

No. 22-293

In The
Supreme Court of the United States

ANTHONY NOVAK,

Petitioner,

v.

CITY OF PARMA, OHIO, ET AL.,

Respondents.

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

**BRIEF OF *THE BABYLON BEE* AS AMICUS
CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF THE AMICUS CURIAE¹

The Babylon Bee is a “dangerous,”² “far-right misinformation site[]”³ that typically peddles “fake news”⁴ but, when its writers are up for more of a challenge, occasionally uses satire to “draw[] on and reinforce[] actual misinformation and conspiracy.”⁵ *The Bee* is part of the “conservative media ecosystem,” famed for its “conspiratorialism and questionable reporting.”⁶

The Bee has had some success with the whole satire thing. With 20 million page views per month on its website,⁷ *The Bee* is quite possibly the most popular source for satire in the history of the world. *The Bee* has inspired many imitators, including our fellow

¹ No counsel for any party authored this brief in whole or in part, and no individual or entity other than *The Babylon Bee* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Timely notice of intent to file this brief was provided to counsel of record for all parties, and the same have consented in writing to its filing.

² Libby Emmons, *CNN Reporter Claims the Babylon Bee Is Dangerous*, *The Post Millennial*, Jan. 7, 2020, <https://tinyurl.com/khbcbbax>.

³ *New York Times: Far-Right Misinformation Site the Babylon Bee Uses “Satire” Claim to Protect Its Presence on Facebook*, *Twitchy*, Mar. 22, 2021, <https://tinyurl.com/yc6ck5sv>.

⁴ *CNN’s Brian Stelter: The Onion Is a Great Parody Site, but the Babylon Bee Is Straight-Up Fake News*, *Twitchy*, July 30, 2019, <https://tinyurl.com/dnma368j>.

⁵ Parker J. Bach, *Can the Right Make Good Satire without Collapsing Due to Fake News?*, *Slate*, June 22, 2021, <https://tinyurl.com/3s2duayk>.

⁶ *Id.*

⁷ James Varney, *The Babylon Bee: Satire or Real News?*, *The Washington Times*, Jan. 3, 2021, <https://tinyurl.com/474jdr7>.

amicus curiae in this case, a cute little upstart known as *The Onion*.

Like Mr. Novak, *The Bee* is frequently the target of censorship and attacks from powerful people who don't get—or at least don't appreciate—its jokes. *The Bee* has faced the ire of a diverse group of establishment-media types—including *The New York Times*, *The Washington Post*, and CNN—and the wrath of the massive tech companies who functionally control the lion's share of public debate in our society.

As a matter of fact, *The Bee* is serving a brutal life sentence in Twitter jail as we speak.⁸ Its writers would very much like to avoid a consecutive sentence in a government-run facility.

SUMMARY OF ARGUMENT

Truth is stranger than fiction. And fiction is illegal. At least in the Sixth Circuit. That court's decision—depriving Petitioner Anthony Novak of any opportunity to hold accountable those who searched his home, arrested him, and jailed him because the parody he wrote was too effective—should be reviewed by this Court on the merits.

First, parody plays an invaluable role in a free society. When parody is imperiled, citizens are deprived

⁸ Ariel Zilber, *Twitter Suspends Babylon Bee for Naming Rachel Levine "Man of the Year,"* N.Y. Post, Mar. 21, 2022, <https://tinyurl.com/4nxfyb2a>. See also Tyler Huckabee, *The Babylon Bee Is Refusing to Delete the Post that Got Their Account Locked on Twitter*, Relevant Magazine, Mar. 21, 2022, <https://tinyurl.com/55b6kp3s>.

of one of their most effective means of criticizing the government.

Second, the Sixth Circuit’s ruling will allow the state to punish vast swaths of speech erstwhile protected by the First Amendment. *The Bee* and its writers could be held criminally liable for many, if not most, of the articles *The Bee* publishes. Good grief, *The Bee* could even be on the hook for publishing this brief’s doppelganger.⁹

Third, the prospect that an individual or entity charged with a speech crime might ultimately be vindicated at a criminal trial does little, if anything, to temper the speech-chilling effects of the decision below. The Sixth Circuit’s qualified-immunity-on-steroids approach means that state actors can search, arrest, jail, and prosecute “offenders” like Mr. Novak without fear of ever being held to account themselves. Knowledge that they may be searched, arrested, jailed, and prosecuted without recourse is enough to dissuade most would-be speakers, regardless of the potential for ultimate acquittal.

⁹ See *Brief of The Babylon Bee as Amicus Curiae for Respondents*, *The Babylon Bee*, Oct. 28, 2022, <http://babylonbee.com/amicus-brief>. See also the inevitable confused internet commentary that will follow.

ARGUMENT

I. Parody Is Essential to a Free Society.

The Onion may be staffed by socialist wackos, but in their brief defending parody to this Court, they hit it out of the park. Parody has a unique capacity to speak truth to power and to cut its subjects down to size. Its continued protection under the First Amendment is crucial to preserving the right of citizens to effectively criticize the government.

Furthermore, parody shouldn't be stripped of constitutional protection just because it's not clearly labeled as parody. And requiring that parody be written so as to ensure that the most gullible in our society—the Facebook-using grandmother, the tween TikTok addict, the CNN reporter—don't take it seriously ruins the parody for everyone else.

The Sixth Circuit's decision undermines these fundamental principles, and this Court should grant Mr. Novak's request for a writ of certiorari in order to right the free-speech ship.

II. The Sixth Circuit's Ruling Allows the Government to Punish Vast Swaths of Constitutionally Protected Speech.

“[P]olice,” the Sixth Circuit has previously said, “cannot punish a peaceful speaker as an easy alternative to dealing with a lawless crowd that is offended by what the speaker has to say.” *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 250 (6th Cir. 2015). But that same court's ruling in this case means that police

can “punish a peaceful speaker” if *they* are the ones offended.

Ohio Revised Code § 2909.04(B) makes it a felony to “[1] knowingly [2] use any computer, . . . other electronic device . . . or the internet [3] so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations.” In Mr. Novak’s case, the Parma PD—backed by the city law director, a magistrate, and a municipal court judge—concluded that, by creating his Facebook page parodying the Parma Police Department, Mr. Novak had violated (or probably had violated) that statute. Therefore, the police reasoned, he at minimum deserved search, arrest, jail time, and criminal prosecution.

The Sixth Circuit didn’t disagree, concluding that the police came close enough to getting it right to entitle them to qualified immunity. That is, respondents “reasonably found probable cause in an unsettled case judges can debate.” *Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022). The Sixth Circuit reasoned that (1) “officers were permitted to rely on inferences” to establish “the knowledge element”; (2) “[n]o one contests that Novak used a computer and the Internet to create his . . . page”; and (3) “the officers could reasonably believe that the calls [to the department alerting it to the parody page’s existence] constituted a disruption.” *Id.* at 304. *Voilà!* Probable cause. Or at least close enough to probable cause to justify a few nights in jail.

Left in the hands of the Sixth Circuit and the Parma PD (and other like-minded law enforcement), the speech-stifling Ohio statute used to go after Mr.

Novak empowers state officials to search, arrest, jail, and prosecute parodists without fear of ever being held accountable. The upshot for *The Bee* is that, in Ohio at least, its writers could be jailed for many, if not most, of the articles *The Bee* publishes, provided that *someone* contacted law enforcement—or another entity “protected” by § 2909.04(B)—to tell them that the articles exist.

Take a simple example. Last March, a headline from *The Bee* trumpeted: *Donut Sales Surge as Police Departments Re-Funded*. The Babylon Bee, Mar. 3, 2022, <https://tinyurl.com/mvufn4zj>. Funny stuff! But suppose someone—*anyone*—had called the Parma Police Department to let them know that *The Bee* had published the article. In Ohio, *The Bee* could have been charged with a felony, its offices searched, and its writers arrested and jailed for days, all without consequence for the parties doing the charging, arresting, jailing, and searching. And what if Officer Riley’s or Officer Connor’s passive-aggressive brother-in-law had forwarded the article to one of them at his official police email address and, heaven forbid, Officer Riley or Officer Connor then had opened the email and read the headline while on the clock, thus “interrupt[ing]” his work day? Ohio Rev. Code § 2909.04(B). Same result. A search, arrest, and felony charge for *The Bee*.

As with other news organizations of similar caliber and eminence, local police are a regular focus of *The Bee*’s hard-hitting journalism.¹⁰ But their federal

¹⁰ *E.g.*, *Cop on Laptop Protecting Community from Drivers on Cell Phones*, The Babylon Bee, Nov. 8, 2019, <https://tinyurl.com/35nad4vw>; *Police Keep Antifa Away from Statues* by

counterparts star even more frequently in *The Bee*'s digital pages. It was *The Bee*, after all, that first reported on these recent antics at the FBI: *FBI Storms Convent to Arrest Group of Dangerous Pro-Life Extremists*¹¹ and *FBI Gets Great Night's Sleep after Raiding MyPillow Guy*.¹²

But *The Bee* would be safe from the wrath of Parma's finest and their ilk in these circumstances, right, since the FBI is a federal agency and not an agency of Ohio or one of its subdivisions? Wrong. The Ohio statute makes no distinction. See Ohio Rev. Code § 2909.04(B). Thus, had a caller contacted the FBI field office in Cleveland or Cincinnati to inquire about one of those stories—or to express outrage over the suspicious timing of the FBI's raid on Melania Trump's Mar-a-Lago closet and Attorney General Garland's acquisition of a *haute couture* wardrobe¹³—*The Bee* would have been subject to a felony charge and writer jail time under the Ohio statute for “disrupt[ing], interrupt[ing], or impair[ing] . . . governmental operations.” Ohio Rev. Code § 2909.04(B).

Taping Job Applications onto Them, The Babylon Bee, Oct. 9, 2017, <https://tinyurl.com/4baa6v6h>; *Uvalde Police Criticize Indiana Mall Armed Citizen for Not Waiting Around Outside for an Hour*, The Babylon Bee, July 18, 2022, <https://tinyurl.com/5n8pnepr>.

¹¹ The Babylon Bee, Sep. 27, 2022, <https://tinyurl.com/37xh2jdk>.

¹² *Id.*, Sep. 22, 2022, <https://tinyurl.com/2p8kaed2>.

¹³ See “*The FBI Raid on Melania's Closet Was Justified*,” *Says Merrick Garland Wearing Gorgeous New Evening Gown and Sun Hat*, The Babylon Bee, Aug. 12, 2022, <https://tinyurl.com/yck4k35a>.

And there could hardly be a more open-and-shut case for the enforcers of law and order in Ohio than that of a story from *The Bee* reporting on testimony before the House’s January 6th Committee: “*I Thought I Was Going to Die,*” Says Capitol Police Officer Who Held Door Open for Protestors on Jan. 6.¹⁴ The article concluded with this self-incriminating line: “The FBI has issued a warrant for the man who called [the officer] a ‘cupcake’ and is asking anyone with information to call Nancy Pelosi’s office immediately.” *Id.* That story is, by the Sixth Circuit’s lights, dripping with probable cause. After all, the article explicitly asked readers to play their part in “disrupt[ing], interrupt[ing], or impair[ing] . . . governmental operations” by calling the Speaker of the House and thereby momentarily inconveniencing one of her staff members. Ohio Rev. Code § 2909.04(B).

All this is only the tip of the iceberg, as the statute criminalizes not only “disrupt[ion], interrupt[ion], or impair[ment]” of “police” or “government operations” but also disruption, interruption, or impairment of “fire, educational, [or] commercial . . . operations” as well. *Id.* Thus, *The Bee* and its writers could be variously subjected to search, arrest, jail, and prosecution for the publication of hundreds of articles unrelated to policing or other “government operations.” Consider *College Athlete Surprised to Learn His School Has Classes*.¹⁵ Had a reader called the Office of Academic Affairs at The Ohio State University about the

¹⁴ The Babylon Bee, July 29, 2021, <https://tinyurl.com/mpbzt77w>.

¹⁵ The Babylon Bee, Aug. 12, 2020, <https://tinyurl.com/mr47amuh>.

article, that would have been enough for law enforcement—without fear of being held to account themselves—to arrest *The Bee*'s staff for disruption of “educational . . . operations.” Ohio Rev. Code § 2909.04(B). Likewise with the articles *Aaron Judge Sets Record for Most Home Runs by Person with a Normal-Sized Head*¹⁶ and *Subway Begins Promotional Offer Where They Will Use Real Meat for a Limited Time*¹⁷: Had someone contacted the Guardians or Reds about the former or an Akron Subway franchise about the latter, then it's goodbye freedom for the team at *The Bee*. Per the decision below, Parma's boys in blue could “reasonably f[ind] probable cause” at that point and therefore search, arrest, charge, and jail with impunity. *Novak*, 33 F.4th at 305.

In short, “vast amounts of protected speech” are “swept up in [this] ‘criminal prohibition of alarming breadth.’” *United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1311 (10th Cir. 2022) (quoting *United States v. Stevens*, 559 U.S. 460, 474 (2010)). When local police and federal appellate courts—officials both “high [and] petty”—join forces to execute *and then condone* the search, arrest, jailing, and prosecution of parodists for protected speech, the very core of the First Amendment is rendered a dead letter. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁶ *Id.*, Oct. 5, 2022, <https://tinyurl.com/5utt7cd6>.

¹⁷ *Id.*, Sep. 17, 2022, <https://tinyurl.com/yc3bh48a>.

III. Where Qualified Immunity Deprives a Speaker of Civil Remedy, Acquittal for a Criminal Speech Charge Is Cold Comfort.

Mr. Novak ultimately was acquitted of the felony charge levelled against him. And *The Bee* hopes that, when its turn comes to face the Committee of Public Safety in Ohio, the result might be the same. But this Court should not confuse acquittal in circumstances like these with vindication of the robust free-speech rights enshrined in the First Amendment.

This goes to the most troubling aspect of the Sixth Circuit's decision. Certain passages of that opinion give the impression that the court's sympathies lie with free speech. The court, for example, purports to regret that neither the police officers nor any of the other state "officials involved" ever put the brakes on the search or the arrest or the jail time or the criminal trial wrought upon Mr. Novak. *Novak*, 33 F.4th at 312. But the aggressive form of qualified immunity the Sixth Circuit adopted in fact gives state officials a blank check to continue suppressing speech via these same means. The court "ha[d] [its] doubts" about the rectitude of respondents' actions, yet it chose to shield them from liability anyway. *Id.*

The Sixth Circuit purported to leave the parties in a state of relative parity. "At the end of the day," the court opined, "neither [side] got all they wanted." *Id.* "Little did Anthony Novak know . . . that he'd wind up a defendant in court. So too for the officers who arrested him." *Id.* But in fact the contrast between the parties' positions could hardly be starker. The Sixth Circuit's decision allowed respondents to deal a fell blow to Mr. Novak's First Amendment right to

criticize the government while at the same time leaving Mr. Novak without any means of redressing this grievous constitutional violation.

True, both Mr. Novak and respondents were, as the court's opinion says, "defendants" at one time or another, but Mr. Novak was a *criminal* defendant subjected to "the ordeal of a criminal trial," including the fear of imprisonment, the public humiliation, and the financial strain that that entails. *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018). And he was not just any criminal defendant: He was a criminal defendant (and search subject and arrestee and jail inmate) who *hadn't done anything wrong*. Yet he escaped criminal liability only because a jury adjudged him not guilty. Respondents, by contrast, were mere civil defendants. And even though they *had* violated Mr. Novak's First Amendment rights, still they were afforded the luxury of avoiding trial altogether.

Moreover, though they "lost" Mr. Novak's criminal case, respondents still managed to get what they wanted: thorough and efficient suppression of Mr. Novak's speech criticizing the police department. They intimidated Mr. Novak into removing his Facebook page, and then, by arresting him, searching his apartment, jailing him for four days, and foisting a criminal trial upon him, made it all but certain that he—and anyone else paying attention—would never commit a similar "speech crime" again.

The only means Mr. Novak had to counteract this thoroughgoing suppression was to lodge an *ex post* civil suit against respondents in hopes of holding them accountable. There was and is no other effective remedy available to him or to the countless others

whose federal constitutional rights are similarly abridged. But the Sixth Circuit closed that door to Mr. Novak, leaving him bereft of recourse. “To an aggrieved party a right without a remedy is doubtlessly not much better than no right at all.” *Triad Assocs. v. Robinson*, 10 F.3d 492, 499 (7th Cir. 1993).

The Bee has no reason to believe that the result would be any different should Ohio authorities choose to bring parody-in-violation-of-2909.04(B) charges against it or one of its writers. Sure, if *The Bee* were to roll the dice with a jury, sanity might prevail. But that is by no means assured. And even if criminal-trial victory were in the bag, without a means of dissuading state actors from continuing to arrest and jail speakers they don’t like, any such “victory” really would be just a less-extreme loss.

The writers at *The Bee* are a hearty bunch, accustomed to regularly and brilliantly absorbing blows from powerful, prestigious media outlets—and also from CNN—that desperately want to muzzle *The Bee*. Child’s play. But whining establishment types who are unable to take a joke *and* who possess the coercive power of the state are an entirely different matter. Add to that mix the aggressive, unbridled strain of qualified immunity propagated by the Sixth Circuit. It’s enough to make Chuck Norris sweat.¹⁸

¹⁸ See *Chuck Norris Comes Out of the Closet as Even More of a Man*, *The Babylon Bee*, Dec. 2, 2020, <https://tinyurl.com/9wu37nh2>.

CONCLUSION

The Babylon Bee respectfully asks this Court to grant Mr. Novak's petition for a writ of certiorari.

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