No. 23-227

IN THE

Supreme Court of the United States

SARAH K. MOLINA and CHRISTINA VOGEL,

Petitioners,

—v.—

DANIEL BOOK, *et al.*,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The court of appeals below rejected Petitioners' First Amendment retaliation claim on two legal grounds warranting this Court's review. First, it held as a matter of law that the words on Petitioners' hats—"National Lawyers Guild Legal Observer"—were not protected speech because they did not express a "pro-protest (or other particularized)" message. Pet. App. 12a. In doing so, the Eighth Circuit further entrenched a well-developed circuit split over whether written messages on clothing are presumptively entitled to First Amendment protection. Second, the court held, again as a matter of law, that the right to unobtrusively observe the police in public was not clearly established. *Id.* at 8a. That holding is blatantly wrong. It underscores the need to reconsider the qualified immunity doctrine wholesale, and at a minimum justifies summary reversal.

Respondents principally oppose certiorari by seeking to re-litigate the facts and suggesting the questions presented were forfeited. But Respondents' factual quibbles have no place here. The court of appeals held as a matter of law that, even if the police targeted Petitioners for the words on their hats or merely observing the police, the First Amendment did not protect those forms of expression. As for forfeiture, Petitioners raised below the precise First Amendment arguments upon which they seek review. And because only this Court can revisit the qualified immunity doctrine, they need not have raised their second question presented in the court of appeals.

Respondents do not address the circuit split over Petitioners' first question presented until page 28 of their opposition. Once they get there, however, they fail to cast any doubt on the 3-3 divide. That split is stark, decades in the making, and shows no signs of resolving on its own. And, by erroneously applying a test for expressive conduct to certain kinds of written messages, the three circuits on the wrong side of the split have left broad swaths of pure speech exposed across the American heartland simply because of the medium through which it has been conveyed.

ARGUMENT

I. This Case is an Excellent Vehicle to Resolve the Purely Legal Questions Presented

Respondents seek to avoid review first by painting this case as a complicated factual dispute about whether the police tear-gassed Molina and Vogel because of their protected First Amendment activities or because other protesters assaulted the police. They then claim Petitioners forfeited the questions presented. Both objections are baseless.

1. Respondents' lengthy recitation of their version of what happened at the protest might be relevant at trial, but it provided no basis for the Eighth Circuit's grant of summary judgment in their favor below. And it affords no justification for denying review of the purely legal questions presented here.

In attempting to reopen these factual disputes, Respondents seek to cast doubt on whether retaliatory animus truly motivated the officers' actions. *See, e.g.*,

BIO 20. For example, they argue officers "never read" the words on Molina and Vogel's hats, *id.* at 14, that there is otherwise "no evidence" to support this basis for Petitioners' First Amendment retaliation claim, *id.* at 13, that Molina and Vogel were not "unobtrusively" observing police, *id.* at 19, and that the record leaves uncertain which officers did and saw which things, *id.* at 21.

Those factual assertions were not why the Eighth Circuit granted summary judgment. Instead, the court ruled that—even assuming Respondents targeted Petitioners for the words on their hats and their conduct as legal observers—those claims still failed as a matter of law. Molina and Vogel ask this Court to reverse the court of appeals' holdings that words on clothing are not presumptively entitled to constitutional protection and that the right to unobtrusively observe the police in public had not been clearly established. These are pure legal questions about what kinds of expression the First Amendment protects, not fact-bound questions about whether officers truly retaliated against Petitioners because of that protected expression.

In any event, the district court already considered and rejected Respondents' version of events. Applying the summary judgment review standard from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the district court found the officers' assertion that they did not know about Molina and Vogel's role as legal observers at the protests to be "illogical" and "untenable." Pet. App. 43a. In reaching that conclusion, it identified a genuine issue of material

fact over whether officers had read the words on Molina and Vogel's hats. *Id.* Although it recognized portions of the record were "unclear" at this stage, at a minimum the district court found the "legal observers [were] close enough" for officers to have "read the words National Lawyers Guild" and thus might have retaliated against Petitioners for that reason. *Id.*

As for whether Molina and Vogel were "peaceful" and "unobtrusive[]" observers at the time of the incident, BIO 18-19 (emphasis omitted), the district court found they had simply been "standing on the sidewalk" in an area with "no evidence of prior protest activity," at a time when "most of the protestors had dispersed," Pet. App. 30-31a. Even looking to Respondents' "own description of events," it concluded the officers lacked so much as "arguable probable cause" to tear gas Petitioners. *Id.* at 40a.

The court of appeals did not disturb those findings of fact about the officers' retaliatory motive. *See* Pet. App. at 68a (Colloton, J., dissenting from denial of rehearing en banc). Instead, it held that the First Amendment simply did not protect the words on Molina and Vogel's hats, and that constitutional protection for their act of observing officers had not been clearly established. *Id.* at 8a, 13a. Those pure legal conclusions are cleanly presented here, and this Court need not conduct a "fact-intensive plenary review of the voluminous record in this case," BIO 13, to address them.

2. Nor does forfeiture stand in the way of granting certiorari. Petitioners presented, and the court below

ruled on, the question whether the words on Molina and Vogel's hats were constitutionally protected speech. In supplemental briefing ordered by the Eighth Circuit, Molina and Vogel argued that the "hats themselves are pure speech in the context of a protest" and that their "donning of caps bearing particular words" warranted First Amendment protection. Appellees' Suppl. Br. at *14, *13 n.5, *Molina v. City of St. Louis*, No. 21-1830, 2022 WL 385490 (8th Cir. Feb. 3, 2022). Molina and Vogel further argued that, even if the officers who attacked them did not fully understand the words on the hats, "a message need not be fully understood . . . to constitute protected speech." *Id.* at *15 n.6. And they claimed the hats, as a form of pure speech, "could not constitutionally motivate the deployment of chemical munitions." *Id.* at *14.[1]

Addressing those arguments, the court below squarely rested its decision on the constitutional status of written messages conveyed on clothing. Pet. App. 13a. Thus, that legal question was both pressed and passed upon, cleanly teeing it up for this Court's review.

[1] Respondents also contend they had no opportunity to respond to Petitioners' characterization of the words on their hats as protected speech. Not so. In their own supplemental briefing, Respondents argued the hats were not protected because the words "National Lawyers Guild" were an "innocuous inscription" that failed to "contain any expressive message." Appellants' Suppl. Br. *6-7, *Molina v. City of St. Louis*, No. 21-1830, 2022 WL 496032 (8th Cir. Feb. 14, 2022).

It is true that Petitioners did not raise in the court of appeals their challenge to qualified immunity's historical pedigree, the second question presented here. But as only this Court can reverse or revise the underlying doctrine, there would have been no point in raising that argument in the lower courts. In any event, Petitioners have indisputably pursued their First Amendment retaliation claim, and—as this Court long ago established—parties can present any argument in support of a claim so long as the claim itself was pressed below. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

II. The Circuits Are Divided on Whether Words Printed on Clothing Qualify as Pure Speech

The brief in opposition also offers no sound basis for disputing the split over whether words on clothing are presumptively protected by the First Amendment. Three circuits—the Fourth, Fifth, and Ninth—hold that they are. Three other circuits—the Eighth in the decision below, as well as the Sixth and Seventh—reject that view and hold that words on clothing are protected only when they express a particularized message. Pet. 12-18.

1. Respondents acknowledge that the Sixth, Seventh, and now Eighth Circuits require that words on clothing express a particularized message before extending First Amendment protection. BIO 32-33. In the Sixth Circuit, the First Amendment applies to words on clothing only if those words convey "a certain viewpoint" that is "easily ascertainable by an

observer." *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 539 (6th Cir. 2001). In the Seventh Circuit, likewise, "the mere presence of words on an article of clothing" is insufficient to qualify as protected speech. BIO 33 (citing *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460 (7th Cir. 2007)). Rather, the words must "convey a particular message" before they are "protected under the First Amendment." BIO 32. The opinion below is of a piece. Pet. App. 12a.[2]

2. On the opposite side of the divide are the Fourth, Fifth, and Ninth Circuits, all of which correctly hold that words on clothing are presumptively protected regardless of whether they express a particularized viewpoint. Pet. 16-18.

Cases from the Fifth Circuit do not even appear in Respondents' brief in opposition. But that court has squarely held "words printed on clothing" "qualify as pure speech and are protected under the First

[2] Respondents suggest that the Second and Third Circuits have also adopted this limitation on what kinds of messages on clothing the First Amendment protects. BIO 30-31. Were that true, it would only deepen the divide. But the Second Circuit case they cite does not address whether written messages on clothing are presumptively entitled to First Amendment protection. *See* BIO 30 (admitting this). Nor does the Third Circuit opinion, *Synpiewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). That case concerned a student disciplined for wearing "redneck" t-shirts. *Id.* at 246. The court assumed that the words on the shirt were protected but found that the school had demonstrated they created a sufficiently substantial disruption to authorize the regulation of speech in school settings. *Id.* at 243, 256-58; *see also Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (substantial disruption test).

Amendment." *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001). Respondents make no effort to show how this is consistent with the opinion below.

Respondents do no better with the Ninth and Fourth Circuits. In *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014), the Ninth Circuit held "the First Amendment analysis" does not "turn[] on an examination of the ideological message (or lack thereof)" expressed by words printed on clothing, *id.* at 1206; *see also* Pet. 16-17. Respondents recite the facts and result of *Frudden* but never mention its rule, nor explain how it can be squared with the Sixth, Seventh, and Eighth Circuits' approach.

Instead, Respondents turn to a case *not* involving words on clothing, *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), which suggested that abstract visual symbols on school uniforms must meet some quantum of discernible "expression" to "implicate concerns of viewpoint neutrality," *id.* at 433; *see also* BIO at 34. But, as plaintiffs have already explained, Pet. 16-17, the school dress code at issue in *Jacobs* required such an assessment precisely because it involved "no written . . . expression of any kind," 526 F.3d at 438. And *Jacobs* further acknowledged in dicta the principle that would later ground the holding in *Frudden*: that "t-shirts containing written messages" are "unquestionably protected by the First Amendment," *id.* at 428 n.21. Thus, Respondents' invocation of *Jacobs* confirms rather than rebuts the Ninth Circuit's conflicting approach.

Respondents also fail to reconcile the Fourth Circuit's decision in *Newsom ex rel. Newsom v. Albermarle County School Board*, 354 F.3d 249 (4th Cir. 2003), with the Sixth, Seventh, and Eighth Circuits. There, the court squarely rejected a school's argument that its dress code did not implicate the First Amendment because wearing clothes bearing messages is "conduct," not "speech." *Id.* at 258 n.6. It did so without any threshold inquiry into the words' underlying meaning.

Respondents claim that in *Newsom*, unlike this case, it was "undisputed that the clothing at issue clearly included a message . . . that was unmistakable in its meaning," BIO 32. But that was not part of the Fourth Circuit's reasoning. *See Newsom*, 354 F.3d at 258 n.6. Regardless, Respondents offer no explanation for how the words on the t-shirt in *Newsom*—"NRA" and "SHOOTING SPORTS CAMP," 354 F.3d at 252—conveyed an "unmistakable" message in any way that the words "National Lawyers Guild Legal Observer" do not.

3. Respondents' effort to explain away the conflict instead rests on a sleight of hand. They argue that "consistent with this Court's teaching," no circuit has embraced the view that words on clothing are "automatically endowed with constitutional protection" even if they are "subjectively and practically meaningless." BIO 28. But the opinion below did not hold that the phrase "National Lawyers Guild Legal Observer" was unprotected because it was subjectively and practically meaningless. There is no dispute that the words "National Lawyers Guild Legal

Observer" have a discernible meaning in the English language, and the court below did not suggest otherwise. Instead, erroneously applying the test for "expressive conduct" to pure speech, the Eighth Circuit concluded that those words were not protected because they conveyed "no obvious pro-protest message." Pet. App. 13a. It is that holding which Petitioners seek to reverse, and it is that holding which conflicts directly with the Fourth, Fifth, and Ninth Circuits (as well as decisions of this Court).

III. Respondents Offer No Basis for Denying Review on the Second and Third Questions Regarding Qualified Immunity

Molina and Vogel also seek review of the court of appeals' holding that Respondents were entitled to qualified immunity because, in retaliating against Petitioners, they did not violate any clearly established right to unobtrusively observe the police in public. That holding warrants review both because newly discovered historical evidence undermines the doctrine of qualified immunity itself and because its perverse application in this case is so plainly wrong that it calls out for summary reversal.

Respondents offer no serious justification for denying review of the underlying doctrine, which new historical evidence shows rests on a factual error. There is, after all, no prospect of the lower courts "reach[ing] consensus" on the implications of this evidence, BIO at 16, without the Court's intervention.

But even if this Court were not yet inclined to rethink the doctrine wholesale, at a minimum it should rein in its excesses by summarily reversing the court of appeals' ruling that the First Amendment right to unobtrusively observe police officers in public was not clearly established at the time of the protests. As the dissent from the order denying rehearing en banc makes clear, no reasonable government official could think that a law barring unobtrusive observation of the police in public is constitutional. *See* Pet. App. 65a. That the court of appeals nonetheless found this claim barred by qualified immunity only illustrates the lower courts' unfortunate tendency to find qualified immunity virtually everywhere. At a minimum, this Court should rein in that impulse by summarily reversing.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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Respectfully submitted,

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