No. 25-1389

In the Supreme Court of the United States

RICHARD HERSHEY,
Petitioner,
v.
CITY OF BOSSIER CITY, LOUISIANA, ET AL.,
Respondents.

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

BRIEF FOR THE BUCKEYE INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the principles of *Hope* v. *Pelzer* are limited to Eighth Amendment claims or extend to Free Speech and Free Exercise claims such that petitioner's constitutional claims should not be barred by qualified immunity?

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. Section 501(c)(3).

SUMMARY OF THE ARGUMENTS

Government officials who threaten a man for peacefully distributing literature on a public sidewalk should not receive the same qualified-immunity protection as a police officer's split-second, life-or-death decisions in the heat of the moment. Yet the current qualified immunity doctrine makes no distinction between the two. The Court should change that.

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

The court-made doctrine of qualified immunity to a claim under 42 U.S.C. § 1983 immunizes public officials from suit unless a reasonable official in the offending official's place would have been on notice that his or her action violated a "clearly established" constitutional right. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine, as applied to Section 1983, was born of the need to protect law enforcement officers' good-faith efforts to enforce the law while still protecting individuals' right to seek compensation for unconstitutional actions. But the doctrine has strayed far from that modest purpose. It now protects officials even when they act in bad faith, so long as no prior case involved the same factual setting. That result is especially difficult to justify because qualified immunity is not rooted in the Constitution, Section 1983's text, or the nineteenth-century legal tradition against which Section 1983 was enacted. Nor have the doctrine's modern policy justifications withstood scrutiny: Empirical evidence suggests qualified immunity rarely saves officials from discovery or trial. This case addresses that doctrinal failure because peaceful First Amendment expression should not lose protection merely because the facts are unique. The Court should clarify that *Hope*'s fair warning/obviousness principle applies when officials deliberately suppress clearly protected speech and religious exercise. See *Hope* v. *Pelzer*, 536 U.S. 730, 739–741 (2002). This protects government officials' good-faith actions and individuals seeking recompense for violations of their constitutional rights.

This case is an appropriate vehicle for that clarification. The First Amendment rights at issue are well established, and the challenged conduct was a considered, community caretaking decision, see *Caniglia* v. *Strom*, 593 U.S. 194, 196, 196 (2021), rather than a life-or-death emergency. The petition, therefore, cleanly presents whether an obvious First Amendment violation may be shielded by qualified immunity merely because no prior case involved the same factual setting.

ARGUMENTS

I. Introduction

Although a mere threat to arrest a man distributing literature outside of a concert does not evoke the visceral outrage of a police brutality case, it nevertheless calls on the Court to re-examine what may be "the most important doctrine in the law of constitutional torts." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010). The engrossing questions threaded through this case are whether non-emergency police or community caretaking actions that violate the rights to free speech and free exercise should receive the same protection as spur-of-the-moment, life-or-death decisions, especially when such life-or-death decisions would seldom implicate the First Amendment.

II. The current qualified immunity test is foreign to our Constitution, Section 1983's statutory text, and the foundational principles on which that text is built.

The Constitution embodies the rights of the American people, and Section 1983 makes liable "in an action at law, suit in equity, or other proper proceeding for redress," "[e]very person who," under the color of state law "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Yet, qualified immunity limits when an individual whose constitutional rights have been violated can seek redress under Section 1983.

As Justice Thomas has noted on several occasions, current "qualified immunity jurisprudence stands on shaky ground." *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., respecting the denial of certiorari) (citations omitted). Whether qualified immunity will apply as a defense to a Section 1983 civil rights claim "depends on the answers to two questions: (1) Did the officer's conduct violate a constitutional or statutory right? If so, (2) was that right clearly established at the time of the violation?" *Daugherty* v. *Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018) (citation omitted). Evaluation of a clearly established right hinges on whether a reasonable official in the defendant's position could have been on notice that the official's conduct violated existing law at the time of the events giving rise to the claim. *Harlow*, 457 U.S. at 818–819. If the facts do not support affirmative answers to both central questions, the official will be entitled to qualified immunity. See *Felders ex rel. Smedley* v. *Malcom*, 755 F.3d 870, 877–78 (10th Cir. 2014). But this standard does not stem from the Constitution or any statutory directive. See, *e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023) (attacking the flawed statutory interpretation used to create qualified immunity for Section 1983 claims); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405, 1440 (2019) (concluding that "neither the separation-of-powers principles nor the federalism concerns explored [ ] provide sufficient support for the *Harlow* standard as applied in . . . § 1983 suits"); see also Reinert, *supra*, at 203 n.3–4 (citing scholarly works on qualified immunity's inconsistency with Section 1983 and the Constitution); *Boyd* v. *United States*, 116 U.S. 616, 626 (1886) (discussing English damages actions against officials, which inspired the Fourth Amendment).

Not only is qualified immunity inconsistent with the Constitution and the text of Section 1983, but it is also inconsistent with the foundations of nineteenth-century tort law. By 1871, Congress knew how to include immunity provisions in federal statutes and had done so in other legislation, including legislation later upheld by this Court. For instance, the Habeas Corpus Suspension Act of March 3, 1863, included a clause that provided an absolute defense for any individual following an order of the President during the rebellion. See Act of Mar. 3, 1863, 12 Stat. 755, § 4; *Mitchell* v. *Clark*, 110 U.S. 633, 639–640 (1884). Including immunity provisions in law was also not an

American creation. The British Parliament included immunity provisions in several laws that preceded America's enactment of Section 1983. The Constables Protection Act of 1750 included indemnification for law enforcement acting under a justice's warrant as long as the plaintiff is allowed to inspect the warrant. Constables Protection Act 1750, 24 Geo. 2 c. 44, § 6 (Eng.). A near century later, Parliament also passed the Justices Protection Act of 1848, which functioned much like a good-faith immunity provision by permitting suits against justices only when they acted "maliciously, and without reasonable and probable cause." Justices Protection Act 1848, 11 & 12 Vict. C. 44, § 1 (Eng.).

Historically, legislatures, not courts, enacted both immunity and immunity-like protection. Northwestern Law Professor James Pfander has demonstrated that courts merely imposed liability on officers, whereas Congress would then decide whether to protect officers through indemnification. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic,* 85 N.Y.U. L. Rev. 1862, 1866–70 (2010). Illustratively, the authors used the example of Nathaniel Mitchell, the postmaster of Portland, Maine, in the 1830s. *Id.* at 1908–09. Mitchell was sued for malicious prosecution after he mistakenly accused an assistant postmaster of stealing mail. *Id.* at 1909. Although the Maine Supreme Court upheld a verdict against Mitchell, Congress—not the courts—later indemnified him because it viewed him as having acted in good faith and within the scope of his official instructions. *Id.* at 1909–10. That sequence illustrates the authors' broader point: Nineteenth-century courts determined liability, while Congress decided whether good-faith official conduct warranted protection from the financial consequences of that liability.

These examples underscore the textual problem with modern qualified immunity. When Congress or Parliament wanted to protect officers from liability, they did so expressly—either through statutory immunity provisions or through legislative indemnification after liability had been imposed. Section 1983 contains no comparable immunity clause, and this Court's early Section 1983 jurisprudence did not recognize a "good faith defense." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 60–61 (2018) (citing *Myers* v. *Anderson*, 238 U.S. 368, 378 (1915)). That defense was not recognized until *Pierson* v. *Ray*, 386 U.S. 547 (1967), ninety-six years after Section 1983's enactment. Congress's omission of an immunity provision from Section 1983, despite its demonstrated ability to create such protections elsewhere, strongly undermines the claim that modern qualified immunity is rooted in the statute's text.

III. Good faith is the foundational justification for qualified immunity.

The history of qualified immunity for those acting under the color of state law dates back over fifty years. In *Pierson* v. *Ray*, three policemen arrested fifteen white and black clergymen who engaged in peaceful civil disobedience by trying to use segregated facilities at a bus terminal in Jackson, Mississippi. *Id.* at 549. After a municipal justice convicted the clergymen for disturbing the peace, the clergymen sued the policemen under Section 1983. *Id.* The Court acknowledged that under the common law, the defendant officers lacked "absolute immunity," but allowed a defense of "*good faith and probable cause*." *Id.* at 556–57 (emphasis added). The good-faith test examined a defendant's *subjective* intent and the constitutionality of the challenged conduct. See *Harlow*, 457 U.S. at 815 ("Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' The subjective component refers to 'permissible intentions.'" (quoting *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975)).

In *Pierson*, the Court focused on the difficulty faced by law enforcement officers called on to enforce an unjust and potentially unconstitutional statute. The Court explained its good faith test in terms of allowing police officers to do their job without having to anticipate future court decisions:

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but

> that was later held unconstitutional on its face or as applied.

Pierson, 386 U.S. at 555. "The Court derived this defense from 'the background of tort liabilit[y] in the case of police officers making an arrest.'" *Baxter* v. *Bracey*, 590 U.S. 1011, 1012–13 (2020) (Thomas, J., dissenting from the denial of certiorari) (quoting *Pierson*, 386 U.S. at 556–57). Like other early immunity cases, the decision of how immunity would apply was "confined to certain circumstances based on specific analogies to the common law." *Id.* (Thomas, J., dissenting from the denial of certiorari).

Importantly, the *Pierson* Court's good-faith test was still rigorous enough to prevent officers from abusing the exception. The Court explained that while "a police officer is not charged with predicting the future course of constitutional law," the officers in *Pierson* did not merely argue that they believed in good faith that they were enforcing a statute that was valid at the time. Instead, the police argued that they arrested the ministers solely for the purpose of preventing violence. *Harlow*, 457 U.S. at 557. This Court noted that the petitioners' complaint alleged that no crowd was present, and there was no threat of violence or other public disturbance. Thus, while the good-faith test did not require police officers to guess at what a court might hold, it still required good faith in applying the law.

The workability and viability of the good-faith immunity test have been illustrated by the several states that have utilized it. Under Wyoming common law, courts ask whether the officer was acting in good faith and whether the officer's acts were reasonable under the circumstances. *Kanzler* v. *Renner*, 937 P.2d 1337, 1344 (Wyo. 1997). Iowa requires a defendant to prove that they exercised "all due care to conform with the requirements of the law." *Baldwin* v. *City of Estherville*, 915 N.W.2d 259, 260 (Iowa 2018). The Iowa Supreme Court has noted that it ordinarily regards "due care or objective good faith as more nuanced" than whether a law is clearly established because due care or objective good faith reflects several considerations. *Id.* at 279. "Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law." *Id.* And Ohio law provides no immunity for government employees whose "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code 2744.03(A)(6)(b). See *Cook* v. *Cincinnati*, 658 N.E.2d 814, 820–21 (Ohio 1st Dist. 1995).

IV. The abandonment of the good faith standard has created a convoluted and confusing rule.

In *Harlow*, the Court reevaluated the "good faith" defense. The Court found that exposing such defendants to trial would entail financial costs and distract officials. *Harlow*, 457 U.S. at 816. And the defendants' "malicious intention" could not be determined without discovery. *Id.* The Court determined that the time and expense of discovery and removing officers from their law enforcement duties created "excessive disruption of government" and did not facilitate the expeditious resolution of "insubstantial claims." *Id.* at 818. Accordingly, the Court revamped its judicially created qualified immunity doctrine by removing subjective intent from the conditions for qualified immunity. *Id.* The Court expected that its modified doctrine would protect officials performing discretionary functions from civil damages, provided the official's conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

Lower courts used the new two-part evaluation to determine whether qualified immunity applied: (1) whether the defendant's conduct reflected a constitutional violation and (2) whether the plaintiff's constitutional right in question was clearly established. However, depending on the facts of each case, the clearly established prong often provides a simpler path to resolution, incentivizing courts to address it first. See *Katz* v. *United States*, 194 F.3d 962, 970 (9th Cir. 1999), *rev'd Saucier* v. *Katz*, 533 U.S. 194 (2001) (assessing the clearly established prong first before answering whether a Fourth Amendment violation occurred).

Qualified immunity has evolved through a crooked path, landing far from the original justification of protecting government officials from liability for good-faith actions, grounded in the law, but not protecting bad-faith actions. While the current two-part test may have been an effort to objectively measure good faith, it has not met that objective. The supposed objective test has resulted in a rule that "even the official who acts in bad faith is entitled to the defense if a different official could have reasonably made the mistake." Baude, *supra*, at 60–61 (discussing the evolution and elimination of the good faith defense). Arguably, qualified immunity allows officials to act in bad faith if the official can colorably claim that "No court has said I can't do this exact thing." Indeed, that is what at least some lower courts have decreed:

> In deciding whether a reasonable corrections officer in a defendant's situation would have known that his or her conduct violated a federal right, it is impermissible to consider the defendant's subjective state of mind—regardless of whether the defendant was acting in good faith, *or was actually intending to harm the plaintiff*.

Henry v. *Dinelle,* 929 F. Supp. 2d 107, 122 (N.D.N.Y. 2013) (emphasis added), *aff'd*, 557 F. App'x 20 (2d Cir. 2014). It seems unlikely that this Court wants to countenance blatant bad faith or intentional harm, but the current qualified immunity doctrine allows just that.

Partly because of the abandonment of the good faith requirement, the "qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith." Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11 (2017). And the current doctrine has not met its objective of reducing discovery and minimizing interference with governmental duties.

V. The reasons offered for abandoning the good faith standard have not withstood the test of time.

The Court's qualified immunity decisions "have relied on the assumptions that discovery and trial impose substantial burdens on government officials, and that qualified immunity can shield government officials from these burdens." *Id.* at 18. Those interests also motivated the Court "to allow interlocutory appeals of qualified immunity denials." *Id.* at 17 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 526–27 (1985)).

> If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants denied qualified immunity could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court concluded, qualified immunity "is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."

Id. at 18 (citing *Mitchell*, 472 U.S. at 526–27).

While the purported government interest in efficiency and avoiding unnecessary costs seems sound on its face, it finds little empirical support. "Plaintiffs, defendants, and trial courts are likely to expend substantial resources simply litigating the qualified immunity defense—an elaborate sideshow, independent of the merits, that in many cases will do little to advance or accelerate resolution of the legal claims." Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 99 (1997). Empirical data tend to show that qualified immunity as it is practiced today offers little public benefit to offset the risk that citizens who have suffered a constitutional tort may lose their right to sue if their facts do not precisely match an earlier case.

In one study, UCLA Professor Joanna Schwartz analyzed 1,183 Section 1983 cases and found that "qualified immunity rarely functions as expected." Schwartz, *supra*, at 26. Professor Schwartz found:

- "Qualified immunity could not be raised in more than 17% of the cases in [the] dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer or otherwise respond." *Id.* at 26.
- "Defendants raised qualified immunity in 37.6% of the cases in [the] dataset in which the defense could be raised." *Id.*
- "Defendants were particularly disinclined to raise qualified immunity in motions to dismiss: they did so in only 13.9% of the cases in which they could raise the defense at that stage." *Id.*
- "Courts granted (in whole or part) less than 18% of the motions that raised a qualified immunity defense. Qualified immunity was the reason for dismissal in just 3.9% of the cases in [the] dataset in which the defense could be raised, and just 3.2% of all cases in [the] dataset." *Id.* at 26–27.

Schwartz also found that qualified immunity was more often raised at summary judgment, after discovery had already occurred, because courts often need a developed factual record to determine whether the defense applies. See *id.* at 48–49. Moreover, "grants of qualified immunity at summary judgment relatively rarely achieved their goal of protecting government officials from trial." *Id.* at 49. Only 31 of the 1,183 cases in Professor Schwartz's dataset, "amounting to just 2.6%," resulted in a grant of qualified immunity by the district court or the court of appeals at the summary judgment stage. *Id.*

Given the above analysis, the argument that qualified immunity saves time and money is unpersuasive. If qualified immunity is denied—usually after time-consuming discovery and motion practice—the subsequent appeal is likely to last another year. Similarly, if qualified immunity is granted after the discovery and motion practice, the plaintiff can appeal that final judgment.

But if qualified immunity is so rarely granted, according to Schwartz, then is there a need to tinker with the doctrine? Yes. Under the current test, the risk that a worthy Section 1983 claim will be dismissed outweighs the purported but often unrealized benefits of government savings and judicial economy.

Recent statutes in New Mexico and Colorado allowing suits against police officers who violate state constitutional rights illustrate that these predicted costs may be overstated. In a separate study, Professor Schwartz, joined by Professor Pfander and Cardozo Law Professor Alexander Reinert, analyzed the before and after effects of state immunity reforms. The study compared New Mexico and Colorado with Washington and Utah—states that continue to recognize qualified immunity defenses. Alexander A. Reinert, Joanna C. Schwartz & James E. Pfander, *Watching the Sky Not Fall: A Study of State Qualified Immunity Reforms* 4–5 (2026), https://dx.doi.org/10.2139/ssrn.6342579. The study showed no discernible difference in the associated costs or outcomes between the two groups. *Id.* Specifically, the study found no significant difference in the number of lawsuits filed against law enforcement, litigation expenses, or police officer retention rates. *Id.* at 26–39.

Improving government efficiency and increasing law enforcement retention rates are laudable policy objectives—but the available empirical evidence does not show that qualified immunity advances those goals. Rather, the evidence suggests that eliminating or limiting qualified immunity at the state level has had negligible effects on those policy concerns. This Court should not continue to rely on fears of excessive litigation, distracted officials, or reduced law-enforcement effectiveness without empirical support.

VI. The current qualified immunity doctrine chills the exercise of First Amendment rights.

The Court's qualified immunity test is a particularly poor fit in First Amendment cases. For decades, the Court has repeatedly decried government actions that might chill speech, whether intentional or incidental. "The very essence of a chilling effect is an act of deterrence." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. Rev. 685, 689 (1978).

> Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should. This is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.

Id. at 693.

This case presents a free-speech problem sharpened by free-exercise concerns. This Court has protected the distribution of religious literature in public-facing spaces. See *Marsh* v. *Alabama,* 326 U.S. 501, 504 (1946) (noting that had the appellant been arrested for distributing religious materials in violation of a municipal ordinance, "it would have been *clear* that appellant's conviction must be reversed" (emphasis added)). And in *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943), the Court held that an individual who is "rightfully on a street which the state has left open to the public" retains the right to communicate ideas through "handbills and literature." The same conduct also implicates the Free Exercise Clause because "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) (citations omitted). Taken together, these cases make it difficult to understand why officers lacked fair notice that suppressing the distribution of peaceful literature in a public space would violate the First Amendment. Yet the result shows how qualified immunity can still shield government actors who chill clearly protected First Amendment activity by law-abiding citizens.

As Justice Thomas pointed out, "the one-size-fits-all doctrine is also an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions." *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., respecting the denial of certiorari) (citation omitted). He further noted that this Court has "never offered a satisfactory explanation to this question." *Id.* at 2422 (Thomas, J., respecting the denial of certiorari) (citation omitted). This case illustrates that oddity. Under the current test, security guards and police officers who confront a man distributing literature outside a concert receive the same doctrinal protection as first responders making split-second decisions in emergencies. Qualified immunity's traditional policy rationale is to allow front-line government officials to do their jobs without fear of litigation while avoiding unnecessary legal expense for the taxpayers. But that rationale does not explain why an officer responding to an emergency should receive the same protection as an officer confronting a man engaged in peaceful First Amendment expression.

It is hard to justify this identical treatment of immunity when we do not treat these situations identically elsewhere. Indeed, "[i]t is not immediately obvious what purpose qualified immunity should serve in such circumstances. These officials had sufficient 'time to make calculated choices.'" *Villarreal* v. *City of Laredo, Texas*, 134 F.4th 273, 283 (5th Cir. 2025), *cert. denied sub nom. Villarreal* v. *Alaniz*, 146

S. Ct. 939 (2026). In *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), Justice Scalia explained that qualified immunity is unavailable only when the violated right had "been 'clearly established' in a more particularized, and hence more relevant sense." Although the Court added that the official's specific conduct need not previously have been "held unlawful," he emphasized that the clearly established right must be defined with specificity. *Id.* But applied rigidly in this context, *Anderson's* particularity requirement risks insulating government actors who chill peaceful First Amendment expression simply because no prior case involved the same factual setting.

Hope seems to hearken back to *Pierson's* "good faith" defense. *Hope* rejected that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," but rather qualified immunity attaches if "in the light of pre-existing law the unlawfulness" is "apparent." *Hope*, 536 U.S. at 739 (citations omitted). And the Court emphasized that

> "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional 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.'"

Id. at 741 (quoting *Anderson*, 483 U.S. at 640). See also *United States* v. *Lanier*, 520 U.S. 259, 270–71

(1997) ("[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.").

Pierson did not insulate officers from suit merely because no prior case involved the same facts. To the contrary, *Pierson* allowed the Section 1983 claims against the officers to proceed while recognizing only a limited good-faith and probable-cause defense rooted in the common law of false arrest. See *Pierson*, 386 U.S. at 555–57. The question is not whether an officer can identify a prior case with materially identical facts, but whether the unlawfulness of the conduct was apparent enough that the officer had fair notice. See *Hope*, 536 U.S. at 739–41.

Hope's fair warning/obviousness principle is the flip side of *Pierson*'s "good faith" coin. No matter which side of the coin you see, a government official acting with fair notice that the official is violating someone's First Amendment rights is not acting in good faith. Such an official should not be shielded by qualified immunity.

VII. This case is an ideal vehicle to apply *Hope's* fair warning standard to obvious First Amendment violations.

This case is an especially clean vehicle for addressing the question presented. The facts do not involve violence, danger, or a rapidly evolving police encounter. Nor do they require the Court to second-guess split-second judgments made during an emergency. Instead, this case involves the alleged suppression of peaceful speech and religious exercise on a public sidewalk.

The legal issue is equally clean. Petitioner does not ask this Court to decide whether officers made a reasonable mistake in applying uncertain law during a dangerous encounter. He asks whether an obvious First Amendment violation may be shielded from damages liability merely because no prior case involved the same factual setting. That question sits at the heart of *Hope* and the modern qualified immunity doctrine. If obvious constitutional violations of First Amendment rights can be insulated from suit unless a plaintiff identifies factually identical precedent, then *Hope's* fair-warning rule is effectively a nullity and those rights are chilled—as they were here.

CONCLUSION

Our indispensable right of free speech should not be so flimsy as to allow government abuse with no consequence. See generally Jonathan Turley, *The Indispensable Right: Free Speech in the Age of Rage* 2 (Simon & Schuster 2024). If the Court retains the current qualified immunity test overall, it should clarify that officials' immunity is not so strong as to preclude their premeditated encroachments on speech—especially when they act in bad faith. Allowing abusive government officials to continue their abuse without consequences denigrates our claimed valuation of free speech. Legal punishment is designed to deter further bad behavior. See, *e.g.*, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence."). Similarly, allowing harmful behavior to go unpunished encourages more of the same. Under the current qualified immunity doctrine, a government official claims there is no exact match to his actions. If that is so, the adjudicating court grants qualified immunity and never determines that the bad acts are legally impermissible. So the bad acts continue. See, *e.g.*, *Camreta* v. *Greene*, 563 U.S. 692, 706 (2011) (noting that without resolving the constitutional claim, the government official will persist in the challenged actions).

The Court should grant the petition to clarify how the qualified immunity test should apply to obvious infringements on First Amendment rights.

Respectfully submitted,

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