CASE NO. 22-30509

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WAYLON BAILEY,
Plaintiff-Appellant,
v.
RANDELL ILES, IN HIS INDIVIDUAL CAPACITY; MARK WOOD, IN HIS OFFICIAL CAPACITY AS SHERIFF,
Defendants-Appellees

Appeal from an Order of the United States District Court for the Western District of Louisiana, Alexandria Division, The Hon. David C. Joseph (Dist. Ct. No. 1:20-CV-01211)

BRIEF OF THE CATO INSTITUTE, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSSION, AND THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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November 14, 2022

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

CASE NO. 22-30509

Bailey v. Iles

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus American Civil Liberties Union of Louisiana (ACLU-LA) is a nonprofit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation that owns 10% or more of its stock.

/s/ Thomas Berry
November 14, 2022

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*. This case interests Cato because it concerns the application of basic First Amendment principles to social media, a critically important issue in the digital age.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. Recently, FIRE expanded its mission to protect free expression beyond colleges and universities. It currently represents various plaintiffs in lawsuits seeking damages for First Amendment violations under 42 U.S.C. § 1983. Because

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

of its decades of experience defending freedom of expression, FIRE is keenly aware of the need for a legal remedy when government officials violate First Amendment rights. FIRE writes to urge the Court to reverse the decision below, making clear that courts should preserve that legal remedy and deny qualified immunity when clearly established First Amendment principles would have given public servants fair warning of a constitutional violation, especially when the officials responsible had time to recognize those principles.

The American Civil Liberties Union of Louisiana (ACLU-LA) is a statewide, nonprofit, nonpartisan public-interest organization with thousands of members across the state, all of whom are dedicated to the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. In particular, ACLU-LA works to secure the First Amendment rights of all Louisianians. Given its longstanding commitment to protection of the U.S. Constitution and the First Amendment specifically, and the dozens of cases it is currently litigating through its Justice Lab program on behalf of clients seeking constitutional vindication under Section 1983, the proper resolution of this case is a matter of substantial importance to ACLU-LA, its members, and its clients.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In March of 2020, Waylon Bailey was arrested by a SWAT team for making a joke on Facebook. Bailey's joke made light of the chaos of the unfolding pandemic by posting a faux-urgent warning to his Facebook friends that his local sheriff's office had been instructed to shoot "the infected" on sight. His over-the-top Facebook post was complete with all-caps text, emojis, and a hashtag, "#weneedyoubradpitt," referring to Brad Pitt's role in a zombie movie. Exchanges between Bailey and his friends in the comments on the post made it clear that Bailey was joking and that his friends and readers were in on the joke.

Despite all this evidence of the post's innocuous nature, Bailey was arrested for violating Louisiana's terrorizing statute. The arresting officer was Detective Randell Iles, with the Rapides Parish Sherriff's Office. Iles contended that Bailey's obvious joke was an attempt to sow dangerous chaos and confusion.

The humorless nature of this absurd arrest was not lost on the prosecutor, who immediately dropped the charges as soon as he became aware of them. Bailey then sought to vindicate his First and Fourth Amendment rights by filing suit against Sherriff Mark Wood and Detective Iles under 42 U.S.C. § 1983. He also brought state law claims for malicious prosecution and false arrest.

The district court, however, erroneously granted the officers qualified immunity by applying a long-since discredited legal standard to conclude that

Bailey's obvious joke on Facebook was not protected speech. The court applied the now 100-year-old "clear and present danger" test from *Schenck v. United States*, 249 U.S. 47 (1919) to wrongly conclude Bailey's speech was beyond the reach of the First Amendment because of its serious implications in light of the pandemic.

In reaching this conclusion, the district court failed to recognize the clearly established protections for humor under the First Amendment. The court also revived an obsolete test that permits the government to jail speakers based on a remote possibility that the speech in question might lead to unlawful action. The reasoning of the district court places millions of present and future speakers in jeopardy of criminal sanctions. This Court should vindicate the guarantees of the First Amendment and reverse the district court.

The Supreme Court has explicitly recognized First Amendment protection for parody. Humor in all of its permutations is a vital part of the free speech ecosystem and is rightly afforded robust protection under the First Amendment. This necessarily means that the First Amendment applies to jokes that don't work and aren't funny in the same way it protects the next work of comedic genius.

When evaluating whether a joke is eligible for First Amendment protection, Courts consider whether a reasonable reader, accounting for the relevant context, would understand the speech in question to be a joke. This straightforward standard is adaptable to new mediums such as social media. Even though the form humor

takes might evolve with time, the First Amendment protects old and new material alike. Because a reasonable reader would have understood Bailey's post to be humorous rather than serious, it was protected speech under clearly established law.

Further, *Schenck* does not override the Constitution's protections for parody because every reasonable officer would have known *Schenck* is no longer good law. When the district court concluded that Bailey's obvious joke was not protected speech, it did so by relying on outmoded First Amendment precedents from the World War I era. This period is often considered the nadir of free speech in the United States. The "clear and present danger" test from *Schenck* allowed the government to arrest and jail individuals for speech that made lawless actions even slightly more likely, regardless of how tenuous the connection was between the speech and the alleged harm.

The district court's reliance on *Schenck* and related World War I precedents was error because those cases have been superseded. The "clear and present danger" standard articulated in *Schenck* has been replaced with the "imminent lawless action" standard from *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which is much more speech protective than its predecessor.

The district court erred in granting qualified immunity to Detective Iles because a reasonable police officer would have recognized Bailey's speech as a joke and understood that arresting Bailey for posting a joke on Facebook would violate

his First Amendment rights. This Court should reverse the district court's grant of summary judgment to appellees and remand for further proceedings.

ARGUMENT

I. The First Amendment Clearly Protects Online Humor

If the First Amendment protects anything, it surely protects ordinary citizens from being arrested for making jokes. Humor—including political humor, parody, and satire—holds a storied place in American tradition and can be used to express a distinct viewpoint just as much as non-humorous speech does. *See, e.g.*, *Hustler Mag. v. Falwell*, 485 U.S. 46, 54 (1988); *L.L. Bean v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987). "The First Amendment isn't just about religion or politics—it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas." *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc). For this reason, the Supreme Court has recognized that humorous viewpoints are entitled to full First Amendment protection. *See Hustler Mag.*, 485 U.S. at 56.

The exercise of First Amendment freedoms "will not always be reasoned or moderate." *Id.* at 51. Jokes may be crude or offensive, but that does not justify diminished First Amendment protection. The fact that a joke, or the view that it expresses, may give offense is "not sufficient reason for suppressing it," but rather

"a reason for affording it constitutional protection." *Id.* at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)). Offensive and critical speech expresses a distinct viewpoint just as much as friendly and supportive speech does, and that viewpoint is entitled to full First Amendment protection. *See id.* at 56 ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."); *see also Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) ("[A government] interest in preventing speech expressing ideas that offend . . . . strikes at the heart of the First Amendment.") (plurality op.). The Supreme Court has repeatedly made clear that nearly all speech is protected with exceptions only "in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468 (2010). These limited areas include speech expressed as part of crime, obscene expression, incitement to imminent lawless action, and fraud. *United States v. Alvarez*, 567 U.S. 709, 716, 720 (2012). Humor and parody do not fall into one of these "limited areas" and are thus fully protected. *Hustler Mag.*, 485 U.S. at 56–57.

Courts have recognized that humor comes in many forms. As the D.C. Circuit acknowledged, "[s]ometimes satire is funny . . . othertimes it may seem cruel and mocking . . . and sometimes it is absurd." *Farah v. Esquire Mag.*, 736 F.3d 528, 536 (D.C. Cir. 2013). Taste and opinions will naturally vary as to whether a given joke is brilliant or crass. That is all the more reason why neither judges nor juries may permissibly draw subjective lines as to which jokes are valuable and worthy of First

Amendment protection. As the Supreme Court has explained, permitting such line-drawing could "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Mag.*, 485 U.S. at 55. Instead, to "assur[e] that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation," the Court has held that any satirical or humorous statement is protected so long as it "cannot reasonably be interpreted as stating actual facts" about its subject. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (cleaned up).

Accordingly, the mere fact that some members of a joke's audience may be fooled into believing it is true does not deprive it of First Amendment protection. *See Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 583 (1994) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." (quoting *Yankee Pub. Inc. v. News Am. Pub., Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992))); *Farah*, 736 F.3d at 536 ("[I]t is the nature of satire that not everyone 'gets it' immediately."); *Golb v. AG of N.Y.*, 870 F.3d 89, 102 (2d Cir. 2017) ("[A] parody enjoys First Amendment protection notwithstanding that not everybody will get the joke.").

Examples abound of satirical publications that were initially regarded as true. Greek playwright Aristophanes' *The Clouds* "was so misunderstood as praising

immorality that he had to insert a deadly serious scene directly criticizing an earlier audience for not catching the satire." Phillip Deen, *What Moral Virtues Are Required to Recognize Irony?*, 50 J. Value Inquiry 51, 52 (2016). Numerous people, including a member of Congress, have mistaken stories from *The Onion*, a popular satirical "news source," as real news. *See id.* at 51. Many readers of Benjamin Franklin's "The Speech of Polly Baker," which protested society's double standards for men and women, believed it to be a genuine account of court proceedings. Max Hall, *Benjamin Franklin & Polly Baker: The History of a Literary Deception* 16–24, 33, 61 (1960). And even when some audience members are confused, a parody should not be required to give up the joke in order to receive First Amendment protection. Such a requirement would undermine the effectiveness of parody.

The touchstone instead is the understanding of a reasonable reader, given the full context of the expression. And given the "special characteristics" of humor, "'what a reasonable reader would have understood' is more informed by an assessment of her well-considered view than by her immediate yet transitory reaction." *Farah*, 736 F.3d at 536.

The internet and social media have engendered new forms and genres of humor, but these First Amendment principles remain the same regardless of the form a joke may take. Social media allows humorists to share their jokes in a forum that has become "the modern public square." *Packingham v. North Carolina*, 137 S. Ct.

1730, 1737 (2017). In one case, a woman created a parody social media account on Disqus (a social media site similar in functionality to Twitter) mocking Kathryn Knott, who had been charged in a high-profile assault case and who was the daughter of a local chief of police. *O'Donnell v. Knott*, 283 F. Supp. 3d 286, 291–92 (E.D. Pa. 2017). Using the profile name "Knotty is a Tramp" and an unflattering photo of Knott as a profile picture, the account posted comments under stories of the assault case such as "That's why I should get off because daddy is a chief of police." *Id.* at 292, 297.

Social media may be a novel format and a new vehicle for humor, but the First Amendment principle remains the same: "speech is protected when, viewed in the appropriate context, it does not reasonably purport to state an actual fact about the subject of the [joke]." *Id.* at 299. Because it was "entirely plausible that a reasonable reader would not believe that Kathryn Knott would publicly" write the comments at issue, the court found that the comments were plausibly protected speech. *Id.* at 301–02 (emphasis in original).

In sum, First Amendment protection for humor is not diminished because some may be offended, because some may be fooled, or because the format is a novel one like social media. If a reasonable reader, upon full reflection, understands the speech to be a joke rather than a claim of fact, that speech is protected by the First Amendment.

Applying these principles to this case, there is no doubt that Bailey's post was protected speech. At the time Iles viewed Bailey's post, there was plenty of context for the reasonable reader to consider. Both the post itself and the comments left by others clearly indicated its humorous nature.

First, the content of Bailey's post itself revealed its unserious nature. Over-stylized all-caps text combined with red exclamation point emojis and a shocked face emoji is not how one would normally convey a serious news bulletin. ROA.100. Additionally, the hashtag "#weneedyoubradpitt" was clearly a reference to the 2013 film *World War Z*, starring Brad Pitt as the hero who is "called upon to help stop the chaotic pandemic that has gripped populations around the world" and transformed the infected into zombies.[2]

The premise of a pandemic turning the infected into zombie hordes is not unfamiliar to Americans, and thus a natural source of humor during an uncertain time. In 2002, the film *28 Days Later* told the story of a group of animal rights activists who freed a caged chimp infected with a virus from a medical research lab.[3] The virus then infected the humans and transformed the infected into a zombified

[2] *See World War Z*, Paramount Movies, https://bit.ly/3zYJiJf.
[3] *28 Days Later*, Rotten Tomatoes, https://bit.ly/3UCaoxG.

state. The sequel, *28 Weeks Later*, featured promotional advertising that depicted a human face wearing what appears to be a N-95 mask.[4]

If the absurd notion that the police were instructed to shoot and kill those infected with COVID-19 combined with a hashtag referencing Brad Pitt weren't enough to give away the joke, then the clear echoes to the popular "infected zombie" genre in American media would have been sufficient to give the reasonable reader pause before concluding that Bailey's post was serious.

In addition to Bailey's post itself, the comments left by his friends also gave away the joke. The district court took notice of the comments but failed to fully consider the relevant context. Bailey's post elicited comments and back-and-forth banter from his Facebook friends. One of his friends who understood the joke commented "lol and he talking about my post gonna get flagged [] he wins." ROA.382. Contained within that response was an emoji representing someone crying with laughter. ROA.382. This clearly demonstrated that the commenter understood that the post was not serious. In response, Bailey stated, "this is your fault" and added the over-the-top all caps "YOU MADE ME DO THIS." ROA.382.

Just as the D.C. Circuit recognized that a reasonable reader who possessed a "baseline of knowledge" would use relevant context to distinguish facts from satire

[4] *28 Weeks Later*, Fandom, https://bit.ly/3UiijjU.

in the context of a political blog, in this case, all of the aforementioned context was available to a reasonable reader with a basic understanding of Facebook and some experience online. That reader's "well considered view" would have incorporated the knowledge of these posts and comments, even if the obviousness of Bailey's joke wasn't already apparent. *Farah*, 736 F.3d at 536–38.

Ultimately, the reasonable reader would have known that Bailey's Facebook post was humor. It could not have been a terroristic message because a reasonable reader would have understood it to be a parody of apocalyptic news stories, not a real warning. Its hyperbole, its zombie-media tropes, and its reference to a particular zombie movie all clearly signaled to a reasonable reader that it was not a serious news bulletin. Bailey's post was a commentary on the paranoia of the moment, just like *The Onion*'s faux-advice to readers in March of 2020 that "If you believe a passenger may be infected, be prepared to rush the cockpit and crash the plane to save America."[5] Both *The Onion*'s warning and Bailey's joke were understood by their readers to be parodies, and both were protected by the First Amendment. The sole difference between the two is that only Bailey was arrested for his speech.

[5] *Best Methods For Staying Safe From Coronavirus*, The Onion (Mar. 11, 2020), https://bit.ly/3tb9fl7.

II. *Schenck*, *Abrams*, and the Other World War I–Era Free Speech Precedents Are Not Good Law

Despite Bailey's post being obvious parody and commentary, the district court nonetheless held that it was unprotected speech, and thus that Bailey could have been arrested (and even jailed!) for his speech. To reach this conclusion, the district court erroneously relied on outmoded precedent and improperly framed the test to be applied.

In concluding that Bailey's Facebook joke was unprotected speech, the district court relied in part on the "clear and present danger" test from *Schenck*. But in the years since 1919, the infamous World War I–era precedents upholding criminal prosecutions for anti-war speech, including *Schenck*, *Frohwerk*,[6] *Debs*,[7] and *Abrams*,[8] have been superseded by key precedents which are more speech-protective and demand far greater scrutiny of government attempts to suppress speech. Despite this well-known evolution in the law, the district court nevertheless exhumed these precedents and allowed them to "stalk our [free speech] jurisprudence once again" like "ghoul[s] in a late-night horror movie that repeatedly sit[] up in [their] grave[s] and shuffle[] abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J.,

[6] *Frohwerk v. United States*, 249 U.S. 204 (1919).
[7] *Debs v. United States*, 249 U.S. 211 (1919).
[8] *Abrams v. United States*, 250 U.S. 616 (1919).

concurring). The specter of *Schenck*'s attempted resurrection is far more frightening than the infected hordes to which Bailey referred in his absurd Facebook post.

The *Schenck*-era cases have been superseded, most significantly, by the Supreme Court's adoption of a narrower standard for speech that incites unlawfulness. In *Schenck*, the Court upheld a criminal conviction punishing anti-war speech under the Espionage Act of 1917. The defendants distributed leaflets urging men not to submit to the draft or enter military service and likened the draft to the involuntary servitude prohibited by the Thirteenth Amendment. *Schenck*, 249 U.S. at 50–51. Justice Holmes, writing for the Court, infamously asserted that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.* at 52. He further wrote that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*

This version of the test for incitement, also known as the "bad tendencies test," enabled the government to criminalize speech if it made unlawful conduct more likely to take place. *See* Ronald J. Krotoszynski, Jr., *The Clear and Present Dangers of the Clear and Present Danger Test*, 72 SMU L. Rev. 415, 421–423 (2019); *see also* James M. McGoldrick, Jr., *"This Wearisome Analysis": The Clear and Present Danger Test from* Schenck *to* Brandenburg, 66 S.D.L. Rev. 56, 59–70 (2021). In

Frohwerk, Holmes further illustrated just how easily speech could be placed beyond the First Amendment's protection under this test when he wrote for the Court that an anti-war paper could be suppressed because it might have been found "that the circulation of the paper was in quarters where *a little breath would be enough to kindle a flame*" and that the authors knew the paper might be read by men subject to the draft. 249 U.S. at 209 (emphasis added); McGoldrick, *supra*, at 69.

Finally, in *Debs*, the Supreme Court upheld the conviction of socialist activist and politician Eugene V. Debs for delivering the same anti-war speech twice in violation of the Espionage Act. Although Debs's speech was "nuanced" and tried "to walk the line between supporting his anti-war cause and not violating the Espionage Act," the Court nonetheless "held Debs's caution against him, pointing out that he was encouraging his listeners to infer more from his statements than appeared on their face." McGoldrick, *supra*, at 70. "Debs 'used words tending to obstruct the recruiting service' which 'meant that they should have that effect.' Not only did words only have to indirectly affect or have the tendency to obstruct the draft, that very tendency was enough to show the intent to obstruct the draft." *Id.* (quoting *Debs*, 249 U.S. at 216).

Subsequently, in *Abrams*, the Court once again upheld convictions for speech critical of the United States' actions in World War I, this time under the 1918 amendments to the Espionage Acts. But in the short time between the Court's

opinions in *Schenck* and *Abrams*, Justice Holmes had changed his view. Holmes dissented in *Abrams*, along with Justice Brandeis. And Holmes's dissent planted the seeds for the modern (and narrower) incitement test the Supreme Court would adopt 50 years later. 250 U.S. at 624–631 (Holmes, J., dissenting); *see also* Krotoszynski, *supra*, at 423 ("Under the *Abrams* version [of the clear and present danger test], the nature of the harm must be both very serious and virtually certain, requiring an 'immediate check' in order 'to save the country.' Speech that merely possesses a bad tendency – the *Schenck* standard – would not meet this standard."). Justice Brandeis also laid down an important marker with his concurring opinion in *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring). Justice Brandeis wrote that a speech restriction will be valid if it "is required in order to protect the State from destruction or from serious injury, political, economic or moral" and that such necessity exists only if speech "would produce, or is intended to produce, *a clear and imminent danger* of some substantive evil." *Id.* at 373 (emphasis added); *see also* McGoldrick, *supra*, at 81–82.

Throughout the rest of the first half of the twentieth century, the Court's precedents gradually became more protective of speech without radically shifting away from the earlier precedents. *See Dennis v. United States*, 341 U.S. 494, 507 (1951) ("Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent

opinions have inclined toward the Holmes-Brandeis rationale."); *see also* McGoldrick, *supra*, at 82–104.

The shift to the modern standard for incitement occurred when the Court decided *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court overturned the conviction of the leader of an Ohio chapter of the Ku Klux Klan after his racial epithet laden speech to a group of hooded and gun-toting Klan members was recorded and broadcast on TV. *Id.* at 444–47. The speech discussed the need for "revengeance" if the government continued to suppress the white race and announced a march that was scheduled for the Fourth of July. *Id.* at 446. The Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action." *Id.* at 447 (emphasis added).

The *Brandenburg* "imminent lawless action" test is difficult to satisfy. "[T]he barrier to liability . . . has generally been the imminence prong, not the intent prong." Eugene Volokh, *Crime-Facilitating Speech*, 57 Stan. L. Rev. 1095, 1193 (2005). To date, the Supreme Court has never found that a speech restriction satisfied the *Brandenburg* test. In the most well-known case to apply the test, *Hess v. Indiana*, 414 U.S. 105 (1973), the Court overturned the conviction of an anti-war demonstrator who was protesting on the campus of Indiana University. While the

police were clearing the streets of the protestors, Gregory Hess was overheard saying "We'll take the fucking street later" or "We'll take the fucking street again" and was subsequently charged with violating Indiana's disorderly conduct statute. *Id.* at 105–07. Applying *Brandenburg*, the Court reasoned that "Hess' statement was not directed to any person or group of persons," and therefore "it cannot be said that he was advocating, in the normal sense, any action." *Id.* at 108–09. The Court further reasoned that "since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State" based merely on the notion that "they had a tendency to lead to violence." *Id.*

In this case, the district court erred by framing the test to be applied using *Schenck*'s infamous "fire in a theatre" analogy. *Bailey v. Iles*, No. 21-01211, slip op. at 15–16 (W.D. La. July 20, 2022). Although the district court cited the appropriate language from *Brandenburg* one paragraph later, the court's opinion nevertheless applied the obsolete *Schenck* standard. The district court wrote that "Bailey's post publishing misinformation during the very early stages of the COVID-19 pandemic and time of national crisis was remarkably similar to falsely shouting fire in a crowded theatre." *Id.* at 16. Making its reliance on *Schenck* even more clear, the court continued, "Viewed in the light of the surrounding circumstances, Bailey's Facebook post may very well have been intended to incite lawless action, and in any

event, certainly had a substantial likelihood of inciting fear, lawlessness, and violence." *Id.* In other words, because it was *conceivable* that Bailey's Facebook post *might* make unlawful conduct more likely, the post was unprotected speech and the state could have punished him for it with impunity. This speech-chilling standard has not been good law since *Brandenburg*, and applying it was error.

The district court should have instead asked whether Bailey's post was "advocacy . . . directed to inciting or producing imminent lawless action" and whether it was "likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. When evaluating Bailey's post in context, it is obvious that a prosecution of his speech, like many others before it, would have failed to satisfy the demanding *Brandenburg* standard.

This is true for several reasons. First, Bailey could not have been advocating imminent lawless action because his post was not advocating *anything*. His post did not prescribe any course of action aside from encouraging others to share the post as part of the joke. Even if his appeal to share the post were taken seriously, merely encouraging others to share an online post is not the type of advocacy that *Brandenburg* and *Hess* had in mind.

Second, the identity of Bailey's alleged audience is unclear. Here, as in *Hess*, Bailey's "statement was not directed to any person or group of persons," and as a

result, "it cannot be said that he was advocating, in the normal sense, any action." 414 U.S. at 107–08.

Third, under *Brandenburg*, the government would need to demonstrate that Bailey's advocacy was both *intended* and likely to produce imminent lawless action. 395 U.S. at 447. But the government did not identify any evidence that Bailey had a bad intent. Instead, the district court simply accepted the musings of a single police officer that the post "was an attempt to get someone hurt" in the context of the uncertainty of the spring of 2020. This rank speculation is in keeping with the "bad tendencies" test of the discredited *Schenck* era and precisely the type of loose justification for punishing speech that *Brandenburg* forbids.

Finally, neither the government nor the district court identified any lawless action inspired by Bailey's post. The Rapides Parish Sherriff's Office didn't receive so much as a call to its non-emergency line to complain about the post. If an address to a group of armed Klansmen referencing the possibility of "revengeance" is not incitement to imminent lawless action, then neither is making a joke on Facebook which does not prescribe any action, is not addressed to anyone, and never so much as generated a single complaint.

Bailey's Facebook post clearly fails the *Brandenburg* test. As a result, summary judgment should be reversed.

III. Bailey's Protected Speech Cannot Serve as a Basis for Probable Cause

Under the principles articulated in the Supreme Court's decisions in *Hustler Magazine* and *Brandenburg*, Bailey's obvious joke on Facebook was protected speech. If the district court's decision is allowed to stand, its failure to recognize the clearly established constitutional protections for humor and its revival of *Schenck*'s "bad tendencies" test would leave future speech vulnerable to criminalization based on the speculative musings of government officials.

Because the district court erred in finding that Bailey's post was not protected speech, it also erred in finding that Iles was entitled to qualified immunity. Iles's defense of qualified immunity fails if his actions were objectively unreasonable in light of established law. *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305–06 (5th Cir. 2020). The constitutional question, then, is whether "a reasonable official would understand that what he is doing violates [a constitutional] right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It is not necessary, however, for a court to have previously found a particular law to be unconstitutional. Even where no court has weighed in, "officials can still be on notice that their conduct violates established law in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979); *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam). "The central concept is that of 'fair warning.'"

Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope*, 536 U.S. at 740).

The Supreme Court's opinions in *Hustler Magazine* and *Brandenburg* should have put any reasonable officer on notice that Bailey's joke was protected speech, which cannot be the basis of probable cause for an arrest. For the reasons explained above, nothing about Bailey's post was unlawful, intended to incite unlawfulness, or risked inciting unlawfulness. Thus, no reasonable officer could have concluded that Bailey's post was unprotected speech. Indeed, no reasonable officer would have looked to a standard that has been extinct for nearly 60 years to justify arresting Bailey for an obvious joke. Consequently, there was no justification for his arrest, and the arresting officer should not be entitled to qualified immunity.

CONCLUSION

The First Amendment protects an individual's ability to make jokes online. Interfering with this right by using outmoded precedents to justify criminal sanctions for innocent speech will undermine the free speech rights of millions of internet users and leave future speech vulnerable to the speculative suppositions of government officials. The decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,502 words, excluding the parts exempted by Fed. R. App. P. 32(f).
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/s/ Thomas Berry
November 14, 2022

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Thomas Berry
November 14, 2022