualified immunity, it must "have a sufficiently clear foundation in then-existing precedent" that it is "settled law." *Wesby*, 583 U.S. at 63 (citation omitted). "The precedent must be clear enough that *every* reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* (emphasis added). The law is not clearly established if referenced cases are "materially distinguishable and thus do[] not govern the facts of this case." *Rivas-Villegas*, 595 U.S. at 6.

94 F.4th at 395 (cleaned up).

It's hard to misread this passage. *Villarreal* reads *Hope* and *Taylor* to apply only to "Eighth Amendment cases." *Id.* *Hope* and *Taylor* don't apply in cases "involving First Amendment free exercise rights." *Id.* And the court justifies this result by citing our earlier en banc decision in *Morgan*. *Id.*

Now I'll quote verbatim what I said in response in my dissent:

> The Supreme Court has made clear that public officials who commit obvious constitutional violations are not entitled to qualified immunity. In fact, the Court has repeatedly reversed circuits, including ours, for granting qualified immunity for obvious violations of constitutional rights. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Taylor v. Riojas*, 592 U.S. 7, 9 (2020).
>
> The majority responds that the standard articulated in *Hope* and *Taylor* doesn't apply here, because those cases arose under the Eighth Amendment, not the First Amendment. *Ante*, at 395.
>
> But that would treat the First Amendment as a second-class right. Nothing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the

> First Amendment rights of law-abiding citizens. Nothing in *Hope* or *Taylor* indicates that those decisions apply only to prison conditions. And no other circuit takes the approach urged by our colleagues in the majority. To the contrary, nine circuits have indicated that the standards articulated in *Hope* apply specifically in the First Amendment context. *See*, *e.g.*, *Diaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle v. Marron*, 663 F.3d 100, 115–116 (2nd Cir. 2011); *McGreevy v. Stroup*, 413 F.3d 359, 366 (3rd Cir. 2005); *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2013); *MacIntosh v. Clous*, 69 F.4th 309, 399 (6th Cir. 2023); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746–47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021–22 (10th Cir. 2021); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345–46 (11th Cir. 2013). *See also Cheeks v. Belmar*, 80 F.4th 872, 877 (8th Cir. 2023) (applying *Hope* to the Fourteenth Amendment); *Atherton v. Dist. of Columbia Off. of the Mayor*, 706 F.3d 512, 515 (D.C. Cir. 2013) (applying *Hope* to the Fifth Amendment).
>
> So I would apply *Hope* and *Taylor* in the First Amendment context. *See also Morgan v. Swanson*, 659 F.3d 359, 412, 414 n.30 (5th Cir. 2011) (en banc) (Elrod, J., dissenting in part) (concluding that *Hope* applies to obvious First Amendment violations).

Id. at 413–14 (Ho, J., dissenting) (cleaned up).

If my dissent mischaracterized the majority's ruling, surely they would've taken me to task. But they didn't. Because I didn't. (Put it another way: If our colleagues agreed with my dissent that *Hope* and *Taylor* apply to the First Amendment, why did they vote against Priscilla Villarreal?)

People can debate, of course, who's right about qualified immunity, *Hope*, and *Taylor*—the en banc majority or my dissent. But we should be candid about what our opinions do and don't say.

Numerous religious liberty organizations and other public interest groups have filed amicus briefs criticizing *Villarreal* for refusing to apply the obviousness exception to the First Amendment.

Start with the Alliance Defending Freedom and the Dhillon Law Group, and their amicus brief on behalf of the Young America's Foundation and the Manhattan Institute. Here's what they said:

> Some applications of laws are so "obvious[ly]" unconstitutional, *Rivas-Villegas*, 595 U.S. at 6, or "egregious," *Taylor*, 592 U.S. at 9, that qualified immunity dissolves without a factually analogous case on the books. Often this principle is associated with *Hope v. Pelzer*, 536 U.S. at 741, where this Court said "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." Accord, *e.g.*, *Anderson*, 483 U.S. at 640 (rejecting the notion "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful").
>
> The Fifth Circuit en banc majority avoided this conclusion by throwing out the obviousness exception to "normal" qualified-immunity rules in the free-speech and free-exercise context. *Villarreal*, 94 F.4th at 395. It refused to accept that "the 'obvious' violation exception applies broadly to arrests that may impinge on First Amendment rights." *Id*. at 392. Obviousness, the majority said, is "no more than a *possible* exception," *ibid*., or one narrowly confined to "Eighth Amendment cases," *id*. at 395.
>
> This dispelling of the obviousness exception is mistaken. Eighth Amendment precedent has its oddities but qualified immunity isn't one of them. Nothing in *Hope* or *Taylor* suggests that the exception applies only to claims of cruel and unusual punishment. Nor does confining the obviousness exception to that narrow context make sense. Freedoms of speech, press, and religion are among our

> proudest liberties, not "second-class right[s]." *Villarreal*, 94 F.4th at 413 (Ho, J., dissenting).

Brief for Young America's Foundation and Manhattan Institute as Amici Curiae Supporting Petitioner, *Villarreal v. Alaniz*, 145 S. Ct. 368 (2024) (No. 23-1155), 2024 WL 2786483, *9–10.

According to ADF, Dhillon, and company, *Villarreal* is "dangerous" for religious liberty: "Left undisturbed, the Fifth Circuit's ruling provides dangerous license for government actors to flagrantly violate the Constitution without recourse, even against the most established rights, simply because they invoke a novel factual situation never before specifically addressed by the courts." *Id.* at *12.

Consider also what the First Liberty Institute wrote:

> The approach taken by the Fifth Circuit towards qualified immunity is exactly the kind of approach this Court castigated in *Hope* and its progeny. In *Hope*, this Court indicated that public officials who commit obvious constitutional violations are not entitled to qualified immunity. *See* 536 U.S. at 740–42, 745–46. Although this principle was first articulated in the Eighth Amendment context, it has been extended to cases involving the First Amendment, by [the Supreme] Court and nine circuits."

Brief of First Liberty Institute as Amicus Curiae in Support of Petitioner, *Villarreal v. Alaniz*, 145 S. Ct. 368 (2024) (No. 23-1155), 2024 WL 2058693, *10.

The First Liberty Institute concluded that *Villarreal* is an "insidious" ruling for religious liberty: "Whatever value qualified immunity has, it cannot be predicated on the distinctly un-American notion that our freedoms are *only* cognizable in the light of judicial pronouncements cast down from on high." *Id.* at *11.

These are the views of the Nation's most respected religious liberty law firms. And they aren't alone. A number of other organizations have also filed Supreme Court amicus briefs protesting our court's elimination of the obviousness exception in First Amendment cases. *See* Docket, *Villarreal v. Alaniz*, No. 23-1155 (U.S.); Docket, *Villarreal v. Alaniz*, No. 25-29 (U.S.); *see also McMurry*, 142 F.4th at 305–06 (Ho, J., concurring) (citing amici).

So they may be surprised to see what our colleagues have to say today.

* * *

One possible explanation for their dissent is that our colleagues regret what they did in *Villarreal* (and before that in *Morgan*). But if that is so, I just wish they had expressed this regret to the rest of us earlier, when we could've done something about it. Because it's not what they've ever said before today. It's not what our dissenting colleague said in her opinion at the panel stage. And it's certainly not what Defendants have urged in their petition for rehearing en banc. They said none of this until today's dissent.

And notably, Hershey himself did not file an en banc rehearing petition asking us to overturn *Villarreal*—presumably because he and his counsel know how to read opinions and count votes.

But make no mistake: Now that everyone's on record, I'd welcome an en banc petition from Hershey asking us to overturn the mistaken principles of *Morgan* and *Villarreal*, deny qualified immunity, and grant Hershey the opportunity to go to trial. Because it sounds like there are now the votes to do it.

That said, Hershey may prefer to preserve his *Monell* win, and leave it to someone else to invoke today's surprising developments to try to overturn *Villarreal*. And that leads me to my final point on *Villarreal*. I'm beyond delighted by this surprising turn of events, to be sure. But it bears noting that

this is precisely the kind of "surprise switcheroo" that members of our court have criticized federal agencies for doing. *Wages and White Lion Investments, L.L.C. v. FDA*, 90 F.4th 357, 386 (5th Cir. 2024), *rev'd*, 604 U.S. 542 (2025).

I'd hold us to the same standard that we apply to others. As imperfect human beings, we're allowed to change our mind, of course. But we should be candid, not caustic, when we do so. "When an agency changes its existing position, it . . . must at least display awareness that it is changing position." *Id.* at 381 (quotations omitted). At least one influential scholar has suggested the same. *See* Josh Blackman, *A Fifth Circuit Disgrantle in the Alien Enemies Act Case*, REASON.COM, Oct. 1, 2025 (comparing the dueling en banc opinions in *United States v. Abbott*, 110 F.4th 700 (5th Cir. 2024), with later developments).[4]

Finally, the dissent asks a question that deserves a fulsome response: "Why say 'We are bound by this terrible opinion,'" but "oppose rehearing to fix the purportedly terrible opinion?" *Post*, at 9. "Wouldn't it be easier to do the right thing and vote for rehearing now?" *Id.*

My two responses to their question/offer: It's deeply disingenuous. But I happily accept.

First, it's disingenuous. Defendants' petition for rehearing en banc (obviously) doesn't ask the court to reverse its qualified immunity win by

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[4] My colleagues deny the surprise switcheroo, and insist that we must read *Villarreal* "in the context in which it was decided." *Post*, at 8. In their view, *Villarreal* wasn't about refusing *Hope* and *Taylor* at all—it was about the "concededly untainted intermediary and the valid arrest warrant." *Post*, at 7. But that's wrong on both fronts. It's wrong because it can't be squared with the verbatim language from *Villarreal* that I quoted earlier. And it's wrong because the intermediary and warrant issues weren't "*conceded*" at all—to the contrary, multiple dissents in *Villarreal* discussed in detail the tainted intermediary and invalid warrant. *See*, *e.g.*, 94 F.4th at 403–04 (Higginson, J., dissenting); *id.* at 418–19 (Ho, J., dissenting).

revisiting *Villarreal*. Their petition is solely about *Monell*. The en banc poll is solely about *Monell*. And the poll closed long ago in any event—well before any of them ever told me (or anyone else, from what I can tell) that they suddenly share my opposition to *Villarreal*.

So they can theorize all they want that I somehow secretly like what happened in *Villarreal*. But personally, I don't think it passes the laugh test. *See*, *e.g.*, *Villarreal*, 94 F.4th at 409 (Ho, J., dissenting) (opposing the en banc decision in *Villarreal*); *McMurry*, 142 F.4th at 302 (Ho, J., concurring) (opposing the en banc decision in *Villarreal*); *Hershey*, 156 F.4th at 557 (Ho, J., concurring) (opposing the en banc decision in *Villarreal*); *see also Oliver v. Arnold*, 19 F.4th 843, 843 (5th Cir. 2021) (Ho, J., concurring in the denial of rehearing en banc) (supporting relief in *Villarreal*); *Mayfield v. Butler Snow*, 78 F.4th 796, 797 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (supporting relief in *Villarreal*); *Gonzalez v. Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (supporting relief in *Villarreal*). I regret the increasing lack of candor that has come to pervade our court's en banc proceedings of late.

But no matter. I vote for rehearing.

I'm happy to let bygones be bygones, and ignore from here on out what my colleagues may or may not have said before, in either *Morgan* or *Villarreal*. I'm delighted to go back to what we said in my original panel majority opinion in *Villarreal*: Of course the obviousness exception of *Hope* and *Taylor* applies to the First Amendment.

So as a member of the panel, I vote for the panel to rehear this case. After today's order is out, I'm sure that the panel will deny qualified immunity in this case. And that will be that.

II.

Next, municipal liability. It's established law that, to obtain liability under *Monell*, an extensive pattern of past violations by municipal employees is sufficient—but it's not necessary. A single incident can also trigger liability, but only if there's an obvious risk of a constitutional violation if the municipality provides "no training whatsoever."

Our dissenting colleagues insist that that's wrong. Indeed, they claim that it's "a sea change from our court's prior approach" to contend that "a political subdivision is liable under *Monell* when it provides *'no training whatsoever' on the First Amendment*." *Post*, at 3–4 (emphasis added).

But virtually every member of the dissent has previously agreed that "a political subdivision is liable under *Monell* when it provides 'no training whatsoever'"—at least in other constitutional contexts. *Id.* *See*, *e.g.*, *Henderson v. Harris Cnty*, 51 F.4th 125, 131 (5th Cir. 2022) (*Monell* liability available under the Fourth Amendment where "the government actor was provided *no training whatsoever*") (quotations omitted); *York v. Welch*, 2024 WL 775179, *5 (5th Cir.) (again, *Monell* liability available under the Fourth Amendment where "the government actor was provided no training whatsoever") (quotations omitted); *Covington v. City of Madisonville*, 812 F. App'x 219, 225 (5th Cir. 2020) (*Monell* liability available where "it should have been apparent" that the complete "failure to train" would result in a Fourteenth Amendment violation) (quotations omitted); *Peterson v. City of Fort Worth*, 588 F.3d 838, 849 (5th Cir. 2009) (*Monell* liability available under the Fourth Amendment based on "a complete failure to train").

None of these cases suggest a different rule for the First Amendment. To the contrary, a municipality is liable if it provides "'no training whatsoever' *with respect to the relevant constitutional duty*." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 625 n.5 (5th Cir. 2018) (emphasis added).

So I don't see a "sea change"—I see equal respect for religious liberty when we apply *Monell* liability to a municipality that "provides 'no training whatsoever' *on the First Amendment*." *Post*, at 3–4 (emphasis added).

The dissenters wonder what might happen if we apply our established law to the First Amendment. They worry, for example, that federal judges might start forcing cities to train all of their employees on "the intricacies of commercial speech." *Post*, at 4. Rest assured that no one is saying that. Nor is anyone ordering municipal waste workers to be taught about *Obergefell*, or insisting that firefighters be instructed on tax law.

We're only saying what the law already says—and what the dissenters once agreed: a municipality is liable if it provides "'no training whatsoever' *with respect to the relevant constitutional duty*." *Littell*, 894 F.3d at 625 n.5 (emphasis added). If the training isn't relevant, then it isn't required.

And that gets us to what I believe is the heart of the dispute. The dissent seems to think that the problem with this case is that the "risk of a constitutional violation was infinitesimal." *Post*, at 3.

I have a different view. Street preaching is not some infinitesimally rare and obscure practice. Nor is it one that municipalities never bother with.

People of faith have long sought opportunities to spread the gospel in the public square. Nearly a century ago, the Supreme Court observed that "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). "It has been a potent force in various religious movements down through the years," as people of faith "carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents." *Id.* at 108–9. So anyone who is "rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion."

Jamison v. Texas, 318 U.S. 413, 416 (1943). "This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Id.*

It's a religious practice that dates back thousands of years. The Bible speaks of the Great Commission, in which Jesus calls on the disciples to go forth and spread the word to others in every nation. MATTHEW 28:16–20. "[O]pen-air preaching was a preferred method of Jonah, Jeremiah, the apostle Paul, and many others." Ryan Denton, *Into the Highways and Hedges: A Primer for Open-Air Preaching*, DESIRING GOD, Feb. 4, 2024, *available at* www.desiringgod.org/articles/into-the-highways-and-hedges. "They went to the people and preached God's word." *Id.* After all, "Jesus went into the boat or up on the mountainside to preach the good news." *Id.*

My dissenting colleagues question why I invoke "thousands of years" of religious tradition. *Post*, at 1. But they invoked millennia of legal tradition in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 123 F.4th 309 (5th Cir. 2024)—even where it didn't seem relevant.[5] So if we're going to consider millennia of legal tradition since at least the time of Roman rule, then we ought to consider millennia of *religious* tradition since Roman times as well—particularly where it's actually relevant to the issues presented.

The Harvard Religious Freedom Clinic certainly thinks it relevant. Just this year, they briefed the U.S. Supreme Court that street preaching is an "ancient tradition" with "deep historical roots." Brief of Stephen Nylen et al. as Amici Curiae Supporting Petitioner, *Olivier v. City of Brandon*, No.

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[5] In that case, I questioned the relevance of Roman law to the established practice of American courts on dismissing appeals as improvidently granted. I'm grateful that my colleagues stepped away from the point shortly thereafter. *See*, *e.g.*, *Silverthorne Seismic v. Sterling Seismic Srvs.*, 125 F.4th 593, 598 & n.5 (5th Cir. 2025) (discussing practice of dismissing discretionary appeals as improvidently granted).

24-993 (U.S.), 2025 WL 2676057, *4. I agree that it's relevant in cases like this that the devout have sought to spread the gospel to others as an essential part of their faith for millennia.

The most effective way to spread the word to others, of course, is to go where lots of people congregate. "The First Amendment protects the right of every citizen to reach the minds of willing listeners *and to do so there must be opportunity to win their attention.*" *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (cleaned up, emphasis added).

Concert venues are an ideal forum for the street preacher. As one of the most famous street preachers has observed, "music venues" are a "good open-air setting" for street preaching because it's a "public location where people gather where they're not in a hurry and can take time to listen." Ray Comfort, Fifty Years Of Open-Air Preaching 50 (2024). *See also* Denton, *Into the Highways* ("open-air preaching is especially useful . . . outside a sporting event").

Municipalities are not only well aware of this—a number of them don't like it, and endeavor to stop it.

In fact, municipalities are so actively opposed to street preaching that our court has had to adjudicate constitutional objections to their restrictive policies in case after case. *See*, *e.g.*, *Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024) (Christian advocate prevented from evangelizing outside public amphitheater); *Herridge v. Montgomery Cnty.*, No. 21-20264, 2022 WL 989421 (5th Cir. Apr. 1, 2022) (Christian advocate prevented from distributing pamphlets near outdoor pavilion in Houston); *Olivier v. City of Brandon*, 2023 WL 5500223 (5th Cir.) (street preacher prevented from evangelizing outside public amphitheater), *cert. granted*, 145 S. Ct. 2871 (2025); *Denton v. City of El Paso*, 861 F. App'x 836 (5th Cir. 2021) (Christian advocate prevented from evangelizing at an outdoor farmer's market); *Roy v.*

City of Monroe, 950 F.3d 245 (5th Cir. 2020) (street preacher prevented from evangelizing on the sidewalk outside of a local bar); *Allen v. Cisneros*, 815 F.3d 239 (5th Cir. 2016) (street preacher prevented from evangelizing on the streets of Houston); *Grisham v. City of Fort Worth*, 837 F.3d 564 (5th Cir. 2016) (Christian advocate prevented from distributing literature on public sidewalks).

Our dissenting colleagues know this. Take *Siders*, for example, about a "Christian who seeks to evangelize and share the gospel with others." 123 F.4th at 298. She "particularly likes to share the gospel on public ways near and outside of public events . . . because such occasions offer her an opportunity to reach a meaningful number of people with her message." *Id.* She likes preaching at music venues because "she can find meaningful pedestrian traffic flow on days of amphitheater events as attendees walk toward the amphitheater." *Id.*

Our colleagues have acknowledged that this is no obscure exercise of faith—to the contrary, they've suggested that there's so much of it that they worry about obstructing traffic. *See Siders v. Mississippi*, 130 F.4th 188, 190 (5th Cir. 2025) (noting concerns about "congestion," "interference with ingress or egress," "ensuring public safety and order," and "promoting the free flow of traffic on streets and sidewalks" to justify shutting down street preachers).

In sum: In *Hershey*, the activity is rare, so there's no liability. In *Siders*, the activity occurs far too much, so there's no liability.

I would not treat these conflicts as infinitesimally rare. I would suggest that we're all just making a judgment call as to whether we think this is a First Amendment right worth protecting—or not.[6]

III.

That brings us to the main event—religious liberty. As I noted at the outset, the First Amendment violation presented here should be obvious. Of course people have the right to spread the gospel in public spaces. Yet our colleagues deny that this case presents a legitimate religious liberty issue.

Richard Hershey claims the right to share religious materials in public spaces. But our colleagues deny that his claim has anything to do with religious liberty.

To begin with, their challenge to Hershey's sincerity is ultimately a red herring. Because the rule of liability they propose would govern the most faithful as well as the most imperfect (which is to say, all of us).

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[6] Our dissenting colleagues highlight the amicus brief filed by the states in our circuit. It's not surprising, of course, that the states would oppose litigants who seek to hold government officials liable. Counsel for government always argues against liability for government. That's their job. It's our job to enforce the Constitution.

The states are concerned about being flooded with frivolous prisoner complaints. So am I. Of course, they're already flooded with such suits—since well before *Hershey*.

We can—and we must—protect the First Amendment rights of law-abiding citizens, even as we work to shield prison officials from frivolous prisoner complaints. We can walk and chew gum at the same time. As federal judges, we're paid to do so.

And that leads me to the question we should really be asking. Why acknowledge only the government amici? Why not also acknowledge the numerous amici who have filed brief after brief after brief expressing grave concerns about the state of freedom of speech and religious liberty in our circuit? *See*, *e.g.*, *McMurry*, 142 F.4th at 305–06 (Ho, J., concurring) (noting broad range of amici and religious liberty experts who have criticized our decisions in *Morgan* and *Villarreal*); *Gonzalez v. Trevino*, 60 F.4th 906, 913 & n.4 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (same).

It's also an issue to be resolved by a jury—not appellate judges. The amended complaint makes clear that "Hershey was distributing free, educational, noncommercial, religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association." **ROA.75.** It's a message that Hershey has made clear he "feels compelled to share with others." **ROA.192.** My colleagues question Hershey's bona fides as a Christian. But that strikes me as (among other things) beyond our province at this stage of the proceedings.

Hershey's sincerity was not doubted by the district court. And even at the panel stage, one of our dissenting colleagues doubted only whether Defendants had ever "*previously*" targeted "someone engaging in free exercise of religion or free speech." *Hershey*, 156 F.4th at 577–78 (Richman, J., concurring in part and dissenting in part). Defendants themselves have acknowledged on appeal that Hershey "travels around the country spreading his Christian vegetarian message on college campuses, at event centers, and other forums." Brief for Defendants, *Hershey v. City of Bossier*, 156 F.4th 555 (2025) (No. 21-30754), 2022 WL 1136998, *3 (quotations omitted).

But our dissenting colleagues now question "what [the Christian Vegetarian Association] has to do with Christianity." *Post*, at 1.

Paul's epistle to the Romans acknowledges that some people of faith will only eat vegetables. Paul warns believers to respect such views. "The one who eats everything must not treat with contempt the one who does not, and the one who does not eat everything must not judge the one who does, for God has accepted them. Who are you to judge someone else's servant? To their own master, servants stand or fall. And they will stand, for the Lord is able to make them stand." ROMANS 14:3-4.

Our colleagues also highlight the fact that "Hershey gets paid" for spreading these religious views. *Post*, at 1. But recall Paul's first epistle to

the church in Corinth. *See* 1 CORINTHIANS 9:3–14. Paul observes that "those who preach the gospel *should* receive their living from the gospel." 1 CORINTHIANS 9:14 (emphasis added). *See also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("Speech . . . is protected even though it is . . . 'sold' for profit."); *Villarreal*, 94 F.4th at 420 (Ho, J., dissenting) ("There is no pro bono requirement to the freedom of speech.").

So I would not question the sincerity of Hershey's faith (and especially not at this early stage of the proceedings, on review of a motion to dismiss). Nor is this the first time we've seen unwarranted skepticism when it comes to religious liberty. In *Siders*, our colleagues argued that the ordinance challenged there did not prevent citizens from evangelizing on public grounds. *See*, *e.g.*, 130 F.4th at 189 (Oldham, J., concurring in the denial of rehearing en banc) ("[T]he ordinance does not purport to regulate prayer, conversation, t-shirts, evangelism, or tracts."). But in *Olivier*, by contrast, they condemned the same ordinance at the same amphitheater because it prevents "an evangelical Christian who feels called to share the good news with his fellow citizens . . . from doing so outside the city's public amphitheater." 121 F.4th 511, 512 (5th Cir. 2024) (Ho, J., dissenting from denial of rehearing en banc, joined by five members of the court).[7]

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[7] Finally, the dissent suggests that I am violating party presentation by treating this as a religious liberty case, rather than as a free speech case. *Post*, at 9–10. My colleagues made the same point in *Siders*. And my response is the same: "religious expression is, of course, protected under the Freedom of Speech Clause." *Siders*, 130 F.4th at 192 (Ho, J., dissenting from the denial of rehearing en banc). The Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), was based on the Free Speech Clause. Would the dissenters be horrified if anyone called that decision a win for religious liberty? Surely not. As the Supreme Court recently reminded us, "the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). "That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government

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Judicial opinions should be read charitably. But I struggle to see how our dissenting colleagues haven't reversed themselves on qualified immunity under *Villarreal* and *Morgan*—or on whether *Monell* applies when there's been no training whatsoever—or on what government actions threaten religious liberty. If I was one of the religious liberty groups who devotes their God-given talents, time, and treasure to advocating for folks like Spring Siders, Gabriel Olivier, Richard Hershey, and Priscilla Villarreal, I'd wonder why they're being accused of misrepresenting this court's precedents and fabricating religious liberty threats out of thin air. I'd also wonder about the unexplained changes of position that they've seen from this court. I'd "wonder what's driving all of these gymnastics." *Post*, at 11.

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attempts to regulate religion and suppress dissent. In Anglo–American history, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.* (cleaned up).

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, RICHMAN, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting from the denial of rehearing en banc:

Richard Hershey is a "vegetarian advocate whose ethical beliefs compel him to share his message with others." ROA.75. When security officers told Hershey to stop distributing his leaflets, he sued for "deprivation of his rights of speech." ROA.85, 86–87. Hershey does not allege that the officers even knew of the content of his vegetarianism leaflets—let alone targeted him for his vegetarian views. *See* ROA.75–79. Nor does Hershey allege *anything* about his religion. You'll look in vain for *any* mention in Hershey's complaint about faith, religiosity, the First Amendment's Religion Clauses, or evangelism. The closest he gets is to allege that he distributed leaflets from "the Christian Vegetarian Association"—without any allegation about what that organization is, what it has to do with Christianity, what it has to do with Hershey's faith, or whether Hershey is even a man of any faith. ROA.75. To the contrary, the complaint alleges that Hershey gets paid to distribute leaflets "by various nonprofit organizations"—without regard to religion of any kind. *Ibid.*

But you would not know that from the opinion concurring in the denial of rehearing en banc. In that opinion, this case about vegetarian ethics somehow transforms into a battle over street preaching, the Great Commission, hatred of Christians, and religious persecution dating back "thousands of years." *Ante*, at 17 (HO, J., concurring); *see also Siders v. Mississippi*, 130 F.4th 188, 191 (HO, J., dissenting from the denial of

rehearing en banc) (5th Cir. 2025) (doing the same thing). This quixotic effort does nothing to justify the panel's badly splintered, three-judge-four-opinion approach to this case. And while it tilts at windmills that appear nowhere in this case, it does nothing to justify our court's refusal to reconsider the matter en banc.

At the panel stage, the three-judge panel issued *four* opinions. The per curiam opinion recognized that the panel was (to put it mildly) "splintered." *Hershey v. City of Bossier City*, 156 F.4th 555, 556 (5th Cir. 2025) (per curiam). Then all three judges issued their own opinions. Judges Richman and Ho wrote the controlling rule on qualified immunity. Judge Ho declared that he would have sided with Judge Dennis on qualified immunity had circuit precedent not prevented him. Then Judges Dennis and Ho wrote the controlling rule on the City's liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Given the far-reaching implications of the qualified immunity rule embraced by Judge Ho, given the *Monell* holding embraced by Judges Dennis and Ho, and given that future parties will need Venn diagrams to understand what this deeply fractured panel held, we should have taken the case en banc.

I begin with (I) the panel's *Monell* holding, because it's the most egregious. Then I address (II) the panel's qualified-immunity holding. Finally, I address the hyperbolic assertion that (III) rehearing this case would have been comparable to throwing Christians to the lions.

I

First, *Monell*. I begin with (A) the *Monell* rule announced by Judges Dennis and Ho and then turn to (B) its anomalies.

A

Judges Dennis and Ho turn the world upside down. *See Hershey*, 156 F.4th at 561 (HO, J., concurring); *id.* at 563–64 (DENNIS, J., concurring in relevant part). Before the panel's decision, plaintiffs could allege a *Monell* claim based on a single incident only if a municipality "fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624–25 (5th Cir. 2018) (quoting *City of Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'CONNOR, J., concurring in part and dissenting in part)). Such circumstances were "very narrow." *Id.* at 624. The classic example: if a city gave its officers guns but no training on when to use them. *See Canton*, 498 U.S. at 390 n.10.

Under the rule embraced by Judges Dennis and Ho, however, plaintiffs need only allege that defendants lacked training to handle plaintiff's case—even if the *ex ante* risk of a constitutional violation was infinitesimal. ROA.86; *see also Hershey*, 156 F.4th at 561 (HO, J., concurring); *id.* at 563–64 (DENNIS, J., concurring in relevant part). This doctrinal Calvinball will have predictable effect: As Judge Richman ably explained, plaintiffs can always "granulate allegations so finely that they arrive at a 'complete failure to train,'" so they will be able to allege municipal liability in "virtually every

instance." *Id.* at 578 (RICHMAN, J., dissenting in relevant part) (quotation omitted).

That might be a good rule; it might be a bad one. But either way, it's a sea change from our court's prior approach. *See Pineda v. City of Houston*, 291 F.3d 325, 334 (5th Cir. 2002) (emphasizing that this court has "necessarily [] been wary of finding municipal liability" based on a single incident). And it's the sort of thing that our en banc court should announce with clarity—not the sort of thing we should sort-of say in a four-way fractured decision that has all the precision of a cubist painting.

B

The controlling *Monell* rule creates a host of anomalies. Three bear emphasis.

First, *Monell* liability is generally derivative of an underlying constitutional tort committed by an officer. "As is well established, every *Monell* claim requires an underlying constitutional violation." *Hicks-Fields v. Harris County*, 860 F.3d 803, 808 (5th Cir. 2017) (quotation omitted). Consequently, we routinely dismiss *Monell* claims against political subdivisions where the plaintiff fails to establish a § 1983 claim against an individual officer. But one of the panel opinions does the opposite: It says no individual officer ever can be held liable—even for the most obvious First Amendment violation—but every political subdivision can always be held liable for any failure to train—even for potentialities that could not reasonably be foreseen. *See Hershey*, 156 F.4th at 561 (HO, J., concurring).

Second, the panel's *Monell* rule proves both too much and too little. The rule provides that a political subdivision is liable under *Monell* when it provides "no training whatsoever" on the First Amendment. *Hershey*, 156 F.4th at 561 (HO, J., concurring); *id.* at 563–64 (DENNIS, J., concurring in relevant part). That proves far too much because if Bossier City had provided training on say, the intricacies of commercial speech, then presumably this case would have come out differently? It also proves far too little because Hershey provided no evidence whatsoever of a failure to train. Nor did Hershey do anything to show that officers ever faced another vegetarian-ethicist pamphleteer (or any other pamphleteer, or any other speech problem for that matter). *See* ROA.85–86. So even if Bossier City did not provide any training, that fact does not save Hershey's deficient pleadings.

Third, the *Monell* rule is equally applicable to failure-to-train cases under the Fourth or Eighth Amendments. Plaintiffs need only allege that officers were not trained the specific situation at hand and, *voila*, the plaintiff has a *Monell* claim. That is why every State in our circuit urged us to rehear this case—and warned us that lawsuits will proliferate, discovery costs will soar, and municipalities will be forced to re-allocate precious time and resources. Br. for the States of Louisiana, Mississippi, and Texas as Amici Curiae, at 6–10. This burden will weigh most heavily on prisons and jails, which face constant failure-to-train allegations. *See id.* at 8. And it will embolden judges to find *Monell* violations in such contexts. *See, e.g.*, *Alvarez v. City of Brownsville*, 904 F.3d 382, 402 (5th Cir. 2018) (en banc) (DENNIS, J., dissenting) (dissenting from court's rejection of *Monell* claim that city

failed to disclose exculpatory evidence); *see also Bond v. Nueces County*, No. 20-40050, 2022 WL 4595000, at *9 (5th Cir. Sept. 30, 2022) (opinion of DENNIS., J.) (vacating district court's rejection of plaintiff's *Monell* claim based on alleged constitutional violations by a prison).

The predictable consequences of the panel's flawed *Monell* holding further underscore why we should have taken this case en banc.

II

Next, qualified immunity. According to Judge Ho, our court's approach to qualified immunity in First Amendment cases is deeply flawed. *So* flawed that it has garnered scathing criticism from the Alliance Defending Freedom, the First Liberty Institute, and other religious-liberty organizations. If our precedent is that bad, however, we should *obviously* go en banc to overturn it. It's surpassing strange to say, "our precedent requires persecution of Christians," and then say, "we should *not* go en banc to fix it!" *See ante*, at 3 (HO, J., concurring) (saying that).

I explain (A) Fifth Circuit precedent and (B) the puzzling decision to recognize an error, refuse to overturn it, and then complain about it anyway.

A

At the panel stage in this case, two judges would have denied qualified immunity. *See Hershey*, 156 F.4th at 558–59 (HO, J., concurring); *id.* at 564 (DENNIS, J., dissenting in relevant part). But one of these panel members opted to grant qualified immunity because, apparently, our court has held that the obviousness exception does not apply in First Amendment cases. *See*

id. at 560 (Ho, J., concurring) (citing *Villarreal v. City of Laredo*, 94 F.4th 374, 395 (5th Cir. 2024) (en banc) (*Villarreal II*); *see also ante*, at 3 (same).

I do not read *Villarreal II* that way. In that case, the panel itself held the state statute at issue was "not one of those 'obviously unconstitutional' statutes" on its face. *Villarreal v. City of Laredo*, 44 F.4th 363, 372 (5th Cir. 2022) (opinion of Ho, J.) (*Villarreal I*). So the question for the en banc court in *Villarreal II* was whether officers unconstitutionally applied that valid statute to a "citizen journalist"—even after an independent intermediary found probable cause for the citizen's arrest and issued a valid warrant. 94 F.4th at 393–94; *see also id.* at 394 (noting Villarreal alleged nothing to say the independent intermediary was somehow tainted). "[I]n this context," the court held, cases discussing "obvious" constitutional violations like *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Taylor v. Riojas*, 592 U.S. 7 (2020), were "inappropriate templates" for the qualified-immunity inquiry. *Villarreal II*, 94 F.4th at 395. That does not forever and for all reasons reject obviousness as a ground for denying qualified immunity. It simply holds that, in the context of the particular circumstances of the concededly untainted intermediary and the valid arrest warrant in Villarreal's case, the officers did not obviously violate the Constitution by arresting her. *See id.* at 397 (holding Villarreal failed to show an "obvious" constitutional violation—not that "obviousness" is no longer a cognizable claim in our circuit (quotation omitted)).

Judge Ho's contrary reading of *Villarreal II* is the opposite of "charitabl[e]." *Ante*, at 23. Both because it requires reading lines in *Villarreal*

II out of context, and because it pits *Villarreal II* against binding Supreme Court precedent. As the Supreme Court has said, "[t]here can be no doubt that the First Amendment protects the right to pray"—even in the absence of a case so holding. *Sause v. Bauer*, 585 U.S. 957, 959 (2018) (per curiam). Indeed, *the entire point* of § 1983 liability in First Amendment cases is that plaintiffs can prevail *without* pointing to earlier, on-point cases. *See, e.g.*, *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (per curiam). Our sister circuits agree. Some have denied qualified immunity in the First Amendment context on obviousness grounds. *See MacIntosh v. Clous*, 69 F.4th 309, 320 (6th Cir. 2023); *Tobey v. Jones*, 706 F.3d 379, 392 (4th Cir. 2013). Many have granted qualified immunity in the First Amendment context while acknowledging that alleged facts did not fall within the obviousness exception. *See Diaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle v. Marron*, 663 F.3d 100, 115–16 (2d. Cir. 2011); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746–47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021–22 (10th Cir. 2021); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1346 (11th Cir. 2013). We should not lightly presume that *Villarreal II* meant to break with all these authorities—especially when a more plausible and narrower reading of the precedent is readily available.

That is not a "surprise switcheroo." *Ante*, at 13 (Ho, J., concurring). That is simply reading an opinion in the context in which it was decided.

B

But insofar as *Villarreal II* held what Judge Ho says it held, that is *all the more reason* to go en banc and to do so immediately. "This is terrible, so please do not fix it" is an incoherent basis for voting against rehearing. It is even more incoherent to deny rehearing, end the case in this court, and then invite the parties to continue litigating. *See ante*, at 14 (Ho, J., concurring). Why say "We are bound by this terrible opinion," oppose rehearing to fix the purportedly terrible opinion, celebrate the order preserving the purportedly terrible opinion, and then invite additional litigation to, what, remain bound by the purportedly terrible opinion? Wouldn't it be easier to do the right thing and vote for rehearing now? Unless the point of all of this is to imagine a horrible rule for the purpose of inveighing against it? Whatever the point, a vote to deny en banc rehearing here *protects* a precedent that Judge Ho reads to "treat[] claims from incarcerated criminals more favorably than law-abiding citizens." *Ante*, at 6. An "oddity" for sure. *Ibid.*

III

Finally, a word about the religious-liberty implications of this case. Judge Ho says the court was correct to deny rehearing in this case because doing so protects "the right to spread the gospel in public spaces." *Ante*, at 20. Again, this assertion is bizarre.

Perhaps it's true that the rules announced in the panel's four-way, deeply fractured opinions implicate religious liberty. That is all the more reason to rehear this case en banc rather than rely on future parties and panels

to decipher the relevant holding in the short per curiam opinion—which is the only opinion that garnered a majority vote. That is especially true if the premise of this entire mess was a reading of *Villarreal II* that conflicts with Supreme Court precedent, splits from every other circuit to consider the question, and portends disastrous consequences for people of faith. *See* Part II, *supra*.

But even if it's true that this case has implications for Christian evangelism, that does not mean that Richard Hershey is himself a Christian evangelist. If Hershey alleged something—*anything*—about his faith, we'd obviously be bound to accept it. Courts have "no license to declare . . . whether an adherent has 'correctly perceived' the commands of his religion." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 651 (2018) (GORSUCH, J., concurring). We take a plaintiff's religious claims as they come, since it is "not for us to say that [a plaintiff's] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). The problem is that Hershey himself alleges nothing about Rome, persecuted Christians, street preaching, the Great Commission, religious liberty, or *anything* that implicates the First Amendment's Religion Clauses in *any* way. *But see ante*, at 22 (HO, J., concurring) (invoking 1 CORINTHIANS 9:3–14 for the proposition that Richard Hershey is a Christian pastor?). Observing that fact says nothing about the sincerity of Hershey's belief. In fact, it does the opposite: it recognizes and honors the belief that Hershey chose to identify in his court filings—namely, the belief

that he has a free speech right to hand out vegetarianism pamphlets for money.

In other circumstances, members of our court care about party presentation:

> In our adversarial system of adjudication, we follow the principle of party presentation. We rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. Our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief. In short: Courts are essentially passive instruments of government. They do not sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.

Gonzalez v. CoreCivic, Inc., 986 F.3d 536, 540 (5th Cir. 2021) (Ho, J., concurring) (quotations omitted). But in this case, the court apparently is an active instrument of government that can sally forth and right wrongs that Richard Hershey and his able counsel never imagined.

* * *

At the end of the day, my concurring colleague presents an imaginary case that implicates persecuted Christians in Rome, "religious liberty," and the "ancient tradition" of street preaching, *ante*, at 17, 4 (Ho, J., concurring)—rather than the facts of this case. He reads our precedent to

create catastrophic consequences for religious liberty—and then says we should *retain* that horrible precedent and *embrace* the horrible consequences. And then he turns *Monell* upside down and celebrates a new failure-to-train theory that will benefit hardened criminals and saddle political subdivisions in every § 1983 case. You have to wonder what's driving all of these gymnastics. I would have granted en banc rehearing to figure it out.

I respectfully dissent.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 7, 2025
Lyle W. Cayce
Clerk

No. 21-30754

RICHARD HERSHEY,

Plaintiff—Appellant,

versus

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

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:21-CV-460

Before DENNIS, RICHMAN, and HO, *Circuit Judges*.

PER CURIAM:

This is a splintered panel decision involving an individual's First Amendment right to distribute leaflets on the sidewalk on the grounds of CenturyLink Center. A majority of the panel (JUDGES DENNIS and HO) agrees to reverse the district court's dismissal of the *Monell*[1] claim against Bossier City for failure to train. A second majority (JUDGES RICHMAN and

[1] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

HO) agrees to affirm the grant of qualified immunity for the police officers and to affirm the dismissal of the security guards.

We AFFIRM in part and REVERSE in part the district court's judgment.

JAMES C. HO, *Circuit Judge*, concurring:

The First Amendment protects not just the right to pray, but to preach. To not only worship, but to witness. The right to exercise your religion includes the right to evangelize your faith.

And that's what's at issue in this case. Richard Hershey alleges that he wanted to distribute religious pamphlets on a public sidewalk while a concert was being held nearby—but that a group of police officers and security guards threatened to arrest him if he did so.

So I agree that we should remand Hershey's claim against the City of Bossier for failing to train its officers to respect the constitutional rights of its citizens.

Moreover, if it were up to me, his claims against the individual police officers and security guards would proceed to trial as well. Unfortunately, recent precedents of our court force us to grant qualified immunity.

To be sure, I strongly disagree with our court's approach to qualified immunity as applied in the First Amendment and other contexts. *See*, *e.g.*, *Villarreal v. City of Laredo*, 94 F.4th 374, 409 (5th Cir. 2024) (Ho, J., dissenting); *see also McMurry v. Weaver*, 142 F.4th 292, 304–7 (5th Cir. 2025) (Ho, J., concurring) (discussing *Villarreal* and *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011)). Likewise, I strongly disagree with our court's approach to the First Amendment as applied to acts of evangelism on public sidewalks outside a public amphitheater. *See*, *e.g.*, *Siders v. City of Brandon*, 130 F.4th 188, 191 (5th Cir. 2025) (Ho, J., dissenting from denial of rehearing en banc).

Our court's record of protecting First Amendment rights leaves much to be desired, to say the least. But as a member of this panel, I'm bound to faithfully follow our precedents, whether I agree with them or not. So I reluctantly concur in affirming the grant of qualified immunity, as compelled by our (mistaken) circuit precedent.

I.

The First Amendment protects the "free exercise" of religion, not just the right to "worship." *Horvath v. City of Leander*, 946 F.3d 787, 795–96 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). And "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). "The dissemination of . . . religious views and doctrines is protected by the First Amendment." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

This right plainly encompasses the distribution of religious pamphlets—the activity at issue in this case. As the Supreme Court observed nearly a century ago, "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). "It has been a potent force in various religious movements down through the years," as people of faith "carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents." *Id.* at 108–9. "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *Id.* at 109.

So anyone who is "rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). "This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Id.*

II.

Hershey's right to evangelize on a public sidewalk is not undermined by the fact that the city-owned facility abutting the sidewalk happens to be

managed by a private corporation. Nor should it matter that his rights were violated by private security guards working alongside police officers. Municipalities cannot abrogate the constitutional rights of their citizens simply by delegating their coercive governmental powers to private agents.

The Supreme Court addressed this very contention in *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the Court was asked to answer the following question: "Can th[e] people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?" *Id.* at 505. "For it is the State's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms." *Id.*

The Court made clear that it "cannot accept that contention." *Id.* at 506. "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507. "The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees." *Id.* at 508. "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country." *Id.* "There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." *Id.* at 508–09.

Accordingly, the Court vacated the conviction of a member of Jehovah's Witnesses, for her only crime was leafletting on the sidewalks of the company town. *See id.* at 509 ("Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute

religious literature in a company town, its action cannot stand."). *See also Lee v. Katz*, 276 F.3d 550, 557 (9th Cir. 2002) (private lessee of public plaza cannot violate the First Amendment rights of street preachers).

Like Grace Marsh, Richard Hershey's First Amendment rights should not depend on whether he was ejected by a cop or a contractor. He alleges that private security guards assisted the police in ejecting him from the area. So he has stated a cognizable claim against "[p]rivate persons" who "jointly engaged with state officials in the prohibited action." *United States v. Price*, 383 U.S. 787, 794 (1966).

III.

All of this *should* have been amply sufficient to defeat qualified immunity at this preliminary stage of the proceedings—and to allow Hershey to proceed to trial.

After all, the Supreme Court has repeatedly denied qualified immunity where it found the constitutional violation so "obvious" that it didn't require the plaintiff to identify factually indistinguishable case law. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("general statements of the law . . . may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful") (cleaned up) (quoting *United States v. Lanier*, 520 U.S. 259, 270–71 (1997), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Taylor v. Riojas*, 592 U.S. 7, 8–9 & n.2 (2020) (citing *Hope* and *Lanier*) (summarily reversing our court's grant of qualified immunity due to the "obviousness" of the constitutional violation).

Under *Hope* and *Taylor*, it should be enough to defeat qualified immunity that the alleged constitutional violation is obvious. And this "obviousness" principle should be intuitive to all who treasure our constitutional rights. As then-Judge Gorsuch put it, "some things are so

obviously unlawful that they don't require detailed explanation." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). "[S]ometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Id.* "[I]t 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.

I most certainly agree. To my mind, "[i]t seems absurd to suggest that the most egregious constitutional violations imaginable are somehow immune from liability precisely because they're so egregious. It would make a mockery of our rights to grant qualified immunity just because no one in government has yet to be abusive enough to commit that particular violation—and then stubborn enough to litigate it, not only before a district court, but also in the court of appeals (or the Supreme Court)." *McMurry*, 142 F.4th at 304 (Ho, J., concurring).

A.

But here's the problem: In our circuit, *Hope* and *Taylor* apply only to the Eighth Amendment claims of incarcerated criminals. They do not apply to the First Amendment claims of law-abiding citizens. That's because of our decision in *Villarreal*.

In *Villarreal*, the majority acknowledged that *Hope* and *Taylor* denied qualified immunity based on "obvious" and "particularly egregious" constitutional violations—and did so without requiring a "fact-specific[]" presentation of case law. 94 F.4th at 395. But the majority distinguished those decisions on the ground that they're "Eighth Amendment cases" that establish only a "narrow[] obviousness exception" that should not apply to obvious violations of the First Amendment. *Id.* It claimed support in our earlier en banc decision in *Morgan*, 659 F.3d 359. *Contra id.* at 412, 414 n.30

(Elrod, J., dissenting in part) (concluding that *Hope* applies to obvious First Amendment violations).

Villarreal has been widely criticized. *See McMurry*, 142 F.4th at 305–06 (Ho, J., concurring) (surveying criticism). And the Supreme Court has vacated it. *See Villarreal v. Alaniz*, 145 S. Ct. 368 (2024). But our court has now reinstated it. *See Villarreal v. City of Laredo*, 134 F.4th 273, 276 (5th Cir. 2025) ("[o]ur previous en banc majority opinion is superseded only to th[e] extent" necessary to respond to the Supreme Court's vacatur regarding the substantive requirements of a First Amendment retaliation claim).

So it doesn't matter how obvious a First Amendment violation might be demonstrated at trial. To overcome qualified immunity under *Villarreal*, the plaintiff must satisfy "the requirement that 'clearly established law' be founded on materially identical facts." 94 F.4th at 395.

B.

Hershey has been unable to identify favorable precedent with the "materially identical facts" required by *Villarreal*. *Id.*

So I'm forced to conclude that qualified immunity must be granted—to both cops and contractors alike. *See*, *e.g.*, *Filarsky v. Delia*, 566 U.S. 377, 393–94 (2012) (holding that private individuals temporarily retained by the government may invoke qualified immunity); *Meadows v. Rockford Hous. Auth.*, 861 F.3d 672, 678 (7th Cir. 2017) (extending qualified immunity to private security guards performing governmental functions).

In fact, the closest case in recent years is profoundly unfavorable to people of faith. In *Siders*, we rejected a First Amendment challenge to a local ordinance that prevented citizens from distributing religious materials on a sidewalk outside a public amphitheater. *See Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024).

I strongly disagree with that ruling. *See Siders*, 130 F.4th at 191 (Ho, J., dissenting from denial of rehearing en banc). But our court denied rehearing en banc in that matter by a lopsided vote.[2]

So I'm bound by *Siders*. To be sure, *Siders* was decided at the preliminary injunction stage. So in theory, I suppose that Siders could still prevail on the merits. But regardless of how *Siders* is ultimately decided on the merits, it seems difficult to see how Hershey has stated a "clearly established" violation in our circuit, when another panel of our court (wrongly) found a similar claim unlikely to succeed on the merits in *Siders*. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (to find a "clearly established" violation, "existing precedent must have placed the statutory or constitutional question beyond debate"); *see also Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 606 U.S. _, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring) ("Of course, decisions regarding interim relief are not necessarily conclusive as to the merits because further litigation may follow. But regardless of a decision's procedural posture, its reasoning—its *ratio decidendi*—carries precedential weight in future cases.") (cleaned up).

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[2] Several members of the court tried to defend the panel ruling in *Siders* by recharacterizing it. That is, they theorized that the challenged ordinance did not actually prevent any citizen from evangelizing on public grounds. *See*, *e.g.*, *id.* at 189 (Oldham, J., concurring in the denial of rehearing en banc) ("the ordinance does not purport to regulate prayer, conversation, t-shirts, evangelism, or tracts").

But this rationalization effort is hard to reconcile with what several members of the court said in the companion case of *Olivier v. City of Brandon*, 121 F.4th 511 (5th Cir. 2024). *See*, *e.g.*, *id.* at 512 (Ho, J., dissenting from denial of rehearing en banc, joined by six members of the court) (condemning same local ordinance at same public amphitheater because it prevents "an evangelical Christian who feels called to share the good news with his fellow citizens . . . from doing so outside the city's public amphitheater").

C.

Qualified immunity, of course, only applies to the damages claim against the individual Defendants. Qualified immunity does not bar claims for injunctive relief. But Hershey's appeal appears to be focused only on damages, and not injunctive relief.

IV.

I turn now to Hershey's claim that the City of Bossier failed to train its officers to respect the constitutional rights of its citizens.

Under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978), municipalities may be held liable for constitutional violations. A failure to train officers to respect constitutional rights, including those protected by the First Amendment, "can without question give rise" to this liability. *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 756 (5th Cir. 2009).

To establish *Monell* liability on a failure to train theory, a plaintiff must allege that the municipality had inadequate training procedures and was deliberately indifferent in adopting them, and that the failure to train caused the violation in question. *See id.*

Although deliberate indifference is usually inferred "from a pattern of constitutional violations," we will also infer it where "the policymaker provides no training whatsoever with respect to the relevant constitutional duty." *Garza v. City of Donna*, 922 F.3d 626, 637–38 (5th Cir. 2019) (internal quotation marks omitted).

That's exactly what Hershey alleges here. His complaint contends that Bossier City did not train its police officers and private security personnel that the park surrounding the Bossier City Arena is public property, or that citizens are entitled to exercise their First Amendment

rights there. Moreover, at oral argument, counsel for Hershey agreed that the officers "received literally zero training" on First Amendment issues. Oral Arg. at 13:20–13:26. If these facts are true, they show that the City provided "no training whatsoever" regarding the application of the First Amendment to the park. *Garza*, 922 F.3d at 638. They are "facts sufficient to show" that the city acted with deliberate indifference. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014).

Hershey also alleges that the City's failure caused the violations of his rights. He contends that the City's failure to inform officers that the park was public property led officers to believe that the park was private property, and that citizens could therefore be ejected without regard to the First Amendment. He alleges that the officers who removed him from the park held this belief, and told him he had to leave the park because it was private property. In sum, he pled facts sufficient to show that the City's complete lack of training was the cause of his injury.

* * *

I agree that Hershey's *Monell* claim against the City of Bossier may proceed. I reluctantly concur that, under our court's current precedent, qualified immunity disposes of his claims against the individual Defendants.

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

Richard Hershey peacefully distributed free pamphlets about Christian vegetarianism on the public sidewalks outside the city-owned CenturyLink Center in Bossier City, Louisiana. The surrounding streets and sidewalks are part of a public park, open and unrestricted to the public. At the same time, another person handed out commercial advertisement cards for an internet radio station. Two City police officers—Deputy City Marshal Bobby Gilbert and Officer Daniel Stoll—and three Center security guards—David Smith, Tyshon Harvey, and Eugene Tucker—approached only Hershey and told him to stop leafletting. They waved handcuffs at Hershey and warned that if he continued, they would arrest him. Hershey attempted to explain that he had a legal right to hand out his literature, but Deputy Marshal Gilbert cut him off and told him that he was on private property, he had to leave or face arrest, and he could not return.

As Hershey was leaving, he inquired about the commercial literature being distributed by the person working for the internet radio station. Security guard Harvey responded that Hershey's literature had not been "approved" by the Center, and that Hershey had to submit his literature in advance. When Hershey repeated his question, Harvey said he did not know whether the radio station's commercial literature had been approved, but because Hershey's had not, he needed to leave. The officers and security guards then "used their command presence to assist in the removal of Hershey from the park." Hershey left without handing out more literature and has not returned because he fears arrest and jail. The officers did not remove the other leafleteer.

Hershey sued the City, the officers, and security guards, alleging that they violated his First Amendment rights by evicting him. The district court dismissed his claims at the Federal Rule of Civil Procedure 12(b)(6) stage,

ruling that (1) the officers were entitled to qualified immunity because Hershey failed to show that the law clearly established his right to distribute literature free from viewpoint discrimination in a traditional public forum; (2) the security guards did not qualify as state actors under 42 U.S.C. § 1983; and (3) Hershey did not allege a municipal policy or custom that could make the City liable under *Monell*.[3]

In my view, the district court erred in dismissing Hershey's *Monell* failure to train claim. Hershey sufficiently pleaded facts to show the City was deliberately indifferent to the violation of his First Amendment rights when it provided no training whatsoever as to an officer's duties under the First Amendment. We reverse on this claim, described more fully in Part A below.

For the officers and security guards, JUDGE RICHMAN and JUDGE HO affirm across the board. Judge Richman's opinion (the PR OPINION) reasons that Hershey failed to meet the clearly established prong of the qualified immunity analysis against the police officers and failed to demonstrate the security guards were acting under the color of state law for purposes of § 1983. I respectfully dissent. Because the law clearly established Hershey's right to leaflet in a traditional public forum without viewpoint discrimination, qualified immunity is inappropriate. *See* Part B. And Hershey plausibly alleged that the security guards acted under color of state law when they exercised the public function of policing. *See* Part C.

A

The district court erred by dismissing Hershey's *Monell* failure to train claim against the City. "A municipality's failure to train its police officers can without question give rise to § 1983 liability." *World Wide Street Preachers*

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[3] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Fellowship v. Town of Columbia, 591 F.3d 747, 756 (5th Cir. 2009) (citations omitted). To prevail on a "failure to train theory," a plaintiff must demonstrate that (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the violations in question. *Id.*

Hershey has sufficiently alleged the first element—that the City's training procedures were inadequate. The City failed to train its officers that the Center and its surrounding area were public property, that the adjacent streets and sidewalks were a traditional public forum, and, therefore, that citizens were entitled to exercise their free speech rights there. Because of this failure to train, the officers mistakenly believed that the Center was private property. The first element is satisfied.

Under the second element, "[d]eliberate indifference may be inferred either from a pattern of constitutional violations or, absent proof of a pattern, from 'showing a *single incident* with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights.'" *Garza v. City of Donna*, 922 F.3d 626, 637–38 (5th Cir. 2019) (emphasis added) (citation modified). "The latter inference 'is possible only in very narrow circumstances' because we have 'generally reserved the single-incident method . . . for cases in which the policymaker provides *no training whatsoever* with respect to the relevant constitutional duty, as opposed to training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury.'" *Id.* at 638 (emphasis added) (citation modified).

Hershey's allegations fall within the latter "narrow circumstances" because he alleged the City completely failed to train officers on their First Amendment duties. The PR OPINION characterizes the failure to train

claim here as a failure to train "in one limited area"—the particular conduct giving rise to the plaintiff's injury—rather than a complete failure to train officers on the First Amendment. But this misconstrues the allegations in Hershey's complaint. Hershey alleged the City "did not have *any* policy . . . regulating speech activities protected by the First Amendment." Hershey alleged the City failed to train its police officers and private security personnel of citizens' First Amendment rights on public property, including the area surrounding the Center. At oral argument, counsel for Hershey confirmed that the officers "received literally zero training" on First Amendment issues. The complaint backs this up. Taking these facts as true, the City provided "no training whatsoever" regarding the First Amendment's application to speech in traditional public forums. *See Garza*, 922 F.3d at 638. These are "facts sufficient to show" that the City was deliberately indifferent to the deprivation of Hershey's First Amendment rights. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014).

The PR OPINION, relying on *Garza*, argues that the need for training was not "obvious" because "this is a case in which only a few individuals violated" First Amendment rights "on one occasion," and there is "no evidence" to infer any subsequent incidents relevant to the City's failure to train. But *Garza* was decided on summary judgment with the benefit of a developed record. And the failure to train claim in *Garza* was based on a theory of inadequate training in a jail, rather than a theory of no officer training whatsoever on the First Amendment. At the motion-to-dismiss stage, Hershey has alleged that the City's complete lack of training directly caused the First Amendment violation in question. At this stage, entirely failing to train officers about their duties under the First Amendment will predictably and obviously result in recurring violations of citizens' First Amendment rights. This is sufficient to allege deliberate indifference.

Finally, Hershey plausibly alleged that the City's failure to train caused the violation at issue. The City's failure to train officers that the park was a public forum led officers to believe that the park was private property and that citizens could be ejected without violating their First Amendment rights. Hershey also alleged that the officers who removed him from the park held this belief and told him he had to leave the park because it was private property. Hershey has pleaded facts sufficient to show that the City's complete lack of training was the cause of his injury.

Hershey has stated a plausible failure to train claim against the City, and the district court erred in dismissing his *Monell* claim.

B

I depart from the majority on all remaining issues, beginning with the grant of qualified immunity to the police officers at the Rule 12(b)(6) stage. Qualified immunity requires two inquiries: first, whether the officer violated a constitutional right; and second, whether that right was clearly established at the time of the misconduct. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). The PR OPINION collapses the inquiries to ultimately conclude Hershey cannot meet the clearly established prong. But taking the allegations in the complaint as true, as we must, Hershey satisfies both prongs: viewpoint discrimination, regardless of forum, violates the First Amendment, and the right to be free from viewpoint discrimination is clearly established.

Because the law governing speech depends on the forum, the threshold question is whether Hershey leafletted in a traditional public forum. Public sidewalks and parks fall squarely into that category. *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 11 (2018). Courts must assess the property at issue based on its particular facts. *Brister v. Faulkner*, 214 F.3d 675, 681–83 (5th Cir. 2000). "The location and purpose of a publicly owned sidewalk is critical" to forum analysis. *United States v. Kokinda*, 497 U.S. 720,

729–30 (1990). We also consider whether the property is "indistinguishable from . . . [a] city sidewalk." *Brister*, 214 F.3d at 683. Because forum status turns on factual circumstances, it rarely lends itself to resolution on a Rule 12(b)(6) motion. *See Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1018 (D.C. Cir. 1988).

The PR OPINION reasons that sidewalk status was not clearly established, relying on *Powell v. Noble*, 798 F.3d 690, 700 (8th Cir. 2015), which treated fairground sidewalks as a limited public forum. But *Powell* arose on appeal from a preliminary injunction, where the court conducted a fact-intensive review of congestion, signage, police presence, and fencing at the fair. *Id.* That context does not exist here. The PR OPINION nonetheless imports *Powell*'s fact-finding into this Rule 12(b)(6) posture, citing contractual arrangements and event management at the Center.

Hershey, however, distributed literature on a public sidewalk within a public park, where public streets and sidewalks led directly to the Center, and no gates or restrictions blocked access. The district court agreed those allegations sufficed to plead that the sidewalk qualifies as a traditional public forum, and neither party disputes that point. At this stage, we must take Hershey's allegations as true. *Brister*, 214 F.3d at 683. By discounting them, the PR OPINION departs from our Rule 12(b)(6) standard.

The second step asks what kind of restriction Hershey faced. The officers stopped him from distributing religious literature while allowing another individual to distribute commercial handbills. Harvey, the security guard, told Hershey that leaflets required advance approval, but admitted he did not know whether the other leafleteer had approval. The district court correctly recognized that Hershey's allegations raised a plausible inference of viewpoint discrimination. Neither party disputes that characterization.

The PR OPINION instead faults Hershey for not alleging what happened after he left—for example, whether the other leafleteer stayed for a "substantial period of time." But Rule 12(b)(6) requires only well-pleaded allegations of unequal treatment, which Hershey provided. His complaint plausibly alleged that the officers engaged in viewpoint discrimination in violation of the First Amendment.

The district court nevertheless held that the right was not clearly established. That conclusion was error. The Supreme Court and this court have long recognized that viewpoint-based restrictions violate the First Amendment in any forum. *See, e.g.*, *Chiu v. Plano I.S.D.*, 260 F.3d 330, 350 (5th Cir. 2001); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). We have also refused to grant qualified immunity at the motion-to-dismiss stage when plaintiffs plausibly alleged viewpoint discrimination. *See Biggers v. Massingill*, No. 23-11023, 2025 WL 429974, at *2–3 (5th Cir. Feb. 7, 2025).

The PR OPINION leans on *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014), which warned that the general prohibition against viewpoint discrimination does not always give officials sufficient notice. But *Morgan* involved the interplay of the Establishment Clause, the Free Speech Clause, and school speech—a uniquely complex setting. *Id.*; *see also Morgan v. Swanson*, 659 F.3d 359, 364 (5th Cir. 2011) (en banc). This case is simpler: Hershey peacefully distributed free Christian literature on a public sidewalk while another individual handed out commercial flyers. The officers forced Hershey to leave but allowed the other to continue. Construing his allegations in his favor, Hershey pleaded a straightforward claim of viewpoint discrimination in a traditional public forum.

Qualified immunity does not protect blatant viewpoint discrimination. Any reasonable officer would have understood that ejecting Hershey while

permitting another leafleteer to remain violated the First Amendment. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Because Hershey has alleged both a constitutional violation and the violation of a clearly established right, reversal of the district court's grant of qualified immunity is warranted.

C

I also disagree that security guards Smith, Harvey, and Tucker were not acting under the color of state law when they removed Hershey from the public sidewalks outside the Center. Policing free speech in a traditional public forum is a traditional and exclusive function of the state or municipal government—such that it constitutes state action.

Smith, Harvey, and Tucker were employees of ASM Global, a private company, not the state. "[M]ere[] private conduct, no matter how discriminatory or wrongful," is generally excluded from § 1983's reach, unless the private conduct is fairly attributable to the state. *Richard v. Hoechst Celanese Chem. Grp.*, 355 F.3d 345, 352 (5th Cir. 2003). There are three tests that provide exceptions to the general rule: the public function test, the nexus test, and the joint action test. *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549–50 (5th Cir. 2005). Relevantly here, "[u]nder the public function test, a 'private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state.'" *Bass v. Parkwood Hosp.*, 180 F.3d 234, 241–42 (5th Cir. 1999) (quoting *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989)); *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) ("[T]o qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function.").

This case involves officers regulating free speech in a traditional public forum through policing, which is an exclusive function of the state or

municipal government. If, as in this case, that responsibility is delegated to a private entity, the private actors' conduct remains state action. *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (describing the "police function" as "a description of one of the basic functions of government"); *Brown v. Maryland*, 25 U.S. 419, 443 (1827) ("[P]olice power, which unquestionably remains, and ought to remain, with the States."). Several circuits have determined private security guards were state actors when delegated exclusive police powers. *Romanski v. Detroit Ent., LLC*, 428 F.3d 629, 637 (6th Cir. 2005); *see also Payton v. Rush–Presbyterian*, 184 F.3d 623, 630 (7th Cir. 1999).

The security guards, in overseeing City property, were for all purposes acting as de facto police officers. Harvey, Smith, and Tucker surrounded Hershey during the initial encounter alongside the police officers, and they used their command presence to remove Hershey from the scene. Harvey was the one explaining the allegedly unconstitutional speech regulations to Hershey as he was ejected, not a police officer. The actions taken by the police officers and the security guards were one and the same.

Further, Hershey alleged that the City employs a policy of allowing their officers and security guards to "use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights," because the Center "does not have any written or official policy prohibiting, regulating or licensing the distribution of leaflets on its grounds." In allowing the security guards to use their discretion to decide which types of speech are permissible, the City has empowered private security guards who patrol its property to regulate speech with no oversight.

Taking all well-pleaded facts as true and in the light most favorable to him, Hershey has sufficiently alleged that the individual security guards were

state actors under the public function test.[4] The district court erred in dismissing Hershey's § 1983 claims against Smith, Harvey, and Tucker.

* * *

In sum, the panel affirms the district court's judgment in part and reverses it in part. As to Hershey's *Monell* claim, JUDGE HO and I hold that the district court reversibly erred. JUDGE RICHMAN dissents. As to the district court's dismissal of Hershey's claims against the City officers and Center security guards, JUDGES RICHMAN and HO affirm. I respectfully dissent as to those issues.

[4] A wholly different version of the facts may be presented as the case progresses to trial. But taking all well-pleaded facts as true and in the light most favorable to him, Hershey has sufficiently alleged that the individual security guards were state actors at this juncture.

PRISCILLA RICHMAN, *Circuit Judge*, concurring in part and dissenting in part:

With great respect, the panel majority radically expands *Monell*[1] municipal liability in at least two unprecedented and unwarranted respects: (1) by sanctioning a "gotcha" claim based on "failure to train at all"; and (2) by holding that a municipality is liable for failure to train security guards *hired by a private entity* that leases and operates property owned by the municipality.

First: This is a single-incident case. It involves nuanced First Amendment law. Instead of adhering to the boundaries that limit the "very narrow circumstances" in which courts will permit an inference of deliberate indifference to be drawn from "an obvious potential for violation of constitutional rights,"[2] the separate opinions of JUDGE DENNIS and JUDGE HO open the door to permit a broad swath of failure-to-train claims to defeat a municipality's qualified immunity.

The Supreme Court has made clear that municipal liability based on *Monell* requires deliberate indifference.[3] Deliberate indifference may be inferred in failure-to-train-at-all cases "in a narrow range of circumstances" if the violation of federal rights is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations."[4] The Supreme Court emphasized that whether such a consequence is "obvious" depends on "[t]he likelihood that the situation

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[1] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[2] *Garza v. City of Donna*, 922 F.3d 626, 637-38 (5th Cir. 2019).

[3] *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

[4] *Bd. of Cnty. Commissioners of Bryan Cnty. v. Brown*, 520 U.S. 397, 409-410 (1997).

will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights."[5]

There is no allegation in this case that viewpoint discrimination by a Bossier City law enforcement officer against someone engaging in free exercise of religion or free speech has ever previously occurred. It is not highly predictable that law enforcement officers would have recurring encounters with individuals paid to distribute literature outside a large, ticketed event and that, absent training about what is "public" versus "private" property and viewpoint discrimination, those officers would discriminate based on the content of the literature being distributed. JUDGE DENNIS's and JUDGE HO'S opinions say that if a city fails to train "at all" regarding the First Amendment, then it is "obvious" that a constitutional violation will occur. This not only permits liability for what may be, at most, mere negligence, it essentially imposes strict liability for a failure to train.

Second: Perhaps even more remarkably, JUDGE DENNIS's and JUDGE HO's opinions say a municipality can be liable for failure to train private security guards who are hired by a private entity for an event at an arena it has leased from the municipality and operates. Hershey has alleged that Bossier City should have trained private security personnel who were engaged for a large concert event and that Bossier City is liable for that failure to train. The panel's majority opinions allow this claim to proceed on the basis that it was obvious Bossier City needed to train security guards hired by a third party, even though the law is far from clear that a city has a duty to train security guards.

As to the liability of the individual defendants in this case (Bossier City law enforcement officers and private security guards), JUDGE HO and I agree

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[5] *Id.*

that the district court did not err in dismissing the claims against them, though our views as to why are not congruent.

I would affirm the district court's judgment in all respects. I therefore concur in part and dissent in part.

I

The City of Bossier City, Louisiana owns a multi-purpose arena (which I will call the Center), formerly known as CenturyLink Center, and also Bossier City Arena. It is currently known as Brookshire Grocery Arena. The Center has been the site of sporting events, such as NBA and NCAA basketball games, and an NHL hockey game.[6] The forum has hosted well-known entertainers including, but not limited to, Paul McCartney, Elton John, Taylor Swift, Cher, Carrie Underwood, Justin Timberlake and Miranda Lambert, to name a few.[7]

The Center is located in a public park. At the time relevant to this litigation, the Center was managed by ASM Global, a private entity. ASM Global leased both the interior space and outdoor areas of the Center for events. On February 28, 2020, the Center hosted a Christian rock concert known as Winter Jam. Guests paid to attend.

Hershey's Amended Complaint alleges that he is a vegetarian and that on the day of the Winter Jam concert, he was distributing "free, educational, noncommercial, religious booklets on behalf of a nonprofit organization named the Christian Vegetarian Association." He is paid "by various nonprofit organizations for his advocacy and distribution of literature." He

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[6] *See Brookshire Grocery Arena*, WIKIPEDIA, https://en.wikipedia.org/wiki/Brookshire_Grocery_Arena (last visited October 6, 2025).

[7] *Id.*

further alleges that he was peacefully engaging in leafleting activity when he was approached by Bossier City Deputy Marshal Bobby Gilbert, Bossier City police officer Daniel Stoll, and three private security agents (David Smith, Tyshon Harvey, and Eugene Tucker) employed by ASM Global.

Hershey's Amended Complaint asserts he was told by Deputy Marshal Gilbert that he was on private property and that "he had to leave, that he would be arrested if he did not leave." Hershey alleges that another person was handing out cards for a radio station, for a commercial purpose, but that person had not been asked to leave when Hershey was approached by the Bossier City officers and ASM Global security guards. Hershey says he was told he had to leave the area because he had not obtained authorization to distribute booklets ahead of time. Hershey alleges he inquired about the person distributing cards for a radio station and was told essentially, "We don't know whether he [that other person] has permission." Hershey left the premises and was not arrested.

He brought this suit, alleging § 1983 claims against the City law enforcement officers, the private security guards, and Bossier City. Hershey asserts in his briefing that he was subjected to viewpoint discrimination. He also alleges that each of the ASM Global security guards was "a willing participant in joint action with state actors."

In framing his claims, Hershey repeatedly alleges that the Center and the areas surrounding it are public property, or in the alternative, that the disputed area is a designated public forum. Hershey asserts in his briefing that he was asked to leave based on his or the leaflets' viewpoint. He further alleges that Bossier City failed to train its officers and ASM Global's security guards about the public nature of the property and attendant First Amendment considerations. He asserts that the Bossier City officers and private security personnel whom he encountered engaged in viewpoint

discrimination and should be liable because Hershey was on public, not private, property.

Hershey also alleges that Bossier City "has a long-standing custom of allowing police officers, employees and/or officials of CenturyLink Center to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights from the CenturyLink property." However, he does not allege that Bossier City officials or officers or private security personnel have ever removed anyone from the Center or the surrounding property who was peacefully exercising their First Amendment rights, other than himself.

Almost a year after the incident in question, Hershey's attorney contacted ASM Global and was told in an email, which is attached as an exhibit to Hershey's Amended Complaint, that ASM Global's policies regarding the Center are as follows:

> If the public would like to engage in a peaceful protests [sic] or distribution of pamphlets, they are free to do so as long as it does not interfere with the safe ingress or egress of guests. This is especially important when the facility and property has been exclusively leased for an event.
>
> In addition, CenturyLink Center has instituted a CODE OF CONDUCT which must be adhered to while on the premises. This Code of Conduct (copy inserted) is posted on our website under Arena Info.

Hershey's counsel had also asked for an "incident report" regarding the day Hershey was told to leave the area near the Center, which was February 28, 2020. The author of the ASM Global email responded:

> I did see an incident report from 2/28/2020, that states "Security Observed two individuals handing out pamphlets in the Parking Lots A & D. The individuals became

> argumentative and Security called for Bossier City Police for assistance." It further states the Pamphleteers then left the property. (It does not state they were removed.)
>
> I, myself, remember this incident, as I heard the call over the radio for police assistance and went to the area. When I arrived, I saw police talking with two people. I did not interject. Our security guards (ASM Global employees) told me that two people with pamphlets were shouting at our guests in line that they were going to Hell for attending this event, and that it made a few "children" cry. It is my understanding that the Police asked the pamphleteers to stop upsetting the guests and that they left of their own accord.
>
> I see no other documentation or incidents pertaining to the subject of your request.

It is unclear whether the "incident report" in this email or the events recounted in that email involved Hershey.

As the magistrate judge's report reflects, this is not the first time Hershey has had an encounter that has given rise to First Amendment litigation.[8] Hershey is a serial plaintiff.

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[8] *See* ROA.130 n.1, which reflects:

> *Hershey v. Jasinski et al*, United States District Court, Western District of Missouri, St. Joseph Division, Docket No. 20-06088-CV-W-BP; (2) *Hershey v. Turner*, No. CIV-19-344-SPS, 2020 WL 1932911 (E.D. Okla. Apr. 21, 2020); (3) *Hershey v. Kansas City Kansas Cmty. Coll.*, No. 2:16-CV-2251-JTM, 2017 WL 661581 (D. Kan. Feb. 17, 2017); (4) *Hershey v. Goldstein*, 938 F. Supp. 2d 491 (S.D.N.Y. 2013); (5) *Hershey v. Multi-Purpose Civic Ctr. Facility Bd. for Pulaski Cty., Arkansas*, No. 4:18-CV-00476 BSM, 2020 WL 4741900 (E.D. Ark. Aug. 14, 2020);(6) *Hershey v. Walker*, No. 4:12CV01603 ERW, 2013 WL 657873 (E.D. Mo. Feb. 22, 2013); (7) *Hershey v. Thomas et al*, United States District Court, Eastern District of Arkansas, Central Division, Docket No. 4:20-cv-01397-KGB; (8) *Hershey v. Junior College District of St. Louis-St. Louis County et al*, United States District Court, Eastern District of Missouri, Docket No.

The defendants moved to dismiss the suit. The magistrate judge prepared a detailed report and recommendations, recommending dismissal based on qualified immunity and for failure to state a claim. The district court agreed with those recommendations and dismissed the suit.

II

Hershey's first contention on appeal is that Marshal Gilbert and Officer Stoll are not entitled to qualified immunity because the right to be free from viewpoint discrimination was clearly established on February 20, 2020, the date the incident in question occurred. The magistrate judge concluded otherwise, and after a conducting a de novo review, the district court agreed with the magistrate judge.

Hershey maintains that based on First Amendment law, the Center is a traditional public forum or, in the alternative, that it is a designated public forum. The magistrate judge's report reasoned that only the sidewalks outside the arena are at issue, and that some decisions have held that sidewalks outside an arena are either nonpublic or limited forums. Ultimately, the magistrate judge concluded

> Plaintiff does not point to a single decision from any court that has held, before or after the date of this incident, that

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4:10-cv-1116; (9) *Hershey v. The Curators of University of Missouri et al,* United States District Court, Eastern District of Missouri, Docket No. 4:16-cv-1229; (10) *Hershey v. Junior College District of Central Southwest Missouri et al,* United States District Court, Western District of Missouri, Docket No. 6:14-cv-3375; (11) *Hershey v. The Curators of the University of Missouri, et al,* United States District Court, Western District of Missouri, Central Division, Docket No. 2:20-cv-04239-BCW; (12) *Hershey v. Oldham, et al*, United States District Court, Middle District of Tennessee, Docket No. 2:20-cv-0012; (13) *Hershey v. Oldham*, et al, United States District Court, Middle District of Tennessee, Docket No. 2:20-cv-0264.

> an officer violated the rights of a leafleteer who was removed from a similar arena premises. The discussions above demonstrate that there are many nuances to First Amendment claims of this nature, beginning with questions about the category of the forum and continuing through the reasonableness of various regulations or restrictions. Very little about this field of law is clearly established.

I agree with the magistrate judge and the district court.

The Supreme Court has explained that "[t]he standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum."[9] The Eighth Circuit has explained, for example, that "[l]imited public forums (sometimes called nonpublic forums) include public properties that are not by tradition or designation public forums but have been opened by the government for limited purposes, communicative or otherwise."[10] That court further explained that "[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."[11] "'[T]he location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.'"[12] The Eighth Circuit concluded that sidewalks serving the purpose of admitting thousands of people to a state fair were a limited public forum.[13] It held that restrictions on speech in a limited public

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[9] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

[10] *Powell v. Noble*, 798 F.3d 690, 699 (8th Cir. 1997) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

[11] *Id.* at 699-700 (quoting *United States v. Grace*, 461 U.S. 171, 178 (1983)).

[12] *Id.* (quoting *United States v. Kokinda*, 497 U.S. 720, 728–29 (1990) (plurality opinion)).

[13] *Id.* at 700.

forum must be reasonable and viewpoint neutral.[14] It further held that the plaintiff in that case was not likely to prevail on his claim that his First Amendment rights were violated when he was prohibited from holding a pole with a poster-sized sign on it while on sidewalks near entrances to a state fair.[15]

JUDGE DENNIS's opinion notes that the Eighth Circuit's decision in Powell was reached only after the court held a preliminary injunction hearing and "conducted a fact-intensive review of congestion, signage, police presence, and fencing at the fair."[16] It was only then, JUDGE DENNIS's opinion posits, that the court was able to conclude that the law was not clearly established as to the character, for First Amendment purposes, of the area in which the plaintiff had displayed his sign.[17] But this discussion exemplifies the whole point of qualified immunity. First, *Powell* was, as noted, a preliminary injunction case. Qualified immunity is not a defense to injunctive relief. The present case is a suit for damages. Second, we do not hold officers like the individual defendants in the present case liable for damages after we conduct a hearing to determine, in hindsight, whether they property they were policing was a public forum. Our inquiry is whether the law was clearly established when the defendant acted or failed to act. Third, we cannot expect officers, even those trained in First Amendment law, to know whether

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[14] *Id.* (citing *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 (2010) ("Recognizing a State's right to preserve the property under its control for the use to which it is lawfully dedicated, the Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral.")).

[15] *Id.* at 701-02.

[16] *Ante* at [___].

[17] *Id.*

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.

Hershey proceeds on the basis that the law was (and is) clearly established that the sidewalk surrounding the Center was a public forum even though the city-owned arena was managed by a private entity and that private entity oversaw the concert that was ongoing at the time of the incident at issue. There is evidence, from an exhibit to the Amended Complaint, that the outside of the Center as well as the inside can be leased for events. Hershey alleges that the sidewalks just outside the concert were public, but he does not consider what contractual arrangements ASM Global may have had in place with the concert organizers.

Several courts have recognized that public property may change its character for purposes of First Amendment forum analysis based on temporary uses. In considering the public sidewalks used for the Iowa State Fair, the Eighth Circuit concluded that the public property "should be considered a limited public forum, *at least during the 11 days each year when the Iowa State Fair is underway*."[18] The Supreme Court similarly found that the Minnesota State Fair "is a limited public forum in that it exists to provide a means for a great number of exhibitors *temporarily*."[19]

Our court recently addressed a factual situation that is similar to the one presented in this case. In *Siders v. City of Brandon, Mississippi*,[20] a Christian evangelist challenged a city ordinance that restricted protesting and demonstrating on a sidewalk outside a city-owned and operated public

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[18] *Powell*, 798 F.3d at 700 (emphasis added).

[19] *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) (emphasis added).

[20] 123 F.4th 293 (5th Cir. 2024).

amphitheater during time periods surrounding a live, ticketed concert event.[21] In that case, we determined the sidewalk outside the amphitheater to be a traditional public forum.[22] We nevertheless held that the plaintiff was not likely to succeed on the merits of the claim that the ordinance violated First Amendment rights. As to whether the sidewalks at issue were a traditional public forum, *Siders* is distinguishable from the instant case because here a private entity was involved in managing the Center. Additionally, given that the Supreme Court has indicated that sidewalks on public property are not automatically public forums[23] and that the district court considered several cases concerning the forum status of spaces surrounding arenas that do not speak in unison,[24] the forum status of the space in question was not clearly established. Hershey has not overcome the qualified immunity defense.

I also note that in the district court, the Bossier City defendants argued that Hershey had failed to allege facts to support his claim that the officers discriminated against him on the basis of viewpoint. They pointed out that Hershey failed to allege that the officers looked at the content of his leaflets or otherwise knew about the content. Nor did he allege the officers heard any

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[21] *Id.* at 296.

[22] *Id.* at 303.

[23] *See, e.g.*, *Kokinda*, 497 U.S. at 730 (noting it "is not [] settled doctrine" to "designate all sidewalks open to the public as public fora"); *Burson v. Freeman*, 504 U.S. 191, 216 (1992) (SCALIA, J., concurring) ("'Streets and sidewalks' are not public forums in all places.") (emphasis omitted).

[24] *See Ball v. City of Lincoln*, 870 F.3d 722, 736 (8th Cir. 2017) (holding a plaza area outside of a city-owned arena to be a nonpublic forum); *Pomicter v. Luzerne Cnty. Convention Ctr. Auth.*, 939 F.3d 534, 537 (3d Cir. 2019) (analyzing concourse outside of a publicly-owned arena as a nonpublic forum). *But see Brister v. Faulkner*, 214 F.3d 675, 683 (5th Cir. 2000) (affirming that public university property between an arena and a city sidewalk is a traditional public forum).

statements Hershey made while passing out leaflets. As to the alleged differing treatment accorded the person who was distributing cards for a radio station, Hershey says he was told he had to leave the premises because he had not obtained authorization ahead of time to distribute leaflets outside of and during a large concert that patrons paid to attend. Hershey inquired about the person distributing cards and was told essentially, "We don't know whether he has permission." Hershey left the premises and does not allege what occurred thereafter.

Hershey does not allege that the officer or security guard who asked him to leave subsequently failed to ascertain whether the other individual had prior authorization. Hershey does not allege that after he left, the other person was permitted to continue to hand out cards for any substantial period of time even though he did not have prior authorization. The Amended Complaint depends on speculation to draw an inference that Hershey was singled out based on the content of his literature. The Amended Complaint does not sufficiently allege content or viewpoint discrimination.

Even assuming Hershey could allege that he was treated differently from the person distributing cards for the radio station, the magistrate judge and district court correctly concluded that the law regarding viewpoint discrimination is not clearly established in circumstances like those in the present case.

"The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech . . . .' There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."[25] "It is also true

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[25] *United States v. Grace*, 461 U.S. 171, 176 (1983) (quoting U.S. CONST. amend. I).

that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"[26] "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'"[27] However, if an area is a limited public forum or a nonpublic forum, "[t]he government can restrict access . . . as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[28]

It is, of course, "axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[29] But that principle is a very general one. It does not clearly establish what the First Amendment prohibits or requires of law enforcement officers when they are policing an area in circumstances similar to those existing at the Center during the Winter Jam concert.

Our court's decision in *Morgan v. Swanson*[30] is instructive on this point. In *Morgan*, the plaintiff argued that "his right to distribute religious material is clearly established because 'regardless of forum, viewpoint

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[26] *Id.* at 177.

[27] *Id.* (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

[28] *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 347 (5th Cir. 2001) (alteration in original) (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998)).

[29] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

[30] 755 F.3d 757 (5th Cir. 2014).

discrimination regarding private speech is unconstitutional.'"[31] Our court acknowledged that while this is "generally true," that proposition was too broad to denote a clearly established right.[32] The *Morgan* decision explained, "such a broad generalization is exactly the kind of proposition that will not suffice for the purposes of qualified immunity analysis, as it simply does not provide the official with any sense of what is permissible under a certain set of facts."[33] Our court concluded, "[f]or example, the nearly universal prohibition against viewpoint discrimination does not inform an official as to what, precisely, constitutes viewpoint discrimination."[34] The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality."[35]

Hershey addresses *Morgan* in his briefing. He says: "Morgan . . . involved the governmental actors attempting to balance competing, significant constitutional interests," making the case "inapplicable" to this one. He characterizes *Morgan*'s outcome as the result of the "special First Amendment context" present in public schools.

But our analysis in *Morgan* did not turn on the complexity of the context. Rather than focusing on any "special First Amendment context," *Morgan* hinged on whether the official was on notice that their conduct was unconstitutional.[36] Under Supreme Court precedent, "'[t]he dispositive

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[31] *Id.* at 761.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

[36] *Morgan*, 755 F.3d at 760.

question' . . . is whether the violative nature of [the] *particular* conduct is clearly established."[37]

Hershey relies on the statement in *Chiu v. Plano Independent School District*[38]: "It is well settled that viewpoint discrimination is a clearly established violation of the First Amendment in any forum."[39] Our decision in *Morgan* considered *Chiu* "inapposite" because of factual dissimilarities and concluded: "[W]hile *Chiu* may indeed be relevant in discerning the nature and extent of Morgan's rights in the classroom, the case does not itself establish those rights. "[40] Just as *Morgan* eschewed *Chiu* as clearly establishing law that governed in that case, we should do likewise in the present case.

Writing for the Court in *Anderson v. Creighton*,[41] JUSTICE SCALIA cogently explained "that the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'"[42] The Court recounted the underpinnings of the doctrine of qualified immunity.[43] It then said, "[s]omewhat

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[37] *Cunningham v. Castloo*, 983 F.3d 185, 191 (5th Cir. 2020) (quoting *Mullenix*, 577 U.S. at 12).

[38] 260 F.3d 330 (5th Cir. 2001) (per curiam).

[39] *Id.* at 350.

[40] *Morgan v. Swanson*, 755 F.3d 757, 761 (2014).

[41] 483 U.S. 635 (1987).

[42] *Id.* at 642 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (BRENNAN, J., concurring)).

[43] *See id.* at 638:

> ("When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing

more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken."[44] The Court continued, "[t]he operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."[45] The Court admonished that if the level of generality at which the legal rule is identified is too high, "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading."[46]

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government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." (internal citations omitted).

[44] *Id.* at 639 (internal citation omitted).

[45] *Id.*; *see also id.* at 639-40 ("It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (internal citation omitted).

[46] *Id.* at 639; *see also id.* ("Such an approach, in sum, would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'") (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

Hershey has not cited decisions that clearly establish that the conduct of Marshal Gilbert and Officer Stoll violated First Amendment rights.

III

Hershey's second contention on appeal is that Marshal Gilbert and Officer Stoll are not entitled to qualified immunity because the law was clearly established that they had to provide Hershey with ample alternative channels of communication, and they did not. Hershey asserts in his briefing that if the officers "were attempting to enforce a time, place and manner restriction, they must also 'leave ample alternative channels of communication.'"

Here again, the law as to how the Center should be characterized for First Amendment purposes is far from clear. More pointedly, Hershey has not cited any authority that would put on notice a law enforcement officer policing an event like the one at the Center on the date in question that the officer, personally, was required to provide an alternate forum for distributing leaflets.

IV

Hershey's third contention on appeal is that Marshal Gilbert and Officer Stoll are not entitled to qualified immunity because they are either plainly incompetent or knowingly violated the law. He argues that if they "genuinely believed that Plaintiff did not have any First Amendment rights on the Bossier City Arena property because it was private property, then they are 'plainly incompetent.'" Here again, Hershey cites no decision that would have clearly put the officers on notice that the Center was not comparable to "private property" for First Amendment purposes during the Winter Jam concert, or that their conduct in asking Hershey to leave the area violated his First Amendment rights.

V

Hershey contends that he has pled a facially plausible *Monell* claim based on his allegations that Bossier City failed to train both its own law enforcement officers and ASM's private security guards "allowed to serve as security personnel" at the Center. The Supreme Court has made clear that municipal liability based on *Monell*[47] requires *deliberate indifference*.[48] With great respect, JUDGE DENNIS's and JUDGE HO's opinions in the present case substantially erode and trivialize that principle.

This is a single-incident case in which Hershey relies on his own confrontation with city officers and private security guards to establish municipal liability. This case does not present the "rare" and "narrow and extreme circumstances" that our court and the Supreme Court has said permit "drawing the inference" of "deliberate indifference."[49]

A

The Supreme Court established in *Monell*[50] that "municipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the

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[47] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[48] *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

[49] *Garza v. Donna*, 922 F.3d 626, 638 (5th Cir. 2019) (quoting *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616 (5th Cir. 2018)).

[50] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

policy or custom."[51] A party must sufficiently allege each element before municipal liability can attach.[52]

The Supreme Court explained in *City of Canton v. Harris*[53] that "[m]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers."[54] The Supreme Court continued, "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983."[55] While a failure to train can be a "policy,"[56] that determination usually requires a pattern of constitutional violations.[57] There is nothing in Hershey's Amended Complaint that reflects a deliberate or conscious choice by Bossier City among various alternatives regarding the need for training its law enforcement officers. There had been no prior incident in which it was even alleged that city officers had violated the First

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[51] *Winder v. Gallardo*, 118 F.4th 638, 647 (5th Cir. 2024), cert. denied, 145 S. Ct. 2816 (2025) (quoting *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

[52] *See Brown v. Tarrant County, Tex.*, 985 F.3d 489, 497 (5th Cir. 2021) (concluding that this court need not consider whether the plaintiff sufficiently alleged the policymaker or constitutional violation element when "he did not link his allegedly unconstitutional confinement to any county 'policy or custom'); *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010) (not considering the "moving force factor" because the plaintiff had "not established a 'custom or policy'").

[53] 489 U.S. 378 (1989).

[54] *Id.* at 389 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (opinion of REHNQUIST, J.)).

[55] *Id.*

[56] *See Garza*, 922 F.3d at 637.

[57] *Harris*, 489 U.S. at 397 (O'CONNOR, J., concurring in part and dissenting in part); *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997).

Amendment by telling individuals they could not pass out literature without prior approval, much less allegations of viewpoint discrimination.

The Supreme Court explained its rationale more fully in *Board of County Commissioners of Bryan County v. Brown*.[58] The Court said that in *Canton*, it "spoke . . . of a deficient training 'program,' necessarily intended to apply over time to multiple employees."[59] The Court reasoned that:

> [i]f a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the "deliberate indifference"—necessary to trigger municipal liability.[60]

The Supreme Court again emphasized in *Connick v. Thompson*[61] that "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."[62]

The Supreme Court has made clear that in *Monell*[63] cases, deliberate indifference may be inferred in failure-to-train-at-all cases "in a narrow range of circumstances" if the violation of federal rights is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools

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[58] 520 U.S. 397, 409-410 (1997).

[59] *Id.* at 407.

[60] *Id.*

[61] 563 U.S. 51 (2011).

[62] *Id.* at 62.

[63] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

to handle recurring situations."[64] The Supreme Court emphasized that whether such a consequence is "obvious" depends on "[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights."[65]

There is no allegation that viewpoint discrimination by a Bossier City law enforcement officer against someone engaging in free exercise of religion or free speech has ever previously occurred.[66] It 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. Nor is it highly predictable that, absent specific training about what is "public" versus "private" property and viewpoint discrimination, those officers would discriminate based on the content of the literature being distributed.

JUDGE DENNIS's and JUDGE HO's opinions permit an outsized path to liability because many plaintiffs would be able to granulate allegations so finely that they arrive at a "complete failure to train" as to the relevant conduct. This ignores the Supreme Court's repeated warning: "[I]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city could have done to prevent the unfortunate incident."[67]

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[64] *Bd. of Cty. Commissioners of Bryan Cty. v. Brown*, 520 U.S. 397, 409-410 (1997).

[65] *Id.*

[66] *But see Littell v. Houston Indep. Sch. Dist.,* 894 F.3d 616, 624–25 (5th Cir. 2018) ("The municipal entity must have 'fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is *certain* to face.'" (emphasis added) (quoting *Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring)).

[67] *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (internal quotation marks omitted).

"[V]irtually every instance"[68] is just the opposite of the "rare"[69] and "extreme"[70] circumstances in which the single-incident exception should apply.

Hershey says, and JUDGE DENNIS's and HO's opinions agree, that if a city fails to train "at all" regarding the First Amendment, then it is "obvious" that a constitutional violation will occur. This not only permits liability for what may be, at most, mere negligence, it essentially imposes strict liability for a failure to train.[71]

Our court has said that in some circumstances "there is a difference between a *complete failure to train* . . . and a failure to train in one limited area."[72] Hershey alleges the City failed to train its officers on the public

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[68] *Id.*

[69] *Littell*, 894 F.3d at 627.

[70] *Id.*

[71] *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 61–62, (2011) ("[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. . . . A less stringent standard of fault for a failure-to-train claim 'would result in *de facto respondeat superior* liability on municipalities . . .'" (quoting *City of Canton v. Harris*, 489 U.S. at 392 (1989))); *see also Loera v. Kingsville Indep. Sch. Dist.*, __ F.4th__, No. 24-40481, 2025 WL 2425186, at *5 (5th Cir. Aug. 22, 2025) ("Deliberate indifference 'is a stringent standard, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.' 'A showing of simple or even heightened negligence will not suffice.'" (first quoting *Brown v. Bryan County*, 219 F.3d 450, 457 (5th Cir. 2000) (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 410 (1997), then quoting *Brown*, 520 U.S. at 410)).

[72] *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273 (5th Cir. 2002) (alteration and internal quotation marks omitted) (quoting *McClendon v. City of Columbia*, 258 F.3d 432, 442–43 (5th Cir. 2001), *vacated for reh'g en banc*, 285 F.3d 1078 (5th Cir. 2001), *decision on rehearing en banc*, 305 F.3d 314 (5th Cir. 2002)); *see also Peterson v. City of Fort Worth*, 588 F.3d 838, 849 (5th Cir. 2009) ("[The] 'narrow' single incident exception has applied when the court finds a complete failure to train, not just a failure to train in 'one limited area'"

nature of the arena and surrounding park and the corresponding First Amendment implications.[73] In other words, Hershey alleges a "failure to train in one limited area" and not "a complete failure to train."[74] But even if Hershey's Amended Complaint could be characterized as alleging a complete failure to train, to say that the need for training was "obvious" in this case would undermine virtually every precept of our *Monell* jurisprudence.

Our court has refused to allow single-incident failure-to-train cases to diminish the bedrock concepts underpinning *Monell* liability, even when the plaintiff's injury was severe and it might seem "obvious" to a lay person that training likely would have prevented the injury. Our decision in *Garza*[75] is just one example. JUDGE DENNIS's and JUDGE HO's opinions both rely on *Garza*, but it completely undermines the positions espoused in those opinions. In *Garza*, Garza's mother sought help from law enforcement when she feared her son, who was intoxicated, would take his own life or would hurt himself.[76] Garza was taken into custody at a detention center.[77] Sometime after 8:00 a.m., he obscured the lens of the camera that was trained on him in his cell.[78] The person tasked with monitoring the camera feed, Minerva Perez, said that after 8:00 a.m., when jailers arrived for their shifts,

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(quoting *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 383, 386 (5th Cir. 2005)).

[73] *See Ante* at [ ].

[74] *Peña v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018).

[75] *Garza v. City of Donna*, 922 F.3d 626 (5th Cir. 2019).

[76] *Id.* at 630-31.

[77] *Id.*

[78] *Id.* at 631.

it was their responsibility to monitor the jail inmates.[79] When the jailers were on duty, they became occupied putting up a sarcastic "welcome" sign for inmates and the logo of a comic-book character, and they "missed that Garza had hanged himself."[80] ICE agents arrived at 8:40 a.m. and found Garza dead at 8:49 a.m.[81] In the ensuing litigation, Garza's survivors claimed that "Perez displayed 'utter confusion' about her responsibility to monitor the jail's camera feeds, invoking the failure-to-train principles articulated by *City of Canton v. Harris*."[82] Our court held that this claim failed because "[a]s we have emphasized, deliberate indifference may be inferred this way 'only in narrow and extreme circumstances,' and decisions by our court drawing the inference are rare."[83] We further explained that "the record has no evidence about the population that passes through the City's jail or about the jail's operations from which the possibility of recurring situations threatening to constitutional rights might be assessed. It is apparent that this record is inadequate to support a failure-to-train theory as to Perez."[84]

So too, in this case. There is no allegation as to how many individuals frequent areas outside the Center during events in order to distribute literature. There is no allegation from which the risk of recurring situations like the one at issue in this case can be assessed. Again, the Supreme Court has emphasized that whether a consequence is "obvious" depends on "[t]he

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 637.

[83] *Id.* at 638.

[84] *Id.*

likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights."[85]

Saying that the need for training was "obvious" in this case would call into question the core tenets of our *Monell* jurisprudence, for the reasons discussed above. Even if Hershey's constitutional rights were violated, this is a case in which only a few individuals violated those rights on one occasion. This a not a case for application of the "obvious" exception. We have reserved that exception for cases of a far different ilk than this one.

JUDGE DENNIS's opinion asserts that Hershey alleged Bossier City "did not have *any* policy . . . regulating speech activities protected by the First Amendment."[86] This implies, if not states, that if Bossier City had provided at least some training on any aspect of the First Amendment, there could be no "complete failure to train" claim, and we would be in ordinary "failure-to-train" territory. The logic here escapes me. If Bossier City had trained its law enforcement officers about how to address an entirely *different* First Amendment issue—for instance, permissible means of policing protestors who shut down a highway with their presence—how would that have affected Hershey's claim? Such training would not bear on preventing viewpoint discrimination against someone handing out leaflets. Yet, it would be "some" First Amendment training, so the "no training at all" theory would be inapplicable. This elusive and slippery nature of a failure-to-train-at-all claim in the context of this case is apparent from the very next sentence in Judge Dennis's opinion, which says, "Hershey alleged the City failed to train its police officers and private security personnel of citizens' First Amendment rights on public property, including the area surrounding the

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[85] *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997).

[86] *Ante* at [___].

Center."[87] That is a much more specific claim, and if Bossier City had notice that it needed to train for that specific potentiality, Hershey likely would have stated a claim. So, to be clear, the failure-to-train-at-all theory in a case like the present one is nothing more than a "gotcha." Providing some First Amendment training, even though it had no bearing at all on the alleged First Amendment violation, would foreclose reliance on the theory. But failure to train "at all" results in strict liability when there was no notice "at all" of the need to train for the specific First Amendment violation alleged.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," and "'[d]eliberate indifference' is a stringent standard of fault."[88] The requisite standard of fault is not met here and Hershey has therefore failed to sufficiently plead allegations of liability under *Monell*.[89]

B

Hershey's Amended Complaint seeks money damages from Bossier City for its failure to train not only its own law enforcement officers but the *private security guards who were hired by ASM Global* for a concert on a particular day. Hershey's brief cites no decision whatsoever that holds a municipality liable for failure to train a private party's employees.

Nevertheless, JUDGE DENNIS's and HO's opinions permit Hershey to proceed with his claim that Bossier City is liable for failing to train security guards ASM hired. I disagree and would affirm the district court's judgment in this regard.

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[87][*Id.*]

[88] *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

[89] *Supra* note 50 and accompanying text.

VI

In a fifth issue raised in Hershey's appeal, he asserts that ASM Global's private security guards worked together with the Bossier City defendants to eject him from the Center and that he has stated a cause of action under the "nexus/joint action tests." "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by *a person acting under color of state law*."[90]

A

The nexus test asks "whether the State has inserted 'itself into a position of interdependence with the [private actor, such] that it was a joint participant in the enterprise.'"[91] In other words, the question is whether there is a "'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[92]

Hershey's complaint alleges virtually no facts regarding "interdependence" between Bossier City and ASM Global's private security guards. The Amended Complaint alleges that the City "owns and operates a public facility known as the Bossier City Arena, which at all times relevant herein was known as the CenturyLink Center." It alleges that defendant security guards were security guards at the CenturyLink Center. It then alleges: "Defendant the City has a long-standing custom of allowing police officers, employees and/or officials of CenturyLink Center to use their unfettered

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[90] *West v. Atkins*, 487 U.S. 42, 48 (1988) (emphasis added).

[91] *Cornish v. Corr. Srvs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (alteration in original) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58 (1974)).

[92] *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson*, 419 U.S. at 351).

discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights from the CenturyLink property." This latter allegation is entirely conclusory. It provides no factual support whatsoever for this assertion.

These allegations are insufficient to permit a factfinder to infer that there is such a close nexus between Bossier City and ASM Global security guards that the actions of the latter "may be fairly treated as that of the State itself."[93] There are no allegations about the nature of the contractual relationship between Bossier City and ASM Global, or between ASM Global and its security guards. Nor are there factual allegations about whether the City routinely relies on private security guards to police the areas abutting or surrounding the Center.

B

Under the joint action test, "private actors will be considered state actors where they are 'willful participant[s] in joint action with the State or its agents.'"[94] "[T]he plaintiff must allege and prove that the citizen conspired with or acted in concert with state actors."[95]

Hershey's Amended Complaint alleges that Bossier City Marshal Gilbert approached Hershey with security guard Harvey and police officer Stoll. Marshal Gilbert waived a pair of handcuffs at Hershey, and Officer Stoll told Hershey that he had been told to leave the park. Marshal Gilbert then told Hershey that he had bracelets for Hershey and would put them on him and take him to jail. Marshal Gilbert said that "people were there to have a good

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[93] *See Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351).

[94] *Cornish v. Corr. Srvs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

[95] *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989).

time." Security guards Smith and Tucker arrived shortly thereafter. Hershey asked about the commercial leafleteer distributing literature nearby, and security guard Harvey replied that Hershey's literature was unauthorized—but that Harvey did not know whether the commercial leafleteer was authorized.

The facts alleged regarding security guards Smith and Tucker are not sufficient to meet the joint action test. The complaint alleges only that "Smith and Tucker were present during Hershey's ejectment from the park . . . and, acting jointly with the other Defendants, used their command presence to assist in the removal of Hershey from the park by Defendant Deputy Marshal Gilbert, Officer Stoll, and Harvey." Smith and Tucker allegedly "arrived shortly" after Marshal Gilbert had told Hershey to leave and had waived handcuffs at him. A reasonable factfinder could not infer from Smith and Tucker's presence that they willfully participated in Hershey's removal. Nor does the complaint allege that the "use[]" of their "command presence" meant more than that Smith and Tucker were present during the incident.

Security guard Harvey spoke to Hershey in the presence of the two Bossier City law enforcement officers. But security guard Harvey's statements do not indicate he understood or believed that Bossier City, as opposed to ASM Global, required prior approval before literature could be distributed. Hershey alleged quite specifically that security guard Harvey said that Hershey's "literature had not been approved by CenturyLink Center, and that Hershey had to submit his literature in advance for approval." That is a requirement of a private, not a state, actor. Neither of the city law enforcement officers indicated that they thought there was a prior-approval requirement by either Bossier City or ASM Global. Hershey's allegations do not sufficiently allege joint action.

VII

Hershey contends in his sixth and final issue on appeal that he stated a claim against the private security guards under the public function test. Under that test, "a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the State.'"[96] But, "to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function" and "[t]he [Supreme] Court has stressed that 'very few' functions fall into that category."[97] One of those narrow categories is "operating a company town."[98]

Hershey argues that the defendants "engaged in the regulation of speech on the public sidewalk" and that "[t]he regulation of speech in a public forum has been traditionally and exclusively a function of the state." However, the only authority he cites for this proposition is *Marsh v. Alabama*,[99] a case involving the regulation of speech in a company town.[100] That case does not carry the day based on the facts Hershey has alleged.

The Center was being used to host a concert at the time Hershey was asked to leave. Hershey has cited no authority that policing the sidewalks

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[96] *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) (quoting *Jackson*, 419 U.S. at 352).

[97] *Id.* (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).

[98] *Id.*

[99] 326 U.S. 501, 505–06 (1946).

[100] *See id.* ("Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?").

abutting an arena like the Center during such an event is a power exercised exclusively by state actors.

Hershey's complaint does not allege that the defendant security guards were licensed by Bossier City or "endowed by law with plenary police powers such that they are *de facto* police officers."[101] Nor does he allege that the private security guards were licensed by the city and empowered by an ordinance to exercise "all of the powers of the regular police patrol."[102]

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I would AFFIRM the judgment of the district court.

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[101] *See Romanski v. Detroit Ent., L.L.C.*, 428 F.3d 629, 637 (6th Cir. 2005).

[102] *See Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 630 (7th Cir. 1999). (quoting CHI., ILL., MUN. CODE § 4-340-100 (1992)).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RICHARD HERSHEY	**CASE NO. 5:21-CV-00460**
VERSUS	**JUDGE TERRY A. DOUGHTY**
CITY OF BOSSIER CITY ET AL	**MAGISTRATE JUDGE HORNSBY**

JUDGMENT

The Report and Recommendation of the Magistrate Judge [Doc. No. 33] having been considered, together with the written Objection [Doc. No. 37] thereto filed with this Court, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended therein is warranted,

IT IS ORDERED, ADJUDGED, and DECREED that the Defendants' Motion to Dismiss [Doc. No. 19] is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that all claims against the City of Bossier City, Bobby Gilbert, and Daniel Stoll are **DISMISSED WITH PREJUDICE.**

MONROE, LOUISIANA, this 24th day of September 2021.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RICHARD HERSHEY	CIVIL ACTION NO. 21-cv-460
VERSUS	JUDGE TERRY A. DOUGHTY
CITY OF BOSSIER CITY, ET AL	MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

Richard Hershey ("Plaintiff") was distributing leaflets outside a public arena when a policeman ordered him to leave or be arrested and taken to jail. Plaintiff left. He later filed this civil rights action against the City of Bossier City, two law enforcement officers, and three security officers. He alleges that his eviction from the grounds violated his First Amendment rights. Before the court is a Motion to Dismiss (Doc. 19) filed by the City and the two law enforcement officers. The three security officers have filed a separate motion to dismiss (Doc. 28) that will be addressed later. For the reasons that follow, it is recommended that the City Defendants' motion to dismiss be granted.

Rule 12(b)(6)

The City Defendants move for dismissal based on Fed. R. Civ. Pro. 12(b)(6). In assessing the motion, the court must accept as true all well-pleaded facts in the complaint and view those facts in the light most favorable to the plaintiff. In re Katrina Canal Breaches Litigation, 495 F.3d 191, 205 (5th Cir. 2007). Those facts must state a claim that rises above the speculative level and is plausible on its face. Bell Atlantic Corp. v.

Twombly, 127 S.Ct. 1955, 1964-65 (2007); Amacker v. Renaissance Asset Mgmt., LLC, 657 F.3d 252, 254 (5th Cir. 2011). A complaint is not sufficient if it offers only "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 127 S.Ct. at 1965).

The Allegations

The relevant facts for purposes of assessing the motion to dismiss are found in Plaintiff's First Amended Complaint (Doc. 17). Plaintiff, a senior citizen from Missouri, is a vegetarian advocate whose ethical beliefs compel him to share his message with others. He is compensated by various nonprofit organizations for his advocacy and distribution of literature. First Amended Complaint, ¶¶ 4, 15-17.

A Christian rock concert known as Winter Jam was held on February 28, 2020 at a Bossier City arena that was then known as CenturyLink Center. ¶ 24. The facility has since been rebranded as Brookshire Grocery Arena. The court will refer to it as the Arena.

The Arena is situated in a public park, with no restriction on access to any of the sidewalks and streets through the park. ¶ 21. The Arena does not have any written or official policy regarding the distribution of leaflets on its grounds, and it does not have any formal application process to request permission to distribute leaflets. ¶¶ 18-19. Instead, the City has a longstanding custom of allowing police officers or officials of the Arena to use unfettered discretion to remove persons who are peacefully exercising their First Amendment rights. ¶ 20.

Plaintiff was on a public sidewalk on the grounds of the Arena and distributing free religious booklets on behalf of a nonprofit organization named the Christian Vegetarian

Association. ¶¶ 14-15. His activity was entirely peaceable and non-aggressive, and he did not create a disturbance or interfere with pedestrian or vehicular traffic. ¶¶ 22-23. Also, out of concern for safety, he did not distribute his booklets on the staircases of the Arena or in the parking lots. ¶ 26. At least one other person, not associated with Plaintiff, was distributing commercial advertisement cards for an internet radio station. ¶ 27.

Plaintiff was approached by Deputy City Marshal Bobby Gilbert and Bossier City Police Officer Daniel Stoll, along with three Arena security officers. ¶ 28. Gilbert waved a pair of handcuffs at Plaintiff, and Stoll told Plaintiff that he had been told to leave the public park. Plaintiff replied that no one had told him to leave. Gilbert responded that he had bracelets for Plaintiff and would put them on Plaintiff and take him to jail. ¶¶ 31-34.

Plaintiff attempted to explain that he had a legal right to pass out his literature, but Gilbert cut him off and told him that he was on private property and had to leave or be arrested. Plaintiff believed that this order was unlawful but, fearing arrest, he agreed to leave. Gilbert, after first blocking Plaintiff's egress, allowed Plaintiff to leave and told him that he would go to jail if he returned. ¶¶ 35-43.

As Plaintiff was leaving, he asked about the radio station cards that were being distributed. Defendant Harvey, one of the Arena security officers, said that Plaintiff's literature had not been approved by the Arena, and he had to submit his literature in advance for approval. Harvey said he did not know if the radio station literature had been approved, but Plaintiff's literature was not approved, so he had to leave. Plaintiff left the grounds, while the radio station leafleteer continued to hand out her commercial literature without interference from officials. There were no alternative avenues available to Plaintiff

to hand out his literature to concert attendees. Plaintiff, fearing arrest, has not returned to the Arena. ¶¶ 44-51.

Forum Analysis

"There is no doubt that as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment." U.S. v. Grace, 103 S.Ct. 1702, 1706 (1983). The government's ability to limit such speech activities depends in part on a forum analysis. "There are two broad categories of forums: (1) traditional and designated public forums and (2) limited public forums and nonpublic forums." Freedom from Religion Foundation v. Abbott, 955 F.3d 417, 426 (5th Cir. 2020).

Plaintiff alleged in his complaint (¶¶ 52 & 53) that the sidewalks and grassy areas outside the Arena are a traditional public forum or, in the alternative, a designated public forum. If Plaintiff is correct, regulations on speech in those areas are subject to strict scrutiny review. They must be narrowly tailored to serve a compelling state interest. Freedom from Religion, 955 F.3d at 426, citing Fairchild v. Liberty ISD, 597 F.3d 747, 758 (5th Cir. 2010). The government has more leeway to restrict speech in a limited public forum or nonpublic forum. Id.

The City Defendants argue that Plaintiff has not alleged sufficient facts to set forth a plausible claim that the areas at issue could be a traditional public forum or designated public forum. They argue that, because Plaintiff does not rely on any other forum theory, the claims against them must be dismissed. The court will review the forum analysis rules and then compare them to the allegations in the complaint.

Traditional public forums are places that by long tradition or by government fiat have been devoted to assembly or debate. Chiu v. Plano ISD, 260 F.3d 330, 344 (5th Cir. 2001). Public places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' " Grace, 103 S.Ct. at 1707.

In addition to traditional public forums, "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S.Ct. 3439, 3449 (1985). "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S.Ct. 948, 955 (1983). Examples of designated forums include university meeting facilities, a schoolboard meeting, and a municipal theater. Id.

Plaintiff made the following allegations regarding the setting of his activity:

> 21. The CenturyLink Center is situated in a public park encompassed by the boundary streets of Arthur Ray Teague Parkway, Angelle Drive, CenturyLink Center Drive, and Reeves Marine Drive which are connected to the public streets and sidewalks through the park leading to the CenturyLink Center. There is no gate or restriction on access to any of the public sidewalks and streets through the park to the CenturyLink Center.
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> 25. Within the park surrounding the Center, the sidewalks, including the sidewalk where Hershey was distributing his literature, streets, staircases, grassy areas, and parking lots were all open to the public.

26. Because of potential safety concerns, Hershey did not distribute his booklets on the staircases or in the parking lots.

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52. The sidewalks traversing the CenturyLink park grounds and the grassy areas constitute a traditional public forum for the exercise of First Amendment rights.

53. In the alternative, the sidewalks traversing the CenturyLink Center park grounds and the grassy areas constitute a designated public forum for the exercise of First Amendment rights.

54. Hershey had a right protected by the First Amendment to the United States Constitution to distribute literature on the sidewalks on the outdoor grounds of CenturyLink Center.

Plaintiff attached email correspondence as an exhibit to his amended complaint. Doc. 25. The exhibit is a part of the complaint for all purposes, Fed. R. Civ. Pro. 10(c), so it may be considered part of the complaint for purposes of a Rule 12(b)(6) motion. U.S. ex rel. Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370, 375 (5th Cir. 2004). The exhibit includes an email from the general manager of the Arena, who explained that the Arena was owned by Bossier City and managed by a private management company. The Arena, both inside and outside, can be leased by organizations to host events. The manager wrote, "If the public would like to engage in a peaceful protests (sic) or distribution of pamphlets, they are free to do so as long as it does not interfere with the safe ingress or egress of guests."

Defendants argue that the complaint lacks sufficient factual detail to make the case that the forum at issue is a traditional or designated public forum. Only the sidewalks outside the arena are at issue, and Plaintiff has alleged that they are part of a public park.

The Supreme Court said in Grace that sidewalks and parks are considered, without more, to be public forums. Grace, 103 S.Ct. at 1707. But some sidewalks and similar areas have, in particular cases, been held to not be part of a public forum. U.S. v. Kokinda, 110 S.Ct. 3115 (1990) (sidewalk that led only from parking area to front door of post office was not a traditional public forum sidewalk).

Defendants cite decisions in which certain areas outside public arenas were held to be either nonpublic or limited forums. See, e.g., Ball v. City of Lincoln, Nebraska, 870 F.3d 722, 736 (8th Cir. 2017) (plaza area outside Pinnacle Bank Arena was nonpublic forum); Pomicter v. Luzerne Cty. Convention Ctr. Auth., 939 F.3d 534, 537 (3d Cir. 2019) (concourse outside Mohegan Sun Arena was nonpublic forum); Calash v. City of Bridgeport, 788 F.2d 80, 83 (2d Cir. 1986) (Kennedy Stadium was either nonpublic or limited forum). None of those decisions, however, were made in a Rule 12(b)(6) setting. Ball was decided on summary judgment, and Pomicter was decided after a bench trial. The appellate court in Pomicter noted that the nature of the forum is a "highly fact-specific" issue. Calash was decided after a hearing on a motion for preliminary injunction, and it involved the entire stadium rather than an outdoor area such as a sidewalk.

Defendants also point to Hershey v. Multi-Purpose Civic Center Facility Board for Pulaski County, 2020 WL 4741900 (E.D. Ark. 2020). The court there held that sidewalks adjacent to an arena where this plaintiff sought to leaflet were a limited public forum during arena events. But that decision was made based on a motion for summary judgment, and the record included photographs and detailed information about the layout and features of

the property. This motion must be decided solely on the allegations in the complaint and its exhibits.

In Plaintiff's favor is Brister v. Faulkner, 214 F.3d 675 (5th Cir. 2000), which recognized an area outside a sports arena as a traditional public forum. Brister affirmed a decision, made after a trial, that a gravel area between the sidewalk and the entrance of the University of Texas' Erwin Center was a traditional public forum. The plaintiff in that case was also distributing leaflets and was told by a police officer that he was in violation of policy.

Plaintiff's mere legal conclusions that the sidewalks are a traditional or designated public forum would not suffice. But Plaintiff has also alleged facts regarding the surrounding area and the nature of its use. Those additional facts give rise to at least a plausible basis for a claim that the sidewalks in a park area could be a traditional or designated public forum, such as in Grace and Brister. Plaintiff needs to allege a plausible case, but he need not allege every specific fact needed to prevail on the merits. For example, a plaintiff in an employment discrimination suit does not have to allege specific facts establishing each element of a prima facie case of discrimination. Swierkiewicz v. Sorema N.A., 122 S.Ct. 992 (2002). Defendants might be able to present evidence, either on a motion for summary judgment or at a trial, that would undermine the allegations in the complaint or provide additional information that would defeat Plaintiff's claims on this issue. But Plaintiff has alleged sufficient facts to withstand Rule 12(b)(6) review on the forum challenge.

Reasonable Regulation; Viewpoint Discrimination

The government is strictly limited in its ability to regulate private speech in a traditional public forum such as a park or sidewalk. Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny. That is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited. Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1125, 1132 (2009).

Defendants argue that Plaintiff has not alleged facts to establish that he was subjected to an unreasonable regulation on speech. Their argument refers to decisions that have approved certain restrictions on leafleting activity outside arenas. In this case, however, there is no allegation that Bossier City had any particular regulation or restriction in place. To the contrary, Plaintiff alleged that the Arena "does not have any written or official policy prohibiting, regulating or licensing the distribution of leaflets on its grounds." ¶ 19. It does not have any formal application process for requesting permission to distribute leaflets (¶ 18), and the City employs a longstanding custom of allowing police officers and other officials "to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights" on the property. ¶ 20. One of the security officers present when Plaintiff was ordered to leave the property allegedly referred to a policy that required prior approval of literature before it could be distributed on the property. But the general manager of the Arena later wrote that a member of the public is free to distribute pamphlets so long as they do not interfere with the safe ingress or egress of guests.

Plaintiff alleges that the City requires prior approval of literature passed out near the Arena. When a regulation requires prior approval but contains no limit on the scope of discretion of the decisionmaker, the regulation is subject to being struck down for vesting unbridled discretion in a government official to engage in content or viewpoint censorship. Lakewood v. Plain Dealer Publishing Co., 108 S.Ct. 2138, 2144 (1988). See also Freedom from Religion Foundation, 955 F.3d at 427-28 (discussing the unbridled discretion doctrine and noting that circuit courts have applied in even in limited and nonpublic forums). There are other characteristics of approval-policies that must also be examined to determine whether they satisfy the First Amendment. No other facts are known about this alleged policy, so it cannot be analyzed for reasonableness at this stage of the case.

Plaintiff has also alleged that the City allows officers on the grounds of the Arena to use unfettered discretion, which could lead to viewpoint discrimination. The facts alleged allow a reasonable inference the officer who removed Plaintiff engaged in viewpoint discrimination. Plaintiff alleged that there were two persons passing out leaflets, the officer was aware of both of them, and he ordered Plaintiff to leave while taking no action with respect to the other person. These allegations allow a reasonable inference that the officer engaged in viewpoint discrimination based on the nature of Plaintiff's literature, compared to the radio station promotion passed out by the other person. A policy that permits "communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship," and "[t]his danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." City of Lakewood, 108 S.Ct. at 2147.

There is a lack of clarity regarding any applicable prior-approval policy or regulation at the Arena, but there is an allegation that any regulation that exists allows unbridled discretion of the approving official. The facts allow a reasonable inference that the police officer on the scene engaged in viewpoint discrimination. Given these considerations, Defendants have not demonstrated that they are entitled to dismiss Plaintiff's complaint for lack of satisfaction of this element of his claim.

Qualified Immunity; Gilbert & Stoll

Deputy Marshal Gilbert and Police Officer Stoll argue that they are entitled to qualified immunity from the damages claims against them. Qualified immunity provides government officials performing discretionary functions with a shield against civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 107 S.Ct. 3034, 3038 (1987). The plaintiff must show that the officer's alleged conduct violated a federal right and that the right in question was clearly established at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his conduct. The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate a law clearly established at the time. Cole v. Carson, 935 F.3d 444, 451 (5th Cir. 2019).

"Once a defendant properly invokes the defense of qualified immunity, the plaintiff bears the burden of proving that the defendant is not entitled to the doctrine's protection." Howell v. Town of Ball, 827 F.3d 515, 525 (5th Cir. 2016). "A plaintiff does not overcome the qualified immunity defense by alleging the violation of a right that is only defined 'at a high level of generality.'" Morgan v. Swanson, 755 F.3d 757, 760 (5th Cir. 2014),

quoting Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2084 (2011). "Instead, there must exist a clearly established 'particular right' such that the official had 'fair notice' of that right and its concomitant legal obligations." Morgan, 755 F.3d at 760. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Id.

To say that an officer's conduct was proscribed by clearly established law at the time of the incident, the court "must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." Shumpert v. City of Tupelo, 905 F.3d 310, 320 (5th Cir. 2018), quoting Morgan v. Swanson, 659 F.3d 359, 371-372 (5th Cir. 2011) (en banc). In determining what constitutes clearly established law, the Fifth Circuit looks to Supreme Court precedent and then to its own precedent. Shumpert, 905 F.3d at 320. If there is no directly controlling authority, the court may rely on decisions from other circuits to the extent that they constitute a robust consensus of cases of persuasive authority. Id. "For conduct to be objectively unreasonable in light of clearly established law, there need not be a case directly on point, but 'existing precedent must have placed the statutory or constitutional question beyond debate.'" Tucker v. City of Shreveport, 998 F.3d 165, 173-74 (5th Cir. 2021), quoting White v. Pauly, 137 S.Ct. 548, 551 (2017).

Officers Gilbert and Stoll challenged Plaintiff to point to authority that clearly established his right, as of February 28, 2020, to hand out leaflets on the sidewalks outside the Arena during an event. Plaintiff responded that leafleting on matters of public concern is protected by the First Amendment. That general principle may be true, and "peaceful

pamphleteering "is not fundamentally different from the function of a newspaper.'" City of Lakewood, 108 S.Ct. at 2146. But protected speech in a public forum may still be subject to reasonable time, place, and manner regulations as long as the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Grace, 103 S.Ct. at 1707.

Plaintiff does not point to a single decision from any court that has held, before or after the date of this incident, that an officer violated the rights of a leafleteer who was removed from a similar arena premises. The discussions above demonstrate that there are many nuances to First Amendment claims of this nature, beginning with questions about the category of the forum and continuing through the reasonableness of various regulations or restrictions. Very little about this field of law is clearly established.

The lack of clarity and its relationship to qualified immunity is demonstrated by the Morgan v. Swanson en banc decision. The Court afforded qualified immunity to a principal who interfered with a third-grader's attempt to distribute religious gifts at a school winter party. Immunity was appropriate because the relevant First Amendment law was too complex for the principal to have known how to handle the situation. Immunity was warranted "because the general state of the law in this area is abstruse, complicated, and subject to great debate among jurists." Id., 659 F.3d 359.

The third-grader's parent later argued that his own rights were violated when he was not allowed to distribute religious material to consenting adults in the classroom. The plaintiff-parent argued that his right to distribute religious materials was clearly established because, regardless of forum, viewpoint discrimination was unconstitutional. The Fifth

Circuit accepted that the assertion was generally true, but it again afforded the principal qualified immunity. The Court noted that it had already rejected the viewpoint discrimination principle as "far too general" to have clearly established the law for the particular setting, and the plaintiff's counsel could not name a single case that clearly established his right to distribute the gifts at school. Morgan v. Swanson, 755 F.3d 757 (5th Cir. 2014).

The Morgan decisions demonstrate the difficult burden on a First Amendment plaintiff to point to clearly established law, in an area of the law that is often unsettled or highly fact-specific, that recognizes a right in a particular setting and context. Plaintiff relies solely upon general statements of law concerning the First Amendment. He has not pointed to any controlling authority or other clearly established law that would have made clear to Gilbert and Stoll, beyond debate, that their prohibition of distributing leaflets on the sidewalks outside the Arena during a concert event was unconstitutional. Both officers are entitled to dismissal based on qualified immunity.

Monell Liability of Bossier City

A. Introduction

A municipality is not entitled to qualified immunity based on the good faith of its officers. Owen v. City of Independence, 100 S.Ct. 1398, 1409 (1980). It is also not subject to Section 1983 liability based on respondeat superior. "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is 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

that the government as an entity is responsible under § 1983." Monell v. Department of Social Services, 98 S.Ct. 2018, 2037-38 (1978).

Plaintiff argues that he has alleged adequate claims of municipal liability based on the City's failure to train its officers and based on a municipal policy or custom that caused the violation of his rights. Before addressing Plaintiff's theories of municipal liability, it is worth noting that the granting of qualified immunity to the City's employees does not necessarily preclude the City being held liable. If the Section 1983 claims against the police officers were dismissed based on the lack of an allegation of a constitutional violation, that would defeat the claims against the City. Romero v. City of Grapevine, 888 F.3d 170, 178-79 (5th Cir. 2018). But here it is recommended that the claims against the officers be dismissed based on qualified immunity due to the lack of clearly established law. In these circumstances, the City may still be liable despite the dismissal of the claims against the officers. See Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 271 (5th Cir. 2019) (turning to Monell claim against school district even though claims against individual employees were dismissed due to lack of clearly established law); Howell v. Town of Ball, 827 F.3d 515 (5th Cir. 2016) (assessing Monell claim against the town after dismissing claims against individual employees due to lack of clearly established law); and Brown v. Lyford, 243 F.3d 185, 191 n. 18 (5th Cir. 2001) (explaining that a municipality may be liable if a plaintiff states a claim against an official but the official is protected by qualified immunity).

B. Failure to Train

The City argues that Plaintiff has not pleaded any plausible claim of municipal liability. Plaintiff's first response is that he has alleged a claim based on the City's failure to train its officers with regard to First Amendment rights at the Arena. Plaintiff alleged in his amended complaint that the City failed to provide adequate training for its law enforcement officers "by failing to train them that the Bossier City Arena and the park surrounding it are public property and, therefore, the citizens using that property are entitled (to) their constitutional rights guaranteed by the First Amendment." ¶ 67. Plaintiff alleged that this lack of training led Deputy Gilbert and the other individual defendants to believe that the Arena and park surrounding it are private property that allowed them to order citizens off of the property with no regard to their First Amendment rights. ¶ 68. Plaintiff also accused the City of failing to train its officers how to take into account the First Amendment rights of citizens on the Arena property by enforcing only reasonable time, place, and manner restrictions rather than blanket denials of access to the property. ¶ 69. This lack of training is alleged to be the moving force behind the removal of Plaintiff from the property. ¶ 70.

A city policy "can take the form of a failure to train, provided that the failure is 'closely related to the ultimate injury' and not just attributable to a particular officer's shortcomings." Garza v. City of Donna, 922 F.3d 626, 637 (5th Cir.), cert. denied, 140 S. Ct. 651 (2019), quoting City of Canton v. Harris, 109 S.Ct. 1197 (1989). In addressing a city's potential liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. Shumpert, 905 F.3d at 317.

A plaintiff must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy. Shumpert, 905 F.3d at 317. "The deficiency in training must be the actual cause of the constitutional violation." Id.

Plaintiff does not focus on any particular inadequacy of the City's training of its police officers and deputy city marshals. Rather, Plaintiff makes general allegations of failure to train. He points to the incident in which he was involved and concludes, in his memorandum, that "[a]pparently" the officers received no training or improper training. Doc. 26, pg. 17. No particular facts about the City's training program are alleged. It is not sufficient, when attempting to plead a claim of municipal liability based on failure to train, to point to a particular officer's alleged shortcomings in a single incident and assume that it must be the result of improper training. That does not allege a plausible claim that a deficiency in training, as opposed to the mistake or misbehavior of the police officer, was the actual cause of any constitutional violation.

Plaintiff's complaint also lacks an allegation that the City was "deliberately indifferent" in adopting its training policy. Plaintiff does argue in his memorandum that the alleged poor training could amount to deliberate indifference. He does not take the typical route of arguing that deliberate indifference can be inferred from a pattern of constitutional violations. Instead, he again argues that the single incident that happened to him is enough to make the inference.

The single-incident inference "is possible only in very narrow circumstances" because the Fifth Circuit has "generally reserved the single-incident method ... for cases in which the policymaker provides no training whatsoever with respect to the relevant constitutional duty, as opposed to training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury." Garza, 922 F.3d at 638, quoting Littell v. Houston Indep. Sch. Dist., 894 F.3d 616, 625 & n.5 (5th Cir. 2018). "To base deliberate indifference on a single incident, 'it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy.' " Alvarez v. City of Brownsville, 904 F.3d 382, 390 (5th Cir. 2018) (en banc), quoting Snyder v. Trepagnier, 142 F.3d 791, 796 (5th Cir. 1998).

Plaintiff does not allege that there was no training whatsoever with respect to persons passing out leaflets at the Arena or similar public areas. He alleges that the City did not provide "adequate" training. Amended Complaint, ¶ 67. His allegations are not sufficient to plead a plausible element of deliberate indifference based on the single incident exception or otherwise. If the allegations in this case were enough, it would risk permitting the single-incident exception to "swallow the rule that forbids mere respondeat superior liability." Roberts v. City of Shreveport, 397 F.3d 287, 295 (5th Cir. 2005). See also Alvarez, 904 F.3d at 390 ("The causal link 'moving force' requirement and the degree of culpability 'deliberate indifference' requirement must not be diluted, for 'where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.' ").

C. Policy or Custom

1. Plaintiff's Burden

Plaintiff also argues that the City can be liable based on a policy or custom that caused a constitutional violation. To plead such a claim of municipal liability under Section 1983, a plaintiff must allege that (1) an official policy (2) promulgated by the municipal policy maker (3) was the moving force behind the violation of a constitutional right. Hicks-Fields v. Harris City, 860 F.3d 803, 808 (5th Cir. 2017). The "official policy" prong includes the decisions of a government's law makers, the acts of its policy-making officials, and practices so persistent and widespread as to practically have the force of law. Pena v. City of Rio Grande City, 879 F.3d 613, 621-22 (5th Cir. 2018).

To proceed beyond the pleadings stage, a complaint's "description of a policy or custom in its relationship to the underlying constitutional violation … cannot be conclusory; it must contain specific facts." Spiller v. City of Texas City, 130 F.3d 162, 167 (5th Cir. 1997). The Twombly standard discussed above "applies to municipal liability claims," so to survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Ratliff v. Aransas County, 948 F.3d 281, 284-85 (5th Cir. 2020).

2. Plaintiff's Allegations

Plaintiff alleged that the Arena does not have any written or official policy regarding the distribution of leaflets (¶ 19), and the letter from the general manager states that the Arena allows persons to distribute pamphlets so long as they do not interfere with the safe ingress or egress of guests. Plaintiff then alleged that the City has "a long-standing custom

of allowing police officers, employees and/or officials of [the Arena] to use their unfettered discretion to arbitrarily and capriciously remove individuals who are peacefully exercising their First Amendment rights from the [Arena] property." ¶ 20. Plaintiff also offered the following allegations relevant to these issues:

> 55. At all relevant times, Defendant the City did not have any official or unofficial viewpoint neutral policy regulating speech activities protected by the First Amendment to the United States Constitution and restricting access to the CenturyLink Center public sidewalks in the park in which the CenturyLink Center is located.
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> 56. Defendant City's custom or policy of requiring prior approval of a leaflet prior restraint on speech and, therefore, bears a "heavy presumption of unconstitutionality." Chiu v. Plano Independent School Dist., 339 F.3d 273, 280-81 (5th Cir. 2003).
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> 57. Defendant City's custom or policy of requiring prior approval of a leaflet before the leafleteer is allowed to distribute it on the CenturyLink property is facially unconstitutional because it is over-broad in that it does not provide for "specified brief period" of time within which the CenturyLink Center official shall approve or deny the request to distribute the leaflet on the CenturyLink Center property, and because it does not provide for expeditious judicial review, and that it does not provide that the censor bear the burden of going to court to suppress the speech. Freedman v. State of Md., 380 U.S. 51, 58-59 (1965).
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> 58. Defendant City's failure to have a policy, or by acquiescence in the arbitrary and capricious denial of citizens' First Amendment rights by the CenturyLink Center officials, or by failing to train its police officers, employees and officials that the Bossier City Arena, aka CenturyLink Center, is public property and a traditional public forum, has created an unconstitutional custom by the City of Bossier City, Louisiana. That unconstitutional custom or policy was the moving force behind the security officers of CenturyLink Center, police officers of the City, and Deputy Marshal of the City's, interference with Hershey's exercise of his First Amendment rights on the CenturyLink Center outdoor grounds.
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> 59. Defendant City's policy or custom as applied to Hershey is unlawful in at least the following ways:

a. It restricts more speech than necessary to achieve a significant government interest.
b. It restricts more speech than necessary to achieve a reasonable government interest.
c. It allows arbitrary and capricious enforcement.
d. It is based on content and viewpoint discrimination.
e. It utilizes prior restraint.
f. It preferentially allows commercial speech while prohibiting noncommercial speech.
g. It is not narrowly tailored to achieve a compelling, significant or legitimate government interest.
h. It provides no alternate channels for speech.

Plaintiff appears to be asserting claims in the alternative, which is allowed by Fed. R. Civ. Pro. 8(d)(2). He alleges on one hand that (1) the city has a policy of requiring prior approval of a leaflet, which he bases on the statement of an Arena security officer. On the other hand, he appears to take the Arena's general manager at her word that the public is allowed to distribute pamphlets, but he contends that the City has (2) a longstanding custom of allowing police officers and employees to use their unfettered discretion to remove persons from the property.

3. Prior Approval Policy

With respect to the alleged City policy of requiring prior approval of a leaflet, Plaintiff bases it only on the words of a security officer. He does not point to any alleged ordinance, regulation, or written policy enacted by the City. That leaves only the potential for an unwritten custom. "A city cannot be liable for an unwritten custom unless '[a]ctual or constructive knowledge of such custom' is attributable to a city policymaker." Pena, 879 F.3d at 623, quoting Hicks–Fields, 860 F.3d at 808. The complaint in Pena "invite[d] no more than speculation that any particular policymaker, be it the chief of police or the

city commission, knew about the alleged custom." Pena, 879 F.3d at 623. Thus, her allegation failed the second prong, which requires an allegation that the policy was promulgated by the municipal policymaker. Plaintiff's allegations are lacking in this same regard, so dismissal of this theory of municipal liability is warranted.

4. Custom of Unfettered Discretion

Plaintiff next contends that he has pleaded a claim that the City has a longstanding custom of allowing police officers to use unfettered discretion to remove persons from the Arena property. Once again, the complaint lacks any allegation that the City or any particular policymaker, whether it be the mayor, city council, or some other official, had actual or constructive knowledge of the alleged custom. Specific facts are necessary to plead a claim that goes beyond alleging the wrongdoing of an officer and asserts a viable claim of a widespread custom known to city officials that could result in municipal liability. Otherwise, the doctrine of respondeat superior has crept in where it is not allowed.

The allegation of a custom itself is also lacking in supporting allegations. The Fifth Circuit set forth the rules for such customs in Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc) and required: "A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Plaintiff's complaint describes only one incident where an officer allegedly exercised discretion to remove some who was handing out leaflets. "Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability." Bennett v.

City of Slidell, 728 F.2d 762, 768 n. 3 (5th Cir. 1984). Thus, "[a] customary municipal policy cannot ordinarily be inferred from single constitutional violations." Piotrowski v. City of Houston, 237 F.3d 567, 581 (5th Cir. 2001), citing Webster, 735 F.3d at 851. The facts offered in the complaint are not adequate to plead a plausible claim of an actionable municipal custom.

Conclusion

Plaintiff has alleged sufficient facts to overcome the forum and viewpoint discrimination challenges. But the city police officers are entitled to dismissal based on qualified immunity because Plaintiff has not made an adequate showing of clearly established law in the context of this case. The City of Bossier City is entitled to dismissal because the amended complaint does not allege sufficient facts to plead an actionable Monell claim of municipal liability.

Plaintiff has once amended his complaint, he did not seek leave to amend a second time when faced with the challenges presented by the motion to dismiss, and his memorandum in opposition to the motion to dismiss did not suggest that further amendment could cure the challenges. The court would have almost certainly granted leave to amend after the motion to dismiss was filed, but any request to amend after the court has invested time in making this report and recommendation will not be granted by the undersigned. Such post-recommendation requests to amend are heavily disfavored because they are considered sandbagging and result in serial motion practice and a great waste of the court's resources that could have easily been avoided.

Accordingly, it is recommended that the Motion to Dismiss (Doc. 19) be granted and that all claims against the City of Bossier City, Bobby Gilbert, and Daniel Stoll be dismissed with prejudice.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 23rd day of August, 2021.

Mark L. Hornsby
U.S. Magistrate Judge