

No. 25-1389

In the Supreme Court of the United States

RICHARD HERSHEY,

Petitioner,

v.

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

Respondents.

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

**BRIEF OF THE MANHATTAN INSTITUTE
AS *AMICUS CURIAE*
SUPPORTING PETITIONERS**

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July 14, 2026

QUESTION PRESENTED

This case arises from the removal of a peaceful religious leafleteer from a public sidewalk outside a public arena, while a nearby commercial leafleteer was allowed to continue distributing materials.

The question presented is:

Whether the principles of *Hope v. Pelzer*, 536 U.S. 730 (2002), are limited to Eighth Amendment claims or extend to Free Speech and Free Exercise claims such that petitioner's constitutional claims should not be barred by qualified immunity.

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INTEREST OF *AMICUS CURIAE*¹

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility, to advance the flourishing of America’s great cities.

This case concerns MI because our constitutional rights are a core component of a free and thriving society. For those rights to work, however, state-actors should sometimes face consequences for violating them. That’s particularly true when the scope of a right has been clearly articulated by this Court and other federal courts for decades in hundreds of cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Qualified immunity has hard cases, but this is not one of them. Some of the doctrine’s genuine difficulty arises in the settings that recur on this Court’s docket: split-second uses of force, uncertain probable-cause judgments, prison-security emergencies, or genuinely exigent crowd-control problems. None of those are present here. Other difficulties arise when a right is ambiguous and hasn’t been clearly defined withing a jurisdiction. That’s not present here, either. On the allegations the Court must accept as true, officials threatened to arrest a peaceful religious leafleteer on a public sidewalk—where he obstructed no one and violated no written rule—while permitting a nearby commercial leafleteer to continue undisturbed.

¹ Rule 37 statement: All parties were timely notified of *amicus curiae*’s intent to file this brief. No counsel for any party authored this brief in any part; nobody other than *amicus* made a monetary contribution to fund its preparation or submission.

Hope v. Pelzer holds that officials may have fair warning that conduct is unconstitutional even without a prior case involving materially identical facts. 536 U.S. 730, 741 (2002). That principle is trans-substantive—doesn’t vary among substantive contexts—which the petition demonstrates at length. *Amicus* writes separately to make a narrower and more practical point: the Fifth Circuit’s materially-identical-facts requirement does not merely misread *Hope*, but inverts it. The absence of a factually identical precedent is, in cases like this one, evidence that the violation was obvious—too obvious for any prior official to have tried it, too informal to have generated a record, and too immediately effective to have produced a published opinion. That inversion is at its most destructive where speech is suppressed informally, on the spot, by command rather than written rule—the very setting least likely to leave the paper trail the Fifth Circuit demands. A rule that treats silence as immunity makes the first obvious violation the safest one.

And that inversion carries a greater cost. Citizens cannot order their conduct around constitutional rules that protect only the second person to suffer an obvious violation. The injury here is sharpened by the government’s own word: the arena’s manager represented that peaceful pamphleteering was permitted so long as it did not impede ingress or egress, and Hershey alleges he complied. When officials nonetheless ordered him to leave because his literature “had not been approved,” they weren’t enforcing any rule. Instead, they replaced a public rule with an undisclosed discretionary veto and then claimed immunity because no earlier citizen had been subjected to the same maneuver.

This case is the paradigmatic case of a government official violating an obvious constitutional right, and a clean vehicle. It carries none of the complications that attended *Villarreal v. Alaniz*, No. 25-29 (cert. denied Mar. 23, 2026): no warrant, no intermediary magistrate, no probable-cause dispute, no criminal statute, no retaliatory-arrest overlay. The qualified-immunity question is presented in its simplest possible form.

ARGUMENT

I. *HOPE*’S “OBVIOUSNESS EXCEPTION” PREVENTS QUALIFIED IMMUNITY FROM BECOMING A “FIRST-VICTIM” RULE SUCH THAT THE FIRST VIOLATION IS EXCUSED DUE TO A LACK OF MATERIALLY IDENTICAL PRECEDENT

In *Hope v. Pelzer*, this Court found that the Eighth Amendment violation was “obvious on the facts alleged.” 536 U.S. 730, 733 (2002). This obviousness principle is not an Eighth Amendment carveout but a general principle about notice. This Court has rejected “the proposition that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). General constitutional rules can themselves supply fair warning when they “apply with obvious clarity to the specific conduct in question.” *United States v. Lanier*, 520 U.S. 259, 270–71 (1997). *Hope* carried that fair-warning logic into §1983, holding that officials can be “on notice that their conduct violates established law even in novel factual circumstances.” 536 U.S. at 741. And *Taylor v. Riojas* confirmed the principle remains live, summarily reversing a grant of qualified immunity because

“any reasonable officer should have realized” the conduct was unconstitutional even without a factually identical case. 592 U.S. 7, 8–9 & n.2 (2020).

Hope doesn’t ask whether an earlier official committed the same violation in the same manner, but whether existing law gave fair warning. That distinction matters most when the violation is obvious enough that few officials would attempt it—and when, if attempted, it ends the constitutional exercise before any record can be made.

Yet the Fifth Circuit’s rule treats the absence of a factually identical precedent as proof that the law was unclear—an inference that’s not always sound. Some violations don’t produce precedent because they are too obvious to be repeated often enough to generate appellate litigation. As then-Judge Gorsuch observed, “the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing”; it would be “remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.” *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.).

This case adds a second reason why there’s a lack of a materially identical precedent. Informal speech suppression is uniquely unlikely to create the very precedent the Fifth Circuit demands. A written policy, permit denial, prosecution, or formal exclusion order may leave a record to review. But an on-the-spot command to stop leafletting or face arrest often ends the speech immediately—without a citation, written denial, or appealable decision. Moreover, litigation is expensive, and most people who are commanded to stop a First Amendment-protected activity without an ar-

rest or other legal consequences will not pursue costly litigation. The absence of a materially identical case may thus reflect not constitutional uncertainty, but the practical success of the suppression itself.

That’s the inversion at the heart of this case. A materially-identical-precedent requirement can make the first effective censor the safest one. The official who violates a right in a familiar way may be liable; the official who violates it in an obvious but informal way receives immunity simply because no prior official generated the same litigation record. *Hope* exists to keep novelty from becoming immunity.

II. THIS IS THE PARADIGMATIC OBVIOUS CASE: PEACEFUL RELIGIOUS LEAF-LETTING ON A PUBLIC SIDEWALK WITHOUT VIOLATING ANY NEUTRAL RULE

The right at issue here is not “free speech” in the abstract. That level of generality would invite the response that no official could be on notice. But neither is it something more specific like “the right to distribute these particular religious leaflets outside this particular arena during this particular concert.” The Fifth Circuit’s materially-identical-facts game lives at that microscopic level—and it’s not what *Hope* requires. The correct framing sits in the middle. Petitioner has the right to engage in peaceful religious leafletting on a public sidewalk without being singled out for removal under threat of arrest while comparable commercial leafletting is allowed to continue, absent a neutral and preexisting time, place, or manner rule.

That formulation includes every legally relevant circumstance—public forum, peaceful conduct, selective enforcement, the absence of a neutral rule—with-

out requiring a previous case involving the same arena, the same concert, the same pamphlet, and the same property-management arrangement.

This case is not operating at the frontier of First Amendment doctrine. Peaceful hand-billing and religious-leaflet distribution on public walkways are among the oldest and most settled forms of protected speech. A person “rightfully on a street which the state has left open to the public” has “the constitutional right to express his views in an orderly fashion,” and that right “extends to the communication of ideas by handbills and literature as well as by the spoken word.” *Jamison v. Texas*, 318 U.S. 413, 416 (1943). The “hand distribution of religious tracts is an age-old form of missionary evangelism,” entitled to the same constitutional dignity as worship from the pulpit. *Murdock v. Pennsylvania*, 319 U.S. 105, 108–09 (1943). Public sidewalks are quintessential traditional public fora, and leafletting upon them is core protected expression. *United States v. Grace*, 461 U.S. 171, 176, 179 (1983). Nearly a quarter-century ago, this Court confirmed that religious proselytizing and pamphleteering remain protected even when the government regulates them through a formal permit regime. *Watchtower Bible & Tract Society of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160–69 (2002).

The officers here didn’t need a case involving Brookshire Grocery Arena, this concert, this pamphlet, or this leafleteer. For more than 80 years, this Court has treated peaceful distribution of religious literature in public places as core First Amendment activity. The alleged violation was not obscure because no prior case involved this venue; it was obvious because the constitutional rule never turned on the venue at all.

Moreover, the absence of a neutral preexisting rule distinguishes this case from the genuinely hard public-forum cases. Those typically involve written rules, permit schemes, fixed-booth assignments, or content-neutral time, place, and manner restrictions—measures that present real line-drawing questions about which a reasonable official might err. *Heffron* is the paradigm. There, the Court upheld a neutral state-fair rule requiring solicitation and distribution from fixed locations, applicable to all comers. *Heffron v. Int’l Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

This is not *Heffron*. The alleged rule here was not a written or neutral time, place, or manner restriction applicable to everyone. It was an on-the-spot command directed at one speaker: the religious leafleteer must leave, while the commercial leafleteer can stay. *Heffron*’s difficulty was that a neutral rule existed and had to be evaluated. Here, the question is no longer “where is the line defining the forum?” or “what is the neutral rule the authorities were applying?,” but “why was this speaker removed while another remained?”

On the allegations that this Court must accept as true: Hershey did not obstruct ingress or egress; he created no disturbance; a nearby commercial leafleteer distributed radio-station advertisements; officers removed Hershey but allowed the other leafleteer to continue; and Officer Harvey acknowledged that he didn’t know whether the commercial literature had been approved, but knew that Hershey’s religious literature had not been. *Hershey v. City of Bossier City*, 156 F.4th 555, 562 (5th Cir. 2025), reh’g denied, 163 F.4th 976 (5th Cir. 2026). The exclusion of speech because of its religious perspective is viewpoint discrimination, which ranks among the gravest First Amendment of-

fenses. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

Brister confirms both sides of the line: officials may impose reasonable rules that preserve access to sidewalk-like public spaces that remain protected forums, while speakers cannot be chilled by invisible boundaries. *Brister v. Faulkner*, 214 F.3d 675, 681–83, 685 (5th Cir. 2000). Here, Hershey alleges no obstruction. This is not a case in which officials enforced a neutral crowd-flow rule against all passers-by near an entrance. Hershey did not obstruct ingress or egress, did not create a disturbance, and was removed while another leafleteer was permitted to continue.

This “obviousness” problem is especially acute where the government’s own stated practice permits the citizen’s conduct. The arena’s manager represented that members of the public were free to engage in peaceful pamphlet distribution so long as they didn’t interfere with ingress or egress. *Hershey*, 156 F.4th at 569. Hershey alleges that he didn’t interfere with either. When officials then threatened him with arrest because his religious literature “had not been approved,” the injury was not merely that officers enforced a rule selectively. It was that they replaced a public rule with an undisclosed discretionary veto.

That is the institutional core of this case, and it does not depend on sentiment. Citizens can’t conform their conduct to hidden discretionary commands. A constitutional order that lets officials announce one rule but enforce another—against disfavored speech, on the spot, with handcuffs displayed—doesn’t ask too little of its citizens; it asks the impossible. “It wasn’t approved” isn’t a neutral rule; it’s the absence of one.

III. THE FIFTH CIRCUIT'S RULE IS ESPECIALLY DESTRUCTIVE WHERE SPEECH IS SUPPRESSED INFORMALLY

Informal censorship rarely establishes legal precedent. A statute, ordinance, permit denial, prosecution, or written policy leaves a record. It can be challenged, reviewed, and reduced to a published opinion. But an officer's "leave or be arrested" command leaves little behind. The speaker departs; no citation issues; no written denial exists; no appellate precedent follows. The censorship is complete before the legal system ever sees it. *Cf. Camreta v. Greene*, 563 U.S. 692, 706 (2011) (quoting *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (explaining that resolving qualified-immunity cases solely on the clearly-established-law prong "may frustrate 'the development of constitutional precedent'"); *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965) (requiring procedural safeguards where official restraint may suppress speech before judicial review); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (invalidating licensing discretion that burdened speech without adequate objective standards).

The absence of precedent in cases like this is therefore not evidence that the law was unclear. It may instead reflect that the censorship was informal, immediate, and effective. If qualified immunity then demands a prior materially identical case, the very informality that makes the violation effective also makes it remediless. But *Hope* rejects that trap: officials may have fair warning that conduct is unlawful even in "novel factual circumstances." 536 U.S. at 741.

Indeed, the materially-identical-facts rule rewards the most successful censors. The official who suppresses speech without writing anything down, issuing

a citation, or invoking a formal rule makes it less likely that any future plaintiff will ever find a “materially identical” case. The rule thus rewards the form of censorship least likely to be reviewed—and the effect reaches far beyond religious leafletting.

The same logic would immunize a protester told to leave a sidewalk, a journalist ordered to stop recording, a canvasser threatened with arrest, or a political advocate removed while favored speakers remain. In each setting, the official’s command may be too informal to generate a record and too effective to generate a case. A doctrine that treats that absence of precedent as immunity does not merely fail to deter censorship. It protects the form of censorship least likely ever to be reviewed. There’s no limiting principle that confines the harm to religious speech; the rule’s logic protects informal suppression precisely because it’s least likely to generate the precedent the rule demands.

This Court has already applied the obviousness principle to threatening but informal commands. In *Sause v. Bauer*, it reversed a grant of qualified immunity where officers allegedly ordered a woman to stop praying, explaining that such an order would violate the First Amendment if it lacked a legitimate law-enforcement justification. 585 U.S. 957, 958–59 (2018) (per curiam). *Sause* confirms that obviousness can operate in the First Amendment context. The Court did not require a prior case involving officers interrupting prayer in precisely the same posture. It treated the relevant question as whether the alleged order, absent a law-enforcement justification, would plainly burden First Amendment rights. The same logic applies here: peaceful leafletting on a public sidewalk, unobstruc-

tive and apparently singled out for disfavored treatment, presents at least as obvious a violation.

IV. THIS CASE IS A CLEAN VEHICLE THAT REMOVES *VILLAREAL*'S COMPLICATIONS

This Court recently declined review in *Villarreal v. Alaniz*, No. 25-29, 607 U.S. ____ (2026) (cert. denied Mar. 23, 2026) (Sotomayor, J., dissenting). Whatever vehicle concerns may have attended that case, this case removes them. *Villarreal* arrived encumbered with two arrest warrants, a warrant-issuing magistrate, a probable-cause dispute, a criminal statute governing the solicitation and receipt of nonpublic government information, and a retaliatory-arrest frame layered atop the immunity question. *See Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024) (en banc).

This case carries none of that. There's no arrest warrant, no warrant-issuing magistrate, no independent-intermediary issue, no probable-cause question, no criminal statute governing access to government information, and no retaliatory-arrest overlay. The question is presented in its simplest form: whether *Hope* applies when officials allegedly suppress peaceful religious leafletting on a public sidewalk in the absence of any neutral rule or exigency.

Moreover, the opinions below show both confusion in the lower courts and how the Fifth Circuit's approach to clearly established law has displaced the obviousness inquiry. Judge Ho wrote that, "if it were up to" him, Hershey's claims against the individual officers and security guards "would proceed to trial," but that recent Fifth Circuit precedent "force[d]" the court to grant qualified immunity. *Hershey*, 156 F.4th at 557 (Ho, J., concurring). Judge Dennis would have denied

qualified immunity because, taking the complaint’s allegations as true, Hershey pleaded “a straightforward claim of viewpoint discrimination in a traditional public forum,” and “[a]ny reasonable officer would have understood that ejecting Hershey while permitting another leafleteer to remain violated the First Amendment.” *Id.* at 565 (Dennis, J., concurring in part and dissenting in part). Judge Richman, by contrast, would have affirmed because she concluded that “the forum status of the space in question was not clearly established,” that the complaint’s viewpoint-discrimination theory “depend[ed] on speculation,” and that general First Amendment principles did not clearly establish what officers were required to do “in circumstances similar to those existing at the Center during the Winter Jam concert.” *Id.* at 572–74 (Richman, J., concurring in part and dissenting in part).

That division doesn’t make the right less important or less clearly grounded in this Court’s jurisprudence. It shows how the Fifth Circuit’s rule converts an obvious public-forum violation into an artificial search for a prior case involving the same arena, the same sidewalk, and the same form of censorship. The fair-warning question should be whether reasonable officials had notice that selective suppression of peaceful religious leafletting on a public sidewalk was unconstitutional, not whether an earlier officer had already committed the same violation in the same setting.

CONCLUSION

Citizens don’t experience constitutional rights as entries in a precedent database. They experience them in public places: on sidewalks, in parks, at protests, in prayer, in leafletting—in ordinary encounters with of-

officials who either respect constitutional boundaries or do not. Qualified immunity shouldn't turn those rights into a waiting list, unenforceable until some earlier citizen has already suffered the same obvious violation and carried it through appeal.

In other words, a right that protects only the second person to suffer an obvious violation is not a right citizens can rely on. It's a waiting list—and no one should have to be the first name on it before the Constitution applies. The petition should be granted.

Respectfully submitted,

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July 14, 2026