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.

On Appeal from the United States District Court
for the Western District of Louisiana, Alexandria Division
No. 1:20-cv-01211, Hon. David C. Joseph, District Judge, and
Hon. Joseph H.L. Perez-Montes, Magistrate Judge, presiding.

APPELLANT'S OPENING BRIEF

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Certificate of Interested Persons

Appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. Plaintiff-Appellant

   Waylon Bailey.

2. Defendants-Appellees

   Randell Iles; Mark Wood (in his official capacity, and thus by extension the Rapides Parish Sheriff's Office).

3. Counsel for Plaintiffs-Appellants

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Dated: November 4, 2022 /s/ Benjamin A. Field
Counsel for Plaintiff-Appellant

Statement Regarding Oral Argument

Plaintiff-Appellant Waylon Bailey respectfully requests oral argument. This case presents important First Amendment questions of the scope of the incitement and true-threats exclusions from constitutional speech protections. It also presents important questions of how these First Amendment principles interact with the Fourth Amendment and with qualified immunity when an officer arrests a citizen for his online speech.

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INTRODUCTION

Waylon Bailey wrote a joke to his friends on Facebook, in part at the expense of his local sheriff's office. Shortly thereafter, a SWAT team of deputies from that sheriff's office arrested Bailey under a Louisiana terrorism statute for what he wrote online—even though they later acknowledged that nobody was actually concerned, much less terrorized, by the joke. In fact, as soon as a prosecutor saw the case, he immediately dropped it. Bailey then sued for violations of his civil rights. Much legal doctrine follows, but the basic question presented by this case is simple: Whether the Constitution allowed the deputies to arrest Bailey for writing a joke online.

It did not. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message" or "its content."[1] If, as here, government officials "target speech based on its communicative content," that is "presumptively unconstitutional,"[2] unless the speech fits within the "well-defined and narrowly limited classes of speech" historically excluded from the First Amendment's

[1] *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases).

[2] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

protection.[3] The Fourth Amendment's protection against unreasonable seizures further bolsters free speech by forbidding the government from arresting a person based on his protected speech.[4] These fundamental constitutional protections place a heavy burden on the government to justify arresting a citizen for his speech.

Yet here, the district court turned those foundational constitutional principles upside down. Rather than vigorously scrutinizing the deputies' conduct, the court instead went out of its way to excuse it because the arrest occurred at a generally stressful time at the beginning of the COVID-19 pandemic. The court also reached for long-discredited and effectively overruled case law from the World War I era—which infamously permitted the government to jail political dissenters—to hold that Bailey's online speech was wholly unprotected. Thus, in the district court's view, the government could not only have arrested Bailey; it could have jailed him for his speech for over a decade without having to prove

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[3] *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (internal quotation marks omitted).

[4] *See Wayte v. United States*, 470 U.S. 598, 608 (1985); *see also, e.g.*, *Davidson v. City of Stafford*, 848 F.3d 384, 393–94 (5th Cir. 2017); *Mink v. Knox*, 613 F.3d 995, 1003 (10th Cir. 2010).

that his speech was actually threatening or that the government actually had a compelling interest in censoring it.

The deputies may well not have liked Bailey's joke. They may have wished to silence him. But the Constitution is made of sterner stuff and demanded the same of them. This Court should enforce the Constitution's guarantees and reverse the judgment of the district court.

STATEMENT OF JURISDICTION

This case raises civil rights claims under 42 U.S.C. § 1983 and the First, Fourth, and Fourteenth Amendments. The district court had jurisdiction over those claims under 28 U.S.C. §§ 1331 and 1343. And it had supplemental jurisdiction over the related state-law claims under 28 U.S.C. § 1367.

The district court granted summary judgment to Defendants-Appellees Randell Iles and Mark Wood on all claims and entered a memorandum order and final judgment on July 20, 2022. ROA.491. Plaintiff-Appellant Waylon Bailey filed a timely notice of appeal on August 15, 2022. ROA.492.

This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in granting Defendant Iles qualified immunity against Plaintiff Bailey's First Amendment claim when Iles arrested Bailey based solely on the content of a social-media post that did not cause any harm or alarm.

2. Whether the district court erred in granting Defendant Iles qualified immunity against Plaintiff Bailey's Fourth Amendment claim when Iles arrested Bailey based solely on Bailey's speech.

3. Whether the district court erred in granting summary judgment against Plaintiff Bailey's Fourth Amendment and state-law false imprisonment claims based on a conclusion that there was probable cause to arrest Bailey under a Louisiana terrorism statute for posting a joke on social media.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Waylon Bailey Posts An Innocuous Joke On Facebook.

Waylon Bailey has lived in Rapides Parish in central Louisiana his entire life. ROA.135-36. He works at the plant nursery his family has run in the area for 65 years. ROA.135.

Like most people, Bailey uses social media. And like most people in the early days after the reaction to COVID-19, he was using social media to fill time and keep in touch with friends. ROA.157 (97:1-7). He and his friends traded jokes back and forth on Facebook in March 2020 to "make light of the situation." ROA.157 (97:6-7).

On March 20, 2020, in response to a joke about COVID-19 that his friend posted on Facebook, Bailey posted his own joke:

ROA.100.

Replete with over-the-top language, all-caps text, and emojis, Bailey's post compared the pandemic to a zombie apocalypse and satirically described a situation in which the local sheriff's office would "shoot on sight" upon encountering "the infected." *Id.* He ended the post with "#weneedyoubradpitt"—referencing the movie's star's role in the

zombie thriller *World War Z*—to "bring light to the fact that [his post] was a joke." ROA.157 (96:7-16).

Bailey did not intend to scare anyone with his post. ROA.130, ROA.157 (97:8-11). Nor is there any evidence that anyone was actually alarmed or upset by Bailey's post. ROA.201 ("Nobody at this time reported that they were injured because of this post.").

Far from going viral, the post remained a joke among friends, as the banter in the comments reflects. The friend whose post triggered Bailey's understood that it was a joke, ROA.187 (25:4-10), and commented, "lol and he talking about my post gonna get flagged  he wins," ROA.382 (¶ 2). In response, Bailey commented, "this is your fault" and "YOU MADE ME DO THIS." ROA.382 (¶ 3). Another person jokingly commented, "I'm reporting you." ROA.196, *see* ROA.201 (Defendant Iles acknowledging that the commenter could have been joking).[5]

[5] Defendant Iles later justified his actions at his deposition based on these Facebook comments. *See* ROA.196. He did not identify the poster of the "I'm reporting you" comment, *id.*, but had he investigated he would have discovered that it was Bailey's wife Brittany, *see* ROA.175-76.

B. The Rapides Parish Sheriff's Office Dispatches A SWAT Team To Arrest Bailey For His Post.

Seemingly immediately after Bailey wrote his post, the Rapides Parish Sheriff's Office assigned Detective Randell Iles to investigate it. ROA.195. After reviewing the Facebook post and a few of the comments on the post, Iles decided—based solely on reading what was written online—that Bailey's post violated a Louisiana statute against "terrorizing." *Id.*

That statute criminalizes "the intentional communication" that "a crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist." La. Rev. Stat. § 14:40.1 (2020).[6] It has a precise and rigorous *mens rea* requirement: that the speech be made "with the intent of causing members of the general public to be in sustained fear for their safety; or causing evacuation of a building, a public structure, or a facility of transportation; or causing other serious disruption to the general public." *Id.*

[6] The statute was subsequently amended in 2022, to add a second crime for "menacing." Unless otherwise stated, all references to the statute are to the version in force in March 2020, when Bailey was arrested.

Iles did not have any evidence that anybody was actually alarmed by Bailey's post. To Iles's knowledge, no one had contacted the sheriff's office to complain about the post or to express any fear. ROA.195 (11:1-10), ROA.196 (17:7-17). The post had not caused any violence, harm, or disruption. ROA.196 (15:4-12), ROA.197 (17:21–18:13). And it hadn't caused anyone to evacuate anything. ROA.196 (15:13-22).

Undeterred, and without seeking a warrant, Iles assembled a SWAT-style team of deputies to descend on Bailey that same day where Bailey was setting up a home gym in a garage on his family's property. As the deputies approached Bailey with weapons drawn, one ordered him to put his "hands on your fucking head." ROA.142 (36:13), ROA.144 (45:12-20). After ordering Bailey to his knees, the deputies handcuffed him. ROA.144. One of the deputies told Bailey that the next thing he put on Facebook "should be not to fuck with the Police," and they laughed at Bailey. ROA.143 (41:17-22).[7]

[7] Defendants dispute some of these facts, but at summary judgment "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

At that point, Iles approached Bailey and briefly interrogated him. ROA.197-98 (21:25–22:6). In a supplemental report Iles later wrote based on that interrogation, Iles stated that Bailey had "no ill will towards the Sheriff's Office; he only meant it as a joke." ROA.130. After the interrogation, Iles informed Bailey that he was under arrest for terrorizing. ROA.198. In a subsequent "Case Information Sheet" Iles filled out for the district attorney, Iles could identify only "Society/Public" in the "Victim" field. ROA.272.

Iles decided to arrest Bailey based solely on the "wording of the post itself," without further investigation. ROA.202 (38:8-19). Iles did not contact Bailey to ask anything further about the post before going to arrest him. ROA.195 (12:21-25). After the deputies searched the garage where Bailey was arrested, they took him to jail. ROA.144 (42:14-43:1), ROA.146 (50:25-51:1). Bailey's wife had to post a $1,200 bond to bail him out. ROA.149 (62:1-9), ROA.15 (¶ 44).

Bailey deleted his Facebook post after Iles told him that he could either "delete this message" or the sheriff's office "will have [Facebook] take it off." ROA.199 (26:16-22). While Bailey was being booked, a sheriff's office employee told Bailey that the FBI had ordered him "to not

be on social media or post anything on social media until their investigation was over." ROA.155 (86:9-12). (Nothing in the record substantiates that the FBI gave such an order or that federal law enforcement had any interest this case at all.)

After reviewing Bailey's case and the terrorism statute, the local district attorney dropped the prosecution. ROA.154 (84:19-85:23). But the SWAT-style arrest and threat of a terrorism prosecution severely rattled Bailey and his family. The sheriff's office took to Facebook to promote the arrest, ROA.380, and Bailey's face was plastered over the local news labeling him a terrorist, ROA.149, ROA.158-59. There are still news articles on the internet that do the same.[8] Bailey has since been off Facebook and taken anti-anxiety medication due to the shock of the episode. ROA.152.

II. PROCEDURAL HISTORY

Bailey filed this lawsuit in September 2020. ROA.8. He sued Iles in his personal capacity under 42 U.S.C. § 1983. ROA.9 (¶ 7). Bailey

[8] *E.g.*, Colin Kalmbacher, *Man Charged With Terrorism for Posting Brad Pitt Coronavirus Movie Comment on Facebook*, Law & Crime (Mar. 21, 2020, 5:56 P.M.), https://lawandcrime.com/covid-19-pandemic/man-charged-with-terrorism-for-posting-brad-pitt-coronavirus-movie-comment-on-facebook/ (last accessed Nov. 3, 2022).

alleged violations of his clearly established rights under the First Amendment (that he was arrested based on protected speech, ROA.19-21) and the Fourth Amendment (that his warrantless arrest lacked probable cause, ROA.18-19). Bailey also brought two state-law claims for false imprisonment and malicious prosecution. ROA.21-22. For those state-law claims, in addition to suing Iles, Bailey sued Sheriff Mark Wood in his official capacity—effectively alleging that the sheriff's office was vicariously liable for the torts committed by Iles. *Id.*

After discovery, Bailey moved for partial summary judgment on his Fourth Amendment claim, ROA.91, and Defendants moved for summary judgment on all the claims, ROA.214. Defendants argued that Iles was entitled to qualified immunity for Bailey's constitutional claims because a reasonable officer in his position would have found probable cause to arrest Bailey, ROA.227-36, and also that the existence of probable cause entitled them to summary judgment on the state-law claims, ROA.238-42.

The district court granted Defendants' motion for summary judgment and denied Bailey's motion for partial summary judgment. ROA.452-71. First, the court held that Iles was entitled to qualified

immunity on Bailey's Fourth Amendment claim because it was reasonable for Iles to believe probable cause existed to arrest Bailey. ROA.459-65. The court leaned heavily on the context of the COVID-19 pandemic in March 2020 to excuse the officers' conduct. ROA.461-65, ROA.467. Acknowledging that was "critical to the Court's analysis," ROA.462, the district court spent several pages recounting generally the circumstances of the pandemic in March 2020. ROA.461-65. That detailed recitation was provided by the court *sua sponte* and was not in Defendants' summary judgment briefs. *See* ROA.214-49, ROA.297-320, ROA.403-10.

Second, the court held that Iles was entitled to qualified immunity on the First Amendment claim as well. ROA.466-69. The principal basis for that conclusion was a holding that Bailey's Facebook post was in fact not protected by the First Amendment at all because it constituted incitement. ROA.467-68. This issue was also raised *sua sponte*. In the First Amendment arguments in Defendants' briefs—consisting of only three paragraphs total—they had not suggested that Bailey's speech was incitement or that it fit into any other category of speech excluded from First Amendment protection. *See* ROA.237-38, ROA.408.

Finally, because Bailey's state-law claims for false arrest and malicious prosecution[9] hinged on the absence of probable cause, the district court granted summary judgment to Defendants on those claims, too. ROA.470-71.

Following the district court's judgment, Bailey filed a timely notice of appeal to this Court. ROA.492.

STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment *de novo* and evaluates the evidence as the district court would." *Mesa v. Prejean*, 543 F.3d 264, 269 (5th Cir. 2008). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact, [and] the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)) (brackets in original). De novo review applies to a "district court's resolution of legal issues on a motion for summary judgment on the basis of qualified immunity." *Solis v. Serrett*, 31 F.4th 975, 980 (5th Cir. 2022) (internal quotation marks omitted). In reviewing a summary judgment ruling, this Court must "view the facts in the light

[9] Bailey is not appealing the dismissal of his claim for malicious prosecution.

most favorable to the non-moving party and draw all reasonable inferences in its favor." *Id.* (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

I. When Iles targeted Bailey's speech because of its content, his actions presumptively violated the First Amendment. Unless he could prove that arresting Bailey was necessary to accomplish a compelling government interest or show that the speech fit into the narrow categories excluded from First Amendment protection, he violated Bailey's free speech rights. Yet Iles did not even try to meet that standard, and so he could not be entitled to judgment.

Nevertheless, rather than subjecting Iles's conduct to First Amendment scrutiny, the district court supplied a rationale for the government and held that Bailey's speech was wholly unprotected as incitement. But Bailey's speech was not directed to inciting anything, and it certainly did not meet the demanding constitutional standard that inciting speech be likely to cause imminent lawlessness. The district court's contrary conclusion relied on long-discredited and effectively overruled World War I-era case law. Similarly, Bailey's joke wasn't a true threat, either, because it could not reasonably have been taken to

have threatened at all, much less to have credibly threatened a specific person or place. And because clearly established law protected Bailey's speech and put it beyond the reach of any criminal law, qualified immunity was unavailable to excuse Iles's conduct.

II. Iles also violated the Fourth Amendment when he arrested Bailey for his online writing because clearly established law said that it is unreasonable to arrest a person based on constitutionally protected speech. Even setting aside the First Amendment, Iles also lacked probable cause under the Louisiana terrorism statute because Bailey's inane joke could not reasonably have been considered terrorizing under the narrow terms of that statute. This all would have been obvious to a reasonable officer, so qualified immunity is also unavailable against Bailey's Fourth Amendment claim.

III. For the same reasons Iles violated the Fourth Amendment by arresting Bailey without probable cause, he also committed the Louisiana tort of false imprisonment. And under Louisiana law, his government employer—Sheriff Mark Woods—is vicariously liable for that tort.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE FIRST AMENDMENT CLAIM BECAUSE BAILEY'S FACEBOOK POST WAS PROTECTED SPEECH UNDER CLEARLY ESTABLISHED LAW.

Bailey's First Amendment argument proceeds in three parts. First, Subsection A establishes that punishing Bailey for the content of his speech presumptively violated the First Amendment and that there is an extensive body of law holding that online speech and humorous speech—even if a court doesn't find it funny—receives full First Amendment protection. Neither Defendants nor the district court suggested that Iles could satisfy strict scrutiny to justify arresting Bailey based on the content of his speech.

Instead, the district court said that Bailey's speech was categorically unprotected by the First Amendment. But as Subsection B explains, Bailey's joke doesn't fit into any of the narrowly drawn categories of speech excluded from First Amendment protection. And, as Subsection C explains, Iles cannot assert qualified immunity on the ground that he was merely enforcing a Louisiana terrorism statute because it should have been obvious to him—especially in light of clearly

established First Amendment law—that the Louisiana statute neither did nor could criminalize Bailey's speech.

A. Bailey's Facebook Post Was Fully Protected By The First Amendment.

The Free Speech Clause of the First Amendment, as extended to the States by the Fourteenth Amendment, is a stark command: Governments may "make no law . . . abridging the freedom of speech." U.S. Const. amend. I. That means, "[a]s a general matter, . . . that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). "As a result, the Constitution 'demands that . . . the Government bear the burden of showing'" that a content-based restriction of speech is constitutional. *United States v. Alvarez*, 567 U.S. 709, 716–17 (2012) (plurality opinion) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)).

Here, there is no dispute that Iles arrested Bailey because of the content of his online speech. Indeed, the *only* thing Iles considered before descending on Bailey with a SWAT team was what was written on Facebook. *See* ROA.473, ROA.253, ROA.124, ROA.245 ¶ 5; *see also supra* pp. 7–9. So a heavy burden presumptively falls on Defendants to show

that punishing Bailey for his speech was consistent with the First Amendment.

More specifically, joking speech as a category—such as satire,[10] parody,[11] and humorous stories[12]—is broadly protected by the First Amendment. Whether a judge finds the joke to be funny or in good taste is irrelevant to the First Amendment's protections. *See, e.g.*, *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 Publ'g Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992))); *Cohen v. California*, 403 U.S. 15, 25 (1971) (explaining that "one man's vulgarity

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[10] *See, e.g*, *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988) ("Despite their sometimes caustic nature, from 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.").

[11] *See, e.g.*, *Golb v. Att'y Gen.*, 870 F.3d 89, 102 (2d Cir. 2017) ("[P]arody enjoys First Amendment protection notwithstanding that not everybody will get the joke."); *accord Hustler Mag.*, 485 U.S. at 57; *id.* (White, J., concurring in the judgment) ("[P]enaliz[ing] the publication of the parody[] cannot be squared with the First Amendment.").

[12] *See, e.g.*, *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982) (Even if stories are "gross, unpleasant, crude, distorted," and have "no redeeming features whatever," "the First Amendment was intended to cover them all.").

is another's lyric," and that it is "because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual"); *Mink v. Knox*, 613 F.3d 995, 1011 (10th Cir. 2010) ("[S]peech, such as parody and rhetorical hyperbole, which cannot reasonably be taken as stating actual fact, enjoys the full protection of the First Amendment[.]").

Bailey's particular type of joke was hardly unusual. As the COVID-19 pandemic was starting, comparisons to zombie movies were a natural way to make light of the situation. One can still find a plethora of examples from March 2020 from a simple internet search, including famous comedians like Stephen Colbert,[13] Trevor Noah and Jimmy Fallon,[14] and the stars of the zombie comedy film *Shaun of the Dead*[15] all

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[13] *See* Amando Yeo, *'Something you hear in a zombie apocalypse': Stephen Colbert looks at New York's coronavirus response*, Mashable (Mar. 11, 2020), https://mashable.com/video/stephen-colbert-coronavirus-new-york-hand-sanitiser (last accessed Nov. 3, 2022).

[14] *See* Aurelie Corinthios, *Trevor Noah Says Social Distancing 'Hasn't Changed' His Life: 'I Don't Need to Go Outside',* People (Mar. 24, 2020, 4:51 PM), https://people.com/tv/trevor-noah-talks-social-distancing-loves-being-inside-coronavirus/ (last accessed Nov. 3, 2022) ("[Noah] and Fallon compared the virus to a zombie invasion . . . .").

[15] *See* Daniel Kreps, *'Shaun of the Dead' Stars Reimagine Scene as Coronavirus PSA*, Rolling Stone (Mar. 19, 2020),

making jokes on TV or social media comparing COVID-19 to a zombie apocalypse. Nearly a decade earlier, the CDC published a tongue-in-cheek "Preparedness 101: Zombie Apocalypse" guide "to promote preparedness for different emergencies and disasters."[16] There is even formal academic research on how making jokes about pandemics on social media—including specifically zombie jokes—can be "a powerful practice for channeling and managing difficult emotions."[17]

If Bailey were a famous comedian, or had he made his joke to a group of friends on Zoom or as part of a stand-up comedy routine, it would be obvious that arresting him for the joke was an unconstitutional overreaction. That the joke was made online by a non-famous person to his friends does not change the First Amendment's application. *See, e.g.*,

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https://www.rollingstone.com/tv-movies/tv-movie-news/shaun-of-the-dead-coronavirus-psa-simon-pegg-970042/ (last accessed Nov. 3, 2022).

[16] *See* Centers for Disease Control and Prevention, *Campaigns*, https://www.cdc.gov/cpr/campaigns/index.htm (last accessed Nov. 3, 2022).

[17] *See* Marci D. Cottingham & Ariana Rose, *Tweeting Jokes, Tweeting Hope: Humor Practices during the 2014 Ebola Outbreak*, Health Communication (Mar. 7, 2022), *available at* https://www.tandfonline.com/doi/full/10.1080/10410236.2022.2045059 (last accessed Nov. 3, 2022) (observing that "Zombies were a common trope in mainstream Twitter reactions to the [2014 Ebola] epidemic").

Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (explaining that "cyberspace . . . in general, . . . and social media in particular," are "the most important places . . . for the exchange of views[] today" (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

In fact, Defendants' actions in this case raise particular First Amendment concerns because there is evidence they were motivated to arrest Bailey, at least in part, because the sheriff's office was the butt of his joke. The arresting deputies mockingly laughed at Bailey and told him the next thing he put on Facebook "should be not to fuck with the police." *See supra* p. 8. That raises especial First Amendment concerns because "[t]he freedom of individuals" to "challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

All these different lenses for evaluating Bailey's Facebook post refract to the same point: His speech was presumptively protected by the

First Amendment, so Iles's content-based enforcement against Bailey's speech triggered strict scrutiny. That required Defendants to prove that restricting Bailey's speech "further[ed] a compelling interest and [was] narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (internal quotation marks omitted). It is hard to imagine how Defendants *could* prove that they had a compelling interest in restricting zombie jokes or that making an arrest and threatening a felony prosecution were appropriately tailored to any such interest.

And reversal is especially easy here because Defendants did not even *try* to satisfy strict scrutiny. *See* ROA.237-38. Nor did the district court apply strict scrutiny. *See* ROA.486-89.[18] Because Defendants made

[18] The district court conceptualized the First Amendment claim as a retaliation claim. *See* ROA.486. Such a claim requires a plaintiff to show that (1) he "engaged in constitutionally protected activity," (2) "the defendants' actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity," and (3) "the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Here, there was no dispute that Iles was motivated to arrest Bailey for his speech. Nor did Defendants suggest that arresting somebody for a felony would not chill speech. That makes sense because a SWAT arrest obviously would chill speech, and it actually did in this case when Bailey deleted his post and deactivated his Facebook account at the deputies' command. *See* ROA.127, ROA.129, ROA.139 (23:15–17), ROA.155 (86:2–12),

no effort to satisfy the correct legal standard, summary judgment must be reversed.

B. No Categorical First Amendment Exclusions Apply To Bailey's Facebook Post.

Rather than apply strict scrutiny, the district court *sua sponte* held that Bailey's speech was categorically unprotected by the First Amendment. *See supra* p. 12. But "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *Alvarez*, 567 U.S. at 717 (plurality opinion) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)) (brackets in *Alvarez*). Unless Bailey's Facebook post fit into one of these "well-defined and narrowly limited classes of speech," *Stevens*, 559 U.S. at 468–69 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)), then it was protected, and Iles's punishment of that speech violated the First Amendment.

ROA.199 (26:12–22), ROA.270. So only the first element is at issue—that is, whether Bailey was "engaged in constitutionally protected activity." Thus, the retaliation framing results in the same inquiry as the general First Amendment standard for content-based speech regulation: whether the government constitutionally could restrict Bailey's online speech.

1. Bailey's Facebook post was not incitement.

One such narrowly limited class is "advocacy intended, and likely, to incite imminent lawless action." *Alvarez*, 567 U.S. at 717 (plurality opinion) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)); *see also Stevens*, 559 U.S. at 468. This is the exception on which the district court relied to conclude that "Bailey's post was not protected speech." *See* ROA.487-88.

The district court was wrong for at least three reasons: (1) Bailey's speech wasn't advocacy, so the incitement exclusion simply cannot apply. (2) Even if Bailey's joke could somehow be framed as advocacy, it comes nowhere near satisfying the stringent *Brandenburg* incitement standard. And (3) the district court's reliance on discredited World War I-era precedent to expand the *Brandenburg* test is squarely foreclosed by modern First Amendment law.

First, it is difficult to see how the incitement exclusion could even apply. Nothing in Bailey's Facebook post was "advocacy," much less advocacy "intended, and likely, to incite imminent lawless action." *Alvarez*, 567 U.S. at 717 (plurality opinion). Bailey made a joke at the expense of the Rapides Parish Sheriff's Office, painting an apocalyptic

scenario comparing COVID-19 to a zombie movie. He was not advocating anything. There is thus just no way the incitement exclusion from First Amendment protection could apply to his speech. The detailed case law discussion below reflects that all the incitement cases relied on by the district court involved real advocacy of supposedly lawless action, further confirming that those cases are simply not relevant to speech (like Bailey's) that doesn't advocate anything at all. Even the district court recognized that Bailey was not "advocating for a particular type of action" or "a particular political viewpoint," yet it applied the incitement standard anyway. ROA.487. The square peg of Bailey's joking speech just isn't a fit for the round hole of the incitement category.

Second, even if the Facebook post could be characterized as advocacy,[19] it doesn't come close to reaching *Brandenburg*'s high bar. Under *Brandenburg*, "the constitutional guarantees of free speech" shield even the express "advocacy of the use of force or of law violation except

[19] To the extent one twisted Bailey's satirical joke at the expense of law enforcement into advocacy criticizing the sheriff's office, such criticism of police would—if anything—trigger *more* First Amendment protection, not less. *See Hill*, 482 U.S. at 461–63; *Enlow v. Tishomingo County*, 962 F.2d 501, 509 (5th Cir. 1992). For what it's worth, any such criticism was validated by Defendants' disproportionate overreaction in this case.

where such advocacy is *directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." 395 U.S. at 447 (emphases added). Thus, speech is protected unless it is (1) directed to producing lawless action, (2) such lawless action is imminent, and (3) the speech is likely to have that effect.

The facts of *Brandenburg* itself reveal how stringent that test is. That case involved films of a Ku Klux Klan rally showing hooded figures gathered around a burning cross, several brandishing firearms. *Id.* at 445. In a speech laced with racist and antisemitic slurs and invective, a speaker in "Klan regalia" said that "[t]he Klan has more members in the State of Ohio than does any other organization" and that "four hundred thousand" would be "marching on Congress." *Id.* at 446. He threatened that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* The films were broadcast on a local station and "on a national network." *Id.* at 445. Despite the ominous and threatening imagery and language, the Supreme Court reversed the conviction of the Ku Klux Klan leader for criminal syndicalism, *id.*, explaining that the statute and jury instructions did not sufficiently

distinguish "mere advocacy" from "incitement to imminent lawless action," *id.* at 448–49.

The Court's later cases applying *Brandenburg* show how demanding the standard is and reflect the troubling nonchalance with which governments will invoke incitement to punish clearly protected speech. For instance, when Texas defended a prosecution for flag burning at a protest because of "the potential for a breach of the peace," the Court said that accepting that argument would "eviscerate our holding in *Brandenburg*" and it "decline[d] to do" so. *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Likewise, the Court applied *Brandenburg* in refusing to allow Mississippi to impose tort liability on the NAACP for promoting a boycott to protest segregation, despite "emotionally charged rhetoric" in speeches at protests supporting the boycott. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). This conclusion was in large part because no "acts of violence" actually followed the relevant speeches, and the speeches had not "authorized, ratified, or directly threatened acts of violence." *Id.* at 928–29. And in *Hess v. Indiana*, the Court refused to allow Indiana to punish the leader of an anti-Vietnam War demonstration because even his most aggressive statements—that

protestors would "take the fucking street"—were "not directed to any person or group of persons." 414 U.S. 105, 107–08 (1973) (per curiam). All these cases involved tense, in-person political protests and provocative speech, but the First Amendment and *Brandenburg* consistently prevailed over government justifications for censorship because the speeches did not directly demand violence or actually result in violence.

If the facts of *Brandenburg* and its progeny do not meet the threshold for incitement that can be constitutionally proscribed, Bailey's Facebook post certainly does not. He did not brandish weapons, burn crosses or flags, or suggest "revengeance." Far from being broadcast on national television or delivered to an agitated crowd, his joke was online for only a few hours to be seen by his Facebook friends. There is no evidence that Bailey intended anyone to do anything unlawful, nor did the joke call for anyone to do anything. And there is no reason to believe it was likely to incite imminent lawless action, as indeed no such lawless action took place—nor could Defendants identify anyone other than themselves who thought there was any danger from the post. *See supra* pp. 5–9. There is simply no basis to conclude that Bailey's Facebook post

was "directed to inciting . . . imminent lawless action" or that it was "likely to incite . . . such action," the independent and necessary conditions for *Brandenburg* to apply. 395 U.S. at 447.[20]

Third, if Bailey's speech could not be criminalized under *Brandenburg*, it couldn't be criminalized under the "clear and present danger" standard either. Perhaps recognizing that Defendants could not hope to satisfy a proper application of *Brandenburg*'s strict rule that incitement can be banned only if it is directed towards and is likely to cause imminent lawless action, the district court also invoked that much older and laxer "clear and present danger" standard and cited two cases applying it. ROA.487 (citing *Schenck v. United States*, 249 U.S. 47 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919)). But that standard was superseded by *Brandenburg* and has been thoroughly discredited by history and more recent First Amendment doctrine.

The "clear and present danger" formulation was born during a nadir of the First Amendment, when the Supreme Court blessed jailing

[20] At the very least, the district court's holding that Bailey's speech would likely incite lawless action was a factual conclusion ill-suited for summary judgment. That contention was a significant point of dispute among the parties, and there was little evidence to support it but much to contradict it.

political dissenters during World War I and in its aftermath. The facts of the two cases invoked by the district court are especially egregious, in which the "clear and present danger" test was deployed to allow the government to jail pamphleteers who challenged the draft, *see Schenck*, 249 U.S. at 50–53, or who criticized U.S. foreign policy towards the Russian Revolution, *see Abrams*, 250 U.S. at 617–24.[21] The same "clear and present danger" standard was also used to bless convictions for publishing antiwar newspaper articles and to jail Eugene V. Debs for his opposition to the war. *See Brandenburg*, 395 U.S. at 450–51 (Douglas, J., concurring) (citing, among other cases, *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919)). During the height of the "clear and present danger" test, in *Whitney v. California* the Court upheld a conviction for being a Communist party member under a criminal syndicalism statute. 274 U.S. 357, 362–72 (1927); *see*

[21] Famously, in the course of seven months, Justice Holmes went from authoring *Schenck* to dissenting vociferously in *Abrams*, and he became a strong First Amendment defender thereafter. It was this latter version of Holmes that ultimately triumphed. As Justice Souter later explained, "one of the milestones of American political liberty is *Brandenburg*," which was "the culmination of a half century's development that began with Justice Holmes's dissent in *Abrams*[.]" *United States v. Williams*, 553 U.S. 285, 321 (2008) (Souter, J., dissenting).

also Dennis v. United States, 341 U.S. 494 (1951) (expressly applying "clear and present danger" standard to uphold convictions of Communist party leaders for advocating overthrow of U.S. government).

Yet this mode of analysis was overturned in *Brandenburg*, which expressly overruled *Whitney* because it afforded far too little protection for free speech. 395 U.S. at 449. Two concurrences in *Brandenburg* made the death of the "clear and present danger" standard even more explicit. Justice Black wrote that "the 'clear and present danger' doctrine should have no place in the interpretation of the First Amendment." *Id.* at 449–50 (Black, J., concurring). And Justice Douglas "s[aw] no place in the regime of the First Amendment for any 'clear and present danger' test." *Id.* at 454 (Douglas, J., concurring). As *Brandenburg* and its progeny make clear, *see supra* pp. 25–28, the kinds of vigorous and disputative advocacy that could once be criminalized under the "clear and present danger" doctrine are now very much protected by the First Amendment.

It's no wonder, then, that courts have consistently read *Brandenburg* to have supplanted *Schenck* and *Abrams*. *See United States v. Viefhaus*, 168 F.3d 392, 397 n.3 (10th Cir. 1999) ("The 'clear and present danger' test, first articulated in *Schenck* . . ., has been replaced

by the 'incitement' test developed in *Brandenburg* . . . ."); *see also, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) (explaining that "the clear and present danger of *Schenck* . . . evolved into the modern incitement rule of *Brandenburg* . . . ."); *United States v. Rundo*, 990 F.3d 709, 718 (9th Cir. 2021) (per curiam) ("*Brandenburg*'s imminence requirement is more exacting than the prior clear and present danger test."); *United States v. Miselis*, 972 F.3d 518, 533 (4th Cir. 2020) ("*Brandenburg* has . . . been widely understood . . . as having significantly . . . narrowed the category of incitement.").

The district court was wrong to evaluate Bailey's Facebook post under the same standard that allowed jailing political dissenters a century ago. If Bailey's online speech does not rise to *Brandenburg*'s strict incitement standard—and it does not—Defendants' actions cannot be justified instead by turning to the thoroughly discredited and long-overruled doctrine from the days of *Schenck* and *Abrams*.

2. Bailey's Facebook post was not a true threat.

Given that the statute under which Bailey was arrested was aimed at "terrorizing," *see* La. Rev. Stat. § 14:40.1, perhaps the more relevant

category of speech excluded from First Amendment protection is "true threats." *Alvarez*, 567 U.S. at 717 (plurality opinion) (citing *Watts v. United States*, 394 U.S. 705 (1969) (per curiam)). But, like the *Brandenburg* test for incitement, the standard for a true threat is also demanding. Bailey's Facebook post does not come close to meeting it.

"'True threats'" are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Threats are "proscribable . . . where a speaker [1] directs a threat to a person or group of persons [2] with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Supreme Court cases applying the true-threats standard make clear how demanding it is. In *Virginia v. Black*, the Supreme Court's most fulsome application of the true threats doctrine, the Court explained that a Ku Klux Klan cross-burning that is targeted to intimidating a *particular* person can be criminalized. *Id.* at 366 (plurality opinion). But *not* cross-burning generally, even though cross-burning at a political rally would naturally "creat[e] anger or resentment" and "arouse[] a sense of

anger or hatred." *Id.* In *Watts*, the case that originated the true-threats doctrine, an anti-Vietnam War protestor at a rally at the Washington Monument—just blocks from the White House—said that if he were drafted and made to "carry a rifle," then "the first man I want to get in my sights is L.B.J." 394 U.S. at 706. The Court reversed his conviction for threatening the President, explaining that "[t]aken in context"—in particular, the nonviolent "reaction of the listeners" and the "conditional nature of the statement"—it was simply a "crude offensive method" of making a point and was fully protected by the First Amendment. *Id.* at 708 (internal quotation marks omitted).

Comparing Bailey's silly and emoji-laden Facebook joke to a Klan cross-burning or a statement of desire to shoot the President makes it obvious how far Bailey's speech was from being a true threat. Bailey's post did not make any threat at all, and it did not express any "intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. The post instead made an over-the-top joke about the surreal state of the early COVID-19 pandemic in general. In fact, nobody actually was intimidated or felt threatened, and nobody reacted violently. *See supra* pp. 5–6, 8–9. The difference between

his joke and "cross burning on a neighbor's lawn," *Black*, 538 U.S. at 366 (plurality opinion), is so stark as to make obvious that the category of true threats is a complete mismatch for Bailey's joke.

Circuit courts' treatment of social media posts confirms that Bailey's post was not a true threat. The most similar case by far is *Ross v. City of Jackson*, 897 F.3d 916 (8th Cir. 2018), which is on all fours with this case. There, a Facebook post with images of different firearms was captioned "Why I need a gun" and listed several reasons, such as self-defense. *Id.* at 918. A man who supported gun control facetiously commented on the post: "Which one do I need to shoot up a kindergarten?" and deleted the comment shortly thereafter. *Id.* at 918–19. But the comment was first forwarded to the police department, and without conducting any investigation other than viewing the post, several officers arrested the sarcastic commenter under Missouri's analogue to Louisiana's terrorizing statute. *Id.* at 918–21. After the district court granted the officers summary judgment based on qualified immunity, the Eighth Circuit reversed. It explained that "even a 'minimal further investigation' would have revealed that [the plaintiff's] post was not a true threat" and that the officers were objectively

unreasonable in arresting the commenter without conducting that minimal investigation. *Id.* at 922–23. Virtually the exact same thing happened here, and the same result should obtain.

In another case, the Tenth Circuit considered a high-schooler's joking post on Snapchat with an image of his friend in "a foreign military hat from the World War II period" and the caption "Me and the boys bout [sic] to exterminate the Jews." *Cl.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270, 1274 (10th Cir. 2022) (alteration in original). Distasteful as the post was, the court explained that it "would generally receive First Amendment protection because it does not constitute a true threat." *Id.* at 1277.

This Circuit recently found a COVID-related Facebook post to be a true threat, but the contrast between that case and this one demonstrates how poorly the true-threats doctrine fits Bailey's post. In *United States v. Perez*, this Court applied the true threats standard to an April 2020 Facebook hoax involving two posts in which the poster "claim[ed] that he had paid a friend's cousin, who was COVID-19 positive, to lick everything in two San Antonio grocery stores." 43 F.4th 437, 439 (5th Cir. 2022). The poster identified two specific H-E-B stores, said his COVID-positive

cousin had "licked every thing," and said "YOU'VE BEEN WARNED." *Id.* at 439–40. As this Court explained, the posts understandably "set off alarm bells," leading a member of the public to report the posts to law enforcement and forcing the grocery company to consider closing its stores and to "task[] four employees with searching thousands of transactions" to determine whether a person connected to the posts had made a purchase. *Id.* at 440.

This Court ruled that the posts constituted true threats and so were not entitled to First Amendment protection. That was because those "posts evinced an intent to spread COVID-19 at a second grocery store in addition to the one already targeted," and "described actions that would have placed employees and potential shoppers at two grocery stores at risk." *Id.* at 443. Moreover, a jury had found beyond a reasonable doubt that "the posts would have a reasonable tendency to create apprehension that their originator will act according to their tenor." *Id.* (internal quotation marks and brackets omitted).

The differences between *Perez* and this case are stark. Most importantly, the threats in *Perez* were entirely believable: It is quite possible that an antisocial prankster would lick produce in a grocery

store. In contrast, Bailey's plainly over-the-top description of sheriffs' deputies indiscriminately shooting COVID-19 patients—replete with a reference to Brad Pitt—was self-evidently farcical. Moreover, the *Perez* posts threatened two specific grocery stores, whereas Bailey's posts did not mention any particular place or person. The real-world effects bear out the obvious differences. The *Perez* post triggered a report to law enforcement and a resource-intensive investigation by the threatened grocery chain. Defendants here, however, could not identify a single member of the public concerned about Bailey's post. Thus, even if laws like Louisiana's terrorizing statute may constitutionally restrict "hoax terrorist attacks" under *Perez*, *id.* at 444, this case is so far from that situation that the comparison only proves why the true threats doctrine has no application here.

If nothing else, the difference in procedural posture requires a different outcome. In *Perez*, a jury had found beyond a reasonable doubt that the posts contained credible threats. Here, by contrast, the district court decided at summary judgment that Bailey's absurdist post "had a substantial likelihood" of being taken seriously, ROA.487, even though that question of fact was a major point of disagreement between the

parties. At a minimum, then, the case must be remanded so that a trial can determine whether, as a factual matter, a reasonable reader would find Bailey's joke about a zombie apocalypse to be a credible threat like *Perez*'s far less fantastical threats to lick produce in two specific grocery stores. *See, e.g.*, *United States v. Stock*, 728 F.3d 287, 298 (3d Cir. 2013) ("In the usual case, whether a communication constitutes . . . a true threat is a matter to be decided by the trier of fact." (internal quotation marks omitted)) (collecting cases); *United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015) (similar).

The factual gulf between this case and *Perez* also shows why the district court erred in analogizing this case to the hypothetical invented in *Schenck* of "falsely shouting fire in a theatre and causing [a] panic." ROA.487 (quoting *Schenck*, 249 U.S. at 52). Like the facts in *Perez*, the shouting-fire-in-a-theater hypothetical involves an entirely plausible threat: that a theater is on fire and its inhabitants in imminent danger, which could easily cause panic and a stampede. Bailey's ludicrous joke, which made no reference to a particular place or person, presented no such risk. Also as in *Perez*, *Schenck*'s shouting-fire-in-a-theater hypothetical presumes that the speech *results* in "causing a panic." In

this case, there was no actual panic, only conjecture in the mind of a sheriff's deputy. *Schenck* deployed the shouting-fire-in-a-theater image to justify jailing a political dissenter, charting a baleful course that the Supreme Court later repudiated. *See supra* pp. 29–32. This Court should not make a similar mistake by allowing criminal law to be deployed against an inane Facebook joke as if it were speech imminently threatening to cause a lethal panic.

C. The First Amendment Protection For Bailey's Facebook Post Was Clearly Established, So Qualified Immunity Does Not Apply.

Iles's qualified-immunity defense fails if his "actions violated clearly established constitutional law." *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305 (5th Cir. 2020). That requires Bailey to show that Iles violated Bailey's First Amendment rights and that Iles's actions were objectively unreasonable in light of clearly established law. *See id.* The question the qualified-immunity inquiry is supposed to answer 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). "The central concept is that of 'fair warning,'" and an officer loses immunity when existing law "'gave reasonable warning that [his]

conduct . . . violated constitutional rights.'" *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)); *accord Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam).

As explained at length in the preceding two subsections, the law was indeed clearly established that Bailey's speech was protected by the First Amendment and that no relevant exclusions from First Amendment protection applied. Iles was therefore fairly warned that arresting Bailey for his online speech would violate the First Amendment, and qualified immunity is unavailable.

As a way partially to side-step the troubling First Amendment problems with Iles's actions, the district court suggested in the alternative that Iles was entitled to qualified immunity because he reasonably believed Bailey violated the Louisiana terrorizing statute. ROA.488. But that statute is narrowly drawn to proscribe only the sort of speech that meets the stringent *Brandenburg* and true-threats standards. It targets only speech made "with the intent of causing members of the general public to be in sustained fear for their safety," such as speech "causing evacuation of a building, a public structure, or a facility of transportation." La. Rev. Stat. § 14:40.1. It is thus like the

federal terrorist-threat statute at issue in *Perez* and is plainly tailored to statements like bomb threats or hijacking threats that could lead to panicked evacuations. A reasonable officer reading the statute against the backdrop of First Amendment principles would have known that it did not apply to Bailey's fantastical online joke that was not directed toward any specific place or person. As the Eighth Circuit explained in the remarkably similar *Ross* case discussed above, even minimal investigation would have revealed that the speech at issue was not subject to the criminal statute. 897 F.3d at 922–23; *see supra* pp. 35–36.[22]

Even if the terrorizing statute could have been read to reach beyond the limitations of the *Brandenburg* and true-threats doctrines—and it could not reasonably be read that way—it would not have justified Iles's conduct. That is because, although officers can generally invoke qualified immunity by "rely[ing] on statutes that authorize their conduct," they

[22] As explained further below, the terrorizing statute's terms, case law interpreting it, and the facts available to Iles all show overwhelmingly that the statute did not apply to Bailey's joke. Thus the statute could not have supported probable cause for an arrest, even setting aside First Amendment limitations. *See infra* Part II.B. That also makes inapplicable *Nieves v. Bartlett*'s proposition that "probable cause should generally defeat a retaliatory arrest claim." 139 S. Ct. 1715, 1727 (2019).

may not do so "if the statute is obviously unconstitutional." *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005); *see also Villarreal v. City of Laredo*, 44 F.4th 363, 372 (5th Cir. 2022), *vacated on reh'g en banc*, 2022 WL 15702899 (5th Cir. Oct. 28, 2022) (collecting cases nationwide for this proposition).[23] To the extent the Louisiana terrorizing statute could be read to apply beyond the bounds of the clearly established incitement and true-threats First Amendment standards, the statute—or at least those applications—would be obviously unconstitutional and so provide no defense to Iles.[24]

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[23] Although this Court has voted to reconsider *Villarreal* en banc, that casts no doubt on the consensus among the circuit courts surveyed by the *Villarreal* panel opinion that applying a statute in a clearly unconstitutional manner cannot support qualified immunity. The panel dissent in *Villarreal* did not take issue with that principle, but rather argued that the application of the Texas statute in that case was *not* clearly unconstitutional. *See Villarreal*, 44 F.4th at 388–90 (Richman, C.J., dissenting). The panel dissent also emphasized that the defendants in that case procured a warrant from a neutral magistrate, *see id.* at 390–91, whereas Iles in this case arrested Bailey on his own independent judgment without seeking input from prosecutors or a magistrate. However *Villarreal* is ultimately resolved, then, the absence of any basis for qualified immunity in *this* case is straightforward.

[24] Qualified immunity is especially unwarranted here because Iles had ample time to consider his actions but nevertheless made the premediated decision to arrest Bailey for his speech. This is thus not a case involving "split-second judgments" about whether to make an arrest, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018), in which

* * * *

Zooming out from the weeds of the legal doctrine, it's worth considering the big-picture issue presented by the First Amendment claim in this case. Waylon Bailey wrote a silly joke to his friends on Facebook, which (unsurprisingly) didn't cause any actual harm. Deputies in the local sheriff's office didn't like the joke—perhaps because it mentioned their office—and descended in force on Bailey to arrest him for his online speech. Under the district court's rationale, that was perfectly acceptable. In fact, in its view, Bailey's speech was wholly unprotected. Thus, had the district attorney not exercised the wisdom to drop the charges, Bailey could have been imprisoned for 15 years "with . . . hard labor," La. Rev. Stat. § 14:40.1(C), for making a harmless joke—without any First Amendment protection whatsoever.

To avoid such absurd results is exactly why First Amendment scrutiny is so demanding for content-based speech restrictions and why

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additional leeway for officers may be more appropriate. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of cert.) (suggesting that officials who "have time to make calculated choices about enacting or enforcing unconstitutional policies" ought not "receive the same protection" as officers making "a split-second decision . . . in a dangerous setting").

the exclusions for incitement and true threats are so narrowly drawn. If government officials like Iles are permitted to use statutes targeting true threats and incitement "not for their intended purposes but to" punish speech they don't like, and courts are lax in enforcing the First Amendment's boundaries, then "little would be left of our First Amendment liberties." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part).

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE FOURTH AMENDMENT CLAIM BECAUSE ILES VIOLATED BAILEY'S CLEARLY ESTABLISHED RIGHT NOT TO BE ARRESTED WITHOUT PROBABLE CAUSE.

Bailey's Fourth Amendment claim is based on the clearly established principle that an officer violates the Fourth Amendment by making a warrantless arrest without probable cause. *See Davidson v. City of Stafford*, 848 F.3d 384, 391 (5th Cir. 2017). The lack of probable cause here is apparent in two independent ways.

First, Subpart A explains that the law was clearly established that protected speech may not serve as probable cause for an arrest. Because Iles arrested Bailey based only on protected speech, Iles lacked probable cause. That is enough for Bailey to prevail. But as Subpart B explains,

there is a second and independent reason to reverse: Even if there were no First Amendment rights at issue, Iles would nevertheless clearly lack probable cause because no reasonable officer could have concluded that the Louisiana terrorizing statute applied to Bailey's Facebook post.

A. The Fourth Amendment Analysis Follows The First Amendment Analysis Because It Is Clearly Established That Probable Cause Cannot Be Based Solely On Protected Speech.

It has been clearly established for decades that probable cause "may not be deliberately based upon an unjustifiable standard" such as "the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotation marks omitted). That means that "[a]n officer may not base his probable-cause determination on speech protected by the First Amendment." *Swiecicki v. Delgado*, 463 F.3d 489, 498 (6th Cir. 2006); *see also Davidson*, 848 F.3d at 393–94 (collecting "fulsome case law clearly establishing that an arrest without probable cause [based on the exercise of First Amendment rights] violates both First and Fourth Amendment rights"); *Mink v. Knox*, 613 F.3d 995, 1011 (10th Cir. 2010) ("[I]t was clearly established . . . that speech, such as parody and rhetorical hyperbole, which cannot reasonably be taken as stating actual fact, enjoys the full protection of

the First Amendment and therefore cannot constitute" a crime "for purposes of a probable cause determination.").

Thus, a reasonable officer in Iles's position would have understood that Bailey's joking Facebook post was constitutionally protected and that such protected speech could not have supplied probable cause for an arrest. Because the arrest therefore lacked probable cause, it violated Bailey's Fourth Amendment right against unreasonable seizure. That is enough to reverse.

B. Even Setting Aside Constitutional Speech Protections, Iles Did Not Have Probable Cause Because He Could Not Have Reasonably Believed That Bailey Had Violated The Louisiana Terrorizing Statute.

A second and independent reason to reverse is that, "[e]ven if [Bailey] had not been exercising core First Amendment rights"—which he was—he "was not (even arguably) in violation of" the Louisiana terrorizing statute. *Davidson*, 848 F.3d at 394. Iles is not entitled to qualified immunity because there was simply no probable cause for an arrest, and he was objectively unreasonable in believing there was. *See Crostley v. Lamar County*, 717 F.3d 410, 422 (5th Cir. 2013).

No reasonable officer would have perceived Bailey's emoji-studded, hashtagged, hyperbolic post as a serious attempt to cause sustained fear

or disruption by spreading misinformation. But Louisiana's terrorizing offense requires (1) the "intentional communication" (2) "of information that the commission of a crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist," (3) "with the intent of causing members of the general public to be in sustained fear for their safety; or causing evacuation of a building, . . . or causing serious disruption to the general public." La. Rev. Stat. § 14:40.1(A). Terrorizing requires both specific intent, *see State v. Lewis*, 43 So. 3d 973, 985 (La. Ct. App. 2010), and "an immediacy element," *see State ex rel. J.S.*, 808 So. 2d 459, 462 (La. Ct. App. 2001)—meaning the statute could only apply if Bailey "actively desired" for his post to cause sustained fear, serious disruption, or the evacuation of a building and that the violence or dangerous circumstances were either in progress or likely to occur at any moment.

Probable cause to arrest Bailey could have existed only if "all of the facts known by" Iles at the time were "sufficient for a reasonable person to conclude that" Bailey "had committed, or was in the process of committing," terrorizing under § 14:40.1. *Sam v. Richard*, 887 F.3d 710, 715 (5th Cir. 2018) (internal quotation marks omitted). And while Iles

was entitled to "rely on the totality of facts available" to him, he was prohibited from "disregard[ing] facts tending to dissipate probable cause." *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988).

At the time he arrested Bailey, Iles knew only: (1) his supervisors had asked him to "look into the situation," ROA.195; (2) the text of the post, *id.*; (3) Bailey was the author, *id.*; and (4) three comments on Bailey's post included "I'm reporting you," "This is your fault," and "YOU MADE ME DO THIS," ROA.196. Considering just those facts—even setting aside constitutional speech protections—reveals how weak Iles's basis for probable cause was.

1. Even in isolation, the facts invoked by Iles do not provide probable cause that Bailey was terrorizing.

Bailey's post was self-evidently farcical, and no reasonable reader would have taken it to intend to terrorize anyone. The specific aspects of the post highlighted by the district court and Iles cannot overcome the absurdity of treating an obvious joke seriously. For instance, Bailey's invitation to "share share share" was plainly tongue-in-cheek in context, not an effort to cause sustained fear or serious disruption. *Contra* ROA.461-62. Iles said he read the post—shared to Bailey's Facebook

friends—as seriously intending "to get someone hurt." ROA.195 (12:3-4). That interpretation itself strains credulity, but it still doesn't meet the statute's requirement that the speaker must intend to "place the entire *general population* in fear." *State v. Brown*, 966 So. 2d 1138, 1145 (La. Ct. App. 2007) (emphasis added); *see also State v. Jason*, 9 So. 3d 336, 340 (La. Ct. App. 2009) (finding that yelled threats of violence to specific people were not intended to cause the *general public* sustained fear or disruption).

The comments on the post don't change any of that. Iles relied on these at his deposition to justify the arrest, but the far more reasonable reading of those comments was banter among friends. Of the three comments that Iles identified as causing him concern, Bailey himself posted two of them. ROA.382. It's nonsensical to say that Bailey caused himself sustained fear.

The third comment that Iles remembered simply said, "I'm reporting you." Iles testified that this made him "concerned," ROA.196, but he admitted that he did not know whether this comment was joking or serious, ROA.201 (36:12-17). In the context of other joking responses, *see supra* p. 6, it is hard to believe it reflected serious concern. Indeed,

Iles was not aware of anyone actually reporting Bailey's post to law enforcement, ROA.196, 201, and he did not include that commenter's name—or anyone's name—in the "victim" field of his post-arrest report, ROA.272.[25] Instead, he simply wrote, "society." *Id.* Iles's "concern[]" about that person was not enough to create probable cause without "evidence . . . demonstrat[ing] that [Bailey's post] [was] intended to place [that person] in sustained fear, or to cause an evacuation, or disruption." *Brown*, 966 So. 2d at 1145.

Finally, Iles's subjective beliefs cannot fill the gap to create objective probable cause. *See Anderson*, 483 U.S. at 641. Iles testified that he believed Bailey's post "meant to get police officers hurt" because "[i]n society there was a lot of protests at the time in reference to law enforcement." ROA.195; *see also* ROA.200 ("It was about getting officers hurt responding to residences."). But Louisiana courts have found that

[25] As noted above, *see supra* p. 6 & n.5, had Iles investigated the comments before making an arrest, he would have found that this comment that supposedly gave him the most concern was written by Bailey's wife. Thus, "had [Iles] engaged in minimal further investigation," he would have come to "the only reasonable conclusion": that the comments were online banter among friends and family, not expressions of fear, and that Bailey had not broken any law. *Ross*, 897 F.3d at 923.

"police officers are not members of the 'general public'" under the terrorizing statute. *Brown*, 966 So. 2d at 1145. So *even if* the post could plausibly be read to communicate an intent to cause police officers to fear for their safety—which is quite a stretch—that would not fall under the definition of "terrorizing" in section 14:40.1(A). *See id.* (reversing terrorizing conviction of a man who called the Alexandria Police Department and threatened to kill any officer that patrolled his neighborhood). Moreover, Iles's post hoc justification for his supposed fear is itself implausible. 2020's large "protests . . . in reference to law enforcement" did not begin until George Floyd's death in May,[26] so they could not have informed Iles's decision to arrest Bailey in March.

2. The facts weighing against probable cause overwhelm Iles's weak bases for believing he had probable cause.

Iles's stated justifications also impermissibly ignore several facts that a reasonable officer would have weighed heavily against probable cause. *See Bigford*, 834 F.2d at 1218. First, the post itself is obviously a joke, and one protected by the First Amendment at that. *See supra*

[26] *See, e.g.*, Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html (last accessed Nov. 3, 2022).

Part I. The over-the-top language, emojis, and hashtag referencing a Brad Pitt zombie movie all indicate that Bailey did not intend for his post to scare anyone, let alone place the general public in sustained fear for their safety.

Second, Bailey himself confirmed to Iles in his brief interview before he was arrested that he "meant [the post] as a joke" and had "no ill will towards the Sheriff's Office." ROA.130. Iles himself later indicated that he believed Bailey in his post-arrest reports. ROA.130 (Iles's report stating that Bailey had "no ill will towards the Sheriff's Office; he only meant it as a joke"). That means that even if Iles had reason to investigate the post in the first instance, probable cause evaporated when he actually spoke with Bailey, and Iles should have walked away then without taking Bailey to jail. *See Ross*, 897 F.3d at 922 (arrest unreasonable where arrestee "tried to explain what was meant by his [social media] comment and provide the officers with more context about the post, but the officers did not give him that opportunity until after he was booked").

Third, nobody ever indicated to Iles or the sheriff's office that they were actually scared by the post. ROA.196, 201. Other than his own

speculation, Iles simply had no reason to believe anybody was terrorized by the joke. *See supra* pp. 8–9.

3. Even if Bailey's post were taken seriously, it did not satisfy the requirements of the Louisiana terrorizing statute.

Even assuming that Iles could reasonably have believed the post was not a joke, Louisiana courts have set a very high bar for what constitutes terrorizing and what is a sufficiently imminent threat to fall within the statute. Thus, a student describing a "hypothetical" scenario of how he would carry out a school shooting was not sufficiently imminent to violate the statute. *State ex rel. R.T.*, 781 So. 2d 1239, 1241–42 (La. 2001). Nor was a student writing on the wall of a school bathroom that "Everyone will die May 28, 1999." *State ex rel. J.S.*, 808 So. 2d at 461. Instead, under Louisiana law, imminent really means imminent. An example of what was imminent is a man calling the sheriff and 911 dispatcher, after an altercation with police at a Wal-Mart, to tell them he intended to return to that specific Wal-Mart store with loaded guns. *Hamilton v. Powell*, No. 13-cv-2702, 2014 WL 6871410, at *1, *4 (W.D. La. Dec. 2, 2014). Even if Bailey's post is read as a serious statement about the police shooting people with COVID-19, it is far more akin to

the general threats of the *R.T.* and *J.S.* cases than the imminent threat to return to a specific store armed after having been thrown out of it.

4. That the early pandemic was generally a stressful time does not supply probable cause.

Rather than explaining clearly how Bailey's Facebook post could reasonably be considered terrorizing under the stringent requirements of the Louisiana statute, most of the district court's reasoning was not about the post itself, but instead recounting its own research about "the context and circumstances of national and global affairs at the time of the post." ROA.482; *see* ROA.482-85. The court frankly admitted that was "central" to its analysis. ROA.485. But whether speech is made at "a time when misinformation and fear were prevalent throughout the United States," *id.*, cannot supply probable cause that a particular writing was specifically intended to cause sustained fear, severe disruption, or evacuation. Nor does it tend to show whether the speech communicates imminent violence.

Otherwise, the criminal law's reach would massively expand—and breathing room for free speech accordingly shrink—anytime a police officer could point to some reason for general anxiety in society. Not only is that a dangerous principle in general, Louisiana courts have rejected

it in the specific context of terrorizing prosecutions: In a pair of cases concerning terrorizing arrests at schools shortly after the Columbine shootings, Louisiana courts reversed two adjudications of delinquency despite the "climate of fear" in which they took place. *State ex rel. R.T.*, 781 So. 2d at 1241, 1242 (finding no evidence that a student communicated that violence was imminent when, just a few days after Columbine, the student described how "easy" it would be carry out a shooting); *State ex rel. J.S.*, 808 So. 2d at 463 (finding no evidence that a student who wrote "Everyone will die May 28, 1999" on a bathroom wall caused any sustained fear or serious disruption, "even in the atmosphere created by the Colorado tragedy").

5. Bailey's case is unlike this Court's unpublished decision in *Stokes v. Matranga* relied on by Defendants.

This case is quite unlike *Stokes v. Matranga*, No. 21-30129, 2022 WL 1153125 (5th Cir. Apr. 19, 2022), an unpublished decision relied upon heavily by Defendants below. *See* ROA.412-13. In that case, a panel of this Court affirmed a grant of qualified immunity and summary judgment to a school resource officer who arrested a student for terrorizing based on a photo of the student posing in front of a whiteboard

drawing of himself, captioned "Future School Shooter." 2022 WL 1153125 at *1.

Even on its own terms, that case was wrongly decided, and the analysis in Judge Duncan's thorough dissent is persuasive. *See id.* at *4–*8. As Judge Duncan pointed out, the arrested student didn't post the image himself and was in fact the victim of a classroom "prank" that his "own teacher was in on," the arresting officer knew all that, and so it was "absurd" and "outrageous" to arrest the student and charge him with terrorizing. *Id.* at *4.

Equally importantly, the legal analysis in *Stokes* is unpersuasive because critical issues were apparently not raised by the parties and thus not considered by the court. First, the student in *Stokes* did not bring a First Amendment claim against the officer or seemingly press any First Amendment arguments, so the court never considered whether the terrorizing statute could constitutionally reach the speech at issue, nor did it confront whether the speech at issue was an unprotected true threat or incitement. Second, in its Fourth Amendment analysis, *Stokes* did not construe § 14:40.1 or consider Louisiana case law explaining the narrow scope of the statute when deciding whether the officer had

arguable probable cause to arrest the student. It considered neither the requirement for specific intent to place the entire general population in fear, nor the requirement that the communication must convey imminent violence or danger. So *Stokes*'s analysis has little value for evaluating the arguments presented in this case, which show that First Amendment principles and Louisiana law thoroughly undermine probable cause.

Even if this Court is inclined to credit the non-precedential *Stokes* decision that seemingly lacked the benefit of comprehensive argumentation on critical legal issues, Bailey's case is also factually distinct in important ways. The "Future School Shooter" caption and drawing contained fewer internal indications that it was a joke—in contrast to the emojis and hashtag in Bailey's post—and portended more imminent violence and disruption than Bailey's non-specific, fantastical zombie joke. And, unlike Iles, the officer in *Stokes* had evidence that the photo had actually caused members of the public fear because parents had called in to complain about it. 2022 WL 1153125 at *3.

* * * *

In sum, "the information available to" Iles could not "be construed, by an objectively reasonable officer in [his] position," as rendering Bailey's post an act of terror under Louisiana law. *Davidson*, 848 F.3d at 392–93. It was objectively unreasonable for Iles to believe that Bailey had the requisite "specific intent . . . to cause members of the general public to be in sustained fear for their safety, or to cause evacuation of a public building . . . or to cause other serious disruption to the general public." *Lewis*, 43 So. 3d at 985. Nor would an officer "familiar with the practical considerations of everyday life" have concluded that Bailey's zombie-apocalypse joke suggested that violence or danger was imminent. *Bigford*, 834 F.2d at 1219. No reasonable officer would have believed there was probable cause to arrest Bailey under § 14:40.1. And because it was clearly established that an arrest without probable cause violates the Fourth Amendment, Iles is not entitled to qualified immunity for violating Bailey's rights.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST BAILEY'S STATE-LAW CLAIMS BECAUSE ILES LACKED PROBABLE CAUSE.

A. False Imprisonment

Because Detective Iles lacked probable cause to arrest Bailey, the district court also erred in granting judgment against Bailey's claim for false imprisonment. False imprisonment, also called wrongful arrest, occurs when a defendant (1) detains a person and (2) the detention is unlawful. *See Miller v. Desoto Reg'l Health Sys.*, 128 So. 3d 649, 656 (La. Ct. App. 2013) (citing *Kyle v. City of New Orleans*, 353 So. 2d 969 (La. 1977)). To recover on a false imprisonment claim against the police, a plaintiff must "prove the police lacked probable cause for the arrest." *Zerbe v. Town of Carencro*, 884 So. 2d 1224, 1228 (La. Ct. App. 2004). As just explained, *supra* Part II, Iles did not have probable cause to arrest Bailey. He therefore falsely imprisoned Bailey by arresting him.[27]

B. Employer Liability

Bailey also sued Sheriff Wood in his official capacity, which in practice means holding the Rapides Parish Sheriff's Office liable for its

[27] The district court recognized that the absence of probable cause is the "determinative factor" for both Bailey's Fourth Amendment claim and his state-law claims. ROA.469.

employee Iles's conduct. Under Louisiana law, an employer—including a sheriff's office—is vicariously liable for an employee's tort. *See* La. Civ. Code art. 2320 ("employers are answerable for the damage occasioned by" employees "in the exercise of the functions in which they are employed"); *Jenkins v. Jefferson Parish Sheriff's Office*, 402 So. 2d 669, 671 (La. 1981) (holding that the sheriff, in his official capacity, "is the appropriate governmental entity on which to place responsibility for the torts of the deputy sheriff").

An "employee's conduct is within the course and scope of his employment if the conduct is of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer." *Barrios-Barrios v. Clipps*, 825 F. Supp. 2d 730, 741 (E.D. La. 2011) (quoting *Bates v. Caruso*, 881 So. 2d 758, 762 (La. Ct. App. 2004)). Here, Iles was acting on instructions from his supervisors in the Rapides County Sheriff's Office to "look into" Bailey's post, ROA.195, and Defendants have never disputed that he was acting within the scope of his employment when he arrested Bailey. Thus, just as Iles is liable for the tort of false imprisonment, Sheriff Wood is vicariously liable for his employee's tort.

CONCLUSION

This Court should reverse the judgment of the district court.

Dated: November 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 2022, I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: November 4, 2022 /s/ Benjamin Field
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,506 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: November 4, 2022 /s/ Benjamin A. Field
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