No. 19-725

In The Supreme Court of the United States

JONMICHAEL GUY,

Petitioner,

v.

ROBERT O. LAMPERT, Director,
Wyoming Department of Corrections, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Wyoming Supreme Court

BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae **Muslim Advocates** is a national legal advocacy and educational organization formed in 2005. Muslim Advocates works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this petition relate directly to Muslim Advocates' work fighting religious discrimination against vulnerable communities.

SUMMARY OF ARGUMENT

The freedom to practice religion is one of the central liberties guaranteed by the U.S. Constitution. In *Guy v. Wyoming Department of Corrections*, 444 P.3d 652 (Wyo. 2019), the Wyoming Supreme Court ignored long-standing precedent and granted immunity to prison officials who discriminated against the Petitioner because of his membership in a non-theistic religion. *See* Petition, at 4. Such a holding betrays not only the promise of religious freedom on which this country is built, it does so in a way that

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation and submission of this brief.

disproportionately harms members of religious minorities—the very people that federal law is meant to protect.

This is particularly clear when considering how prison officials have denied recognition and religious accommodation to adherents of the Nation of Gods and Earths ("NGE"), an offshoot of the Nation of Islam. The *Guy* court found that Petitioner did not identify case law with an identical fact pattern demonstrating that "humanism, no matter in what form and no matter how practiced, amounts to a religion under the First Amendment." *Guy*, 444 P.3d at 660 (citing *Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000)). Such a threshold requirement for establishing a faith not only runs contrary to the U.S. Supreme Court's unambiguous precedent that any sincerely held religious belief is entitled to First Amendment protections, it deprives practitioners of NGE and other similarly situated minority religions of the chance to vindicate their rights.

In effect, the *Guy* rule allows government officials to discriminate against prisoners with impunity based on subjective notions of which religious beliefs are worthy of recognition. This is particularly concerning for prisoners who subscribe to minority religions or sects and who already constitute the vast majority of claims for faith-based discrimination. While members of majority sects of major religions will be able to defeat qualified immunity by pointing to specific precedent regarding their faith, members of minority sects and less-common religions will be vulnerable to discrimination and unable to hold public officials accountable for misconduct. This reality is already borne out by Mr. Guy's case, and upholding the *Guy* rule will

yield actual—not theoretical—harm to the prisoners most susceptible to faith-based discrimination.

Accordingly, the Petition should be granted to ensure that public officials face appropriate consequences for religious discrimination, including when such discrimination is targeted at unpopular or unfamiliar religions or sects.

ARGUMENT

I. The Free Exercise Clause Protects the Religious Freedoms of All Americans, Including the Rights of Prisoners and Religious Minorities.

A. Religious liberty is among the most important freedoms guaranteed by federal law.

The freedom to practice one's religion is among "the cherished rights of mind and spirit" protected by the Constitution. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As Justice Murphy noted, "nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions." *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). For many Americans, "free exercise [of their religious beliefs] is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J.,

concurring). By including protection for the free exercise of religion in the First Amendment to the Constitution, "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

Not only does the Constitution guarantee these rights, Congress has repeatedly acted to expand federal law's commitment to religious freedom. In passing the Civil Rights Act of 1871, Congress established a remedy currently codified at 42 U.S.C. § 1983 ("Section 1983") that created "a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights," creating a remedial scheme that was "broader than the pre-existing common law of torts." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Congress reaffirmed and expanded the federal commitment to religious freedom when it passed the Religious Freedom Restoration Act ("RFRA") in 1993. Congress chose to require that any substantial burden on a plaintiff's sincere religious practice be the "least restrictive means of furthering [a] compelling government interest." 42 U.S.C. § 2000bb-1(b)(2). This standard—also known as "strict scrutiny"—is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). When RFRA was found not to apply to the states, Congress acted once again to unanimously pass the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),

which restored the strict scrutiny test to state prisoners and land-use permit applicants. Pub. L. 106-274, 114 Stat. 803 (2000), *codified at* 42 U.S.C. § 2000cc *et seq*. Thus, both federal and state prisoners are guaranteed religious freedom and protection under U.S. law.

B. The Free Exercise Clause is specifically intended to protect the rights of vulnerable groups like religious minorities.

Religious protections under federal law are especially critical for those who are most vulnerable to religious discrimination. Indeed, while the First Amendment protects the religious rights of all Americans, the framers of the Free Exercise Clause were "specially concerned with the plight of minority religions." *Selman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (O'Connor, J., concurring). The Free Exercise Clause, along with the Establishment Clause, was intended to protect "members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar." *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Stevens, J., concurring). As Justice Gorsuch wrote last year, "[p]opular 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." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

Just as religious minorities face a high likelihood of religious discrimination, so too do prisoners. This Court has noted that prisons are among those state-run institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720–21 (2005). RLUIPA's legislative history is replete with discussion of the compelling need for religious protection among prisoners. Some of this evidence included "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post hoc rationalizations"[2] such as prisons prohibiting Chanukah candles,[3] restricting the Catholic use of sacramental wine for celebration of Mass,[4] and banning prisoners from wearing a cross or a Star of David.[5]

Religious minorities in prison face the disadvantages of both statuses. For example, Muslims at U.S. Bureau of Prisons facilities are significantly overrepresented as filers of administrative grievances and lawsuits concerning violations of religious freedom, indicating that they frequently experience substantial

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[2] 146 Cong. Rec. S7774-01, S7775 (statement of Sens. Hatch & Kennedy) (quoting S. Rep. No. 103-111, at 10 (1993)).

[3] *Hearing on Protecting Religious Freedom After* Boerne v. Flores *before the Subcomm. on the Constitution of the H. Committee on the Judiciary*, 105th Cong., 2d Sess., Pt. 3, at 41 (1998) (statement of Isaac M. Jaroslawicz).

[4] *See id.*, Pt. 2, at 58-59 (statement of Donald W. Brooks)

[5] *Hearing before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong., 1st Sess. 86 (July 14, 1997) (testimony of Prof. Douglas Laycock).

burdens on their religious exercise. *See Enforcing Religious Freedom in Prison*, U.S. Comm'n on Civil Rights Table 3.8, at 70; Table 4.1, at 82 (Sept. 2008) (noting that Muslims filed 42% of administrative remedy requests for accommodation from 1997-2008 and that Muslims litigated 29% of RLUIPA cases from 2001-2006). In 2008, Muslims constituted only 9.3% of federal prisoners, but brought the highest percentage of religious discrimination grievances, accounting for 26.3% of all grievances filed. *See id.* at Table 2.1 & 26. The Department of Justice also consistently reports a disproportionately high number of discriminatory incidents against Muslims and Jews in particular. *See* U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, at 4 (2016). These statistics make clear the wisdom of the framers' vision: in order to secure religious liberty for all, the law must be especially protective of religious minorities and other vulnerable groups.

C. The availability of damages is essential to the preservation of a meaningful right to religious liberty.

For vulnerable groups like religious minorities and prisoners, the courts may offer the only way to vindicate their rights to religious freedom. This Court has noted that "[i]n situations of abuse, an action for damages against the responsible individual can be an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

Damages deter violations of rights by making officials internalize the costs of their illegal activity rather than forcing their victims to bear it. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 72 (1998).

Not only does a cause of action for damages provide a meaningful deterrent to violations of rights, in many cases the *only* way that victims can vindicate their rights is through a claim for damages. Deprivations of religious liberty often involve "individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). For the victims of such individual instances, denying the possibility of recovering damages is equivalent to denying them the promise of religious freedom that federal law is meant to guarantee.

II. The *Guy* Holding Undermines Religious Liberty By Disproportionately Harming Minority Religions.

A. In the absence of the *Guy* rule, adherents of Humanism would be protected under the Free Exercise Clause.

Under federal law, sincere religious beliefs are entitled to First Amendment protection no matter how atypical or unique. *See*, *e.g.*, *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious

beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (same). The U.S. Supreme Court has long made it clear that government officials are tasked only with a simple inquiry: "whether the beliefs professed . . . are sincerely held and whether they are, in the [individual's] own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965). So long as the religious beliefs are sincerely held, an individual is entitled to First Amendment protection even in the absence of "membership in an organized religious denomination." *Frazee v. Ill. Dep't of Empt. Sec.*, 489 U.S. 829, 834 (1989).

Qualified immunity does not protect government officials from such liability when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 635 (1987). The U.S. Supreme Court has repeatedly stated that the standard for qualified immunity does not require that "the very action in question has previously been held unlawful"; rather, "the unlawfulness must be apparent" "in light of pre-existing law." *Id.* The relevant case law need not be "directly on point," *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018), or even "fundamentally similar." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "[O]fficials can . . . be on notice that their conduct violates established law even in novel factual circumstances." *Id.* By failing to inquire only about the

sincerity of Petitioner's beliefs, the defendants in this case failed to properly perform that inquiry.

Moreover, while the U.S. Supreme Court has not expressly found that "humanism, no matter in what form and no matter how practiced, amounts to a religion under the first amendment," *Guy*, 444 P.3d at 660 (citing *Kalka*, 215 F.3d at 99), it has repeatedly recognized that non-mainstream beliefs and creeds are entitled to protection under the First Amendment. *See*, *e.g.*, *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (recognizing Buddhism, Taoism Ethical Culture, and Secular Humanism as religions under the First Amendment); *cf. Welsh v. United States*, 398 U.S. 333, 342-43 (1970) (holding in favor of a conscientious objector by examining the role that his morals played in his personal belief system and conceding that his beliefs were not "traditional religious convictions").

The "prior cases make it sufficiently clear" that discriminating against the Petitioner's sincerely held Humanist beliefs is unlawful. *See*, *e.g.*, *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003). "[C]ourts need not have ruled in favor of a prisoner under precisely the same factual circumstance in order for [a] right to be clearly established." *Id. See*, *e.g.*, *id.* at 597-98 (no prior case law finding that prison officers were obligated to provide an Eid-al-Fitr meal); *Fox v. Sheftic*, No. 9:19-CV-498, 2019 WL 5597906, at *6 (N.D.N.Y. Oct. 3, 2019) (no prior case law recognizing Anunnaki religion); *Avery v. Elia*, No. 11-CV-3341, 2013 WL 4407266, at *7 (E.D. Cal. Aug. 15, 2013) (no prior case law on a Wiccan's right to access a fire pit and a

religious altar); *Parkell v. Senato*, 704 F. App'x 122, 126 (3d Cir. 2017) (no prior case law on novel religious belief "Jewish/Wicca"); *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) (law is sufficiently clear that refusing to accommodate sincerely held religious beliefs violates "clearly established rights"). Under U.S. Supreme Court precedent, it is beyond debate that government officials cannot discriminate against an individual's sincerely held religious beliefs, no matter how unpopular or atypical.

The *Guy* court held that the Respondents were entitled to immunity because no preexisting U.S. Supreme Court or Wyoming Supreme Court case expressly recognized Humanism as a religion. *Guy*, 444 P.3d at 660-61. But this standard—which requires precedent with an identical set of facts and circumstances to preclude the protections of qualified immunity—is inconsistent with federal law.

Guy thus applied the wrong standard in determining whether the prison officials were entitled to qualified immunity. The absence of a "case directly on point" does not automatically immunize the Respondents. Instead, the *Guy* court should have applied the extensive legal precedent on First Amendment protections for religious beliefs and practices and, accordingly, denied qualified immunity to the defendants.

B. Granting government officials immunity under the *Guy* rule will disproportionately harm religious minorities.

Members of minority religions and sects will be disproportionately harmed by the application of the *Guy* rule. People who subscribe to majority sects of major religions will see no impact from this decision. A prisoner who identifies as a Christian, for example, can easily defeat qualified immunity in a claim for discrimination because there is a plethora of precedent recognizing Christianity as a "legitimate" faith. In contrast, a prisoner with sincerely held religious beliefs belonging to an unpopular faith or unknown sect will struggle to hold public officials accountable for even overt discrimination if forced to rely on precedent to prove the "legitimacy" of their faith.

The *Guy* rule will thus harm those who are most vulnerable to discrimination. As discussed above, members of minority religions are vastly overrepresented in claims brought under RFRA and RLUIPA. *See supra* Section I.C. The judicial system is often the only avenue a prisoner has to vindicate his First Amendment rights. But, under *Guy*, prison officials can continue to discriminate against Humanists and other minority faiths without facing any consequences in the court system or elsewhere.

C. Religious minorities already face actual and substantial challenges to the legitimacy of their religious beliefs.

This threat to religious minorities is not a theoretical concern. Prisoners who identify as religious minorities already face significant challenges to the legitimacy of their religious beliefs. Petitioner is not the first Humanist prisoner to bring a claim for religious discrimination. In *Kalka*, prison officials refused to recognize Humanism as a religion. *Kalka*, 215 F.3d at 92; *see also Espinosa v. Dzurenda*, 775 F. App'x 362, 362 (9th Cir. 2019) (dismissing case as moot because defendants agreed to recognize Humanism as a faith group during pendency of appeal). Further, because the Wyoming Supreme Court declined to "resolve whether Humanism is a recognized religion for First Amendment purposes," *Guy*, 444 P.3d at 661, the Petitioner and other Humanists are still not assured that government officials will face penalties for future discriminatory conduct. If the Wyoming Department of Corrections reverses its decision to recognize Humanism as a legitimate religion, government officials can still claim that Petitioner's right to freely exercise his faith is not "clearly established."

Nor are Humanists the only minority faith group that has suffered a pattern of discrimination in the prison system. NGE, whose practitioners are also known as "Five Percenters," was founded by disaffected members of the Nation of Islam in 1964. *See Coward v. Robinson*, 276 F. Supp. 3d 552, 566 (E.D. Va. 2017).

NGE teaches the pursuit of righteousness and self-mastery through the destruction of negative personality traits, speaks to "the ultimate questions of human existence," and "teaches a continued existence beyond this dense physical world . . . that most religions refer to as the afterlife." *Id*. NGE adherents believe that divinity is located within mankind, rather than an external being, noting that each adherent "is a God in the sense of being a Creator of his own destiny." *Id*. Like Humanism, NGE clearly imposes a "duty of conscience" on its practitioners and "function[s] as a religion in [the] life" of its adherents, thereby entitling its adherents to the same protections as "traditional religious convictions." *See Welsh*, 398 U.S. at 340.

Yet NGE adherents have been subjected to repeated challenges to the religious nature of their beliefs. *See*, *e.g.*, *Coward v. Robinson*, 276 F. Supp. 3d 544, 566 (E.D. Va. 2017) ("[n]umerous courts in the Fourth Circuit" declined to recognize NGE as a religion); *Miles v. Guice*, No. 13-CT-3193, 2018 WL 505071, at *2 (E.D.N.C. Jan. 22, 2018) (North Carolina Department of Public Safety did not recognize NGE as a religion). Though numerous states and federal courts now recognize NGE as a religious group, *see id.* at *5 (collecting cases), other jurisdictions have declined to do so. For instance, in *Beamon v. Dittmann*, 720 F. App'x 772 (7th Cir. 2017), the Seventh Circuit found no issue with a prison official disciplining a prisoner for writing a letter containing "Five Percenter ideology" and

deeming NGE a hate group. *See id.* at 773-74; *see also Breland v. Goord*, No. 94-CV-3696, 1997 WL 139533, at *8 (S.D.N.Y. Mar. 27, 1997) (granting qualified immunity to prison officials who confiscated NGE materials because no precedent "held that Five Percenters constitute a religion"). Adherents to NGE are even more vulnerable to such discrimination under *Guy*. Prison officials can deny followers of NGE the right to practice their sincerely held religious beliefs without any risk of consequences. In light of cases such as *Beamon*, courts can apply the *Guy* rule to conclude that NGE is not "clearly established" as a religion and immunize any discriminatory conduct.

Numerous other unfamiliar or unpopular religions have faced similar challenges to their legitimacy. *See*, *e.g.*, *Scott v. Ozmint*, 467 F. Supp. 2d 564, 575 (D.S.C. 2006) (Neterian faith not recognized by prison officials); *Howard v. Epps*, No. 05-CV-206, 2007 WL 474940, at *3 (N.D. Miss. Feb. 9, 2007) (government officials and court decline to recognize Rastafari as a religion); *but cf. Powlette v. Morris*, No. 12-CV-7378, 2016 WL 3017396 (S.D.N.Y. May 23, 2016) (recognizing Rastafari as a religion afforded First Amendment protections). In many instances, prisoners were able to overcome these challenges and restore their right to practice their faith. *See*, *e.g.*, *Fisher v. Va. Dep't of Corr.*, No. 06-CV-529, 2007 WL 1552548, at *4 (W.D. Va. May 25, 2007) (court denies summary judgment, finding potential violation of prisoner's right to practice Asatru faith); *Pineda-Morales v. De Rosa*, No. 03-CV-4297,

2005 WL 1607276, at *15 (D.N.J. July 6, 2005) (court recognizes claims brought for failure to recognize Apostolic Faith Church as independent Christian sect); *Blount v. Fleming*, No. 04-CV-00429, 2006 WL 1805853, at *11 (W.D. Va. June 29, 2006) (prison officials initially declined to but subsequently recognized House of Yahweh as a religion). But even where claimants have succeeded, requiring a member of each faith or sect to litigate their First Amendment rights places an unequal burden on adherents of minority religions. This unequal burden ensures that those most at risk of suffering religious discrimination are those who are least able to fight back against it. Only by rejecting the *Guy* rule can the Court preserve this country's proud tradition of religious freedom and continue to protect the religious minorities that this tradition is meant to protect.

CONCLUSION

It is contrary to established U.S. Supreme Court precedent to require members of minority religious groups—who have the greatest need for First Amendment protections—to identify a case involving their specific faith or sect in order to hold public officials accountable for engaging in discriminatory conduct. For the foregoing reasons, this Court should grant the

Petition for a Writ of Certiorari and reverse the decision of the Wyoming Supreme Court.

Dated: January 8, 2020

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