No. 18-1173

IN THE

Supreme Court of the United States

I. B. AND JANE DOE,

Petitioners,

v.

APRIL WOODARD, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KELLY J. SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
KENNETH A. KLUKOWSKI
LEA E. PATTERSON
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
kklukowski@firstliberty.org

Counsel for Amicus Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a case-worker who suspects abuse to obtain a warrant to strip-search a child, an issue that has produced an acknowledged 4-2 circuit split—and is nearly identical to the issue this Court granted certiorari on but did not resolve in *Camreta v. Greene*, 563 U.S. 692, 698 (2011).

2. Even if a warrant is not required in this context, whether clearly established law prohibits conducting warrantless strip searches of children at school where there are no "specific suspicions" of danger or wrongdoing justifying the "categorically extreme intrusiveness of a search down to the body." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376–77 (2009).

3. Whether this Court should reconsider its qualified-immunity jurisprudence to accord with historical common-law practice and to eliminate the widespread confusion plaguing current qualified-immunity doctrine.

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INTEREST OF *AMICUS CURIAE*[1]

First Liberty Institute is a public-interest law firm incorporated in the State of Texas, and designated a 501(c)(3) for tax purposes. First Liberty is the largest law firm in the United States exclusively dedicated to protecting the religious liberty of all Americans consistent with the Constitution.

Many of First Liberty's cases involve qualified immunity. This Court granted summary reversal in favor of First Liberty's client in one such case last Term. *See Sause v. Bauer*, 138 S. Ct. 2561 (2018) (per curiam). Another major case is *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), and First Liberty is currently litigating cases implicating similar questions.

First Liberty therefore has an interest in developing qualified-immunity jurisprudence in a way that vindicates the religious liberty of everyday Americans. This Court's cases granting qualified immunity typically pertain to split-second decisions by police or discretionary decisions by high-ranking government officials. By contrast, First Liberty's cases typically involve low-ranking local officials who enjoy ample time to consider their actions, no need to act quickly,

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[1] *Amicus curiae* certifies that all parties filed blanket consents on record with this Court's Clerk's Office regarding the filing of *amicus* briefs, and were given notice regarding the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* contributed any money to fund the preparation or submission of this brief.

and often even time to seek legal counsel before taking actions that our cases show violate the statutory and constitutional rights of Americans seeking to share or live out their faith. Distinguishing cases such as ours from those involving perilous law enforcement encounters or high-level national security decisions is important to the correct development of this doctrine, and therefore is the focus of First Liberty's *amicus* brief here.

SUMMARY OF ARGUMENT

This case highlights the need for this Court to refine its qualified immunity jurisprudence by reversing the Tenth Circuit's decision to grant qualified immunity to the government actors who violated the Fourth Amendment rights of a young girl in their care and then lied about what they had done.

Some form of immunity from personal financial liability for certain officers is essential to the proper functioning of government. That is true in any form of government, and as such it has been part of American law since the founding of the Nation.

The one form of immunity expressly secured by the Constitution is legislative immunity, rooted in the Speech or Debate Clause. Legislative immunity is absolute. The President also enjoys absolute immunity, as do judges for anything arising from their judicial duties. But whenever this Court is not bound by written legal text such as a constitutional or statutory provision, it is imperative for the Court to carefully examine the rationales for judicially crafted immunities in order to ensure the immunity conferred

in a given situation matches the reasons for the existence of such immunity. Congress is free to confer federal immunity anytime it wishes, so when it does not do so, the Court should proceed cautiously before allowing immunity in new contexts.

Most qualified immunity cases concern one of two types of circumstances, the first of which involve police officers in dangerous situations. The Court recognizes that police officers often respond to situations that require swift and decisive action in situations where many facts are not immediately knowable, in settings where there may be limited visibility and unknown dangers could be present, where the emotions are running high. In such situations, the Court has determined those who choose to protect and serve their fellow citizens by willingly facing such dangers are often entitled to qualified immunity, lest the fear of liability produce hesitation at a crucial moment that costs them their life, or sacrifices the life, safety, or rights of another innocent person.

Another line of cases where qualified immunity frequently attaches involve high-ranking government officials. At the highest level below the President—the Cabinet level—government officials must make sweeping decisions that impact potentially millions of people. Many of these decisions involve national security, where by definition lives are often at stake. Although the President enjoys absolute immunity for his official actions, he might have difficulty finding Cabinet Secretaries who would implement bold and sweeping department-wide actions if those top officials must constantly second-guess whether they could face

personal liability from any one of the many individuals who might be impacted by their decisions. At less senior levels, government officials who are involved in prosecutions, adjudications, and investigations similarly require some measure of protection if they are to be expected to fearlessly execute the duties of their offices.

Sometimes these two lines of cases overlap, such as in a 2017 case where this Court granted immunity to top Department of Justice officials and lower-level law enforcement personnel who were sued personally for certain actions taken to secure the Nation immediately after the 9/11 terrorist attacks that claimed the lives of thousands of innocent Americans. Senior officials who make national security decisions and the officers who implement those decisions are certainly entitled to some form of qualified immunity as they do so.

But respondents here are not involved in national security. They are not fighting terrorists or confronting criminals at night in dangerous settings, nor are they in Washington, D.C., with the weight of the world on their shoulders. They had all the time and situational control necessary to go through normal channels to seek a search warrant if they felt the humiliating and scarring experience of strip-searching a young child was necessary to investigate potential wrongdoing. The lower court was wrong to hold that qualified immunity was appropriate here, and this Court should grant the petition to review this case.

REASONS FOR GRANTING THE PETITION

I. QUALIFIED IMMUNITY IS A JUDICIALLY CREATED DOCTRINE THE COURT SHOULD BE RELUCTANT TO APPLY TO CASES LIKE THIS ONE.

The Constitution and various laws grant immunity from personal liability to certain individuals under certain circumstances.

One form of absolute immunity is mandated by the Constitution of the United States: legislative immunity.[2] The Speech or Debate Clause provides that, "The Senators and Representatives . . . for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 179 (1966). Rooted in the English law Americans inherited from Great Britain, the Constitutional Convention adopted this protection without debate. *See* 2 RECORDS OF THE FEDERAL CONVENTION 246 (Farrand ed. 1911). Justice Wilson explained the Framers' purpose:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is

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[2] *See generally* Kenneth A. Klukowski, *Sued for Speechifying: Legislative Immunity Trumps* Monell *Liability*, 23 TEX. REV. L. & POL. (forthcoming 2019).

> indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

2 WORKS OF JAMES WILSON 38 (James D. Andrews ed. 1896). "The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). As a consequence, the Clause "will be read broadly to effectuate its purposes." *Johnson*, 383 U.S. at 180. Legislative immunity therefore provides categorical immunity not just for words spoken on the legislative floor during "speech" or "debate," *Gravel v. United States*, 408 U.S. 606, 625 (1972), but also while performing their legislative functions, *see, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).

Although legislative immunity is the only immunity expressly commanded by the Constitution, the Court has determined that the Constitution's governmental order requires other forms of absolute immunity. One—and likely of special interest to the Justices of this Court—is judicial immunity. Federal judges are absolutely immune from suit for actions within the scope of their judicial duties. *See Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871); *see also, e.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978). Another is absolute immunity from civil liability that the President of the United States enjoys, owing to the unique role his

constitutional office plays in the life of the Nation, an immunity that encompasses the full spectrum of his official acts as President. *Nixon v. Fitzgerald*, 457 U.S. 731, 749–56 (1982).

Beyond various absolute immunities, this Court has created limited and conditional immunity for other government officials to accomplish certain policy goals. But this Court should proceed circumspectly when crafting policy rather than applying policy codified by the American people in the Constitution, or by elected legislators in federal statutes. While federal immunity protections for state and local actors might at least be related to a statute where actions brought under 42 U.S.C. § 1983 are concerned, many immunity cases are in uncharted policy waters. The Court has acknowledged the need for such care in various endeavors when this Court has crafted precedent not tethered to positive law, such as when expositing unenumerated rights. *See Washington v. Glucksberg*, 521 U.S. 702, 710–12 (1997); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). This caution should also apply here, when the Court is considering applying broad immunities to new settings, and counsels in favor of refraining from extending forms of qualified immunity beyond the rationales that initially justified them.

II. QUALIFIED IMMUNITY FOR POLICE IS LARGELY TO PROTECT OFFICERS WHEN MAKING SPLIT-SECOND DECISIONS WHERE LIVES AND SAFETY ARE AT RISK.

Police officers serve the public in a capacity that often involves significant risk to their own lives and safety. Law enforcement personnel stand between the general public compromised overwhelmingly of law-abiding citizens and those few individuals in society who disregard the law, often threatening the safety, property, and rights of ordinary people. This Court has recognized that police officers often need to make immediate decisions under extreme circumstances as they carry out their duties that are vital to public safety, and therefore that they are protected by qualified immunity as they protect and serve their communities.

The foundational case for qualified immunity of police officers is *Pierson v. Ray*, 386 U.S. 547 (1967). The Court held that the protection the common law offers police officers acting in good faith and with probable cause provides officers a qualified immunity from liability under 42 U.S.C. § 1983. *Id.* at 555–57.[3] Half a century of precedent has built on this premise.

A significant share of qualified immunity cases arise in suits against police officers, who, the Court has repeatedly emphasized, "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Plumhoff v. Rickard*,

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[3] The Court also held that § 1983 did not abrogate state judges' immunity. *Pierson*, 386 U.S. at 553–55.

572 U.S. 765, 777 (2014). Qualified immunity allows police officers to operate effectively in this unique context, which differs significantly from the circumstances giving rise to petitioners' case here. To demonstrate, a brief survey of recent qualified immunity cases regarding police officers follows.[4]

In *Plumhoff*, the Supreme Court granted qualified immunity to police officers who fired shots to end a high-speed car chase. The car's driver had sped from the scene of a traffic stop and led police on a chase at speeds exceeding 100 miles per hour. *Id.* at 769. He eluded several attempts to end the pursuit, eventually colliding with two police cars. Officers opened fire when the driver continued to accelerate his car into one of the police cars after they collided, then reversed course and careened into a building in an attempt to flee. *Id.* at 769–70. The Court held that the officers did not violate the Fourth Amendment when they opened fire, emphasizing that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 775, 777–78 (citing *Graham v. Connor*, 490 U.S. 386, 369–97 (1989) (internal quotation marks omitted)). In the

[4] Many qualified immunity cases that do not involve the split-second decision factor are prison cases. *See, e.g.*, *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam). In such a setting, the fact that law enforcement personnel are vastly outnumbered by individuals who were found beyond a reasonable doubt to have committed crimes worthy of incarceration provides a substitute rationale for giving those officers such measure of latitude regarding decisions they make.

alternative, the officer was entitled to qualified immunity because, even if his conduct had violated the Fourth Amendment, it was not clearly established at the time. *Id.* at 778, 781.

Similarly, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam), addressed a Fourth Amendment claim challenging a state trooper's efforts to stop a high-speed pursuit. 136 S. Ct. 306. A police officer attempted to execute an arrest warrant on a suspect, who proceeded to lead police on a high-speed pursuit. *Id.* 307. During the chase, the individual called the police dispatcher, claiming to have a gun and threatening to shoot police officers if they did not cease pursuit. *Id.* at 306. To prevent the individual from carrying out his threat against officers manning a spike strip, the state trooper fired six shots from the overpass in an effort to stop the car, killing the individual in the process. *Id.* at 307. This Court found qualified immunity appropriate. *Id.* at 312.

Wood v. Moss, 572 U.S. 744 (2014), addressed qualified immunity in the even more compelling circumstance of Secret Service agents protecting the President. The Court found the defendant Secret Service agents entitled to qualified immunity against a protest group's First Amendment claim. *Id.* at 747–49. The Secret Service agents had moved the protestors to a different location in response to security concerns that arose when the President made an unscheduled detour. *Id.* at 749–54. The protestors alleged that the agents' failure to keep them as close to the President as a group of supportive demonstrators constituted viewpoint discrimination, even though the

supporters' location did not pose similar security concerns. *Id.* at 751, 754. "Mindful that '[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy," *id.* at 759 (quoting *Reichle v. Howards*, 566 U.S. 658, 671 (2012)), and because "[n]o decision of which we are aware . . . would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation to ensure that groups with different viewpoints are at comparable locations at all times," *id.* at 759–60 (quotation omitted), the Court granted qualified immunity, *id.*

Carroll v. Carman, 135 S. Ct. 348 (2014) (per curiam), concerned homeowners' Fourth Amendment claims against a police officer who, in search of a fugitive and without a warrant, knocked on the plaintiffs' back door and temporarily incapacitated the husband, who behaved belligerently and appeared at one point to be reaching for a weapon. *Id.* at 349. The Court found the officer was entitled to qualified immunity because the question of whether officers may knock on a back door without first knocking on a front door was not beyond debate at the time of the incident. *Id.* at 352.

City and County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015), concerned claims under the Fourth Amendment and the Americans with Disabilities Act against several police officers that arose out of the officers' efforts to take a mentally ill woman into custody. *Id.* at 1769–70. Responding to a social worker's application to have the plaintiff detained for

evaluation and treatment, the police officers encountered the plaintiff wielding a knife and resisting their efforts to take her into custody. *Id.* at 1770–71. After pepper spray proved ineffective and the plaintiff had cornered one of the officers, the officers opened fire, ultimately requiring three shots to incapacitate the plaintiff. *Id.* *Sheenan* held that qualified immunity attached, especially given that the initial entry was lawful and the plaintiff presented a threat. *Id.* at 1774–75 ("The Constitution is not blind to the fact that police officers are often forced to make split-second judgments.") (quotation omitted).

In *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam), the Court considered excessive force claims against a police officer who, arriving late to the scene of an ongoing situation, witnessed a suspect firing a shotgun at other officers. *Id.* at 549–50. After a second suspect pointed a handgun in his direction, the officer shot and killed him. *Id.* The Court found him entitled to qualified immunity. *Id.* at 552.

In *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam), the Court granted qualified immunity to a police officer who shot a knife-wielding woman who refused to obey commands to put her weapon down. *Id.* at 1150–51. Officers were responding to a call about an erratic woman hacking a tree with a kitchen knife, and when they arrived on scene they witnessed the plaintiff, knife in hand, approach another woman. *Id.* at 1151. Believing her a threat to the other woman, one of the officers shot and incapacitated the plaintiff when she refused to obey commands to put the knife down. *Id.* The Court granted the officer qualified

immunity from the plaintiff's excessive force claim. *Id.* at 1152.

In contrast, in *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam), the Court denied qualified immunity to a U.S. border patrol officer who allegedly shot and killed an unarmed fifteen-year-old-Mexican national in Mexican territory. *Id.* at 2004, 2007–08. The Court emphasized in denying immunity that, even if a Mexican national in Mexican territory did not enjoy U.S. constitutional protection, the officer could not have known the individual's nationality at the time and, thus, was obligated to order his behavior accordingly. *See id.* at 2006–07.

District of Columbia v. Wesby, 138 S. Ct. 577 (2018), addressed a situation in which police officers arrested sixteen individuals for unlawful entry in connection with a late-night party at a vacant house the individuals did not have permission to enter. *Id.* at 582. Neighbors who spoke with police indicated that they understood the house to be vacant, and music could be heard outside the house well into the early morning hours. *Id.* at 583. Upon entering, police could smell marijuana and observed the house in filthy, virtually unfurnished condition and partygoers engaged in all manner of "debauchery." *Id.* Based on the partygoers' inconsistent explanations of why they were there, along with an admission from the individual who organized the party that she did not have permission to use the house, the officers arrested the partygoers for unlawful entry. *Id.* at 583–84. The Court found that the officers had probable cause and,

in the alternative, were entitled to qualified immunity. *Id.* at 589, 593.

Finally, *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam), concerned an excessive force claim against a police officer who, responding to a domestic violence complaint, took down and handcuffed an unidentified man who exited the house and tried to brush past him. *Id.* at 501–02. The complaint was the second domestic violence complaint at that address, officers had been unsuccessful in gaining entry for a welfare check, and the takedown was accomplished without the officer displaying a weapon or striking the plaintiff. *Id.* The Court vacated and remanded, instructing the circuit court to conduct an appropriate qualified immunity analysis rather than defining the right at so high a level of generality as "the right to be free from excessive force." *Id.* at 503–04.

III. QUALIFIED IMMUNITY FOR HIGH-RANKING GOVERNMENT OFFICIALS IS TO PROTECT TOP OFFICIALS AS THEY MAKE WEIGHTY DECISIONS FOR THE NATION.

Another major line of qualified-immunity cases concerns the decisions of high-ranking government officials, both elected and appointed. These are politically accountable officials who bear the burden of making profoundly important decisions and choose to serve the Nation by shouldering that burden for the benefit of their fellow citizens. The Court has held that such public servants are covered by qualified immunity for personal liability as they discharge the weighty duties of their offices.

The first case relevant here is *Barr v. Mateo*, 360 U.S. 564 (1959). The Acting Director of a federal agency was sued for defamation by two former agency employees. *Id.* at 565. A fractured Court held that high-ranking official entitled to qualified immunity. Taking the plurality opinion with the concurring opinion that supplied the fifth vote to reverse the judgment of liability below, the Court held such senior officials are immune for discretionary acts that fall within the range of responsibilities committed to their control by law. *See id.* at 571–75 (plurality opinion of Harlan, J.); *id.* at 577–78 (Black, J., concurring).

The second case is *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Following *Pierson*, the Court held that the Governor of a State and similar top-ranking state officials have the same qualified immunity against § 1983 liability that the police officers under their supervision enjoy. *Id.* at 240. *Scheuer* used language similar to law-enforcement immunity cases, reasoning that officials such as Governors must often act quickly in an "atmosphere of confusion, ambiguity, and swiftly moving events." *Id.* at 246–47.

The third case is *Butz v. Economou*, 438 U.S. 478 (1978). The plaintiff argued that officials at the U.S. Department of Agriculture initiated proceedings against him to retaliate for his criticizing the Department. *Id.* at 480. The Court explained that immunity also extends to prosecutors and those who perform roles analogous to prosecutors, *id.* at 508–12, as well as to those performing adjudicatory functions, *id.* at 513–17. *See id.* at 506. The Court reasoned that the broader the scope of an officer's duties and

discretion, the broader the range of actions to which immunity would attach, providing capacious protections for an officer as high as Cabinet rank—though those protections are still qualified, not absolute. *See id.* at 504.[5]

This Court elaborated on this rationale in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), a case concerning warrantless wiretapping of American citizens on U.S. soil, *id.* at 513. The Court held that the Attorney General can attempt to assert qualified immunity, rather than absolute immunity, even when a case arises from that Cabinet officer making decisions for reasons of national security. *Id.* at 520. Forsyth reasoned that "the considerations of separation of powers that call for absolute immunity for state and federal legislators and for the President of the United States do not demand a similar immunity for Cabinet officers or other high executive officials." *Id.* at 521.

IV. LAW ENFORCEMENT AND HIGH-LEVEL GOVERNMENT RATIONALES SOMETIMES OVERLAP, HIGHLIGHTING HOW SUCH RATIONALES DO NOT APPLY TO THE RESPONDENTS HERE.

These two lines of cases—law enforcement and high-level officials—sometimes overlap. In the recent case of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), these

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[5] In the first case pertaining to senior-level immunity, the Court spoke of legal protection for Cabinet officers in robust terms when those officers act within the limits of their authority. *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896). *Butz* made clear that even this broad immunity is qualified.

categories merge, and thus both rationales fully apply. In *Abbasi*, several individuals detained after the September 11, 2001, terrorist attacks on this Nation sued three top officials at the U.S. Department of Justice and two detention facility wardens. *Id.* at 1851. Unlike this case, and other cases involving lower-level military and government personnel making routine decisions, *Abbasi* involved government officials at the highest level making time-sensitive decisions on matters of national security.

"Judicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Id.* at 1861 (quoting *Christopher v. Harbury*, 536 U.S. 403, 417 (2002)). The Court emphasized that these considerations "are even more pronounced" when seeking to impose financial liability because the "risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy." *Id.*

The case petitioners offer the Court here could not be further removed from *Abbasi*, and the rationales justifying both lines of cases that controlled in *Abbasi* are virtually irrelevant here. Respondents should not be able to hide behind the protections the Court has afforded to those involved in weighty national-security matters such as thwarting mass-death terrorism attacks, and those whose very lives are frequently at risk in fast-paced, adrenaline-filled moments in dark alleys. Whatever justifications exist to protect such public servants, the Court should take this case as an

appropriate vehicle to determine whether the same protections extend to instances when school and child-welfare personnel perform in deliberative fashion invasive and degrading strip-searches of a young child—a humiliating experience that young child will remember with shame for the rest of her life—in a controlled environment when there is ample opportunity to seek a warrant, and who then lie to that child's mother about the whole affair. If those local government employees are shielded from personal liability here, it would have to be for very different reasons, none of which are apparent. The Tenth Circuit erred in holding that qualified immunity applies here, and this Court should reverse.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

KELLY J. SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
KENNETH A. KLUKOWSKI
LEA E. PATTERSON
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
kklukowski@firstliberty.org

Counsel for Amicus Curiae

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