No. _____

In The
Supreme Court of the United States

ANTHONY NOVAK,

Petitioner,

v.

CITY OF PARMA, OHIO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Anthony Novak created a parody Facebook page to mock his local police department in Parma, Ohio. Novak published six posts on the page, deriding the department through obvious parody. For his speech, respondents searched, seized, jailed, and prosecuted Novak for a felony under a broadly written Ohio law prohibiting the use of a computer to "disrupt" or "interrupt" police functions. A jury acquitted Novak after trial.

When Novak sued for the violation of his First and Fourth Amendment rights, the Sixth Circuit found that there was probable cause to believe Novak's protected speech was criminal and held, joining a growing circuit split, that the officers were entitled to qualified immunity for their violation of Novak's rights.

The questions presented are:

1. Whether an officer is entitled to qualified immunity for arresting an individual based solely on speech parodying the government, so long as no case has previously held the particular speech is protected.

2. Whether the Court should reconsider the doctrine of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioner is plaintiff Anthony Novak. Respondents are the City of Parma, Ohio; Kevin Riley; and Thomas Connor.

RELATED PROCEEDINGS

U.S. District Court for the Northern District of Ohio:

Novak v. *City of Parma*,
No. 17-CV-2184 (Apr. 5, 2018; Feb. 24, 2021)

U.S. Court of Appeals for the Sixth Circuit:

Novak v. *City of Parma,*
No. 18-3373 (July 29, 2019)

Novak v. *City of Parma*,
No. 21-3290 (April 29, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Anthony Novak was arrested by Ohio police for parodying them on Facebook. Although the Sixth Circuit had previously acknowledged that Novak's mockery was the sort of government ridicule that "holds an important place in American history and tradition," Pet. App. 81a, the court held below that the same mockery supported probable cause for Novak's arrest, dismissing his claims under the First and Fourth Amendments. *Id.* at 8a–10a. Employing an impossibly granular interpretation of "clearly established law" in the face of obvious First Amendment violations, the court granted police qualified immunity for violating Novak's rights.

The First Amendment demands the courts "give the benefit of the doubt to speech, not censorship." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007) (opinion of Roberts, C.J.). But qualified immunity inverts that relationship in at least three circuits. The Sixth, Eighth, and Eleventh Circuits grant officials qualified immunity for First Amendment violations disguised as searches and seizures justified by probable cause under broadly written laws. In those circuits, censorship-by-arrest prevails. Three other circuits prioritize speech over immunity. The Fifth, Ninth, and Tenth Circuits look beyond pretext and deny qualified immunity to officials who should have known that their actions violated the First Amendment. See Reasons, Section I, *infra*.

This split is illustrated by comparing Judge Thapar's decision for the Sixth Circuit below and Judge Ho's decision for the Fifth Circuit in *Villarreal*

v. *City of Laredo*, 44 F.4th 363 (5th Cir. 2022). In both cases: (1) the plaintiffs were engaged in speech protected by the First Amendment; (2) police relied on broad interpretations of vague state statutes to arrest the plaintiffs for the protected speech; (3) the arrests were the result of slow and deliberate, rather than split-second, decision making; (4) prosecutors approved the police action and prosecuted the plaintiffs; and (5) judges warranted the arrests. Yet the Fifth Circuit rejected the existence of probable cause and denied the officers qualified immunity because their actions obviously violated the First Amendment, while the Sixth Circuit did precisely the opposite. Compare Statement, Section III, and Reasons, Sections I(A)(i), (B)(i), *infra*, with Pet. App. 25a–26a.

On the interaction of qualified immunity and the First Amendment, the circuits are split. This Court's guidance is needed to restore uniformity, and this case is a good vehicle to do so.

Alternatively, the Court should grant certiorari to reconsider the doctrine of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Pierson* v. *Ray*, 386 U.S. 547 (1967). The Court has recently proclaimed that it must follow congressional direction in deciding whether and how constitutional claims may proceed. See *Egbert* v. *Boule*, 142 S. Ct. 1793 (2022). Yet through the doctrine of qualified immunity the Court has discarded the congressional direction given in Section 1983: "*Every person* who under color of any statute of any State subjects any other person to the deprivation of any rights secured by the Constitution *shall be liable* to the party injured." 42 U.S.C. 1983

(omissions not indicated and emphases added). See Reasons, Section III, *infra*.

OPINIONS BELOW

The opinion of the circuit court, Pet. App. 1a, is reported as *Novak* v. *City of Parma*, 33 F.4th 296 (6th Cir. 2022). The opinion of the district court, Pet. App. 27a, is not reported but is available electronically as *Novak* v. *City of Parma*, 2021 WL 720458 (N.D. Ohio Feb. 24, 2021).

JURISDICTION

The Sixth Circuit entered its decision below on April 29, 2022. Justice Kavanaugh granted a 60-day extension of the period for filing this petition on June 21, 2022. Petitioner timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution prohibits any law "abridging the freedom of speech, or of the press."

* * *

The Fourth Amendment to the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

* * *

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute * * * of any State * * * 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 and laws, shall be liable to the party injured in an action at law[.]
>
> * * *

Section 2909.04(B) of the Ohio Revised Code provides: "No person shall knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations."

STATEMENT

I. Police search, arrest, jail, and prosecute Anthony Novak for making fun of them on Facebook.

On March 1, 2016, Anthony Novak anonymously published a Facebook page parodying the Parma, Ohio, Police Department. Pet. App. 30a. Novak's page had the same name, cover photo, and profile photo as the department's official page, but it was designated a "Community" page—not the "Police Station-Government Organization" designation held by the department's real page—and it lacked the official "blue

checkmark" verifying it as an official page. *Id.* at 30a–31a. The page also displayed the satirical slogan: "We no crime." *Id.* at 115a.

During the 12 hours the page was online, Novak published six posts—all obvious parody. See Pet. App. 139a–141a (screenshots of available posts); Novak C.A. Br. at 4–5. The six posts were:

- An apology for failing to inform the public about the armed robbery of a Subway sandwich shop by a white man, while requesting information to "br[ing] to justice" an "African American woman" who was loitering in front of the shop during the robbery, *id.* at 141a;
- An announcement that new police officers would be recruited based on "a 15 question multiple choice definition test followed by a hearing test" and "strongly encouraging minorities to not apply," *id.* at 139a;
- An "UPDATE" about a "Pedophile Reform event" to include a "'[n]o means no' station filled with puzzles and quizzes" and promising that anyone who made it through the stations would be "removed from the sex offender registry and accepted as an honorary police officer," *ibid.*;
- A warning about the introduction of a new law forbidding Parma residents "from giving ANY HOMELESS person food, money, or shelter in our city for 90 days," which was intended "to have the homeless population eventually leave our city due to starvation," *id.* at 140a;

- An advertisement for a food drive to "benefit teen abortions" at which police "will be giving out free abortions * * * [in a van in front of a grocery store] using an experimental technique discovered by the Parma Police Department," *ibid*; and
- An announcement of an "official stay inside and catch up with family day" to "reduce future crimes" during which anyone outside would be arrested.[1]

Many who saw the posts thought they were funny, but a handful of people called the department to ask about or tattle on the parody page. Pet. App. 3a.

When police got wind of Novak's page, they sprang into action. Pet. App. 3a. The department posted a notice on its official page, confirming it was the real page and warning that the fake page was being investigated. *Ibid.* To prevent others from spoiling the joke, Novak copied that notice to the parody page and deleted comments calling his page fake. *Ibid.* But after Respondent Officer Kevin Riley appeared on the

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[1] There is no screenshot of the sixth post, but it read:

> PARMA: Tuesday will be our official stay inside and catch up with the family day in Parma! The Parma Police Department has set this day to allow families to come together in an effort to reduce future crime by having children have well balanced communication with their families. Anyone's [*sic*] seen outside their home from the hours of 12 pm – 9 pm will be arrested. Thank you.

Novak C.A. Br. 5.

nightly news to announce a criminal investigation into the parody page, Novak took it down. *Id.* at 4a.

Yet police kept investigating. Riley tasked Respondent Detective Thomas Connor with figuring out who created the parody page. Pet. App. 4a. Connor obtained a search warrant for Facebook and discovered that Novak was the page's author. *Ibid.* Both Riley and Connor then consulted Parma Law Director and Prosecutor Timothy Dobeck. Dobeck and Connor searched for a crime to fit the situation and ultimately landed on Ohio Revised Code Section 2909.04(B), a felony statute prohibiting the knowing "use [of] any computer * * * to disrupt, interrupt, or impair the functions of any police * * * operations." *Id.* at 4a, 32a.

Citing 11 calls by Facebook users to a non-emergency department phone line, local police, prosecutors, and judges all concluded there was probable cause to believe Novak's parody posts had feloniously disrupted police operations.[2] See Pet. App. 4a, 23a. Officer Connor applied for and obtained an arrest warrant for Novak and a search warrant for his apartment. *Id.* at 4a.

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[2] According to Ohio officials, "it was the *fact* that the calls occurred at all * * * that grounded [the] disruption analysis." Pet. App. 12a. This staggeringly broad interpretation of the statute, now blessed by the Sixth Circuit, criminalizes all manner of First Amendment activity. See, *e.g.*, Pet. App. 7a, 12a, 99a. Indeed, if Paul Cohen had posted "Fuck the Police" on Twitter, rather than wearing his "Fuck the Draft" jacket in a courthouse, *Cohen* v. *California*, 403 U.S. 15 (1971), or if Raymond Hill had told police to "pick on somebody your own size" on Facebook, rather than in person, *City of Houston* v. *Hill*, 482 U.S. 451 (1987), Cohen and Hill would be just as guilty as Novak if anyone had called the police about their online speech.

Nearly a month after Novak had deleted the parody account, police arrested him, searched his apartment, seized his phone and laptop, and jailed him for four days. Pet. App. 4a, 34a. Prosecutors then presented Novak's case to a grand jury, which indicted him thanks to testimony from Connor, which included his misrepresentation that people calling the department "honest to God believed" that Novak's page was real. Connor admitted at deposition that none of the callers thought that. *Id*. at 4a, 11a, 23a–24a.

Novak was acquitted at trial. Pet. App. 3a, 4a. Out from under that process, Novak sued Riley, Connor, and the City of Parma for violating his First and Fourth Amendment rights.[3] *Id.* at 85a. Riley and Connor asserted qualified immunity and moved to dismiss the claims against them, but the district court denied the officers' motion. *Id.* at 138a. As permitted by *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the officers filed an interlocutory appeal. *Id.* at 85a.

II. Because the facts showed that Novak's posts were parody, the Sixth Circuit denied the officers qualified immunity at the motion-to-dismiss stage.

The Sixth Circuit affirmed the denial of qualified immunity. Pet. App. 80a; *Novak* v. *City of Parma*, 932 F.3d 421 (6th Cir. 2019). The court questioned whether protected speech could serve as the basis for probable cause and held that a reasonable jury could find that Novak's page was parody. More facts were

[3] Novak's operative complaint contained additional claims that are not relevant to the questions presented in this petition.

needed to decide whether the officers could justify their actions. *Id.* at 92a–95a.

In the court's opinion, Judge Thapar observed that the right to ridicule the government through parody is as American as "[a]pple pie[and] baseball." Pet. App. 81a. Offensive or funny, "when it comes to parody, the law requires a reasonable reader standard, not a 'most gullible person on Facebook' standard." *Id.* at 81a–82a. And crucial to Novak's claims, "the genius of parody is that it comes close enough to reality to spark a moment of doubt in the reader's mind before she realizes the joke." *Id.* at 88a–89a. Thus, "there is no reason to require parody to state the obvious (or even the reasonably perceived)" because parody's "safe haven under the First Amendment" does not depend on whether it "spoil[s] its own punchline by declaring itself a parody." *Id.* at 89a, 90a. "Imagine," Judge Thapar offered, "if *The Onion* were required to disclaim that parodical headlines * * * are, in reality, false." *Id.* at 89a–90a. Thus, the Sixth Circuit concluded that whether Novak's page was parody presented a question of fact for a jury. *Id.* at 91a.

The court also explained that the existence of probable cause presented questions of fact for the same reasons. Pet. App. 91a–92a. Even so, the court noted "there is good reason to believe" that probable cause is irrelevant in cases like Novak's, where protected speech is the sole basis for police action. *Id.* at 96a–99a. Unlike earlier Supreme Court cases addressing the relationship of probable cause and protected speech, Judge Thapar explained there was no non-speech conduct here: "Novak did not create a Facebook page criticizing police *and* use his computer to

hack into police servers to disrupt operations." *Id.* at 96a–98a.

The Sixth Circuit further announced that Novak's case "is prime ground" for the concern—discussed in *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1727 (2019); *Lozman* v. *City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018); and *Reichle* v. *Howards*, 566 U.S. 658, 663 (2012)—that police have the power to "use probable cause as a pretext for retaliation." Pet. App. 98a–99a. And that concern is heightened here, where vague and broad laws like the Ohio disruption statute "give[] the police cover to retaliate against all kinds of speech under the banner of probable cause." *Id.* at 99a. Thus, Judge Thapar concluded, "this case raises new questions" about the interaction of protected speech and probable cause. *Id.* 99a–100a.

Novak's case was remanded to the district court. After discovery, the parties moved for summary judgment with the officers again asserting qualified immunity and the city disclaiming municipal liability. This time, the district court granted the officers immunity and held that Parma had no liability. Pet. App. 47a–79a. Stating that "the Supreme Court has never recognized a First Amendment right to be free from retaliatory arrest that is supported by probable cause," *id.* at 50a, the district court held that the officers could arrest Novak without addressing whether Novak's posts were constitutionally protected. *Ibid.* In other words, "Novak's First Amendment claim, though significant in a general sense, is irrelevant to this Court's determination on the motions for summary judgment." *Ibid.*

III. Although the facts showed that Novak's posts were parody, the Sixth Circuit granted the officers qualified immunity at the summary-judgment stage.

When Novak's case returned to the Sixth Circuit, the court issued a very different opinion than its first. In the second opinion, also written by Judge Thapar, the court held that, although the facts continued to support the finding that Novak's *posts* were parody, the Court granted the officers qualified immunity because it was not clearly established by an earlier decision that Novak's deletion of comments and copying of the department's notice onto his page were protected speech. Pet. App. 8a–10a.

Judge Thapar again acknowledged that protected speech cannot serve as "the sole basis for probable cause" and that "[w]hether Novak's satirical posts were protected parody is a question of fact." Pet App. at 7a–8a. But though the court declared in its earlier decision that parody's "genius" is its resemblance to reality and that it need not "spoil its own punchline by declaring itself a parody," *id.* at 88a–89a, this time, the court questioned whether Novak's "model[ing] his page after the Department's," "delet[ing] comments that let on his page wasn't the official one," and "copying the Department's clarification post word for word" were protected under the First Amendment. *Id.* at 8a–9a (cleaned up). The court acknowledged that whether *those* actions are protected speech is a "difficult question." *Id.* at 9a. But it added that "while probable cause here may be difficult, qualified immunity is not" because "Novak has not identified a case that clearly establishes deleting comments or copying the

official warning is protected speech." *Ibid*. Under the disruption statute, "the officers could reasonably believe that some of Novak's Facebook activity was not parody, not protected, and fair grounds for probable cause."[4] *Ibid.* Accordingly, the Sixth Circuit granted the officers immunity, rejected *Monell* liability for the city, and dismissed all of Novak's claims. *Id.* at 10a, 17a–21a.

REASONS FOR GRANTING THE PETITION

If the First Amendment means anything, it surely means that an individual can mock the government without fear of arrest. See Pet. App. 90a–91a (Thapar, J.). Yet that is exactly what happened here: Anthony Novak was arrested and jailed for mocking his local police department on Facebook. "If that is not an obvious violation of the Constitution, it's hard to imagine what would be. And as the Supreme Court has repeatedly held, public officials are not entitled to qualified immunity for obvious violations of the Constitution." *Villarreal*, 44 F.4th at 367 (Ho, J.).

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[4] In a footnote, the court justified the shift between its opinions by explaining it was "no longer limited to Novak's complaint." Pet. App. 8a n.1. But the facts on which the court based its qualified immunity analysis in the decision below—modeling the page after the department's, deleting comments calling the parody fake, and copying the department's warning—were all in Novak's complaint and addressed in the court's earlier motion-to-dismiss opinion. *Id.* at 82a–83a. They also describe protected speech. As the Sixth Circuit had previously acknowledged, "[p]arody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious." Pet. App. 89a (quoting *Campbell* v. *Acuff-Rose Music, Inc.* 510 U.S. 569, 583 n.17 (1994)). See also Reasons, Section I(B)(i), *infra*.

Despite the obviousness of the First Amendment violations in Novak's case, the Sixth Circuit found that police had probable cause for his arrest and granted them qualified immunity. It did so because Novak could not produce a case holding that every specific aspect of his speech (*i.e.*, deleting comments and reposting the department's notice) was protected. Based on similar facts and arguments, the Fifth Circuit rejected immunity and probable cause. It did not matter that the plaintiff could not cite a case addressing the specific aspects of her speech. *Villarreal*, 44 F.4th at 370–371.

The circuits are split over what to do with qualified immunity when probable cause rests on speech. Should protected speech yield to probable cause, or should probable cause yield to protected speech? Outside the qualified-immunity context, the answer is clear: "The Constitution does not allow such speech to be made a crime." *City of Houston* v. *Hill*, 482 U.S. 451, 462 (1987). But when qualified immunity is asserted, several circuits, like the Sixth, elevate the policies underlying qualified immunity above the policies underlying the First Amendment and permit individuals to be punished for their speech. This Court should grant certiorari to resolve the circuit split over this issue. Alternatively, the Court should reconsider entirely the doctrine of qualified immunity.

This case presents these issues cleanly, highlighting the sorts of First Amendment violations that can be accomplished under the cover of qualified immunity. And the remarkable similarities between the Sixth Circuit's decision below and the Fifth Circuit's decision reaching the opposite outcome in *Villarreal*

make for an easy comparison of the competing legal arguments.

I. The circuits are split over how to address qualified immunity when confronted with obvious First Amendment violations.

Had Novak posted his Facebook parody while sitting at a computer in Texas rather than Ohio, the Fifth Circuit would have denied qualified immunity to the police who arrested Novak for his speech. See *Villarreal*, 44 F.4th at 370–373. That's because the circuits are divided over how qualified immunity interacts with the First Amendment.

The Fifth, Ninth, and Tenth Circuits hold that general First Amendment principles provide government officials fair warning that they cannot punish individuals for exercising their speech rights. In those circuits, protected speech cannot provide the sole basis for probable cause, and a plaintiff need not identify an earlier decision addressing the specific speech at issue. The Sixth, Eighth, and Eleventh Circuits hold, on the other hand, that probable cause from broad interpretations of vague criminal statutes supports qualified immunity and renders the First Amendment irrelevant unless an earlier case clearly establishes that the specific speech at issue is protected. As a result, police in those circuits may arrest and jail someone for criticizing the government, and they cannot be sued for doing so.

A. Three circuits have rejected qualified immunity for First Amendment violations, regardless of minor factual distinctions from earlier cases.

The Fifth, Ninth, and Tenth Circuits have all held that qualified immunity does not shield government officials who violate obvious—though general—First Amendment principles, regardless of probable cause. In these circuits, there is no need to find an earlier case clearly establishing that the particular speech at issue is protected. See *Villarreal*, *supra*; *Ballentine* v. *Tucker*, 28 F.4th 54 (9th Cir. 2022); *Thompson* v. *Ragland*, 23 F.4th 1252 (10th Cir. 2022).

i. The Fifth Circuit denied qualified immunity in a case just like Novak's.

Taking seriously this Court's summary reversal of its decisions in *Taylor* v. *Stevens* and *McCoy* v. *Alamu*,[5] the Fifth Circuit recently issued *Villarreal* v. *City of Laredo*. There, the court held that, when an arrest under a broadly written criminal law constitutes an obvious First Amendment violation, a lack of factually similar precedent cannot support a finding of probable cause or a grant of qualified immunity. "For '[w]hen it comes to the First Amendment, . . . we are concerned about government chilling the citizen—not the other way around.'" 44 F.4th at 372 (citing *Horvath* v. *City of Leander*, 946 F.3d 787, 802 (5th Cir.

[5] *Taylor* v. *Stevens*, 946 F.3d 211 (5th Cir., 2019), rev'd *sub nom. Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam); *McCoy* v. *Alamu*, 950 F.3d 226 (5th Cir. 2020), rev'd, 141 S. Ct. 1364 (2021) (mem.).

2020) (Ho, J., concurring in the judgment in part and dissenting in part)). *Villarreal* is strikingly similar to this case, but the outcomes reached by the Fifth and Sixth Circuits could not be more different.

1. In *Villarreal*, a citizen journalist with a large Facebook following and a history of being a thorn in the side of local law enforcement was arrested for asking a police officer questions. 44 F.4th at 368–369. In the spring of 2017, Villarreal twice contacted a Laredo, Texas, police officer to confirm the names of people who had died in local incidents before publishing stories online. *Id.* at 368. Six months later, police sought arrest warrants for Villarreal, citing violations of Texas Penal Code § 39.06(c), which provides that "[a] person commits an offense if, with intent to obtain a benefit * * * he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public." *Ibid.* A prosecutor and magistrate judge approved the warrants, and Villarreal turned herself in. She was jailed before a Texas court ultimately granted her habeas corpus, finding the statute unconstitutionally vague. *Id.* at 368–369.

2. Villarreal sued the officers for violating her First and Fourth Amendment rights. The officers asserted qualified immunity and moved to dismiss the claims against them. The district court granted the officers' immunity, holding, like the Sixth Circuit below, that, despite its broad language, the Texas statute provided probable cause for Villarreal's arrest and that no precedent clearly established that the law was "so patently or obviously unconstitutional that no reasonable law enforcement officer could have believed

that their enforcement of the statute against the Plaintiff was constitutional." *Villarreal* v. *City of Laredo*, No. 5:19-CV-48, 2020 WL 13517246, at *14 (S.D. Tex. May 8, 2020).

3. The Fifth Circuit reversed. In a 2-1 opinion written by Judge Ho, the Court invoked the obviousness exception to qualified immunity's clearly established test. *Villarreal*, 44 F.4th at 370–371 (citing *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002); *Taylor* v. *Riojas*, 141 S. Ct. 52, 52 (2020) (per curiam); *Sause* v. *Bauer*, 138 S. Ct. 2561 (2018) (per curiam)). The Court observed that since "freedom of speech * * * includes the right to curse at a public official, then it surely includes the right to politely ask that official a few questions as well." *Id.* at 371 (citing, among others, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 569 (1942)). Relying on this and other general First Amendment principles, the Court held that "it should be patently obvious to any reasonable police officer that the conduct alleged in the complaint constitutes a blatant violation of Villarreal's constitutional rights. And that should be enough to defeat qualified immunity." *Ibid.* After all, "[t]he doctrine of qualified immunity does not always require the plaintiff to cite binding case law involving identical facts" when general constitutional rules apply with "obvious clarity." *Villarreal*, 44 F.4th at 370, 371.

The Fifth Circuit was unmoved by the officers' argument that they were simply enforcing a statute. And while the Court found that the Texas statute was not facially unconstitutional, its application to Villarreal was: "It should be obvious to any reasonable police officer that locking up a journalist for asking a

question violates the First Amendment." *Villarreal*, 44 F.4th at 373.

On the related Fourth Amendment claims, the Fifth Circuit explained, like the Sixth Circuit below, that protected speech cannot support probable cause. *Villarreal*, 44 F.4th at 375 (citation omitted). But unlike the Sixth Circuit, the Fifth Circuit concluded that, "[j]ust as the First Amendment violation * * * was obvious for purposes of qualified immunity, so too was the Fourth Amendment violation alleged here." *Ibid.* It made no difference, Judge Ho explained, that the officers' probable cause determinations were approved by a prosecutor or a judge. Because the constitutional infirmity was obvious, it was also "obvious that no reasonably competent officer would have concluded that a warrant should issue." *Ibid.* (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).

4. Chief Judge Richman dissented. Accusing the majority of confusing the bench and bar about which First Amendment violations are obvious enough to defeat qualified immunity, Judge Richman made the same arguments as the Sixth Circuit below. Indeed, Judge Richman's dissent can be summarized using quotes from the Sixth Circuit's decision, changing only the relevant names and facts:

According to Judge Richman, "the officers reasonably believed they were acting within the law," Pet. App. 3a (*Villarreal* at 388), and "qualified immunity protects officers who reasonably pick one side or the other in a debate where judges could reasonably disagree," Pet. App. 9a (cleaned up) (*Villarreal* at 383). Because Villarreal's actions fell within the broad language of the Texas statute, Pet. App. 7a (*Villarreal* at

386–388), "[t]hat's just what the officers did—they reasonably found probable cause in an unsettled case that judges can debate," Pet. App. 9a (*Villarreal* at 383, 389). "What's more, the officers had good reason to believe they had probable cause. Both the [district attorney] and the judge[] who issued the warrants agreed with them. Reassurance from * * * other officials," Judge Richman contended, "further supports finding that the officers 'reasonably' * * * concluded that probable cause existed." Pet. App. 10a (*Villarreal* at 390–391). "That's enough to shield [the officers] from liability." Pet. App. 10a (*Villarreal* at 391). After all, "[Villarreal] has not identified a case that clearly establishes [that her requests for information from police were protected speech]." Pet. App. 9a (*Villarreal* at 390).

5. Judge Ho separately concurred to address Judge Richman's dissent. Beginning from the proposition that "no statute may be enforced that violates the Constitution," Judge Ho argued that, "[l]ikewise, no officer of the law may hide behind an obviously unconstitutional statute to justify trampling on a citizen's fundamental liberties." *Villarreal*, 44 F.4th at 379. And although the Fifth Circuit chose constitutional avoidance to construe the Texas statute in a way that was not facially unconstitutional, Judge Richman's less forgiving interpretation of the law to criminalize Villarreal's speech would mean "it is a crime to be a journalist in Texas." *Id.* at 380.

On this point, Judge Ho clarified that, under the court's opinion, the statute should be construed in a way that does not prohibit protected speech, but, if it cannot be, the statute is obviously unconstitutional.

And he rejected the argument that the independent intermediary doctrine insulated the officers from accountability: "[T]he dissent argues that, just as we can't question the officers because a magistrate issued a warrant, we likewise can't question the officers because a federal district court granted them qualified immunity." *Villarreal*, 44 F.4th at 381. But, Judge Ho explained, the district court, the judge who signed the warrant, and the officers were all wrong: "We don't just ask—we require—every member of law enforcement to avoid violations of our Constitution. * * * And when the violation is as obvious as it is here, we don't grant qualified immunity." *Ibid.*

ii. The Ninth and Tenth Circuits, like the Fifth, deny qualified immunity for obvious constitutional violations.

The Fifth Circuit's decision rejecting qualified immunity for obvious First Amendment violations joins similar decisions in the Ninth and Tenth Circuits.[6] In *Ballentine* v. *Tucker*, the Ninth Circuit denied qualified immunity to a detective for his arrest of local activists for chalking anti-police messages on sidewalks. 28 F.4th at 58–59. Notwithstanding factual distinctions from earlier cases, the court held that a "right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances." *Id.* at 66 (citations omitted).

[6] Although similar principles are at play, the cited Tenth Circuit opinions do not address probable cause because they do not involve arrests.

And in *Thompson* v. *Ragland*, the Tenth Circuit denied qualified immunity to a college administrator who punished a student for emailing her classmates to criticize a professor. It did not matter that the Tenth Circuit could not "point to a precedent with identical facts."[7] 23 F.4th at 1260. *Thompson* explained that, although "not every detail of First Amendment law governing student speech is (or ever will be) settled," a great deal is and "in any given case the unsettled contours of the law may be irrelevant."[8] *Ibid.* Accord *Williams* v. *Snyder*, No. 20-1512, 2022 WL 1078226 (7th Cir. Apr. 11, 2022) (denying qualified immunity to a prison guard who confiscated inmate mail).

B. Three circuits have granted qualified immunity for First Amendment violations based on minor factual distinctions from earlier cases.

On the other side of the split, the Sixth Circuit is joined by the Eighth and Eleventh Circuits. In these circuits, even when laws are broadly written, a lack of earlier caselaw involving identical circumstances

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[7] See also *Browder* v. *City of Albuquerque*, 787 F.3d 1076, 1082–1083 (10th Cir. 2015) (Gorsuch, J.) ("[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing.").

[8] See also *Janny* v. *Gamez*, 8 F.4th 883, 915 (10th Cir. 2021) (holding that a "minor distinction [from earlier caselaw] cannot prevent a determination that the law was clearly established" by general First Amendment principles); *Ashaheed* v. *Currington*, 7 F.4th 1236, 1248–1249 (10th Cir. 2021) (holding that broad "free exercise law precepts were not too general to provide fair warning to a reasonable officer").

results in qualified immunity for First Amendment violations. See *Ness* v. *City of Bloomington*, 11 F.4th 914 (8th Cir. 2021); *Crocker* v. *Beatty*, 995 F.3d 1232 (11th Cir. 2021).

i. The Sixth Circuit's decision below is indistinguishable from Judge Richman's dissent in *Villarreal*.

Judge Thapar's decision for the Sixth Circuit below is a photo negative of Judge Ho's decision for the Fifth Circuit in *Villarreal*. Indeed, as shown above, the decision below is substantively identical to Judge Richman's dissent in *Villarreal*. And, like Judge Richman's dissent, the Sixth Circuit's core holding is that, while some of Novak's speech was unquestionably protected, additional acts of speech he used to support his parody—deleting comments and reposting the notice—were not clearly established as protected speech. Compare Pet. App. 9a ("Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech."), with *Villarreal*, 44 F.4th at 390 (Richman, J., dissenting) ("There was no clearly established law that there was no probable cause for arresting Villar[r]eal, and there was no clearly established law that in arresting Villar[r]eal based on section 39.06, the defendants were violating her First Amendment rights."). In both cases, the basis for probable cause was pure speech—Novak parodying police and Villarreal asking them questions.

Although the Sixth Circuit found "it's *possible*" Novak's deletion of comments and copying the department's notice is not *protected* speech, it did not

question whether those expressive acts are speech at all. Pet. App. 8a n.1 (emphasis added). They clearly are. See *Texas* v. *Johnson*, 491 U.S. 397, 404–405 (1989) (broadly defining speech as any act to convey a message). They are also clearly protected. Indeed, all speech is presumptively protected by the First Amendment outside of extremely limited categories that do not apply here. See *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); *United States* v. *Stevens*, 559 U.S. 460, 468–469 (2010). And the Sixth Circuit's earlier discussion of parody makes clear that Novak's acts were undertaken for the expressive purpose of serving his parody. See Pet. App. 3a, 8a n.1. If deciding who can walk in your parade or what arguments are fit to print in your newspaper are speech, deciding who can respond to your Facebook posts is too. See *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570, 573–574 (1995) (parades); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (editorials). The Sixth Circuit's holding rests on its approval of punishment for pure speech exclusively because there is no caselaw addressing the particular types of speech Novak engaged in. Contra *Taylor*, 141 S. Ct. at 53–54.

ii. The Eighth and Eleventh Circuits join the Sixth in allowing qualified immunity to swallow the First Amendment.

Like Judge Richman and the Sixth Circuit, the Eighth and Eleventh Circuits allow probable cause provided by broad interpretations of vaguely written

laws to supply qualified immunity for First Amendment violations. In *Ness*, for instance, the Eighth Circuit granted qualified immunity to police who threatened a gadfly with arrest under a harassment statute for filming and taking photographs at a public park. *Ness* granted the officers immunity because, though constitutionally suspect, the flaws in the statute were not so gross or flagrant that "no reasonable police officer could have believed that it was constitutional." 11 F.4th at 921. Besides, the Eighth Circuit explained, "[t]he reliance on a state statute that has not been declared unconstitutional is generally a paradigmatic example of reasonableness that entitles an officer to qualified immunity." *Ibid.* (citations omitted).

And in *Crocker*, the Eleventh Circuit granted qualified immunity to a police officer for seizing a man's phone for photographing a traffic accident from a public median and arresting him when he refused to leave the scene. Although the Eleventh Circuit agreed its earlier caselaw established a First Amendment right to photograph police conduct from public property, 995 F.3d at 1240 (citing *Smith* v. *City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)), the court held that *Smith*'s "broad statement of [First Amendment] principle" could not overcome qualified immunity. *Crocker*, 995 F.3d at 1240–1241. It was not "obvious" that the general rule applied "to the specific situation" because the opinion announcing the rule provided a "dearth of detail about the contours of the right." *Id.* at 1241.

Judge Martin dissented from *Crocker*, arguing that the majority "parse[d] this critical right too narrowly" and explaining, like Judge Ho in *Villarreal*,

that the "broad pronouncement" of First Amendment principles in *Smith* "underscores the right's general applicability." *Crocker*, 995 F.3d at 1260–1261 (Martin, J., dissenting in part). See also *id.* at 1260 (adding that the general statement from *Smith* does not "require * * * precise definition" for it to be easily understood and followed).

C. The circuits are divided because each side of the split follows a different line of this Court's cases.

The first question presented in this case arises from a conflict between two doctrines of this Court that are each concerned with over-deterring rightful behavior: free speech and qualified immunity.

In the free-speech context, the Court has repeatedly cautioned that conflicts between speech and other concerns should be resolved in favor of speech. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271–272 (1964) (explaining that "freedoms of expression [must] have breathing space * * * to survive") (cleaned up); *Hill*, 482 U.S. at 462–463. As *Speiser* v. *Randall* noted, "the line between speech unconditionally guaranteed and speech which may legitimately be * * * punished is finely drawn." 357 U.S. 513, 525 (1958). And "[e]rror in marking that line exacts an extraordinary cost" because it deters protected speech. *Playboy*, 529 U.S. at 817. For this reason, "[w]hen First Amendment compliance is the point to be proved, the risk of nonpersuasion * * * must rest with the Government, not with the citizen." *Id.* at 818. That core insight runs through this Court's First Amendment jurisprudence. See, *e.g.*, *Wisconsin Right*

to Life, Inc., 551 U.S. at 482 (opinion of Roberts, C.J.). Otherwise, protected speech will be chilled. *Speiser*, 357 U.S. at 526.

Fear of overdeterrence is the same concern that animates qualified immunity. Because civil rights litigation may "diver[t] official energy from pressing public issues" or "dampen the ardor of all but the most resolute * * * in the unflinching discharge of their duties," the Court created qualified immunity to avoid those policy concerns. *Harlow*, 457 U.S. at 813–819. But see Reasons, Section III, *infra*.

In the Fifth, Ninth, and Tenth Circuits, First Amendment jurisprudence trumps qualified immunity. Those courts ensure that individuals may speak without needing to carefully parse the "clearly established" caselaw in their jurisdiction to ensure they cannot be arrested for their speech with impunity. But in the Sixth, Eighth, and Eleventh Circuits, qualified immunity jurisprudence trumps the First Amendment. Those courts ensure, instead, that government officials have a wide berth to do their jobs, even if that means individuals can be jailed for their protected speech without consequence.

This circuit split requires this Court's intervention because only this Court can reconcile these two lines of cases. Perhaps qualified immunity is so important that it overrides the Constitution's concern for free speech—even, as in cases like this one and the Fifth Circuit's, where no split-second decisions were required. Or perhaps free speech is so important that government officials *should* pause before arresting someone for their speech and speakers *should* rest easy that they cannot be arrested without recourse,

since the prospect of being subjected to a home search, property seizure, arrest, and a night or two in jail (even if none of those lead to a conviction) would surely deter many Americans from speaking their minds. Either way, only this Court can decide whether speech or government action is more important.

II. This case presents an important question of federal law that this Court should settle.

The question over which the circuits are split effectively dictates whether, thanks to qualified immunity, protected speech can provide the basis for punishment in the United States. In an era when much of our political discourse takes place on social media and crosses jurisdictional boundaries, it is untenable for different jurisdictions to have different free-speech rules. If *The Onion* wants to publish a parody logo of the Uvalde, Texas, police, it can do so without risking the arrest of its writers. But if it wants to publish a parody logo of the East Cleveland, Ohio, police, it is on shakier ground, and the wiser decision might be not to publish at all. Only this Court can resolve this fundamental dilemma.

A. The First Amendment provides broad protections for speech.

This case exemplifies the importance of the First Amendment's broad protections. "One of the prerogatives of American citizenship is the right to criticize public men and measures." *Baumgartner* v. *United States*, 322 U.S. 665, 673–674 (1944). See also *Cohen*

v. *California*, 403 U.S. 15, 18 (1973); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 638 (1943). In line with that concept, this Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Hill*, 482 U.S. at 465; *id.* at 465 n.15 (listing examples). *Hill* rejected the enforcement of a Houston law prohibiting speech that "interrupt[s]" police. 482 U.S. at 462–463. To the contrary, "[t]he freedom of individuals * * * to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." [9] *Ibid.*

And this Court has explained the unique significance of parody. *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 54–55 (1988). "[F]rom the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate." *Id.* at 54. "From the viewpoint of history it is clear that our political discourse would have been considerably poorer without" parodies like Novak's. *Id.* at 55.

Through its decision below, the Sixth Circuit employed qualified immunity to circumvent these

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[9] See also *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part) ("If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age."); *id.* at 1736 (Sotomayor, J., dissenting) ("[S]ome arrests are demonstrably retaliation for protected speech, notwithstanding probable cause of some coincidental infraction.").

foundational First Amendment principles in a way that will chill parody and speech critical of the government.[10] Never mind that the Ohio disruption law sweeps far beyond and with greater force than the Houston interruption law at issue in *Hill*[11] or that Novak's arrest and incarceration resulted from substantial planning and deliberation, rather than split-second decision-making.[12]

And never mind that *Harper's Weekly* cartoonist Thomas Nast could publish cartoons in support of virulently anti-Catholic Representative James Blaine depicting "Catholic priests as crocodiles slithering

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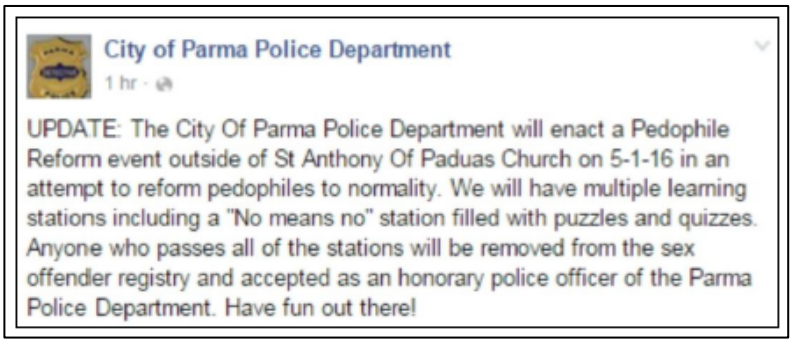
[10] The court did so despite recognizing that, unlike many of the thornier cases this Court has addressed, Novak's involved a situation where "the sole basis for probable cause was speech." Pet. App. 96a–97a (outlining the mixture of speech and conduct at issue in earlier cases, where probable cause outweighed speech claims). But see Pet. App. 8a n.1.

[11] Compare Hous., Tex. Ord. § 34-11(a) (1984) (making it a misdemeanor for "any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest"), with Ohio Rev. Code § 2909.04(B) (2004) (making it a felony for any person to "knowingly use any computer * * * to disrupt, interrupt, or impair the functions of any police * * * operations").

[12] Accord *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (mem.) (Thomas, J., respecting denial of certiorari) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"); *Villarreal*, 44 F.4th at 371 ("There is a big difference between split-second decisions by police officers and premeditated plans to arrest a person for her [speech], especially by local officials who have a history of targeting her because of her [speech]." (citation and quotation marks omitted)).

hungrily toward American children" without fear of arrest:

See *Espinoza* v. *Montana Dep't of Rev.*, 140 S. Ct. 2246, 2226–2270 (2020) (Alito, J., concurring). While Novak was arrested, jailed, and prosecuted for silly Facebook posts making fun of his local police:



Pet. App. 139a.

Neither the Sixth Circuit nor any of the many government officials involved in Novak's arrest or prosecution stopped to consider the obvious constitutional defects in the process they facilitated. If more than

half a dozen members of the legal system, see Pet. App. 78a, including a federal appellate court, *id.* at 3a, can look at obvious parody and still disregard that constitutionally sacred speech to forgive the arrest and prosecution of a government critic—all because there is no factually identical case holding that the specific conduct is unconstitutional—something has gone terribly wrong. This Court must step in.

B. Immunities are providing an end run around First Amendment protections.

Just as apparent as the constitutional violation in Novak's case is the immunity shell game being played to ensure that, despite the clear and exceptionless language Congress enacted in what is now Section 1983, Novak will be left without a remedy for the violation of his constitutional rights. The Sixth Circuit's decision exemplifies the operation of "an unholy trinity of legal doctrines—qualified immunity, absolute prosecutorial immunity, and *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978)"—that "frequently conspires to turn winnable [civil rights] claims into losing ones." *Wearry* v. *Foster*, 33 F.4th 260, 278 (5th Cir. 2022) (Ho, J., dubitante).

Under the doctrine of qualified immunity, as applied below, Novak cannot sue the police who arrested him in violation of his First Amendment rights for the trivial reason that he cannot point to an earlier case that specifically "establishes deleting comments or copying the official warning is protected speech." Pet. App. 9a. Under the doctrine of prosecutorial immunity, Novak cannot sue the prosecutors who helped police plan his arrest and prosecuted him in violation of

the First Amendment. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). And under *Monell*, as applied below, Novak cannot sue the city. Pet. App. 17a–21a.

The result is a situation where, although the Sixth Circuit claims its decision "does not mean [the officers'] actions were justified or should be condoned," they face no consequences for violating Novak's First and Fourth Amendment rights. Pet. App. 25a. So, Novak's claims face a predictable fate: "No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses." *Zadeh* v. *Robinson*, 928 F.3d 457, 479–480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). Thus, the Sixth Circuit felt compelled to end its decision with a coda to excuse the injustice of its ruling: "[I]t is cases like these when government officials have a particular obligation to act *reasonably*. Was Novak's Facebook page worth a criminal prosecution, two appeals, and countless hours of Novak's and the government's time? We have our doubts." Pet. App. 25a. The Sixth Circuit ended by lamenting that "any one of the officials involved could have allowed the entire story to turn out differently, simply by saying 'No.' Unfortunately, no one did." *Ibid.* (citation and internal quotation marks omitted). Not least of all the Sixth Circuit.

This Court should grant certiorari and ensure that Novak, and others like him, do not have rights under the First Amendment without remedies in American courts.

III. This Court should reconsider qualified immunity because the doctrine has no basis in law or policy.

Better yet, this Court should grant certiorari and reconsider qualified immunity altogether. The doctrine has no basis in sound law or policy, and it is long past time for this Court to revisit one of its most flawed precedents: *Harlow* v. *Fitzgerald*. Because qualified immunity perpetuates an egregious damaging error; is based on exceptionally weak reasoning; necessitates unworkable rules; disrupts other areas of law; and cannot support a reliance interest, it should be reconsidered. See *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265–2278 (2022) (stating bases for overruling precedent).

This Court has recently and repeatedly pronounced that Congress, not the courts, should be the primary voice in deciding whether to provide a damages remedy for constitutional violations. *Egbert*, 142 S. Ct. at 1803; *Hernandez* v. *Mesa*, 140 S. Ct. 735, 750 (2020); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017). For such violations committed under color of state law, Congress did just that by enacting Section 1983. But the Court has overridden congressional prerogative through *Pierson* v. *Ray*, *Harlow* v. *Fitzgerald*, and their progeny.

In *Pierson*, the Court, ostensibly relying on a common-law defense tacitly incorporated into Section 1983, created a limited doctrine of good-faith immunity to constitutional claims. 386 U.S. at 555–557. But see *Myers* v. *Anderson*, 238 U.S. 368 (1915). While some have attempted to justify this earlier form of

immunity,[13] they overlook the original language of Section 1983. Under the plain language of the Ku Klux Klan Act, "every person" was "liable" for constitutional violations "any such law, statute, ordinance, regulation, custom, or usage of the State *to the contrary notwithstanding*." Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. 1983) (emphasis added). The common-law justification for *any* form of immunity was misplaced from the outset.[14]

Even still, *Harlow*'s creation of qualified immunity went far beyond that. It "completely reformulated qualified immunity principles not at all embodied in the common law" or the text of Section 1983. *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) (common law); *Crawford-El* v. *Britton*, 523 U.S. 574, 594 (1998) (statutory text). Rather, *Harlow* founded the doctrine on judicially made policy assumptions that have all

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[13] See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1360–64, 1383–84 (2021). But see James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. L. Rev. Online 148 (2021) (responding to Keller); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115 (2022) (responding to Keller).

[14] See Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz *v.* Economou, 126 Dick. L. Rev. 719, 730 n.66, 735 n.87 (2022) ("The statutory text shows that Congress intended to abrogate defenses or immunities from other sources (including the common law), even if they would have otherwise been folded into Section 1983 as background law."); Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. Crim. L. & Criminology 105, 122 n.118 (2022) (same); see also, generally, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. ___ (2022) (forthcoming) (same).

been empirically disproven.[15] Qualified immunity thus yields arbitrary and unjust results.[16] For these reasons, the doctrine has been consistently criticized by scholars[17] and jurists,[18] including members of this Court.[19]

For the overwhelmingly persuasive reasons provided by the doctrine's chorus of critics, the Court should grant certiorari to reconsider qualified immunity altogether. But if it will not go that far, it should at least grant certiorari to settle the circuit split over whether an officer is entitled to qualified immunity for arresting an individual based solely on

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[15] See, *e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 673–677 (2021).

[16] See, *e.g.*, Marie Miller et al., *Constitutional GPA*, "Notable Findings" (last accessed Sept. 26, 2022), https://ij.org/report/constitutional-gpa/notable-findings/ (finding that the likelihood of overcoming qualified immunity is driven largely by circuit population "because larger circuits have more cases; more cases result in more [statements of clearly established law]; and more [statements of clearly established law] provide more opportunities to overcome qualified immunity").

[17] See, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

[18] See, *e.g.*, *Cunningham* v. *Blackwell*, 41 F.4th 530, 544–547 (6th Cir. 2022) (Donald, J., concurring in part and dissenting in part); *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.). See also, generally, *Jamison* v. *McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (Reeves, J.).

[19] See, *e.g.*, *Ramirez* v. *Guadarrama*, 142 S. Ct. 2571, 2571–2573 (2022) (mem.) (Sotomayor, J., joined by Breyer and Kagan, JJ., dissenting from denial of certiorari); *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862–1865 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

speech parodying the government, so long as no case has previously held the particular speech is protected.

IV. This case is a good vehicle because on certiorari the Court need only apply the law and resolve the split.

This case is a good vehicle for the Court to consider the questions presented. There are no jurisdictional problems, no messy fact disputes, and the issue animating the circuit split is the sole basis for the decision below. Despite being protected by the same Constitution, speakers in the Fifth, Ninth, and Tenth Circuits have robust protections from punishment for their speech. Speakers in the Sixth, Eighth, and Eleventh do not. The only things to do on certiorari are apply the law and resolve the split.

CONCLUSION

The Court should grant Novak's petition.

Respectfully submitted,

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