No. 19-____

IN THE

Supreme Court of the United States

JONMICHAEL GUY,

Petitioner,

v.

WYOMING DEPARTMENT OF CORRECTIONS, BY AND THROUGH ROBERT O. LAMPERT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE WYOMING DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

JONMICHAEL GUY,

Petitioner,

v.

ROBERT O. LAMPERT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE WYOMING DEPARTMENT OF CORRECTIONS, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the Wyoming Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a government official discriminates against a belief that is sincere and religious to the victim, and is therefore protected by the Religion Clauses, does qualified immunity turn on whether the appellate judiciary has "clearly established" the victim's belief system as a "religion"?

PARTIES TO THE PROCEEDING

Petitioner JonMichael Guy is the plaintiff and was the appellant in the consolidated appeals below.

Respondents Robert O. Lampert, individually and in his official capacity as Director of the Wyoming Department of Corrections; Julie Tennant-Caine, individually and in her official capacity as a Deputy Administrator of the Wyoming Department of Corrections; the Wyoming Department of Corrections; and the State of Wyoming are the defendants and were appellees in the consolidated appeals below.

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PETITION FOR A WRIT OF CERTIORARI

JonMichael Guy petitions for a writ of certiorari to review the Wyoming Supreme Court's judgment.

OPINIONS BELOW

The Wyoming Supreme Court's opinion (Pet. App. 1a-25a) is published at 444 P.3d 652. The trial court's opinion (Pet. App. 26a-51a) is unpublished.

JURISDICTION

The Wyoming Supreme Court entered its judgment on July 9, 2019. On September 20, Justice Sotomayor granted a 60-day extension to file this petition, to December 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The Fourteenth Amendment provides:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

STATEMENT OF THE CASE

1. Petitioner is a Wyoming prisoner. He practices "the religion of Humanism," a system of moral values and beliefs about the meaning of life, which subscribes to "a non-theistic view on the question of deities"; "an affirmative naturalistic outlook"; "an affirmative

recognition of ethical duties"; and "a strong commitment to human rights." Pet. App. 53a, 56a-57a.

Humanism "has a structure akin to many religions, with clergy/celebrants who perform weddings, funerals, ceremonies, counseling, and other functions of clergy." Pet. App. 57a. Founded by Quakers in 1939, the Humanist Society is a religious, educational, charitable organization, which issues charters around the world and trains and certifies people who are accorded the rights and privileges granted to priests, ministers, and rabbis of traditional religions. *Id.* Humanists observe several holidays (for instance, "Human Light" in December and other solstice-related holidays), and live according to principles outlined in their guiding document known as "Humanism and Its Aspirations." Pet. App. 56a.

Like people who associate with many mainstream religions, those who subscribe to the beliefs and customs of Humanism may explicitly identify themselves as religious or observe the customs and practices while viewing themselves as secular. Unitarian, Universalist, and Ethical Culture congregations, for instance, generally identify as Humanist. Pet. App. 58a. Like many other religions, religious Humanism "offers a basis for moral values, an inspiring set of ideals, methods for dealing with life's harsher realities, a rationale for living life joyously, and an overall sense of purpose." *Id.* Humanism also has associations with more traditional religious practice and custom, such as the "Society for Humanistic Judaism" and the "American Ethical Union." Pet. App. 57a.

Petitioner identifies as a member of the "Humanist religion" and maintains "sincerely held Humanist convictions." Pet. App. 53a. For him, this belief system

occupies the place that one associates with other religions: it "comforts, guides, and provides meaning to [Petitioner] in the way that religions traditionally provide such comfort, guidance, and meaning to others." Pet. App. 56a.

2. When a person is committed to the custody of the Wyoming Department of Corrections, he or she is given an opportunity to designate his or her religious association. Pet. App. 60a. Respondents control the list of designated religions, and are also responsible for facilitating study groups between people of the same religion. Pet. App. 59a-61a.

In accordance with prison policy, Petitioner sought to identify under his "chosen religion of Humanism" and be afforded the right to practice it. Pet. App. 53a, 59a, 69a. Petitioner also sought to form a religious study group, which would have allowed him to associate with and observe his religion with several other prisoners in his facility who identify as Humanists, as members of other religious groups are permitted to do. Pet. App. 53a, 61a.

Despite knowing that Petitioner's requests were based on his "sincerely held convictions," Respondents refused to allow Petitioner to identify as a Humanist or form a study group. Pet. App. 59a-61a, 63a-64a. Respondents' decision was based on their preference for organized religions that have theistic traditions, and their desire to discriminate against Petitioner because of his sincerely held belief in a non-theistic religion. Pet. App. 53a-54a, 61a. Their refusal has the effect of decreeing that Petitioner's "chosen religion of Humanism" is "not a religion" within Wyoming prison walls. Pet. App. 63a, 69a.

3. Petitioner brought this civil-rights action in state court under 42 U.S.C. § 1983, seeking "the right to practice his . . . Humanist religion" and live according to his "religious convictions." Pet. App. 53a, 69a. He alleged Respondents violated the Free Exercise, Establishment, and Equal Protection Clauses by discriminating against him because of his "sincerely held Humanist convictions," by refusing to let him identify as a Humanist or to receive the religious study group accommodations provided to prisoners of other faiths. Pet. App. 53a-54a, 61a. Petitioner sought both injunctive and monetary relief. Pet. App. 2a.

After Petitioner filed suit, Respondents backpedaled and allowed Petitioner to identify as a Humanist and receive religious accommodations. Pet. App. 5a. Respondents then moved to dismiss Petitioner's injunctive claims as moot and his damages claims based on qualified immunity. *See* Defs. Mem. of Law in Support of Mot. to Dismiss 11-12, 24-26. With respect to qualified immunity, Respondents' sole argument was that the court should adopt the D.C. Circuit's rule in *Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000), which holds the law is not clearly established unless a plaintiff can point to binding precedent establishing that his "particular beliefs" should be "treated as a religion." Defs. Mem. of Law in Support of Mot. to Dismiss 25 (quoting *Kalka*, 215 F.3d at 99).

The trial court granted Respondents' motion to dismiss, concluding that their change in policy mooted all of Petitioner's claims against Respondents, including any entitlement to damages. Pet. App. 32a-40a.

4. Petitioner appealed to the Wyoming Supreme Court. On appeal, Respondents conceded that the trial court erred in concluding that Petitioner's damages

claims were moot. Appellee Br. 5. They repeated their argument that they were entitled to qualified immunity. Again, relying on the D.C. Circuit's rule in *Kalka*, Respondents argued they were entitled to immunity for any discrimination against Petitioner's sincerely held religion until "recognition of Humanism as a religion" came "from the United States Supreme Court, the Tenth Circuit, or the clearly established weight of authority from other courts." *Id.* at 25. Petitioner argued it is clearly established—and would be "common knowledge" to any correctional official in charge of religious accommodations—that government officials violate the constitution if they deny religious accommodations based on "their own independent evaluation" of whether the adherent's beliefs are part of a "religion." Appellant's Reply Br. 7-8. He urged the court to reject Respondents' approach of "requiring specific reference to Humanism" in the caselaw. *Id*. at 8-9.

The Wyoming Supreme Court affirmed. To resolve qualified immunity, the court skipped directly to the question of whether Respondents violated clearly established law. Without citing any authority, the court began from the premise that the qualified immunity inquiry required it to evaluate the legitimacy of Petitioner's religion in some objective sense: "the 'right' at issue is Humanism's status as a 'religion' for purposes of the First Amendment." Pet. App. 15a. Applying that framework, the court said it would "assume, without deciding, that Humanism is a 'religion' for purposes of the First Amendment." *Id*. In evaluating whether it was clearly established that Humanism was a religion, the court acknowledged that the protection of the Religion Clauses is not limited to orthodox views

or to theistic religions. Pet. App. 17a-18a. Adopting the D.C. Circuit's position in *Kalka*, however, the court concluded Petitioner could not "demonstrate that the question of whether Humanism is a religion . . . has been placed 'beyond debate.'" Pet. App. 16a. That is, even though the Religion Clauses protect unorthodox and non-theistic belief systems, Petitioner could not point to binding appellate precedent "for the proposition that humanism, no matter in what form and no matter how practiced, amounts to a religion under the First Amendment." Pet. App. 17a-18a (quoting *Kalka*, 215 F.3d at 99). Because the judiciary had not clearly established that Petitioner's system of beliefs "qualified" as a "religion," Respondents were entitled to immunity. *Id.*

The court reiterated that it would not undertake whatever inquiry would have allowed it to decide whether Petitioner's belief system was a "recognized religion." Pet. App. 18a. Thus, having assumed the power to establish what "religions" can or cannot accrue liability, the court made clear that it had not previously recognized Petitioner's religion (disposing of his claim against Respondents), and chose not to exercise its proclaimed power (leaving Respondents with impunity for any future discrimination against Petitioner's sincere and religiously held convictions).

REASONS FOR GRANTING THE PETITION

By adopting the D.C. Circuit's rule that a government official is immune for religious discrimination unless the victim practiced "a clearly established 'religion,'" *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000), the court below joined the troubling side of a conflict, which embroils the judiciary in ecclesiastical

questions that this Court's First Amendment jurisprudence has consistently sought to avoid. The *Kalka* rule premises immunity on a question this Court has told government officials *not* to consider in the first place, and creates a system that relegates minority, unpopular or unorthodox religions or sects to second-class status—as demonstrated by its application to exclude protection for religions like the Nation of Islam and Petitioner's non-theistic religion of Humanism.

The Court should grant certiorari.

I. Lower Courts Are Split Over Whether Officials Who Discriminate Against Sincere, Religiously Held Beliefs Are Immune Until The Judiciary Clearly Establishes The Victim's Particular Belief System As A "Religion" In Some Objective Sense.

This Court has recognized that the judiciary performs a "narrow function" in determining whether a professed belief is protected by the Religion Clauses: to ask whether the belief is "an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981)). In other words, the pertinent questions are whether the adherent's belief is "sincere" and whether it is "meaningful," so as to "occup[y] in the life of its possessor a place parallel to that filled by" traditional religions. *Welsh v. United States*, 398 U.S. 333, 339 (1970). The Court's First Amendment caselaw explicitly eschews that constitutional protection depends on whether a government official or a court thinks the adherent's belief system is "responding to the commands of a particular religious organization," *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989), and reserves

religion as "a matter for the individual conscience, not for the prosecutor or bureaucrat." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

These foundational principles have long been settled, but lower courts are divided as to the proper inquiry when qualified immunity is layered on top. Three jurisdictions—the D.C. and Third Circuits, and now Wyoming—hold that qualified immunity applies only if the plaintiff's belief system "was a clearly established 'religion'" in some general or objective sense, as defined by binding appellate caselaw. *Kalka*, 215 F.3d at 98. Two other circuits—the Second and Seventh—reject inquiry into "objective religious significance" and instead hold qualified immunity turns on whether government officials made a reasonable mistake under the governing constitutional inquiry—*i.e.*, as to whether the plaintiff's professed belief "was sincerely held and '*in his own scheme of things*, religious.'" *Ford v. McGinnis*, 352 F.3d 582, 587, 590, 598 (2d Cir. 2003) (Sotomayor, J.) (emphasis in original).

The preeminent case for the first view—that qualified immunity asks whether the plaintiff practiced a "clearly established" religion—is the D.C. Circuit's decision in *Kalka*. There, prison officials denied certain accommodations to a Humanist plaintiff based on their own assessment that Humanism was not a religion. They pointed to materials that identified Humanism both as "a religious movement" and as having secular components, such as "rejection of the supernatural" and belief "that there is no life after death," as well as materials indicating that "among humanists, the question whether humanism is a religion is a 'contentious one.'" 215 F.3d at 92-93. The plaintiff

filed suit, arguing that his constitutional rights did not turn on the prison officials' assessment of whether his beliefs were "conventionally religious" or even "anti-religious." *Id.* at 94.

According to the D.C. Circuit, the critical question for qualified immunity was "whether the type of humanism to which [the plaintiff] allegedly subscribes, if a religion, was a clearly established 'religion' within the First Amendment's meaning." *Id.* at 98. The court recognized that the Religion Clauses are not limited to belief systems that "entail a belief in God" and that there are many "religions in this country which do not teach what would generally be considered a belief in the existence of God," including "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Id.* (quoting *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961)). It concluded, however, that caselaw recognizing protection for unorthodox and non-theistic religions "does not stand for the proposition that humanism, no matter in what form and no matter how practiced, amounts to a religion." *Id.* at 99. Because "[t]here was neither precedent declaring humanism in general to be a religion nor any prior ruling on the religious nature of [the plaintiff's] beliefs," public officials were immune for any discrimination against his beliefs.[1] *Id.*

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[1] Like the court below here, having assigned itself the power to establish what qualifies as a "religion" in some objective sense for the purposes of § 1983 liability, the D.C. Circuit simply "assume[d] *arguendo* that [the plaintiff's] humanism is a 'religion,'" and declined to actually resolve that ecclesiastical question, *see Kalka*, 215 F.3d at 98, leaving public officials free to continue to discriminate against people of that belief system irrespective of

The Third Circuit has adopted the same rule, applying it to immunize government officials for discrimination against adherents of the Nation of Islam. In *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003), the plaintiffs brought suit alleging that prison officials violated the Religion Clauses by limiting their religious materials to "a Bible, Qur'an, or equivalent" and interpreting that policy to exclude Nation of Islam texts because they "were not religious." *Id.* at 240-44. The defendants did so based on their view that Nation of Islam texts were not in furtherance of the "search for and discovery of God" and could not be religious because they "smack of racism and hatred." *Id.* at 243. The defendants "kn[e]w of no God that wants us to worship him in this way." *Id.*

The Third Circuit held that the plaintiffs' "sincerely-held views [were] sufficiently rooted in religion to merit First Amendment protection" and the defendants violated the First Amendment by discriminating against those sincere beliefs. *Id.* at 252. It granted qualified immunity for that discrimination, however, because there was no "clear consensus whether the Nation of Islam is a religion for purposes of protection under the First Amendment." *Id.* at 252, 258-59. The court cited to the view of an earlier panel that the Nation of Islam could not be religious insofar as the "inexorable hatred of white people" was part of its faith. *Id.* at 258 (quoting *Long v. Parker*, 390 F.2d 816, 819-20 (3d Cir. 1968)).

As set forth above, the Wyoming Supreme Court adopted the same rule here. Although Petitioner had

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their sincere and religiously held views (just as the court below would allow nineteen years later in this case).

specifically alleged Respondents discriminated against his sincere and religiously held beliefs in the tenets of Humanism, the court endorsed *Kalka* and held that, for qualified immunity, the constitutional "'right' at issue is Humanism's status as a 'religion.'" Pet. App. 15a. Nineteen years after *Kalka*, a court once again held prison officials could discriminate against the beliefs of a Humanist prisoner with immunity, no matter how sincere and religious the prisoner's beliefs are to him.

The Second and Seventh Circuits have rejected the argument that government officials can get qualified immunity based on their or a court's view that the plaintiff's sincerely and religiously held beliefs lack "objective religious significance," *Ford*, 352 F.3d at 584 (2d Cir.), or were not "a tenet of religious faith" in some general or objective sense, *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) (Easterbrook, C.J.). In these circuits, qualified immunity does not turn on "the 'ecclesiastical question' of whether" a particular belief system lines up with an established religion; instead, "the proper inquiry [is] always whether [the plaintiff's] belief was sincerely held and '*in his own scheme of things*, religious.'" *Ford*, 352 F.3d at 590, 598 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *Jackson v. Mann*, 196 F.3d 316, 321 (2d Cir. 1999)).

In *Ford*, the Second Circuit considered the application of qualified immunity to prison officials who denied a requested feast on the basis it "had no objective religious significance." *Id.* at 587. The defendants relied on the assessment of clerics of the plaintiff's religion that the requested feast was nothing more than a "family event" and was not mandated by a religion.

Id. at 586-87. Recognizing "courts are 'singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs,'" the Second Circuit rejected the proposition that a court may "assess the objective validity of [the plaintiff's] belief that [his requested accommodation] carried religious significance." *Id.* at 588, 590. The court explicitly rejected the defendants' argument that they could be granted qualified immunity based on an objective assessment that the plaintiff's request "did not retain religious significance." *Id.* at 597. It explained that the defendants' assessment of whether the plaintiff's belief took place in accordance with an established religion was "beside the point" because "the proper inquiry was always whether [the plaintiff's] belief was sincerely held and '*in his own scheme of things*, religious.'" *Id.* at 597-98 (emphasis in original); *see also id.* at 597 n.16 (explaining that the "defendants' beliefs as to the religious content of the [requested accommodation] are irrelevant to whether the claimed right is clearly established"); *Jackson v. Mann*, 196 F.3d 316, 320-21 (2d Cir. 1999) (holding that defendants violated clearly established law, and explaining that the Religion Clauses turn on "whether the beliefs professed by a [plaintiff] are *sincerely held* and whether they are, in his own scheme of things, religious" and therefore a plaintiff "need not be a member of a particular organized religious denomination" and liability does not turn "on the 'ecclesiastical question' whether he is in fact" part of an established religion).

The Seventh Circuit similarly rejects the proposition that qualified immunity turns on whether the plaintiff's religion has been established in some general sense—indeed, it has reasoned that a government

official's evaluation of whether the adherent's belief is a "religion" is a basis for *denying* qualified immunity. In *Vinning-El*, the defendants denied accommodations to a plaintiff who adhered to his own personal version of "Moorish Science," on the basis that his requested diet was not a requirement of the "Moorish Science" religion. 657 F.3d at 592, 593-94. The Seventh Circuit rejected the proposition that qualified immunity turned on whether the plaintiff's beliefs accorded with an established religion: "A personal religious faith is entitled to as much protection as one espoused by an organized group." *Id.* at 593. The court explained that if a government official denies religious accommodation based on his own assessment that it was not "a tenet of religious faith," that would be a basis to conclude "he violated [the plaintiff's] clearly established rights and is not entitled to immunity." *Id.* at 594. Instead, a defendant's entitlement to qualified immunity requires a showing that "he reasonably attempted to determine whether [the plaintiff] has a sincere belief that his religion requires" the requested accommodation. *Id.* at 595; *see also Grayson v. Schuler*, 666 F.3d 450, 452, 455 (7th Cir. 2012) (denying qualified immunity where defendants denied "a member of the African Hebrew Israelites of Jerusalem" the ability to wear dreadlocks on their assessment that it was not a religious requirement, explaining that a prison official is entitled to qualified immunity only "if he reasonably thought the plaintiff insincere in his religious belief").

II. This Is A Tremendously Important Issue.

The question presented urgently warrants this Court's attention for four reasons.

First, the idea that government officials or judges may be the arbiter of what is a "religion" in some objective sense is antithetical to the Religion Clauses themselves. As James Madison, "the leading architect of the religion clauses," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012), wrote: "The Religion . . . of every man must be left to the conviction and conscience of every man." Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed., 1901). As this Court has recognized, "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

This Court has accordingly been steadfast in grounding application of the Religion Clauses on the sincerity and religiousness of the beliefs to the plaintiff and has warned that "[t]he determination of what is a 'religious' belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714; *see also Frazee*, 489 U.S. at 834 ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). As Justice Jackson eloquently wrote, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox" when it comes to religion. *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943).[2]

Nothing in this Court's qualified immunity jurisprudence purports to superimpose new, substantive questions, let alone one that would afford immunity based on a consideration that the Court has long rejected as incompatible with the Religion Clauses themselves. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1739 (2018) (Gorsuch, J., concurring) (observing that "fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views" is "results-driven reasoning" and "improper"). To be sure, qualified immunity may still protect a prison official's reasonable "mistake" as to the proper inquiry: whether the adherent's beliefs are sincere and religious to him. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). But that is quite apart from saying qualified immunity transforms "the 'right' at issue" to the professed belief system's "status as a 'religion.'" Pet. App. 15a.

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[2] *See also, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (this Court has "identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment"); *Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from denial of certiorari) (explaining the proper inquiry is the plaintiff's "ability to exercise *his* religious beliefs, as *he* understands them") (emphasis in original); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1739 (2018) (Gorsuch, J., concurring) (recognizing that each individual "alone [is] entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment").

Second, the *Kalka* rule entangles the judiciary in determining "ecclesiastical questions" that are not just "wholly inconsistent with the American concept of the relationship between church and state," *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445-46 (1969), but also beyond "the competence of courts," *Fowler v. State of R.I.*, 345 U.S. 67, 70 (1953). Actually, tasking courts with "establishing" religions via qualified immunity adds an extra layer of repugnance to state-created orthodoxy. Recall that this Court's qualified immunity jurisprudence allows courts "to exercise their sound discretion" to forgo addressing underlying questions and simply state that the law is not clearly established. *Pearson*, 555 U.S. at 236. Thus, under the *Kalka* rule, courts are not only the arbiters of what is a "religion" in their respective jurisdictions, but they have the discretion to withhold that imprimatur whenever they choose. What principles are to guide a court's discretion whether to "establish" a person's religion so that she can have the protection afforded to people of more popular faiths or to take a pass, exposing people who subscribe to that religion to further discrimination with impunity? If it were ever clear the Court should not "inject the civil courts into substantive ecclesiastical matters," it is here. *Presbyterian Church*, 393 U.S. at 451.

Third, the notion that only "clearly established" religions accrue liability for discrimination inherently disfavors minority or unorthodox belief systems. Obviously, no government official could claim that a mainstream religion like Christianity is not "clearly established." It will be those who sincerely and reli-

giously adhere to small sects, unpopular faiths, or unusual belief systems who must wait for an appellate court to confront and then exercise discretion to give their belief system the same protection as more mainstream religions. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring) ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom.").

Fourth, for all these reasons, further percolation is not just unnecessary, it is constitutionally intolerable. Even absent this sort of judicial entanglement, the Court has recognized the need to intercede in cases concerning the protection of religious freedom, on less mature conflicts. *E.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015) (1-3 split); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (1-1-1 split); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) (1-1-1 split); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (3-2 split). And the Court has repeatedly intervened when lower courts read its qualified immunity mandate to superimpose improper showings. *See Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (rejecting a "heightened proof standard" for qualified immunity and collecting cases where the Court has "declined similar invitations" to impose special requirements). In fact, in the most recent instance when these two areas—religious liberty and qualified immunity—converged, the Court found fit to summarily reverse. *See Sause v. Bauer*, 138 S. Ct. 2561 (2018). In reversing qualified immunity for officers who ordered a woman to stop praying, *id.* at

2562, the Court did not stop to ask whether it had previously blessed her belief system as a legitimate "religion."

III. This Is A Clean Vehicle.

This case provides a straightforward record to resolve the question presented—indeed, one that is cleaner than any case that preceded it in the split—because it arises at the pleading stage. Petitioner's complaint expressly alleges that Respondents discriminated against his sincere beliefs, which he holds in the same regard as other religious beliefs. *See supra* pp. 2-4. The *Kalka* rule was Respondents' sole argument in favor of qualified immunity, and it was the sole, express basis for the decision below.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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