No. 22-1876

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOHAMED SALAH MOHAMED A EMAD,

Plaintiff-Appellant,

v.

DODGE COUNTY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin, No. 2:19-cv-00598-LA
The Honorable Lynn Adelman, District Court Judge

BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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139 CONG. REC. S14461-01 6

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Amicus submits this brief to explain the role qualified immunity currently plays in judging violations of rights protected by the First Amendment, and to remind the Court of the reasons for limiting, rather than expanding, an ahistorical and atextual doctrine that too often forecloses remedies for serious rights violations. This Court should reverse the district court's decision granting Defendants qualified immunity and make clear that qualified immunity does not protect prison officials who brazenly disregard inmates' clearly established constitutional rights for want of case law perfectly matching the facts presented to the Court. All parties have consented to the filing of this brief.

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amicus, its members, or its counsel, contributed money that was intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

Mohamed Salah Mohamed Ahmed Emad was detained for 14 months at the Dodge County Detention Facility. Mr. Emad is a practicing Muslim and takes his faith seriously. During his confinement he wished to pray according to the dictates of his faith. This required, in part, that Mr. Emad not pray next to a toilet because doing so contradicted his religious practice. Unfortunately for Mr. Emad, officials at Dodge County Jail ("Defendants") did not care.

For over a year Defendants forbade Mr. Emad from praying anywhere except for next to the toilet. Mr. Emad appealed to Defendants to allow him to pray elsewhere, in a clean environment, for example in a common area. His requests were denied or ignored. At the same time Defendants routinely allowed Christian inmates to practice their faith without hinderance, including in common areas. There was no justification for this disclination. The district court agreed and found that there was sufficient evidence to overcome Defendants' motion for summary judgment. Defendants clearly violated the Constitution. But despite this clear constitutional violation, Defendants were spared liability because their actions were protected by the overly-broad, all-encompassing and judge-made doctrine of qualified immunity.

Here, the district court erred by applying qualified immunity despite finding a clear constitutional violation. Where a violation is clear, a defendant should not be allowed to feign ignorance and use qualified immunity as a shield to liability. Defendants had over a year to reconsider their conduct, but never stopped violating

Mr. Emad's religious rights. Qualified immunity should not protect such sustained and bald-faced violations.

Moreover, the district court's decision to apply qualified immunity to Defendants is based on an approach that is unworkable, unjust, and untethered to history or reality. To overcome qualified immunity, courts often require plaintiffs to present judicial precedent that establishes the exact constitutional violations at issue have previously been found to be violations (as the district court did here). This creates an unending cycle where a violation is always protected by qualified immunity unless the exact same facts were previously found to be an exception to the rule. This broken doctrine should be abolished.

The problems with qualified immunity are especially troubling in the context of religious liberty, where violations take place over the course of months rather than in a few seconds. The continued harm prisoners like Mr. Emad suffer when they are not allowed to practice their faith will never be remedied under the current qualified immunity schema. It should change.

ARGUMENT

I. Clear Violations of Constitutional Rights Are Not Protected by Qualified Immunity.

The district court was wrong to require a perfect match in factual circumstances to past case law as the only source of clearly established law that would abrogate qualified immunity for the officials who denied Mr. Emad his First Amendment rights. Under binding Supreme Court precedent, when a constitutional violation is "obvious," officials "can still be on notice that their conduct violates

established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Qualified immunity thus cannot protect officials who, for example, hold prisoners in "deplorably unsanitary conditions for [] an extended period of time." *Taylor v. Rojas*, 141 S.Ct. 52, 53 (2020).

In some cases, such as Fourth Amendment probable cause or excessive force cases, a "high degree of specificity" may be necessary to provide the requisite notice. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). But in other cases—like this one—no such situational similarity is required to make it over the clearly established hurdle. Rather, a "general statement[] of the law" provides fair warning, as long as it applies with "obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741, 745-76.

The Supreme Court recently affirmed that obvious violations of constitutional law can be judged at a less stringent standard for purposes of qualified immunity than the split-second decision-making of police officers in excessive force cases. First, in *Taylor*, the Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry in a prison conditions case. 141 S. Ct. at 53-54. The Supreme Court was untroubled by the absence of a prior case establishing that the specific conditions at issue in *Taylor* were unconstitutional. *Id*. Instead, the "obviousness of Taylor's right" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth Amendment. *Id*. at 53- 54 & n.2 (quoting *Hope*, 536 U.S. at 741). Even more recently, the Supreme Court granted, vacated, and remanded in another qualified immunity case. *McCoy v. Alamu*, 141 S.

Ct. 1364 (2021). *McCoy* instructed the Fifth Circuit to reconsider, in light of *Taylor*, the grant of qualified immunity to a correctional officer who sprayed a prisoner with pepper spray for no reason. *Id.* Although the Supreme Court did not explain its reasoning, the Fifth Circuit had rejected McCoy's argument that the assault was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." *See McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020). The dissent had centered on this issue, vigorously contending that the majority erred in not applying the "obviousness exception." *Id.* at 236 (Costa, J., dissenting).

McCoy and *Taylor* emphasize that lower courts can and must look carefully at whether "general statements of the law" apply with "obvious clarity" in a given case, even in the absence of a prior factually-similar case. Doing so here reveals that Defendants had fair notice that they discriminated against Plaintiff as a Muslim by denying him the same opportunities provided to Christian inmates. *See* Plfs. Opening Brf. At 51-57.

Statutory law further supports that prison officials knew or should have known they could not discriminate among prisoners based on their religion. For example, while no cause of action under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C § 2000b et seq, is currently before this Court, RFRA's legislative rebuke of government interference with religious worship suggests prison officials should have known they could not treat Mr. Emad's religious interests as an afterthought—indeed prisoners were specifically and intentionally included within RFRA. While some members of Congress pushed for an amendment that would have exempted prisoners

from RFRA's broad protections, "allowing the actions of prison administrators to be judged by a reasonableness standard," 139 CONG. REC. S14461-01, S14463, 1993 WL 434847 (daily ed. Oct. 27, 1993) (statement of Sen. Alan Simpson), the amendment was ultimately rejected, *see* 139 CONG. REC. D1201-02, D1201, 1993 WL 435075 (daily ed. Oct. 27, 1993), reflecting a judgment that it is "unnecessary and inappropriate to deny prisoners the same religious rights the act [] guarantee[s] to all Americans," 139 CONG. REC. S14461-01, S14467, 1993 WL 434847 (daily ed. Oct. 27, 1993) (statement of Sen. Ted Kennedy). Thus, prisons were put on notice that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." S. REP. NO. 103-111, at 10 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1900.

The prison officials here had every reason to know they were denying Mr. Emad's constitutional rights. As Plaintiff rightly points out, prayer is "doubly protected" by the First Amendment. Open. Br. 29-30. It is protected both as speech, and as religious practice. And this Court has repeatedly made clear that Prison officials may not discriminate against prisoners on the basis of religion. *See id.* at 50. Moreover—unlike Fourth Amendment excessive force cases—prison officials need not make split-second decisions as to whether Muslim inmates should be treated the same as Christian inmates when it comes to group prayer or prayer in common areas—they have the luxury of time to develop such policies. So, in First Amendment cases such as the one here, clearly established law can be derived from obviousness

and general decisional rules far more easily than in, say, Fourth Amendment probable cause cases where the bar for showing probable cause is "not [] high" and arrests often require officers to make on-the-spot decisions in stressful situations. *See Wesby*, 138 S. Ct. at 586.

Indeed, clear Supreme Court precedent explains that discriminatory treatment of religious believers cannot be abided under the Constitution. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (explaining that "treat[ing] any comparable secular activity more favorably than religious exercise" triggers strict scrutiny, and holding that petitioners were likely to prevail on the merits of their free exercise claim where the state treated some secular activities more favorably than religious activities, even though it also treated others less favorably); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020) (allowing uncapped numbers of people at secular essential businesses but not at places of worship likely violates free exercise). Under the circumstances, the restrictions imposed by Defendants amount to a quintessential example of obviously unlawful conduct.

The district court itself acknowledged that Mr. Emad's constitutional rights were violated when prison officials refused to allow him to pray away from the toilet. The district court further recognized the Defendants erred by incorrectly demanding proof from "admissible, authenticated Islamic law" that Mr. Emad was barred by his sincere religious beliefs from praying in a room with a toilet, rather than his sincere personal beliefs. *See, e.g., Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) (confirming that religious freedom claims look to the sincerity, not orthodoxy of

religious beliefs). Notably, the district court below offers no explanation for *why* Defendants refused to accommodate Mr. Emad's religious need to pray in a clean space. *See id.* (finding error where District Court granted qualified immunity without addressing this issue). Indeed, the district court offered no analysis whatsoever about what lack of "clarity" existed as to "[t]he clearest command of the Establishment Clause"—"that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 (1982).

But the district court's application of qualified immunity nonetheless demanded an unduly "extreme level of factual specificity" between this case and a previous one to find that the applicable constitutional law was "clearly established." See *United States v. Lanier*, 520 U.S. 259, 267 (1997). This was error. As the U.S. Supreme Court has explained, "clearly established law" does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Wesby*, 138 S. Ct. at 590. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances," and the outward attributes of a case do not have to be "fundamentally similar" or "materially similar" to those in previous precedents. *Hope*, 536 U.S. at 739, 741. Thus, qualified immunity does not apply when "courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *see also Hyland v. Wonder*, 117 F.3d 405, 411-12 (9th Cir. 1997) (rejecting the argument that the district court should have granted

qualified immunity because no previous case involved a comparable plaintiff; the "Supreme Court and our case law do not require that degree of specificity").

In sum, the First Amendment does not allow prison officials to favor one religious creed over another. Thus, Defendants were on notice that they could not treat Muslim inmates such as Mr. Emad worse than Christian inmates. Nor does the First Amendment allow Defendants to lace arbitrary restrictions on Mr. Emad's worship. The district court's apparent determination that qualified immunity was appropriate because Mr. Emad did not identify a clean enough comparison in existing case law is reversible error in this context, where the general principles are sufficient and a Constitutional violation occurred.

II. This Court Should Use This Case to Re-Think the Doctrine of Qualified Immunity, Especially When It Comes to Religious Freedom.

A. Qualified immunity is unworkable, unjust, and untethered to any statutory or historical justification.

Qualified immunity has been the subject of withering criticism from an ever growing number of jurists, scholars, elected officials, and practitioners. *See, e.g., Baxter v. Bracey,* 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of *certiorari*) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Kisela v. Hughes,* 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers," telling them that "they can shoot first and think later"); William Baude, *Is Qualified Immunity Unlawful?,* 106 CAL. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 NOTRE DAME L. REV. 1797 (2018); Emma Tucker, *States Tackling "Qualified*

Immunity" for Police as Congress Squabbles Over the Issue, CNN (April 23, 2021), https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html.[2] A majority of the general public supports ending qualified immunity. *See* Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police,* CATO INSTITUTE (July 16, 2020), https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police.

Although much has been written about the many ways in which qualified immunity has been an abject failure, several of its failings warrant emphasis here as the Court considers whether and how to apply it to the facts of this case.

[2] In addition to Justices Thomas and Sotomayor, judges across the country have strongly criticized qualified immunity. *See, e.g., Cole v. Carson,* 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting from the denial of rehearing en banc) ("The real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses'—leaves many victims violated but not vindicated."); *Sampson v. County of Los Angeles,* 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) (noting "struggle" to apply the "ill-conceived" and "judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983"); *Horvath v. City of Leander,* 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."); *Thompson* v. *Clark,* No. 14-CV-7349, 2018 WL 3128975, at *6-7 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Court's expansion of immunity . . . is particularly troubling. . . . The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."); *Ventura v. Rutledge,* 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete reexamination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Estate of Smart v. City of Wichita,* No. 14–2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."), *aff'd in part and rev'd in part,* 951 F.3d 1161 (10th Cir. 2020).

First, qualified immunity is unworkable. As the Second Circuit recently lamented, "determining whether an officer violated 'clearly established' law has proved to be a mare's nest." *Vega v. Semple,* 963 F.3d 259, 275 (2d Cir. 2020) (quoting John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?,* 62 FLA. L. REV. 851, 852 (2010)). Qualified immunity is a frequent source of legal challenges, and defining the scope of immunity presents a "chronic difficulty" for courts. *Id.* Judge Charles Wilson of the Eleventh Circuit described "[w]ading through the doctrine of qualified immunity" as "one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense,* 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). Similarly, Judge Don Willett of the Fifth Circuit observed that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh,* 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part).

One exasperated district judge put it more bluntly:

> Factually identical or highly similar factual cases are not the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. . . . It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself:

> "Are the facts here anything like the facts in *York v. City of Las Cruces*, 523 F.3d 1205 (10th Cir. 2008)*?"*

Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) (cleaned up) (referencing *York v. City of Las Cruces*, 523 F.3d 1205 (10th Cir. 2008).

Manzanares' suspicions were dead-on. Recent studies have shown that "officers are not actually educated about the facts and holdings of court decisions that"—theoretically—"clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie,* 88 U. CHI. L. REV. 605, 683 (2021). This is unsurprising. After all, "[t]here could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law for qualified immunity purposes." *Id.* at 611. Why, then, are courts and litigators alike forced to throw themselves into the mare's nest that is the clearly established inquiry, "plumb[ing] the depths of Westlaw for factually similar lower court decisions"? *Id.* at 612.

Even worse, applying the same qualified immunity standard to every government official provides undue protection to actors that enjoy the benefit of forethought. As Justice Thomas explained, qualified immunity should not be applied as a one size fits all solution: "But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question." *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (citing *Ziglar*, 582 U. S. at 1871-1872).

Second, qualified immunity is unjust. As Justice Sotomayor explained, qualified immunity jurisprudence "sends an alarming signal . . . that palpably unreasonable conduct will go unpunished." *Kisela,* 138 S. Ct. at 1162 (Sotomayor, J., dissenting). The doctrine serves to "insulat[e] incaution," and "formalizes a rights-remedies gap through which untold constitutional violations slip unchecked." *Cole v. Carson,* 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting from the denial of rehearing *en banc*). In particular, the vicious cycle created by *Pearson v. Callahan,* 555 U.S. 223 (2009)—allowing courts to decide cases at prong two without first deciding whether there was a constitutional violation at prong one—means that government officials can flagrantly violate the law in similar ways, over and over again, until and unless a court finally decides to intervene and address prong one. The growing frequency of this "Escherian Stairwell," *Zadeh,* 928 F.3d at 480 (Willett, J., concurring in part and dissenting in part), is supported by empirical research. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity,* 89 S. CAL. L. REV. 1, 6-7 (2015) (quantifying post-*Pearson* reduction in courts establishing constitutional violations at prong one).

Finally, qualified immunity has no basis in the statutory text or common law. Justice Thomas has said as much several times in recent years. *See, e.g., Baxter,* 140 S. Ct. at 1862, 1864 (Thomas, J., dissenting from the denial of *certiorari*) ("[O]ur § 1983 qualified immunity doctrine appears to stray from the statutory text," and "[i]n several different respects, it appears that our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act.") (internal

quotation marks omitted); *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("[W]e have diverged from the historical inquiry mandate by the statute . . . [and] completely reformulated qualified immunity along principles not at all embodied in the common law.") (internal quotation marks omitted). Scholars agree. *See, e.g.,* Baude, *supra,* at 50-60 (explaining that neither the statutory text nor historical common law immunities provide support for qualified immunity); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic,* 85 N.Y.U. L. REV. 1862, 1863, 1928-29 (2010) (matters of indemnity and immunity were left to Congress, not the judiciary, in the founding era); Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1506-07 (1987) (the lone historical defense against constitutional torts was legality).

Section 1983 was enacted in 1871 in the Ku Klux Klan Act during Reconstruction. Congress passed the law to combat civil rights violations in the post-war south where government officials were violating constitutional rights with impunity. *See, e.g.,* Baude, *supra,* at 45, 49 (contextualizing the enactment of Section 1983 in the Reconstruction Era). The law was unambiguously intended to hold public officials to account. That intent has been undermined by the development of the qualified immunity doctrine. Critically, Section 1983 provides no statutory basis for any immunities, let alone qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("[Section 1983] on its face does not provide for any immunities.") Instead of relying on the text of the statute, qualified immunity has been created over time by

drawing inferences from Section 1983 and the common law at the time. See, e.g., *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). Despite the lack of any explicit immunities in the statute, qualified immunity has been read into Section 1983 based on similar immunities that were purportedly established in the common law of at the time Section 1983 was enacted. The doctrine's untethering from the statutory text to reinstate the historical practice the Act was intended to prevent thus makes the "heads government wins, tails plaintiff loses" reality of modern qualified immunity case law.[3]

Of course, despite the myriad flaws of the doctrine, this Court is still bound to follow the dictates from the Supreme Court on qualified immunity. *See Agostini v. Felton,* 521 U.S. 203, 238 (1997) (lower courts must follow applicable Supreme Court precedent "unless and until [the Supreme Court] reinterpret[s] the binding precedent"). So, while this Court cannot step outside the existing qualified immunity

[3] Although the application of qualified immunity has been upheld by the Supreme Court over time, recent decisions support overturning Supreme Court precedent in certain conditions. *See*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Supreme Court applies five factors to determine whether overturning precedent is appropriate: (1) the nature of the error in the precedent, (2) the quality of the reasoning in the precedent, (3) the workability of the rules imposed on the country, (4) the disruptive effect on other areas of law and (5) absence of concrete reliance. *Id. at* 2239. First, there is no text in Section 1983 that supports the application of qualified immunity, it is an error to create such an extratextual immunity. Second, as Justice Thomas has pointed out on, the development of the qualified immunity doctrine is rooted in error both in terms of legal reasoning and scope. *See, e.g., Ziglar*, *supra,* 582 U. S. at 1871-1872. Third, the doctrine interferes with the enforcement of other laws insofar as it effectively distorts the application of Section 1983 and other laws designed to hold public officials accountable. Finally, there can be no adherence to the qualified immunity doctrine because a constitutional violation is inherently an "unplanned activity" *See*, *Dobbs, supra* 142 S. Ct. at 2228.

lines, "with so many voices critiquing current law as insufficiently protective of constitutional rights, the last thing [this Court] should be doing is recognizing an immunity defense when existing law rejects it." *McCoy v. Alamu,* 950 F.3d 226, 237 (5th Cir. 2020) (Costa, J., dissenting in part).

It is unworkable to allow qualified immunity to protect Defendants for violating Mr. Emad's right to freedom of religious expression because no other case on all fours has been published by this Court before. This case thus presents the Court with the opportunity to modify its qualified immunity doctrine to remedy these shortcomings.

B. Qualified immunity is particularly unjustifiable in the context of religious liberty.

Qualified immunity is particularly hard to reconcile with expansive religious rights. "[R]eligious freedom ... has classically been one of the highest values of our society." *Braunfeld v. Brown,* 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting). And religious freedom continues to be one of our highest values: Congress's passage of Religious Freedom Restoration Act ("RFRA") underscored its centrality by "provid[ing] very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 693 (2014).

Qualified immunity's clearly-established-inquiry is especially likely to lead to intolerable results in religious liberty cases. For example, while a Christian prisoner may have many precedents to cite for the proposition that destroying a Bible violates clearly established law, members of minority religions may have a hard time finding an on-point precedent and overcoming qualified immunity for the destruction of

similarly important religious property.[4] If adherents of minority religions are uniquely hamstrung by qualified immunity, then applying that doctrine in the context of religious liberty cases runs contrary to "[t]he clearest command of the Establishment Clause"—"that one religious denomination cannot be officially preferred over another." *Larson,* 456 U.S. at 244. And qualified immunity is also least necessary in religious liberty cases: While the need for 'split-second' decision-making in the use-of-force context might justify some kind of good-faith defense for police officers in the heat of an arrest, decisions about whether to accommodate religious liberty in the prison context—often made, as here, with the luxury of time and consideration—do not.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment and remand the case for further proceedings.

Respectfully submitted,

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[4] *See also* Jake Young, *Qualified Immunity and Religious Liberty* 14-15 (Dec. 10, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746583 (further elaborating on the argument that "[r]eligious liberty cases are especially problematic under the 'clearly established law' test because of the variance in religious practices").

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29 because this brief contains 5,341 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office. 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) and Circuit Rule 32 because it has been prepared in a proportionally spaced typeface using 12-point Century Schoolbook.

Dated: November 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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